No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMISH INDIAN NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5067

SAMISH INDIAN NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: Sept. 20, 2011

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO. 02-CV-1383, JUDGE MARGARET M. SWEENEY

Before: BRYSON, GAJARSA[*], and MOORE, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

The issues on appeal before this court are ones of statutory construction. We must decide whether certain claims are premised on money-mandating statutes and are therefore within the jurisdiction of the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491(a), and the Indian Tucker Act, 28 U.S.C. § 1505. The Court of Federal Claims dismissed for lack of jurisdiction over the claims brought

[*] Judge Gajarsa assumed senior status on July 31, 2011.

by the Samish Indian Nation ("Samish") because some of their allegations were not premised upon any statute that was money-mandating, and the allegations reliant on money-mandating statutes were limited by other statutes. We affirm the Court of Federal Claims' decision that it lacked jurisdiction over some of the Samish's allegations because the Tribal Priority Allocation ("TPA") system is not money-mandating. We conclude, however, that the trial court's ability to provide a monetary remedy under the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act") is not limited by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341. We therefore reverse the trial court's dismissal of the Samish's Revenue Sharing Act allegations and remand for further proceedings consistent with this opinion.

BACKGROUND

This case is the latest in a series of suits filed by the Samish to obtain treaty rights and benefits from the United States ("Government").[1] The Samish's efforts to

[1] In 2002, the Samish filed a complaint under the Administrative Procedure Act ("APA") in the Western District of Washington alleging that the funding the Bureau of Indian Affairs allocated to the Samish after the tribe was officially recognized was inequitable. *Samish Indian Nation v. U.S. Dep't of Interior*, No. C02-1955P, 2004 WL 3753252, at *1 (W.D. Wash. Sept. 22, 2004). In 2004, the district court dismissed the Samish's claims for lack of subject matter jurisdiction, for lack of standing, and because there was no "final agency action" allowing for judicial review under the APA. *Id.* at *3; *see also Samish Indian Nation v. U.S. Dep't of Interior*, No. C02-1955P, 2004 WL 3753251, at *1 (W.D. Wash. Feb. 6, 2004). The Samish also filed a motion to reopen the 1979 judgment in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), that denied the Samish's claim to fishing rights under the Treaty of Point Elliott. *United States v. Washington*, 593 F.3d 790, 796-98 (9th Cir. 2010). The Ninth Circuit

be federally recognized and acknowledged for statutory benefits are more fully discussed in *Samish Indian Nation v. United States*, 58 Fed. Cl. 114, 115-16 (2003) ("*Samish I*") and *Samish Indian Nation v. United States*, 419 F.3d 1355, 1358-62 (Fed. Cir. 2005) ("*Samish II*") but are briefly summarized below.

Before 1978, the Department of the Interior ("Department") through the Bureau of Indian Affairs ("BIA") accorded tribes federal recognition on an ad hoc basis. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272-73 (9th Cir. 2004). In 1966, the BIA created an unofficial list of tribes recognized by the United States. According to the BIA, the 1966 list was not intended "to be a list of federally recognized tribes as such" and was derived from its unofficial files. *Samish II*, 419 F.3d at 1359. The list did not distinguish between tribes based on their treaty recognition status because, at that time, the BIA lacked the legal basis to determine which tribes were treaty recognized. *Id*. The Samish were included on the list.

In 1969, the BIA created another unofficial list restricted to tribes with a "formal organization" approved by the BIA. *Id*. The Samish did not appear on that list due to an arbitrary omission by the BIA. *Greene v. Babbitt*, 943 F. Supp. 1278, 1288 n.13 (W.D. Wash. 1996) (concluding that the omission of the Samish from the unofficial 1969 list was arbitrary). Although the BIA

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sitting en banc held that the recognition obtained by the Samish was not an extraordinary circumstance warranting the reopening of the prior denial of treaty rights. *Id*. at 798-99. The Ninth Circuit held that "treaty litigation and recognition proceedings were 'fundamentally different' and had no effect on one another." *Id*. at 800 (quoting *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995)).

created the list, it lacked the legal authority to determine which tribal groups would be accorded federal recognition. The 1969 list nonetheless became the basis for the BIA's classification of tribes in the future. *Samish II*, 419 F.3d at 1361. According to the BIA employee who prepared the list, the BIA's relevant records from 1969 have been lost. *Id*.

In the early 1970s, Congress began conditioning federal benefits to the tribes and their members on formal federal recognition as determined by the Department. The final regulation establishing the formal procedure for federal recognition of the tribes was published by the Department in 1978. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (codified at 25 C.F.R. Pt. 54 (1979)). As the current version of that regulation makes clear, federal acknowledgment does "not create immediate access to existing programs." 25 C.F.R. § 83.12(c) (2011). A tribe may participate only "after it meets the specific program requirements, if any, and upon appropriation of funds by Congress." *Id*. Because they were arbitrarily removed from the list of recognized tribes, the Samish ceased receiving federal benefits.

In 1972, the Samish petitioned the Department seeking federal recognition in order to obtain federal program benefits. *Samish Indian Tribe v. Babbitt*, Docket No. Indian 93-1, Office of Hearings and Appeals, Recommended Decision (Dep't of Interior, Aug. 31, 1995). That petition was finally denied fifteen years later by the Department following an informal adjudication procedure. Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe, 52 Fed. Reg. 3,709 (Feb.

5, 1987). As a result, the Samish filed an action in federal district court alleging that the Department's adjudicative procedure violated the tribe's due process rights. In 1992, the district court vacated the Department's determination and remanded the federal recognition petition to be reconsidered under the formal adjudication procedures set forth in the Administrative Procedure Act ("APA"). *Greene v. Lujan*, No. 89-645, 1992 WL 533059, at *9 (W.D. Wash. Feb. 25, 1992), *aff'd sub nom. Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1996). This long travail for the Samish finally ended when it obtained federal recognition on April 9, 1996. The Department published formal notice on that date indicating that the Samish was an Indian tribe under applicable federal law. Final Determination for Federal Acknowledgement of the Samish Tribal Organization as an Indian Tribe, 61 Fed. Reg. 15,825 (Apr. 9, 1996).

On October 11, 2002, the Samish filed suit in the Court of Federal Claims seeking money damages under the Tucker Act and the Indian Tucker Act, which waive the sovereign immunity of the United States with respect to certain actions. These statutory provisions only waive the sovereign immunity of the United States. Damages, if any, must be premised on money-mandating statutes. In their first amended complaint, the Samish sought damages for the deprivation of their statutory benefits as a result of the Government's erroneous and arbitrary refusal to recognize the tribe between 1969 and 1996, as well as compensation for benefits that the Samish had been wrongfully denied since their acknowledgement and recognition as a federal tribe in April 1996. *Samish I*, 58 Fed. Cl. at 116-17.

The trial court dismissed the complaint holding that the six-year statute of limitations in 28 U.S.C. § 2501 barred all but one of the Samish's claims and 28 U.S.C. § 1500 barred the remaining claim. *Id*. On appeal, this court found that the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, and the Snyder Act, 25 U.S.C. §§ 2, 13, were not money-mandating with respect to the Samish's claims. *Samish II*, 419 F.3d at 1358. This court reversed the trial court's determination that the Samish's claim regarding its failure to receive benefits from 1969 until 1996 was time barred. We then remanded "for further proceedings to determine whether the remaining statutes underlying the claim are money-mandating." *Id*.

On remand, the Samish filed a second amended complaint alleging two claims for relief. 2d Am. Compl., *Samish Indian Nation v. United States*, No. 02-1383 (DE 36) at ¶¶ 31-36 (Fed. Cl. Jan. 1, 2006). The first claim sought damages under various federal statutes and programs for the Government's failure to provide the Samish with benefits from 1969 until 1996. The complaint alleged that either the underlying legal framework of the programs or the statutes creating the programs were money-mandating. 2d Am. Compl. at ¶¶ 31-36; *see Samish Indian Nation v. United States*, No. 02-1383 L, 2006 WL 5629542, at *1 (Fed. Cl. July 21, 2006) (interim discovery order interpreting first claim). The second claim alleged that the "network" of programs and statutes providing federal benefits to all federally-recognized tribes created a fiduciary duty that the Government breached by failing to provide the Samish with benefits. 2d Am. Compl. at ¶¶ 37-44; *see Samish*, 2006 WL 5629542, at *2 (interpreting second claim).

The Government moved to dismiss the Samish's complaint and argued that the referenced programs or statutes were not money-mandating. Thus, the Samish's claims fell outside the scope of both the Tucker Act and the Indian Tucker Act, and consequently, sovereign immunity was not waived. The Court of Federal Claims issued two opinions explaining why it was granting the motion to dismiss. *See Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 55 (2008) ("*Samish III*"); *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 128-29 (2009) ("*Samish IV*"). On appeal, the Samish challenge the trial court's dismissal of their claims, but limit their arguments to two programs they allege are money-mandating, the TPA system and the Federal Revenue Sharing program created by the State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919, commonly known as the Revenue Sharing Act of 1972.

In *Samish III*, the Court of Federal Claims held that the TPA system was not money-mandating and, thus, it did not have jurisdiction over either of the Samish's claims. 82 Fed. Cl. at 68-69. The trial court first found that the TPA system was neither a "statute" nor a "discrete statutory program." *Id.* at 59, 65-66. Rather, it was merely a budgetary mechanism and, therefore, could not impose a money-mandating duty on the Government. *Id.* at 66. The trial court discussed *United States v. Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo I*"), and explained that its analysis "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Samish* III, 82 Fed. Cl. at 68 (quoting *Navajo I*, 537 U.S. at 507). Applying *White Mountain Apache Tribe v. United States*, 537 U.S. 465 (2003), and *Navajo I*, the trial court next determined that because the TPA system did not create a fiduciary

duty on the part of the Government or a specific trust, it could not be interpreted as money-mandating. *Samish III*, 82 Fed. Cl. at 69.

In *Samish IV*, the Court of Federal Claims held that although the Revenue Sharing Act was money-mandating, to the extent that the Samish's allegations in its claim relied upon it, the Anti-Deficiency Act, 31 U.S.C. § 1341, rendered those allegations moot. 90 Fed. Cl. at 133-37. The Court of Federal Claims applied *Agwiak v. United States*, 347 F.3d 1375 (Fed. Cir. 2003), and held that the Revenue Sharing Act's usage of the phrases "is entitled" and "shall pay," made it money-mandating. *Samish IV*, 90 Fed. Cl. at 135-36. The trial court found that the Act was money-mandating because it was framed as an "entitlement" and included the following language: "The Secretary of the United States Department of the Treasury *shall*, for each entitlement period, *pay out* . . . to each State government . . . and . . . each unit of local government a total amount equal to the entitlement of such unit." *Id*. at 133 (quoting 86 Stat. 919 at Sec. 102) (emphasis added). The court analyzed the Samish's claim for statutory damages under the Revenue Sharing Act, but did not address the Samish's breach of trust argument or whether the Revenue Sharing Act imposed a fiduciary duty upon the Government to provide the Samish with funds authorized by the Act.

The trial court concluded, however, that its ability to award any damages mandated by the Revenue Sharing Act was limited by the Anti-Deficiency Act. *Samish IV*, 90 Fed. Cl. at 136-37. It interpreted the Anti-Deficiency Act as prohibiting a court from "award[ing] funds if an appropriation has lapsed unless an aggrieved party files

suit before the appropriation lapses." *Id.* at 136. Because the appropriations for the Revenue Sharing Act lapsed in 1983 but the Samish did not file their lawsuit until 2002, the trial court held that the Samish's allegations related to the Revenue Sharing Act were moot. *Id.* at 136-37. We have jurisdiction over the Samish's timely filed appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

This court reviews the Court of Federal Claims' dismissal of a complaint for lack of jurisdiction and interpretation of statutes without deference. *Brown v. United States*, 86 F.3d 1554, 1559 (Fed. Cir. 1996); *Western Co. of N. Am. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003). The Government argues that it had no duty to treat the Samish as federally recognized prior to 1996, and therefore, this court need not even address whether the TPA system or Revenue Sharing Act can be interpreted as mandating compensation for damages. This argument is not persuasive because in *Samish II*, this court ruled that the Government's failure to treat the Samish as a federally recognized tribe from 1969 to 1996 was "wrongful" and "arbitrary and capricious." 419 F.3d at 1373-74. The Government's wrongful failure to recognize the Samish gave rise to a damages claim, but two questions remain. The answer to these questions determines whether the Government is liable to the Samish. The first is whether the Court of Federal Claims has jurisdiction over the Samish's claim because the TPA system is money-mandating. The second is whether the Anti-Deficiency Act limits the trial court's ability to provide a monetary remedy under the Revenue Sharing Act. We address each in turn.

I.

The analysis of whether a law is money-mandating contains two steps. First, the court determines whether any substantive law imposes specific obligations on the Government. If that condition is met, then the court proceeds to the second inquiry, "whether the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *United States v. Navajo Nation*, 129 S. Ct. 1547, 1552 (2009) ("*Navajo III*") (quotations omitted). The Court of Federal Claims has jurisdiction if the substantive law at issue is "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain*, 537 U.S. at 473.

Under *Navajo I* and *Navajo III*, the TPA system, Appropriations Acts, and statutes authorizing Indian programs are not money-mandating. The "money-mandating" condition is satisfied when the text of a statute creates an entitlement by leaving the Government with no discretion over the payment of funds. *Doe v. United States*, 100 F.3d 1576, 1581 (Fed. Cir. 1996). In limited situations, the "money-mandating" requirement may also be satisfied if the Government retains discretion over the disbursement of funds but the statute: (1) provides "clear standards for paying" money to recipients; (2) states the "precise amounts" that must be paid; or (3) as interpreted, compels payment on satisfaction of certain conditions. *Perri v. United States*, 340 F.3d 1337, 1342-43 (Fed. Cir. 2003). As the Supreme Court explained in *Navajo I*, the money-mandating "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S. at 506. In *Navajo III*, the Supreme Court empha-

sized that the "text of the Indian Tucker Act makes clear that only claims arising under 'the Constitution, laws or treaties of the United States, or Executive orders of the President' are cognizable." 129 S. Ct. at 1558.

Although the TPA system secures funds for tribes, it is not a statute or regulation.

According to 25 C.F.R. § 46.2, "TPA means the BIA's budget formulation process that allows direct tribal government involvement in the setting of relative priorities for local operating programs." The TPA system refers to the BIA's internal budgeting process, which includes preparation of the BIA's budgetary requests, presentation of the BIA's requests to Congress, and distribution of Congressional appropriations for the operation of Indian programs authorized under different statutes. Congress has enacted authorizing statutes for some but not all of the specific programs covered by the TPA system, including the Johnson-O'Malley Act, the Indian Child Welfare Act of 1978, the Indian Child Protection and Family Violence Protection Act, and the Higher Education Tribal Grant Authorization Act.

In this case, the relevant statutes are the annual Appropriations Acts that provide the TPA system with funds and the statutes creating the programs supported by TPA funds. After receiving the funds through the Appropriations Acts, the BIA allocates the funds among federally recognized tribes if they are participating in statutorily designated programs pursuant to a contract, the Indian Self-Determination and Education Assistance Act, funding compacts, or grant agreements. As the General Accounting Office has recognized, the purpose of the TPA system is to "further Indian self-

determination by giving the tribes the opportunity to establish their own priorities and to move funds among programs accordingly, in consultation with BIA." Gen. Accounting Office: Report to Congressional Requesters, GAO/RCED 98-181, at 4 (July 1998) (J.A. 230 ¶ 33). The Appropriations Acts do not provide a clear standard for paying money to recognized tribes, state the amounts to be paid to any tribe, or compel payment on satisfaction of certain conditions. *See Perri*, 340 F.3d at 1342-43.

The Appropriations Acts provide funds to the BIA, specifically, "sums . . . appropriated . . . [f]or operation of Indian programs." *See, e.g.*, Appropriations Act for 2001, Pub. L. No. 106-291, 114 Stat. 922 (2000). For example, the Appropriations Act for 1993 states:

> Be it enacted . . . [t]hat the following sums are appropriated . . . for the Department of the Interior and related agencies for the fiscal year . . . , and for other purposes, namely: For operation, of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians either directly or in cooperation with States and other organizations . . . ; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs . . . ; for the general administration of the Bureau of Indian Affairs . . . , $1,353,899,000.

Pub. L. No. 102-381, 106 Stat. 1374-88 (1992). The annual Appropriations Acts and the statutes that establish programs supported by TPA funds do not impose any specific trust obligations on the Government beyond the

general trust relationship that exists between the Government and the tribes.

Since its decision in *Cherokee Nation v. Georgia* in 1831, the Supreme Court has recognized the existence of a general trust relationship between the Government and the tribes. 30 U.S. 1, 2 (1831) (explaining the tribes' "relations to the United States resemble that of a ward to his guardian"). Similarly, Congress has recognized that general trust relationship. *See, e.g.*, 25 U.S.C. § 458cc(a) (noting the "Federal Government's laws and trust relationship to and responsibility for the Indian people.") As recently explained in the *United States v. Jicarilla Apache Nation*, the trust relationship between the tribes and the Government is "defined and governed by statutes." No. 10-382, 2011 WL 2297786, *8, 564 U.S. ___ (June 13, 2011). In *Jicarilla*, the Supreme Court also explained that common law trust principles apply to the trust relationship between the Government and the tribes only where Congress has indicated it is appropriate to do so. *Id*. at *11. In *White Mountain*, the Supreme Court distinguished instances where the Government undertook "full" responsibility for managing Indian land and resources from "limited" trust relations in which the Government undertook no resource management responsibility. 537 U.S. at 473-74. In *Navajo I*, the Supreme Court looked for an assignment to the Government of "a comprehensive managerial role" or express investment with responsibility to secure "the needs and best interests of the Indian owner and his heirs" as indicators of a fiduciary relationship. 537 U.S. at 507-08.

In *United States v. Mitchell*, the Supreme Court held that the Government may be obligated to pay damages

when a network of statutes describes a fiduciary relationship beyond the general trust relationship between the Government and the tribes. 463 U.S. 206, 226 (1983). The statutes in *Mitchell* imposed "elaborate control" duties on the Government and gave the Government significant managerial responsibility over the tribe's property. The same cannot be said of the TPA system, and although the TPA system facilitates the allotment of federal money to the tribes, it is not money mandating. The network of statutes underlying the TPA system does not contain detailed express language supporting the existence of a fiduciary relationship or a trust corpus. The Samish have not identified any TPA-related statutes containing the level of detail necessary to establish a fiduciary relationship beyond the general trust relationship between the Government and the tribes. *See Jicarilla*, 2011 WL 2297786 at *8; *Navajo I*, 537 U.S. at 507-08. We therefore affirm the trial court's finding that the TPA system is not money-mandating.

II.

A.

We now review whether the trial court is correct in its analysis of the other statutes relevant to the Samish's claims, namely, the Federal Revenue Sharing Act and the Anti-Deficiency Act. We affirm the conclusion of the trial court that the Revenue Sharing Act is money-mandating. We hold that the Anti-Deficiency Act does not apply because it does not limit the Court of Federal Claims' power to enter a judgment in damages to compensate a plaintiff for an injury on a claim brought under the Tucker Act. Therefore, we conclude that the Court of Federal Claims has jurisdiction over the Samish's allegations based on the Revenue Sharing Act.

The Revenue Sharing Act distributed federal funds to state and local governments, including Indian tribes and Alaskan native villages. The funds to be paid to each unit of government were described as "entitlements," and the Act directed that Indian tribes "shall be allocated" a portion of the funds based on population. As discussed below, that language is language that this court has recognized as making a statute money-mandating.

In *Agwiak*, the plaintiff-appellants who had been employed by the Government sought remote worksite pay pursuant to a statute that included language that "the employee in commuting to and from his residence and such worksite, *is entitled*, in addition to pay otherwise due him, to an allowance of not to exceed $10 a day. The allowance *shall be paid* under regulations. . . . " 347 F.3d 1378-79 (quoting 5 U.S.C. § 5942(a) (2000) (emphases different than original)). As the court explained, "[w]e have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating." *Id*. at 1380. Similarly, in *Greenlee County, Arizona v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007), this court held that an act providing that the Government "shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located" was "reasonably amenable" to a reading that it is money-mandating. Additionally, in *Britell v. United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004), this court held that regulations implementing the military's health insurance plan providing that the plan "will pay" benefits "directly" to the insured, were "reasonably amenable to the reading that [they] mandate[ ] a right of recovery in damages." Thus, because the Revenue Sharing Act, like the statutes discussed above, di-

rects that tribes "shall be allocated" certain funds, we hold that it is money-mandating.

In *National Association of Counties v. Baker*, 842 F.2d 369 (D.C. Cir. 1988), the D.C. Circuit examined provisions of the Revenue Sharing Act similar to the relevant language in this case and found that the Act did not mandate compensation. In that case, local counties sought to recover revenue sharing funds that had been sequestered pursuant to a statute aimed at eliminating the federal budget deficit. *Id.* at 371-72. The government argued that the counties' lawsuit was one for money damages that fell within the exclusive jurisdiction of the Court of Federal Claims and therefore could not proceed in the district court. The D.C. Circuit disagreed and characterized the lawsuit as a request for the release of specific funds for which the APA waived sovereign immunity, not as a request for money damages. As a predicate to that ruling, the D.C. Circuit determined that the Revenue Sharing Act did not mandate compensation, even though the Act directed the payment of money. *Id.* at 376. We note that the D.C. Circuit reached this conclusion before the Supreme Court's decision in *White Mountain*, 537 U.S. at 472-73 and our decision in *Agwiak*, 347 F.3d at 1378-79, and, as did the Court of Federal Claims, we instead rely on those later authorities in determining that the Revenue Act is money mandating.

B.

The parties dispute whether the Samish's allegations under the Revenue Sharing Act are barred by the Anti-Deficiency Act or any lapse in appropriated funds. Although the Court of Federal Claims correctly held the Revenue Sharing Act money-mandating, it incorrectly

found the Samish's allegations barred by the Anti- Deficiency Act. *Samish IV*, 90 Fed. Cl. at 133 n.10, 135-37. The Anti-Deficiency Act provides that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). The Government argues that the Anti-Deficiency Act "prevents the Court of Federal Claims from granting relief to the Samish because it bars the award of funds pursuant to a statute for which the appropriations have lapsed or have been capped, unless the aggrieved party files suit before the appropriation lapses." Appellee's Br. 49. Because the appropriations for the Revenue Sharing Act lapsed in 1983 and the Samish did not file suit until 2002, the trial court held that the Anti-Deficiency Act barred the Samish's allegations. *Samish IV*, 90 Fed. Cl. at 136-37.

The Anti-Deficiency Act limits the authority of federal officials to enter into contracts or otherwise obligate the Government to pay funds in excess of the amounts appropriated. It does not, however, limit the Court of Federal Claims' jurisdiction or its power to enter a judgment in damages to compensate a plaintiff for an injury on a claim brought under the Tucker Act. As explained in *Ferris v. United States*, "[a]n appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money entrusted to them for distribution; but its insufficiency does not pay the Government's debts nor cancel its obligations, nor defeat the rights of other parties." 27 Ct. Cl. 542, 546 (1892); *accord Bureau of Land Mgmt.*, 63 Comp. Gen. 308, 312 (Apr. 24, 1984) ("[A] judicial or quasi-judicial judgment or award 'does not involve a

deficiency created by an administrative officer' . . . . Accordingly, such an award would not be viewed as violating the Antideficiency Act." (citations omitted)).

Citing *Star-Glo Associates, LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), the Government contends that the appropriations for the program are capped and the funds spent, so, the Anti-Deficiency Act prohibits the judicial award of money over the amount appropriated. In *Star-Glo*, this court found that language in the relevant appropriations act imposed a cap on the available funds and that the imposition of such a cap restricted the government's liability for damages and therefore precluded an award of damages by the Court of Federal Claims. Congress had directed the Secretary of Agriculture to use $58 million dollars in appropriated funds to compensate citrus growers that had lost crop due to disease; such funds were "to remain available until expended." We held that the legislative history of the relevant statute made clear that Congress had intended to limit the Government's liability to the amount specified in the statute and that the Government was therefore not subject to liability for damages. *Id*. at 1352-53. Subsequently, in *Greenlee County*, 487 F.3d at 878-79, we held that explicit language that funds will be "available only as provided in appropriations laws" served to cap the statute and therefore limit the government's liability.

In contrast, neither the text of the Revenue Sharing Act nor its legislative history include the limiting language of the statutes in *Star-Glo* and *Greenlee County*. The Government contends that such language can be found at section 106 of that Act, which states that "if the total amount appropriated under section 105(b)(2) for

any entitlement period is not sufficient to pay in full the additional amounts allocable under this subsection for that period, the Secretary shall reduce proportionally the amounts so allocable." But that portion of the Act deals only with the special provisions for revenue transfer to noncontiguous states. Section 105(b)(2) separately provides for appropriations for such transfers. It is not relevant to the portion of the Act that would have governed disbursement of funds to the Samish, had the Samish been properly recognized as a tribe. We therefore disagree with the government's assertion that the Revenue Act was capped in a manner that restricts the government's liability for damages.

Based on the language of the Revenue Sharing Act and the nature of the Samish's allegations, we reject the government's argument that the Anti-Deficiency Act limits recovery in this case. The Samish do not seek the release of appropriated funds, as in many of the cases involving the APA cited by the Government. Rather, the Samish seek compensation under the Tucker Act for damages for an injury sustained due to the Government's wrongful failure to recognize the Samish and their inability to participate in programs to which they were entitled. The Samish's Second Amended Complaint explicitly seeks compensation for a "harm" done. 2d Am. Compl. at ¶¶ 28-29.

The Court of Federal Claims based its analysis regarding the application of the Anti-Deficiency Act on cases from other circuits, including *City of Houston v. Department of Housing & Urban Development*, 24 F.3d 1421 (D.C. Cir. 1994) and *County of Suffolk, N.Y. v. Sebelius*, 605 F.3d 135 (2d Cir. 2010). Those cases involve a district court's jurisdiction under the APA and

are not suits for damages under the Tucker Act. In each case, the plaintiff challenged agency action affecting its funding and sought injunctive relief requiring the agency to restore grant funds. *City of Houston*, 24 F.3d at 1424; *Cnty. of Suffolk*, 605 F.3d at 138-39. The appellate courts found that the claim became moot when the agency's appropriated funds lapsed or were expended. The courts based their decisions on the limited jurisdiction of district courts in cases brought under the APA. Under that Act, district courts can grant a limited monetary award only if it is in the form of specific relief paid from a particular res. Once the res no longer exists, the claim becomes moot because funds cannot be obtained from any other source. *See City of Houston*, 24 F.3d at 1428; *Cnty. of Suffolk*, 605 F.3d at 140-41. Unlike the district courts, the Court of Federal Claims need not identify a res against which a judgment for declaratory and injunctive relief can be directed. Its judgments are paid from the Permanent Judgment Fund.

The Court of Federal Claims has general jurisdiction to enter judgments in damages against the Government. 28 U.S.C. §§ 1491, 1505. The Permanent Judgment Fund was established to pay monetary damage judgments entered against the Government when other funds are unavailable. 31 U.S.C. § 1304. The relevant section of 31 U.S.C. § 1304 states:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
>
> (1) payment is not otherwise provided for;

> (2) payment is certified by the Secretary of the Treasury; and
>
> (3) the judgment, award, or settlement is payable under [various sections of title 28, including § 2517, which includes "every final judgment rendered by the United States Court of Federal Claims."]

Thus, if other funds are not available to pay the judgment, the Permanent Judgment Fund is available for that purpose. *See Thompson v. Cherokee Nation*, 334 F.3d 1075, 1092 (Fed. Cir. 2003) (stating that a claim for damages was not mooted by the lapse in appropriated funds "as damages are awarded from the judgment fund created by 31 U.S.C. § 1304").

As the Government Accountability Office ("GAO") Redbook explains, "unless otherwise provided by law, agency operating appropriations are not available to pay judgments against the United States." United States Government Accountability Office, III Principles of Federal Appropriations Law, at 14-31 (3d ed. 2008). Although the opinion of the GAO is not binding, it is an "expert opinion, which we should prudently consider." *Arctic Slope*, 629 F.3d at 1303; *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on GAO Redbook at 6-159). Because agency operating appropriations are not available to pay the damages due to the Samish, "payment is not otherwise provided for" and the Samish are eligible to receive monetary damages from the Permanent Judgment Fund.

CONCLUSION

We affirm the Court of Federal Claims' decision that it lacked jurisdiction over some of the Samish's allega-

tions because the TPA system is not money-mandating. We also affirm the decision that the Revenue Sharing Act is money-mandating, reverse dismissal of some of the Samish's allegations under the Revenue Sharing Act, and remand to the Court of Federal Claims for further proceedings consistent with this opinion.

AFFIRMED-IN-PART, REVERSED-IN-PART, REMANDED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-1383L

SAMISH INDIAN NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Nov. 30, 2009

OPINION AND ORDER

SWEENEY, Judge

Plaintiff in the instant action is a federally recognized Indian tribe that seeks compensation for the programs, services, and benefits that it claims it would have received between 1969 and 1996, if it had been properly recognized by the federal government during that time period. The court previously ruled that it lacked jurisdiction to entertain those portions of plaintiff's second amended complaint specifically implicating the Tribal Priority Allocation ("TPA") system and the Indian Health Service ("IHS") funding process. In its renewed motion to dismiss, the government contends that this court also lacks jurisdiction over the remainder of plaintiff's second amended complaint. As explained in more

detail below, the court concludes that it lacks jurisdiction to entertain most of plaintiff's remaining allegations. However, where jurisdiction is properly invoked, the court finds plaintiff's allegations to be moot. Accordingly, **[127]** plaintiff's second amended complaint must be dismissed in its entirety.

I. BACKGROUND[1]

Plaintiff, the Samish Indian Nation, is a federally recognized Indian tribe that descends from a signatory tribe to the 1855 Treaty of Point Elliott. Second Am. Compl. ("Compl.") ¶¶ 1, 3, 7-8. In 1958, the Indian Claims Commission recognized the modern tribe's right to sue for damages for lands lost under the treaty. *Id.* ¶ 8. Then, in 1969, the United States Department of the Interior ("Department of the Interior") omitted plaintiff from its list of Indian tribes. *Id.* ¶ 9. Although "the list was not intended to be a list of federally recognized tribes, it was nevertheless used by the United States to identify federally recognized Indian tribes." *Id.*; *see also id.* ("There was no lawful authority to create such a list and there was no rational basis for excluding the Samish Indian Nation from the list."). As a result of this omission, plaintiff and its members were "deprived of all of the programs, benefits and services afforded by the

[1] Because only a brief factual recitation is necessary for the purposes of this ruling, the court derives the facts in this section solely from plaintiff's second amended complaint. A more detailed fact statement can be found in *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005) ("*Samish II*"). The court derives the procedural history from its prior rulings in this case. *See Samish Indian Nation v. United States*, 85 Fed. Cl. 525 (2009) ("*Samish IV*"); *Samish Indian Nation v. United States*, 82 Fed. Cl. 54 (2008) ("*Samish III*") (citing *Samish Indian Nation v. United States*, 58 Fed. Cl. 114 (2003) ("*Samish I*")).

United States to all other federally recognized Indian tribes and their members. . . ." *Id.* Accordingly, beginning in 1972, plaintiff sought to confirm its status as a federally recognized Indian tribe. *Id.* ¶ 10. After almost thirty years of administrative proceedings and multiple appeals to the federal courts, *id.* ¶¶ 10-18, plaintiff's status as a federally recognized Indian tribe was conclusively established on October 15, 1996, *id.* ¶ 15.

In an attempt to recover compensation for all of the benefits it would have received from 1969 to 1996 had the United States properly treated it as a federally recognized Indian tribe, plaintiff filed the instant action on October 11, 2002. As explained in more detail in a prior ruling by the undersigned, the Honorable Edward J. Damich dismissed plaintiff's complaint, holding that the relevant claims ran afoul of the statute of limitations.[2] *See Samish III*, 82 Fed. Cl. at 56 (citing *Samish I*, 58 Fed. Cl. at 115). On appeal, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") held that although the United States Court of Federal Claims ("Court of Federal Claims") lacked jurisdiction to consider plaintiff's claims under the Indian Self-Determination and Education Assistance Act and the Snyder Act, the claims alleged by plaintiff based on other statutes were not barred by the statute of limitations.[3] *Id.* (citing *Samish II*, 419 F.3d at 1357). It thus

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[2] The case was transferred to the undersigned on November 1, 2007.

[3] Specifically, the Federal Circuit held that plaintiff's other claims for past benefits did not accrue until November 1, 1996, when the district court entered its final judgment determining that plaintiff should have been federally recognized between 1969 and 1996. *Samish II*, 419 F.3d at 1373-74.

remanded the case to the Court of Federal Claims to determine whether the other statutes identified by plaintiff that benefitted federally recognized Indian tribes conferred jurisdiction on the court. *Id.*

After remand, plaintiff filed a second amended complaint in conformance with the Federal Circuit's ruling. *Id.* In its second amended complaint, plaintiff enumerates the myriad of statutes and regulations that established programs, services, and benefits for federally recognized Indian tribes from 1969 to 1996, and then alleges two claims for relief. Plaintiff's first claim for relief seeks damages for the government's failure to provide it with the identified programs, services, and benefits from 1969 to 1996. Compl. ¶¶ 31-36. Plaintiff contends that the "underlying legal framework" of each program, service, or benefit provides a money-mandating basis for jurisdiction because it "provides clear standards for paying money to recipients, compels payment upon the satisfaction **[128]** of pre-set conditions, and the amounts that each recipient will receive can be readily determined." *Id.* ¶¶ 32-33. Plaintiff's second claim for relief seeks damages for the government's failure to properly treat it as a federally recognized Indian tribe. *Id.* ¶¶ 37-44. Plaintiff alleges that all of the cited statutes, taken together, "comprise a network of statutes defining . . . the federal government's trust responsibility" to Indian tribes that provides a money-mandating basis for jurisdiction. *Id.* ¶¶ 41, 43.

After plaintiff filed its second amended complaint, defendant moved to dismiss the complaint for lack of subject matter jurisdiction. *Samish III*, 82 Fed. Cl. at 56. In response to defendant's motion, plaintiff sought limited discovery, which Judge Damich ultimately al-

lowed. *Id.* at 56-57. As a result of disputes that arose concerning the permitted discovery, Judge Damich limited the scope of the issues to be decided by defendant's motion to dismiss to those concerning the TPA system and the IHS funding process. *Id.* at 57. The case was subsequently reassigned to the undersigned, who ultimately ruled on defendant's motion to dismiss, as limited by Judge Damich, in a May 27, 2008 Opinion and Order. *See id.* at 54-69.

In its opinion, the court began its discussion by observing that the crux of plaintiff's allegations was "that both the TPA system and IHS funding are the product of a network of statutes, regulations, and administrative agency practices, and it is those networks that provide a money-mandating source of jurisdiction in the Court of Federal Claims." *Id.* at 61. Given plaintiff's allegations, the court reviewed the relevant case law, *id.* at 61-65, and concluded that a network of statutes and regulations "could create a money-mandating source of jurisdiction in the Court of Federal Claims," but only if the network described "a fiduciary relationship between the government and Indian tribes,"[4] *id.* at 65-66. The court described the two factors identified in controlling precedent as necessary to establish the existence of a fiduciary relationship that was defined by a network of statutes and regulations: "(1) express statutory and regulatory language supporting the existence of a fiduciary

[4] In so concluding, the court rejected plaintiff's contention that it need not show the existence of a fiduciary relationship to establish jurisdiction using the network theory. *Samish III*, 82 Fed. Cl. at 65-66 (holding that the "discretionary schemes" described in Federal Circuit precedent were limited to "individual statutes or discrete statutory programs," and did not include the networks alleged by plaintiff).

relationship and (2) such elaborate or comprehensive government control over Indian property as to constitute a common-law trust."[5] *Id.* at 66 (citations omitted). Upon analyzing the network of statutes and regulations underlying the TPA system and IHS funding process, the court determined that neither factor described in the case law was present in the case *sub judice*. *Id.* at 66-69. Specifically, the court held that "[n]either the TPA system nor the IHS funding process contemplates the creation of a fiduciary relationship where the United States is directed to control and administer specific trust property for plaintiff," *id.* at 68, and that because "the funding appropriated by Congress for the benefit of the Indian people via the TPA system and IHS funding process is not trust property . . . , plaintiff has failed to prove the existence of a common-law trust," *id.* at 68-69. Accordingly, the court dismissed "plaintiff's first claim for relief with respect to the TPA system and the IHS funding process" for lack of jurisdiction. *Id.* at 69.

Subsequently, plaintiff moved, pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC"), for the entry of judgment on the court's ruling. *Samish IV*, 85 Fed. Cl. at 525-26. The court denied plaintiff's motion, holding that plaintiff's **[129]** TPA system and IHS funding process allegations

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[5] The three referenced decisions were, at that time, the only decisions in which a reviewing court had found the existence of a fiduciary relationship that was defined by a network of statutes and regulations, and included: *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"); and *Navajo Nation v. United States*, 501 F.3d 1327 (Fed. Cir. 2007). The United States Supreme Court ("Supreme Court") subsequently reversed the Federal Circuit's decision in *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009).

were not individual, cognizable claims for the purposes of entry of judgment. *Id.* at 526, 530. Then, in concluding that there was a just reason for delaying entry of judgment, the court outlined the three ways in which plaintiff could demonstrate the money-mandating nature of the remaining programs, services, and benefits: if "(1) the program, service, or benefit is the product of a network of statutes and regulations; (2) the program, service, or benefit is a qualifying discretionary scheme; or (3) one of the statutes or regulations that comprise the program, service, or benefit is individually money-mandating." *Id.* at 531 (citations omitted).

Thereafter, the court directed defendant to file a renewed motion to dismiss that addressed (1) "whether, as averred in plaintiff's first claim for relief, the 'underlying legal framework' of each program, service, or benefit identified in the complaint (with the exception of the Tribal Priority Allocation system and the Indian Health Service funding process) provides a money-mandating basis for jurisdiction" and (2) "whether, as averred in plaintiff's second claim for relief, all of [the] statutes cited by plaintiff, taken together, 'comprise a network of statutes defining . . . the federal government's trust responsibility' to Indian tribes that provides a money-mandating basis for jurisdiction."[6] Order 1-2, Mar. 5, 2009. Briefing has now concluded on the instant motion. The court deems oral argument unnecessary.

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[6] In the same order, the court denied the remaining portions of defendant's then-pending motion to dismiss.

II. LEGAL STANDARDS

A. Motion to Dismiss

In ruling on a motion to dismiss pursuant to RCFC 12(b)(1), the court assumes that the allegations in the complaint are true and construes those allegations in plaintiff's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). However, plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject matter jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). The court may look to evidence outside of the pleadings to determine the existence of subject matter jurisdiction. *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1974); *Reynolds*, 846 F.2d at 747. If the court concludes that it lacks subject matter jurisdiction over a claim, RCFC 12(h)(3) requires the court to dismiss that claim.

B. Subject Matter Jurisdiction

Whether the court has jurisdiction to decide the merits of a case is a threshold matter. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). The parties or the court *sua sponte* may challenge the court's subject matter jurisdiction at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

The ability of the Court of Federal Claims to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The waiver of immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969).

Plaintiff asserts jurisdiction under both 28 U.S.C. § 1491 ("Tucker Act") and 28 U.S.C. § 1505 ("Indian Tucker Act"). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States that are founded upon the Constitution, a federal statute or regulation, or an **[130]** express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2006). The Indian Tucker Act waives sovereign immunity for claims brought by "any tribe, band, or other identifiable group of American Indians" against the United States that are founded upon "the Constitution, laws or treaties of the United States, or Executive orders of the President," as well as claims that "otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." *Id.* § 1505. However, both the Tucker Act and the Indian Tucker Act are merely jurisdictional statutes, and do not create "a substantive right enforceable against the Government by a claim for money damages." *United States v. Navajo Nation*, 537 U.S. 488, 503, 506 (2003); *White Mountain Apache Tribe*, 537 U.S. at 472.

Instead, the substantive right must appear in another source of law, *Mitchell II*, 463 U.S. at 216, that, in general, "'can fairly be interpreted as mandating compensation by the Federal Government for the damages

sustained,'" *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). To make such a showing, a plaintiff must only demonstrate that the substantive source of law is "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache Tribe*, 537 U.S. at 473. "While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do." *Id.* (citation omitted).

As a general rule, "[a] statute is not money-mandating when it gives the government complete discretion over the decision whether or not to pay an individual or group." *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006). "There is a presumption that the use of the word 'may' in a statute creates discretion" that "may be rebutted by 'the intent of Congress and other inferences'" that may be drawn "'from the structure and purpose of the statute at hand.'" *Id.* (quoting *McBryde v. United States*, 299 F.3d 1357, 1362 (Fed. Cir. 2002)). Thus, jurisdiction in the Court of Federal Claims may derive from "[c]ertain discretionary schemes," including those "statutes (1) that provide 'clear standards for paying' money to recipients; (2) that state the 'precise amounts' that must be paid; or (3) as interpreted, compel payment on satisfaction of certain conditions." *Samish II*, 419 F.3d at 1364 (citation omitted).

Jurisdiction can also be based upon a network of statutes and regulations that describes a fiduciary relationship between the government and Indian tribes.[7]

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[7] A more detailed discussion of the genesis and application of the theory that a network of statutes, regulations, and other sources of law

Mitchell II, 463 U.S. at 226. However, there must be more than a "limited" or "bare" trust relationship. *Id.* at 224; *Navajo Nation*, 537 U.S. at 508; *White Mountain Apache Tribe*, 537 U.S. at 474; *Mitchell v. United States*, 445 U.S. 535, 542 (1980) ("*Mitchell I*"); *see also Navajo Nation*, 537 U.S. at 506 (noting that the "'general trust relationship between the United States and the Indian people' . . . alone is insufficient to support jurisdiction under the Indian Tucker Act" (quoting *Mitchell II*, 463 U.S. at 225 (citation omitted))). Rather, "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo Nation*, 537 U.S. at 506. Thus, the elements of a qualifying fiduciary relationship are: (1) express statutory and regulatory language supporting the existence of a fiduciary relationship, *see White Mountain Apache Tribe*, 537 U.S. at 474-75; *Mitchell II*, 445 U.S. at 224-25, and (2) such elaborate or comprehensive government control over Indian property as to constitute a common-law trust, *see White Mountain Apache Tribe*, 537 U.S. at 474-76 & n.3; *Mitchell II*, 445 U.S. at 225.

[131] III. PLAINTIFF'S FIRST CLAIM FOR RELIEF

As noted above, plaintiff seeks compensation for the programs, services, and benefits it would have received between 1969 and 1996, if it had been treated as a federally recognized Indian tribe during that time period. Plaintiff contends that because Congress provided funding for these programs, services, and benefits "with the clear intent that they benefit every federally recognized tribe, it is fair to reason that Congress intended a dam-

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can supply a money-mandating source of jurisdiction can be found in *Samish III*, 82 Fed. Cl. at 61-65.

ages remedy to be available where a federal agency denied one tribe the benefits of such funding by its arbitrary and wrongful refusal to recognize that tribe." Samish Indian Nation's Opp'n United States' Renewed Mot. Dismiss ("Opp'n") 2. In particular, plaintiff argues that the statutes and regulations underlying each program, service, and benefit expressly mandate the payment of money damages or, alternatively, that the "underlying legal framework" of each program, service, and benefit constitutes a discretionary scheme mandating the payment of money damages. The court begins its analysis with a discussion of whether the type of programs, services, and benefits identified by plaintiff can, in general, constitute a money-mandating source of jurisdiction. It then specifically addresses each of the programs, services, and benefits identified by plaintiff.

A. Federal Grant-In-Aid Programs

Broadly speaking, a federal grant is "financial assistance authorized by federal law to support autonomous programs of states or local governments or groups, which the federal government does not dictate but does wish to encourage." Paul G. Dembling & Malcolm S. Mason, *Essentials of Grant Law Practice* § 2.02 (1991). Grants are characterized by "a maximum of autonomy in the program essentials, coupled with a necessary minimum of fiscal control to assure integrity." *Id.*; *see also Dixson v. United States*, 465 U.S. 482, 508 (1984) (O'Connor, J., dissenting) (noting that the "main defining characteristic" of federal grant programs is that the recipient of the grant has autonomy, *i.e.*, "considerable discretion to design and execute the federally assisted programs without federal intrusion"). Grants may be distinguished by their mandatory or discretionary na-

ture. Mandatory or entitlement grants are those "in which the recipient, which is typically a state, has a right to receive the grant, if it meets the qualifying conditions." Dembling & Mason, *supra*, at § 2.04(a). Discretionary or project grants "are those in which the recipient applies for assistance, and a discretionary choice is made by a federal agency among the applicants." *Id.* § 2.04(b). Thus, federal agencies have the discretion to refuse the grant, to condition the grant, and to determine the amount of the grant. *Id.* Grants may also be distinguished by their purpose. *Id.* Categorical grants "are those that are made for a narrowly defined purpose" and block grants "are those that are made for broadly defined purposes. . . ."[8] *Id.* § 2.04(c). Generally speaking, revenue sharing programs, loans, and subsidies are not considered to be grants. *Id.* § 2.05; *see also Goolsby v. Blumenthal*, 581 F.2d 455, 465 (5th Cir. 1978) (Thornberry, J., dissenting) (distinguishing between block grants and revenue sharing), *aff'd*, 590 F.2d 1369 (5th Cir. 1979) (en banc); *Ely v. Velde*, 497 F.2d 252, 256 (4th Cir. 1974) ("A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached."); S. Rep. No. 92-1050, pt. 1 (1972) ("[O]ne of the principal virtues of revenue sharing is the fact that this program is different from the categorical grant programs."). *But see Malone v. United States*, 34

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[8] In fact, block grants are a form of federal aid provided to state and local governments as a substitute for the more numerous and more specific categorical programs. U.S. Gen. Accounting Office, GAO/HEHS-95-74, *Block Grants: Characteristics, Experience, and Lessons Learned* 1 (1995) ("*GAO Block Grant Report*"). Governmental entities that receive such grants "are given greater flexibility to use funds based on their own priorities and to design programs and allocate resources as they determine to be appropriate." *Id.* at 21.

Fed. Cl. 257, 258 (1995) (asserting that subsidies provided to landowners under section 8 of the Housing Act of 1973 constituted a grant-in-aid program). Accordingly, based upon these definitions, and as apparent from the **[132]** descriptions provided below, most of the programs, services, and benefits identified by plaintiff are federal grants.[9]

Thus, the question arises whether the statutes creating federal grant programs are money-mandating, so as to permit the Court of Federal Claims' exercise of jurisdiction. The Supreme Court addressed this issue in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). The overarching issue in *Bowen* was whether a federal district court had jurisdiction under the Administrative Procedure Act to review the final order of the Secretary of the United States Department of Health and Human Services ("Secretary of HHS") "refusing to reimburse a State for a category of expenditures under its Medicaid program," a federal grant-in-aid program. *Id.* at 882 & n.1. The Secretary of HHS argued that the United States Claims Court ("Claims Court")—now the Court of Federal Claims—"had exclusive jurisdiction over the State's claim." *Id.* at 890.

In discussing this court's jurisdiction under the Tucker Act, the Supreme Court noted that although there are "many statutory actions over which the Claims Court has jurisdiction to enforce a statutory mandate for the payment of money," such statutes all "provide compensation for specific instances of past injuries or

[9] The exceptions are the Federal Revenue Sharing program, those programs created by the United States Housing Act of 1937 ("Housing Act") to provide loans and subsidies, and the Commodity Food Distribution Program, which provides surplus food to low-income individuals.

labors; suits brought under these statutes do not require the type of injunctive and declaratory powers that the district courts can bring to bear in suits under the Medicaid Act." *Id.* at 900 n.31; *see also id.* at 904 n.39 (concluding that Tucker Act jurisdiction was proper to "remedy particular categories of past injuries and labors," while Administrative Procedure Act jurisdiction was proper when "[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets"), 905 n.42 (reiterating that statutes found to mandate the payment of money damages under the Tucker Act typically "attempt to compensate a particular class of persons for past injuries or labors"). In contrast, "the statutory mandate of a federal grant-in-aid program directs the Secretary to pay money to the State, not as compensation for a past wrong, but to subsidize future state expenditures." *Id.* at 905 n.42. Thus, the Supreme Court concluded that the state's suit was "not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [was] a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900; *accord Suburban Mortgage Assocs. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1125 (Fed. Cir. 2007) (citing the distinction with approval); *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 200 (Fed. Cir. 1997) (same); *Malone*, 34 Fed. Cl. at 262-63 (same).

Plaintiff contends that the precedent cited above is inapplicable to its first claim for relief because the decisions concerned the "'jurisdictional boundary between the Tucker Act and the Administrative Procedure

Act,'" and did not turn "on the type of federal funds at issue. . . ." Opp'n 33 (quoting *Suburban Mortgage Assocs.*, 480 F.3d at 1117). It further asserts that those decisions concerned "whether the primary relief sought by the plaintiff is to correct the future application of agency policy, secure specific performance, or obtain other prospective relief," and that here, it seeks no prospective relief, only money damages. *Id.* While plaintiff is correct that the aforementioned decisions turned on the actual nature of the relief sought, it overlooks the Supreme Court's unambiguous statement in *Bowen* that "the statutory mandate of a federal grant-in-aid program directs the Secretary to pay money to the State, *not as compensation for a past wrong*, but to subsidize future state expenditures." 487 U.S. at 905 n.42 (emphasis added). In other words, statutes creating federal grant-in-aid programs are not designed to provide for a damages remedy. Thus, plaintiff's attempt to use the underlying statutes and regulations to obtain **[133]** money damages for the government's failure to provide the specified programs, services, and benefits must fail.[10] Jurisdiction for plaintiff's first claim for relief

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[10] Moreover, to the extent that this court possesses jurisdiction to provide a monetary remedy when grant funds are not properly disbursed by the federal government, its ability to do so is limited by operation of the Antideficiency Act. The Antideficiency Act provides, in relevant part, that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation[.]" 31 U.S.C. § 1341(a)(1)(A) (2006). Thus, "[f]unds appropriated for an agency's use can become unavailable in three circumstances: if the appropriation lapses; if the funds have already been awarded to other recipients; or if Congress rescinds the appropriation." *City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *accord Star-Glo Assocs. v. United*

must arise from a source of law distinct from grant-creating statutes and regulations. Because plaintiff has not relied upon any other substantive sources of law, dismissal of plaintiff's grant program allegations is warranted.

Although the court's conclusion disposes of nearly all of plaintiff's allegations in its first claim for relief, for the benefit of the parties, the court will individually address all of the programs, services, and benefits identified by plaintiff, regardless of whether they constitute federal grants-in-aid. The court groups the programs, services, and benefits into five categories: (1) federal revenue sharing; (2) housing programs; (3) food and nutrition programs; (4) block grants for community services, health services, and home energy assistance; and (5) employment and training programs. The court discusses each category in turn.

States, 414 F.3d 1349, 1354 (Fed. Cir. 2005) (noting that if a statute imposes a cap on expenditures for a particular purpose, "payments in excess of the cap would violate the Anti-deficiency Act"). The only situation in which a court may award funds after an appropriation lapses is when the lawsuit was instituted prior to the lapse date. *City of Houston, Tex.*, 24 F.3d at 1426; *accord Star-Glo Assocs. v. United States*, 59 Fed. Cl. 724, 734-35 (2004), *aff'd*, 414 F.3d at 1349. Here, plaintiff has not alleged that (1) the appropriations for any of the grant programs have not lapsed since November 1, 1996, the last date for which plaintiff seeks unawarded grant funds; (2) the appropriations for any of the grant programs had not lapsed on the date it filed suit; or (3) the grant program funds had not all been awarded to other recipients. Accordingly, the operation of the Antideficiency Act would moot plaintiff's grant program allegations. *See City of Houston, Tex.*, 24 F.3d at 1426-27 (affirming the district court's grant of summary judgment on mootness grounds).

B. Federal Revenue Sharing

Plaintiff first asserts that it was entitled to receive funds via the Federal Revenue Sharing program.[11] Congress created the Federal Revenue Sharing program in 1972 to provide fiscal assistance to state and local governments. *See* State and Local Fiscal Assistance Act of 1972, 86 Stat. at 919. The assistance was characterized as an entitlement. *See*, *e.g.*, *id.* § 102, 86 Stat. at 919 ("[T]he Secretary [of the United States Department of the Treasury] shall, for each entitlement period, pay out . . . to . . . each State government . . . and . . . each unit of local government a total amount equal to the entitlement of such unit."), § 107(a), 86 Stat. at 922 ("The State government shall be entitled to receive one-third of the amount allocated to that State for each entitlement period. The remaining portion of each State's

[11] Plaintiff cites the following three statutes in its second amended complaint: State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (appropriating funds for the period of January 1, 1972, through December 31, 1976), *amended by* State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341 (appropriating funds for the period of January 1, 1977, through September 30, 1980), *and* State and Local Fiscal Assistance Act Amendments of 1980, Pub. L. No. 96-604, 94 Stat. 3516 (appropriating funds for the period of October 1, 1980, through September 30, 1983). The Federal Revenue Sharing program authorized by the State and Local Fiscal Assistance Act of 1972 terminated on September 30, 1983. State and Local Fiscal Assistance Act Amendments of 1980, § 2(a)-(b), 94 Stat. at 3516. However, although the underlying statutes are not cited by plaintiff, the Federal Revenue Sharing program continued to exist. *See, e.g.*, Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877, 1010-31 (codifying title 31 of the United States Code), *amended by* Local Government Fiscal Assistance Amendments of 1983, Pub. L. No. 98-185, § 2, 97 Stat. 1309, 1309 (extending the program through September 30, 1986), *repealed by* Consolidated Omnibus Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 327-28.

allocation shall be allocated among **[134]** the units of local government of that State. . . ."), § 108(b)(6)(A), 86 Stat. at 925 ("[T]he entitlement of any unit of local government for any entitlement period shall be the amount allocated to such unit. . . ."). Among the units of local government covered by the program were Indian tribes: "If . . . there is an Indian tribe . . . which has a recognized governing body which performs substantial government functions, then . . . there shall be allocated to such tribe . . . a portion of the amount allocated. . . . " *Id.* § 108(b)(4), 86 Stat. at 925; *see also id.* at § 108(d)(1), 86 Stat. at 927 (noting that Indian tribes constituted units of local government for the purposes of most provisions of the statute, including those cited here). Funds were allocated to state and local governments in accordance with a complex formula based on population, general tax effort, and relative income. *Id.* §§ 106-109, 86 Stat. at 921-31. Initially, local governments were required to use their allocated funds for the following "priority expenditures": public safety, environmental protection, public transportation, health, recreation, libraries, social services, and financial administration. *Id.* § 103(a), 86 Stat. at 919. Within these general categories, local governments could use the funds "in accordance with local needs and priorities and without the attachment of strings by the Federal Government." S. Rep. No. 92-1050, at 1 (1972). Subsequently, when Congress amended the Act in 1976, it eliminated the need to use the allocated funds for "priority expenditures." State and Local Fiscal Assistance Amendments of 1976, § 3(a), 90 Stat. at 2341; *see also* S. Rep. No. 94-1207, at 1 (1976) (characterizing the provision of fiscal assistance as "unrestricted").

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") addressed whether the Claims Court had jurisdiction to entertain claims brought under the Federal Revenue Sharing program in *National Ass'n of Counties v. Baker*, 842 F.2d 369 (D.C. Cir. 1988).[12] In particular, the plaintiff-appellees, various local governments, sought to recover revenue sharing funds that had been sequestered pursuant to a statute aimed at eliminating the federal budget deficit. *Id.* at 371-72. The Secretary of the United States Department of the Treasury ("Treasury Secretary") argued that the local governments' claims belonged in the Claims Court pursuant to the Tucker Act. *Id.* at 371. Specifically, he contended that the Federal Revenue Sharing statute mandated compensation because the withheld funds were entitlements. *Id.* at 374. The D.C. Circuit disagreed, explaining:

> First, we do not believe that the Revenue Sharing Act can fairly be interpreted as mandating the compensation which the local governments seek. Second, we believe that the compensation mandating requirement refers to cases where "classical money damages" are sought by the plaintiff and not to cases such as the present case where the relief sought is only a disbursal of the money to which a statute allegedly entitles them.

Id. With respect to the former holding, the D.C. Circuit noted that the only language in the statute that might

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[12] The specific statute addressed by the D.C. Circuit was the Act of Sept. 13, 1982, which codified the Revenue Sharing Program at title 31 of the United States Code. *See Nat'l Ass'n of Counties*, 842 F.2d at 371-72. The relevant provisions in the Act of Sept. 13, 1982 are substantively similar to those in the statutes cited by plaintiff.

support the Treasury Secretary's position provided: "'Each unit of general local government *is entitled to an amount* equal to any amount allocated to the government under this chapter for each entitlement period. Each State government *shall be paid* an amount equal to any allocation made for each entitlement period.'" *Id.* at 374-75 (quoting 31 U.S.C. § 6702 (1982)) (second emphasis added). It concluded, however, that this language could not "be fairly interpreted as compensation mandating." *Id.* at 375.

Amplifying the latter holding, the D.C. Circuit elucidated:

> The Revenue Sharing Act contains no provision that expressly makes the United States liable for mismanagement of the Revenue Sharing [funds]. Nor is there any indication in the legislative history that Congress intended to provide the local **[135]** governments with a substantive right to recover money damages due to mismanagement of the Revenue Sharing [funds].
>
> . . . .
>
> We are reluctant to interpret the Revenue Sharing Act as mandating compensation in the absence of clear Congressional intent, because to do so would result in an implied right of action in favor of [fund] recipients. A substantive right to recover is not to be implied in the absence of clear Congressional intent. We do not believe the Revenue Sharing Act or its legislative history reflects an intent by Congress to provide the local governments with a substantive right to recover damages due to the improper withholding of funds by the Secretary.

Id. (citations omitted). In sum, the D.C. Circuit concluded:

> The Revenue Sharing Act creates monetary entitlements, or rights, and the local governments seek only to enforce those rights. They do not seek monetary compensation because their rights have been abridged. Thus, the local governments seek specific relief. There is a difference between monetary relief in the form of compensation on the one hand, and monetary relief in the form of specific relief, on the other.

Id. at 380.

The D.C. Circuit's holding that the Federal Revenue Sharing statute did not mandate the payment of money damages appears to stand in contrast with the Federal Circuit's decision in *Agwiak v. United States*, 347 F.3d 1375 (Fed. Cir. 2003), which also addressed the appropriate statutory construction of the terms "is entitled" and "shall be paid." In *Agwiak*, the plaintiff-appellants, who had been employed by the United States Department of Health and Human Services, sought, among other things, remote worksite pay pursuant to 5 U.S.C. § 5942(a). *Id.* at 1376-77. The statute provided:

> [A]n employee of an Executive department or an independent establishment who is assigned to duty, except temporary duty, at a site so remote from the nearest established communities or suitable places of residence as to require an appreciable degree of expense, hardship, and inconvenience, beyond that normally encountered in metropolitan commuting, on the part of the employee in commuting to and from his residence and such worksite, *is entitled*, in addi-

> tion to pay otherwise due him, to an allowance of not to exceed $10 a day. The allowance *shall be paid* under regulations prescribed by the President establishing the rates at which the allowance will be paid and defining and designating those sites, areas, and groups of positions to which the rates apply.

5 U.S.C. § 5942(a) (2000) (emphasis added), *cited in Agwiak*, 347 F.3d at 1378-79. The government argued that this statute and its implementing regulations were not money-mandating. *Agwiak*, 347 F.3d at 1379. The Federal Circuit disagreed, explaining:

> The relevant statute in this case provides that an employee at a remote duty site "is entitled" to the remote duty allowance. The statute further provides that "[t]he allowance shall be paid under regulations prescribed by the President." We have repeatedly recognized that the use of the word "shall" generally makes a statute money-mandating. Indeed, we have held that 37 U.S.C. § 204 is money-mandating, and it contains substantively identical language to the statute at issue here: "The following persons are entitled to the basic pay of the pay grade to which assigned or distributed[.]"

Id. at 1380 (second alteration added) (citations omitted); *see also id.* (noting that "the implementing regulations for section 5942(a) contain similar language"); *accord Greenlee County, Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (holding that the Payment in Lieu of Taxes Act, which provided that the government "shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located," was "'reasonably amenable' to a reading that it

is money-mandating"); *Britell v. United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004) (holding that the regulations implementing the military's health insurance plan, which provided that the plan "will pay" benefits "directly" to the insured, were "'reasonably amenable to the reading that [they] **[136]** mandate[] a right of recovery in damages'"). Accordingly, the Federal Circuit concluded that section 5942 and its implementing regulations were money-mandating. *Agwiak*, 347 F.3d at 1380.

In the instant case, as in both *National Ass'n of Counties* and *Agwiak*, the court is presented with language indicating that Indian tribes are "entitled to" funds and "shall be allocated" those funds, and that the Treasury Secretary "shall . . . pay out" the funds to the Indian tribes. Although *National Ass'n of Counties* concerns the same statutory program as the case at bar, it is only persuasive, not controlling, precedent. *See Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) ("[W]e accord great weight to the decisions of our sister circuits when the same or similar issues come before us, and we 'do not create conflicts among the circuits without strong cause.'" (quoting *Wash. Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996))); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1371 (Fed. Cir. 2000) ("While these decisions [of two federal appellate courts] are not binding on the Court of Federal Claims, the court found them persuasive in their own right. . . ."). The Federal Circuit in *Agwiak* addressed language nearly identical to the language contained in the Federal Revenue Sharing statutes cited by plaintiff. Accordingly, the court must follow this binding precedent and conclude that the

State and Local Fiscal Assistance Act of 1972, as amended, is money-mandating.

However, this conclusion does not end the court's inquiry. While the court possesses jurisdiction over plaintiff's Federal Revenue Sharing program allegations, it must consider whether those allegations have been rendered moot by operation of the Antideficiency Act.[13] *See*

[13] The court's jurisdictional inquiry is distinct from its inquiry into the justiciability of a claim. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *Murphy v. United States*, 993 F.2d 871, 872 (Fed. Cir. 1993). An issue is justiciable if it is within the court's competency to supply relief. *Murphy*, 993 F.2d at 872; *see also Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005) (panel portion) (noting that justiciability "encompasses a number of doctrines under which courts will decline to hear and decide a cause," including the "doctrines of standing, mootness, ripeness, and political question"). Thus, the court may find that it possesses jurisdiction over the subject matter of a case but that the dispute is nonjusticiable. *Baker*, 369 U.S. at 198; *Oryszak v. Sullivan*, 576 F.3d 522, 526 n.3 (D.C. Cir. 2009) ("That a particular dispute is nonjusticiable, however, does not mean the court lacks jurisdiction over the subject matter.").

The D.C. Circuit's opinion in *Oryszak* deserves further comment. The opinion was unanimous, save for the footnote in which the quotation set forth above appears. *See* 476 F.3d 523 n.* (noting that the Honorable Brett M. Kavanaugh concurred "in all but footnote 3 of the opinion of the court"). Notably, the Honorable Douglas H. Ginsburg, who authored the opinion of the court, also filed a concurring opinion that further addressed the distinction between jurisdiction and justiciability, as well as the proper mechanism of dismissing a suit on justiciability grounds:

> That a plaintiff makes a claim that is not justiciable . . . does not mean the court lacks subject matter jurisdiction over his case, as the opinion of the court helps to clarify. Upon a proper motion, a court should dismiss the case for failure to state a claim. . . .
>
> That the nonjusticiability of a claim may not be waived does not render justiciability a jurisdictional issue, and this court has been careful to distinguish between the two concepts.

Star-Glo Assocs., 414 F.3d at 1354; *City of Houston, Tex.*, 24 F.3d at 1426-27. As noted above, the court is unable to award funds if an appropriation has lapsed unless an aggrieved party files suit before the appropriation lapses. *City of Houston, Tex.*, 24 F.3d at 1426. The three Federal Revenue Sharing statutes cited by plaintiff appropriated funds for three time periods: (1) January 1, 1972, through December 31, 1976; (2) January 1, 1977, through September 30, 1980; and (3) October 1, 1980, through September 30, 1983. Thus, the appropriations for the Federal Revenue Sharing program, as alleged by plaintiff, lapsed on September 30, 1983, almost twenty **[137]** years before plaintiff filed suit in the Court of Federal Claims. As a result, plaintiff's Federal Revenue Sharing program allegations are moot.

C. Housing Programs

Plaintiff next contends that it would have been eligible to receive housing assistance pursuant to the Housing Act, as amended, and via the Housing Improvement Program. The court addresses each in turn.

That the court may in its discretion address a threshold question before establishing that it has jurisdiction does not render the question jurisdictional nor, significantly, does it mean the court must address that question at the outset of the case. Because justiciability is not jurisdictional, a court need not necessarily resolve it before addressing the merits. . . . For a court to retain this discretion it is important to distinguish among failure to state a claim, a claim that is not justiciable, and a claim over which the court lacks subject matter jurisdiction.

Id. at 526-27 (Ginsburg, J., concurring) (citations omitted).

1. United States Housing Act of 1937[14]

In enacting the Housing Act, Congress sought to "remedy the unsafe and insanitary housing conditions

[14] Plaintiff cites the following three statutes in its second amended complaint: Housing Act, ch. 896, 50 Stat. 888, *amended in relevant part by* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 653-67, *and* Indian Housing Act of 1988, Pub. L. No. 100-358, 102 Stat. 676. In its opposition to defendant's renewed motion to dismiss, plaintiff cites another statute amending the Housing Act, the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016. This Act terminated the assistance available to Indian tribes under the Housing Act as of September 30, 1997. *Id.* § 502, 110 Stat. at 4043. Moreover, the substantive provisions of the Act specifically cited by plaintiff— §§ 101, 301, 110 Stat. at 4022-23, 4036—had an effective date of October 1, 1997. *Id.* § 107, 110 Stat. at 4030; *see also* U.S. Gen. Accounting Office, GAO/RCED-99-16, *Native American Housing: Information on HUD's Funding of Indian Housing Programs* 3 (1998) ("*GAO Housing Report*") (noting that after rulemaking concluded on March 12, 1998, the Act "went into effect on April 13, 1998"). Because plaintiff was reestablished as a federally recognized Indian tribe on November 1, 1996, almost a year before the provisions of the Native American Housing Assistance and Self-Determination Act of 1996 went into effect, the Act is not applicable here.

Plaintiff also cites the following statutory provisions in its second amended complaint, although they do not directly amend the Housing Act: (1) Housing and Community Development Act of 1977, Pub. L. No. 95-128, § 901, 91 Stat. 1111, 1148 and (2) Housing and Community Development Act of 1974, §§ 102(a)(1), 103, 88 Stat. at 635, 637, *amended by* Housing and Community Development Act of 1977, §§ 102(a)(6), 103(a), 91 Stat. at 1112-13. The cited provision of the Housing and Community Development Act of 1977 created a Special Assistant for Indian and Alaska Native Programs in the United States Department of Housing and Urban Development ("HUD") to coordinate housing and community development for Indian tribes. The cited provisions of the Housing and Community Development Act of 1974 authorized the Secretary of HUD to provide grants to Indian tribes to help finance approved Community Development programs.

and the acute shortage of decent, safe, and sanitary dwelling-conditions for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation." § 1, 50 Stat. at 888. Funding was provided "to construct, maintain, and rehabilitate low-income housing through programs such as Development, Subsidies, and Modernization." *GAO Housing Report*, *supra*, at 3. For some programs, funding was awarded on a competitive basis. *Id.* at 4. For the remaining programs, funding was allocated "noncompetitively through a formula or on a first-come, first-served basis." *Id.* Whatever the funding mechanism, to obtain assistance, a tribal governing authority, like any state or local unit of government, was typically required "to enact an ordinance creating a housing authority" to administer the programs upon receipt of funding.[15] *Indian Housing*, *supra*, at 4. Assistance was available to all Indian housing authorities, regardless of whether the establishing tribe was federally recognized. *See, e.g.*, 24 C.F.R. § 805.104 (1976). Once it had established an Indian housing authority, a tribe could submit an application to HUD to develop a project. *See*, *e.g.*, *id.* §§ 805.206-.207. To obtain approval for a project, an Indian housing authority was required to demonstrate, among other things, that it was capable of administering the project. *See, e.g., id.* § 805.207(a).

For many of the programs authorized by the Housing Act, the Secretary of HUD had the discretion to make

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[15] Indian housing authorities could also be established pursuant to state law. *See, e.g.*, 24 C.F.R. § 805.108(b) (1976); *see also* Staff of S. Comm. on Interior & Insular Affairs, 94th Cong., *Indian Housing in the United States* 4 (Comm. Print 1975) ("*Indian Housing*").

the relevant grants and loans. *See*, *e.g.*, Housing and Community Development Act of 1974, § 201(a), 88 Stat. at 656 ("The Secretary may make loans . . . to public housing agencies to help finance or refinance the development, acquisition, or [138] operation of low-income housing projects by such agencies. . . . The Secretary may make annual contributions to public housing agencies to assist in achieving and maintaining the low-income character of their projects."), 662 ("The Secretary is authorized to enter into annual contribution contracts with public housing agencies. . . ."), 666 ("[T]he Secretary may make annual contributions to public housing agencies for the operation of low-income housing projects."). However, plaintiff contends that two statutory provisions were nondiscretionary in nature. Plaintiff first quotes from a 1974 amendment to the Act:

> [T]he Secretary [of HUD] shall enter into contracts for annual contributions, out of the aggregate amount of contracts for annual contributions authorized under this section . . . , to assist in financing the development or acquisition cost of low-income housing for families who are members of any Indian tribe . . . which is recognized by the Federal Government as eligible for service from the Bureau of Indian Affairs, or who are wards of any State government. . . .

Id. § 201(a), 88 Stat. at 657. Plaintiff then quotes from a 1988 amendment to the Act: "The Secretary [of HUD] shall carry out programs to provide lower income housing on Indian reservations and other Indian areas in accordance with the provisions of [title II of the Housing Act]." Indian Housing Act of 1988, § 2, 102 Stat. at 676. According to plaintiff, these quoted provisions

demonstrate a congressional intent to benefit Indian tribes, and therefore render the Housing Act money-mandating.

The court has previously held that the Housing Act is not a money-mandating source of jurisdiction to the extent that it authorizes federal grant-in-aid programs. However, even if the court looks beyond the grant-in-aid aspects of the Housing Act, it could not find that the provisions of the Housing Act cited by plaintiff are money-mandating. As an initial matter, plaintiff has not cited any language demonstrating that the Housing Act is "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache Tribe*, 537 U.S. at 473. The only language cited by plaintiff—that the government "shall enter into contracts" and "shall carry out programs"—does not suffice to mandate compensation. *Accord Britell*, 372 F.3d at 1377-78 (holding that a statute providing that the government "shall contract . . . for medical care" and that an insured "is entitled . . . to the medical and dental care" was not money-mandating).

Morever, plaintiff has not demonstrated that any of the programs, services, or benefits authorized by the Housing Act constitute a discretionary scheme that is money-mandating. First, plaintiff has not shown that the statutes and regulations it cites provide clear standards for paying money to recipients. In some of the authorized programs, funding is awarded on a competitive basis. Thus, not all applicants automatically receive funding. Rather, it remains within the government's complete discretion to determine the successful applicant. Plaintiff's nonspecific allegation that funding is provided on a noncompetitive basis pursuant to a for-

mula in some programs is not sufficient evidence that the relevant portions of the Housing Act rise to the level of money-mandating. Second, the statutes and regulations cited by plaintiff do not provide that precise amounts must be paid. Third, the statutes and regulations cited by plaintiff do not compel payment on satisfaction of certain conditions. In order to qualify for funding under Housing Act programs, an Indian tribe is required to (1) establish a housing authority, (2) submit an application to develop a project, and (3) demonstrate that it was capable of administering the project. However, the mere submission of an application to develop a project does not result in the award of funding to the Indian housing authority. And, it is within the discretion of the Secretary of HUD to determine whether the housing authority is capable of administering the project. In sum, plaintiff has not established a discretionary scheme that is money-mandating with respect to the Housing Act.

2. Housing Improvement Program[16]

The Bureau of Indian Affairs ("BIA") of the Department of the Interior created the **[139]** Housing Improve-

[16] Plaintiff asserts that beginning in 1983, Congress provided funding for the Housing Improvement Program in its annual appropriations acts pertaining to the Department of the Interior and related agencies. In particular, plaintiff cites: Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-192 (1996); Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-169 to -170; Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2510 (1994); Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1390 (1993); Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106

ment Program in 1965 "in an effort to respond to the housing needs of those Indian families with exceptionally low incomes or no income at all. . . ." *Indian Housing*, *supra*, at 7. The Housing Improvement Program "provides grants for repairs, major rehabilitation, down payments, and some new housing construction" and "is designed to provide these various forms of assistance to Indian people who are unable to obtain it from any other source." *Id.* Grants may be made to individuals to enable them to do their own work, or the project grant money can be used by a tribe or the BIA to perform the work. *Id.*; 25 C.F.R. § 300.6 (1976) (noting that the BIA can disburse funds through direct grants to individuals, negotiated contracts and grant agreements with Indian tribes, contracts with non-Indian firms, and BIA programs); *see also* 25 C.F.R. § 300.3 (1976) ("To the maximum extent possible, the program will be administered through tribes, tribal housing authorities, or other tribal organizations, or by having tribal officials participate in the applicant selection process."). "Annual [Housing Improvement Program] appropriations

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Stat. 1374, 1388 (1992); Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 990, 1005 (1991); Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990); Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 701, 714 (Fiscal Year 1990); Act of Sept. 27, 1988, Pub. L. No. 100-446, 102 Stat. 1774, 1795 (Fiscal Year 1989); Department of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-229 (1987); Department of the Interior and Related Agencies Appropriations Act, 1987, Pub. L. No. 99-500, 100 Stat. 1783, 1783-256 (1986); Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185, 1236 (Fiscal Year 1986); Department of the Interior and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1849 (1984); Act of Nov. 4, 1983, Pub. L. No. 98-146, 97 Stat. 919, 929 (Fiscal Year 1984).

are distributed . . . according to tribal needs and relative priorities for housing repair services to Indian homes. . . ." *Indian Housing*, *supra*, at 7; *see also* 25 C.F.R. § 300.5(a) (1976) ("Priority is given to families with the greatest need in relation to income, family size, and of not being eligible for other available programs providing housing assistance."). Beginning in 1983, the annual appropriations acts for the Department of the Interior expressly provided funding for the "construction, repair, and improvement of Indian housing. . . ." *See*, *e.g.*, Act of Nov. 4, 1983, 97 Stat. at 929 ("For . . . construction, repair, and improvement of Indian housing, $78,920,000, to remain available until expended[.]").

The court has previously held that the statutes and regulations constituting the Housing Improvement Program are not money-mandating sources of jurisdiction due to the Housing Improvement Program's status as a federal grant-in-aid program. However, even if the Housing Improvement Program was not a federal grant program, or if grant programs were not categorically excluded from having money-mandating status, the court could not conclude that the underlying legal framework of the Housing Improvement Program is money-mandating. To begin, neither the appropriations acts cited by plaintiff, nor the regulations implementing the Housing Improvement Program, are "reasonably amenable to the reading that [they] mandate[] a right of recovery in damages." *White Mountain Apache Tribe*, 537 U.S. at 473. The appropriations acts merely set aside a sum of money for the BIA for the "construction, repair, and improvement of Indian housing" and do not otherwise specify who would ultimately receive the funds, much less indicate that funds are earmarked specifically

for the Housing Improvement Program. Similarly, the regulations are bereft of any provision that mandates the payment of money to Indian tribes; they merely direct that funding should be [140] funneled through tribes to the "maximum extent possible."

In addition, plaintiff has not established that the legal framework underlying the Housing Improvement Program constitutes a discretionary scheme that is money-mandating. First, plaintiff has not demonstrated that the statutes and regulations it cites provide clear standards for paying money to recipients. As already noted, the appropriations acts contain no guidance concerning who should receive Housing Improvement Program funds. And, not only do the regulations indicate that funding could flow through tribes or be provided directly to the individual requiring assistance, they also indicate that grants are awarded on a competitive basis, thus evidencing the BIA's absolute discretion to determine grant recipients. Second, the statutes and regulations cited by plaintiff do not provide that precise amounts must be paid. Third, the statutes and regulations cited by plaintiff do not compel payment on satisfaction of certain conditions. In fact, neither the statutes nor the regulations set forth any steps that an Indian tribe must take to obtain funds under the Housing Improvement Program. The regulations merely provide that tribes may receive funds through negotiated contracts or grant agreements. For these reasons, plaintiff has not established a discretionary scheme that is money-mandating with respect to the Housing Improvement Program.

D. Food and Nutrition Programs

Third, plaintiff asserts that it was eligible to receive food and nutrition benefits via a special supplemental nutrition program for women, infants, and children ("WIC Program") and the Commodity Food Distribution Program.[17] The court addresses each program in turn.

1. Supplemental Nutrition Program for Women, Infants, and Children[18]

Congress created the WIC Program in 1972 to enable "local health or welfare agencies or private nonprofit agencies . . . to carry out a program under which supplemental foods will be made available to pregnant or lactating women and to infants determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income." Act of Sept. 26, 1972, § 9, 86 Stat. at 729 (adding section 17 to the Child Nutrition Act of 1966). The Secretary of the United States Department of Agriculture ("Secretary of Agriculture") was authorized to make cash

[17] In its second amended complaint, plaintiff also asserts that it was eligible to receive benefits pursuant to the Food Stamp program. However, in its opposition to defendant's renewed motion to dismiss, plaintiff indicates that it has abandoned its Food Stamp program claim. Thus, the court need not address this now-abandoned contention.

[18] Plaintiff cites the following statutory provisions in its second amended complaint: Act of Sept. 26, 1972, Pub. L. No. 92-433, § 9, 86 Stat. 724, 729-31 (amending the Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885), *amended by* National School Lunch and Child Nutrition Act Amendments of 1973, Pub. L. No. 93-150, § 6(a), 87 Stat. 560, 563. In its opposition to defendant's renewed motion to dismiss, plaintiff cites another statutory provision amending the Child Nutrition Act of 1966, the Child Nutrition Amendments of 1978, Pub. L. No. 95-627, § 3, 92 Stat. 3603, 3611-19. The WIC Program is currently codified at 42 U.S.C. § 1786.

grants to states for the purposes of funding the WIC Program. *Id.* ("[T]he Secretary shall make cash grants to the health department or comparable agency of each State. . . ."). In 1973, Congress extended eligibility for the receipt of cash grants to Indian tribes. National School Lunch and Child Nutrition Act Amendments of 1973, § 6(a), 87 Stat. at 563 (amending the statute to read: "[T]he Secretary shall make cash grants to the health department or comparable agency of each State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare. . . ."); *see also* Child Nutrition Amendments of 1978, § 3, 92 Stat. at 3613 (providing that "the Secretary shall make cash grants to State agencies," including Indian tribes, "for the purpose of administering the program" and that any eligible local agency, including an Indian tribe, "that applies to participate in . . . the program . . . shall immediately be provided with the necessary funds to carry out the program"). As [141] of 1998, many, but not all,[19] federally recognized Indian tribes in the continental United States participated in the WIC Program. *USDA WIC Report*, *supra*, at 3, 6.

To receive WIC Program funds, an Indian tribe must have "executed an agreement with the Department [of Agriculture] and received approval of its State Plan of Program Operation and Administration." 7 C.F.R.

[19] About 100 of the 385 federally recognized Indian tribes or tribal organizations in the continental United States were represented by Indian Tribal Organizations operating as state agencies, while about fifty-six Indian tribes or tribal councils operated local agencies. Nancy Cole, U.S. Dep't of Agric., WIC-02-NAM, *The Characteristics of Native American WIC Participants, On and Off Reservations* 3, 6 (2002) ("*USDA WIC Report*").

§ 246.14(a) (1980). Beginning in 1980, funds appropriated by Congress for the WIC Program were allocated among states and Indian tribes according to a formula. *See id.* § 246.14(b) ("Funds . . . shall be distributed . . . on the basis of funding formulas which allocate funds to all State agencies for food costs and operational and administrative costs."); Child Nutrition Amendments of 1978, § 3, 92 Stat. at 3617 ("[T]he Secretary [of Agriculture] shall divide, among the State agencies, the funds provided in accordance with this section on the basis of a formula determined by the Secretary.").

The court has previously held that the statutes and regulations comprising the WIC Program are not money-mandating sources of jurisdiction due to the WIC Program's status as a federal grant-in-aid program. Accordingly, the court need not further analyze whether the underlying legal framework of the WIC Program is expressly money-mandating or constitutes a discretionary scheme that is money-mandating.

2. Commodity Food Distribution Program[20]

The Commodity Food Distribution Program originated in statutes permitting the use of price supports to "encourage the domestic consumption" of agricultural commodities "by increasing their utilization through

[20] Plaintiff cites the following two statutes: Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913; Agricultural Act of 1949, ch. 792, § 416, 63 Stat. 1051, 1058. The Commodity Food Distribution Program is currently codified at 7 U.S.C. § 612c. Further provisions related to the distribution of commodities on Indian reservations are currently codified at 7 U.S.C. § 2013(b). Although the program, as it applies to Indian tribes, is currently referred to as the Food Distribution Program on Indian Reservations, for simplicity, the court uses the original name, the Commodity Food Distribution Program.

benefits, indemnities, donations or by other means, among persons in low income groups. . . ." Act of Aug. 24, 1935, ch. 641, § 32, 49 Stat. 750, 774, *amended by* Act of June 30, 1939, ch. 253, 53 Stat. 939, 975. "[T]o prevent the waste of food commodities acquired through price support operations which are found to be in danger of loss through deterioration or spoilage," Congress provided that the United States Department of Agriculture ("USDA") could make such commodities available to "the Bureau of Indian Affairs and Federal, State, and local public welfare organizations for the assistance of needy Indians and other needy persons[.]" Agricultural Act of 1949, § 416, 63 Stat. at 1058.

In amending the Food Stamp Act in 1977, Congress reaffirmed its policy "to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." Food and Agriculture Act of 1977, § 1301, 91 Stat. at 958. It also reaffirmed the application of the Commodity Food Distribution Program to Indian tribes, providing:

> Distribution of commodities, . . . shall also be made whenever a request for . . . food program operations . . . is made by a tribal organization. In the event of distribution on all or part of an Indian reservation, the appropriate agency of the State government in the area involved shall be responsible for such distribution, except that, if the Secretary [of Agriculture] determines that the tribal organization is capable of effectively and efficiently administering such distribution, then such tribal organizations shall administer such distributions. . . . The Secretary is authorized to pay such amounts for administrative costs **[142]** of such distribution on Indian reserva-

> tions as the Secretary finds necessary for effective administration of such distribution by a State agency or tribal organization.

Id. § 1301, 91 Stat. at 961; *see also id.* § 1304(a), 91 Stat. at 980 ("[T]he Secretary [of Agriculture] may, . . . purchase and distribute sufficient agricultural commodities . . . to maintain the traditional level of assistance for food assistance programs as are authorized by law, including . . . distribution to . . . Indians, whenever a tribal organization requests distribution of federally donated foods pursuant to [section 1301 of the Food and Agricultural Act of 1977].").

It appears that during the period for which the federal government did not properly recognize plaintiff as a tribe, *i.e.*, between 1969 and 1996, funds appropriated for the Commodity Food Distribution Program were distributed to regional USDA offices based on fixed percentages of unknown origin, and then the regional USDA offices negotiated funding levels with individual tribal organizations. *See* Pl.'s Ex. 96 at 1, 4-5. As of June 2009, many, but not all,[21] Indian tribes in the United States participated in the Commodity Food Distribution Program. Pl.'s Ex. 94.

The court finds that the underlying statutory framework of the Commodity Food Distribution Program is not money-mandating. To begin, the statutes cited by plaintiff are not "reasonably amenable to the reading that [they] mandate[] a right of recovery in damages." *White Mountain Apache Tribe*, 537 U.S. at 473. The Food and Agriculture Act of 1977 provides that "[d]istri-

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[21] About 243 Indian tribes received food under the program. Pl.'s Ex. 94.

bution of commodities . . . shall . . . be made" and that the Secretary of Agriculture is "authorized to pay" the administrative costs of the distribution. This language does not mandate a payment of money. *Accord Britell*, 372 F.3d at 1377-78 (holding that a statute providing that the government "shall contract . . . for medical care" and that an insured "is entitled . . . to the medical and dental care" was not money-mandating). It only mandates the distribution of food, leaving the payment of incidental administrative costs to the discretion of the Secretary of Agriculture.

Furthermore, plaintiff has not demonstrated that the statutory framework underlying the Commodity Food Distribution Program constitutes a discretionary scheme that is money-mandating. First, plaintiff has not established that the statutes it cites provide clear standards for paying money to recipients. Indeed, as previously noted, the Food and Agriculture Act of 1977 primarily speaks in terms of providing commodities, not money, to recipients. The payment of administrative costs only occurs when commodities are distributed, and is at the discretion of the Secretary of Agriculture. Second, the statutes cited by plaintiff do not provide that precise amounts must be paid. Third, the statutes cited by plaintiff do not compel payment on satisfaction of certain conditions. Again, the payment of money is not compelled under the Commodity Food Distribution Program. Thus, there are no relevant conditions. In sum, plaintiff has not established a discretionary scheme that is money-mandating with respect to the Commodity Food Distribution Program.

E. Block Grant Programs

Plaintiff next contends that it was entitled to receive a variety of block grants in the areas of community services, health services, and home energy assistance pursuant to the Omnibus Budget Reconciliation Act of 1981 ("OBRA").[22] Specifically, the block grants authorized by OBRA included: Community Services Block Grants,[23] Preventative Health and Health Services Block Grants,[24] **[143]** Alcohol and Drug Abuse and Mental Health Services Block Grants,[25] Primary Care Health Block Grants,[26] and the Low Income Home Energy Assistance

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[22] Pub. L. No. 97-35, 95 Stat. 357. The block grant programs created in OBRA "replace[d] a large number of programs . . . administered by the Federal Government, transfer[red] primary responsibility for their administration to the States, and confer[red] substantial discretion on the States as to the use of the block grant funds." Block Grant Programs, 46 Fed. Reg. 48582, 48582 (Oct. 1, 1981).

[23] Plaintiff cites the following statutory provision: OBRA, tit. VI, subtit. B, 95 Stat. at 512-19. The Community Services Block Grant program is currently codified at 42 U.S.C. §§ 9901-9926.

[24] Plaintiff cites the following statutory provision: OBRA, tit. IX, subtit. A, § 901, 95 Stat. at 535-43 (amending the Public Health Service Act, ch. 373, 58 Stat. 682 (1944)). The Preventative Health and Health Services Block Grant program is currently codified at 42 U.S.C. §§ 300w to 300w-9.

[25] Plaintiff cites the following statutory provision: OBRA, tit. IX, subtit. A, § 901, 95 Stat. at 543-52 (amending the Public Health Service Act, 58 Stat. at 682). The Alcohol and Drug Abuse and Mental Health Services Block Grant program—now known as the Mental Health and Substance Abuse Block Grant program—is currently codified at 42 U.S.C. §§ 300x to 300x-66.

[26] Plaintiff cites the following statutory provisions: OBRA, tit. IX, subtit. A, § 901, 95 Stat. at 552-59 (amending the Public Health Service Act, 58 Stat. at 682), *repealed by* Health Services Amendments Act of 1986, Pub. L. No. 99-280, § 5, 100 Stat. 399, 400. The Primary Care

Program.[27] Except as otherwise noted, the statutory provisions describing each of the five block grant programs contained substantially the following language:

> (c)(1) If, with respect to any State, the Secretary [of HHS]—,
>
> (A) receives a request from the governing body of an Indian tribe or tribal organization within the State that assistance under this subtitle be made directly to such tribe or organization; and
>
> (B) determines that the members of such tribe or tribal organization would be better served by means of grants made directly to provide benefits under this subtitle;
>
> the Secretary shall reserve from amounts which would otherwise be allotted to such State under this subtitle for the fiscal year the amount determined under paragraph (2).
>
> (2) The Secretary shall reserve for the purpose of paragraph (1) from sums that would otherwise be allotted to such State not less than 100 percent of an amount which bears the same ratio to the State's allotment for the fiscal year involved as the population of all eligible Indians for whom a determination under this paragraph has been made bears to the popu-

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Health Block Grant program was formerly codified at 42 U.S.C. §§ 300y to 300y-11.

[27] Plaintiff cites the following statutory provisions: OBRA, tit. XXVI, 95 Stat. at 893-902; Home Energy Assistance Act of 1980, Pub. L. No. 96-223, tit. III, 94 Stat. 229, 288-99, *repealed by* OBRA, tit. XXVI, § 2611, 95 Stat. at 902. The Low Income Home Energy Assistance Program was formerly codified at 42 U.S.C. §§ 8601-8612 and is now codified at 42 U.S.C. §§ 8621-8630.

lation of all individuals eligible for assistance under this subtitle in such State.[28]

(3) The sums reserved by the Secretary on the basis of a determination under this subsection shall be granted to the Indian tribe or tribal organization serving the individuals for whom such a determination has been made.[29]

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[28] For the three health-related block grants, this paragraph contains language substantively identical to the following:

> (2) The Secretary shall reserve for the purpose of paragraph (1) from amounts that would otherwise be allotted to such State under subsection (a) an amount equal to the amount which bears the same ratio to the State's allotment for the fiscal year involved as the total amount provided or allotted for fiscal year 1981 by the Secretary to such tribe or tribal organization under the provisions of law referred to in subsection (a) bore to the total amount provided or allotted for such fiscal year by the Secretary to the State and entities (including Indian tribes and tribal organizations) in the State under such provisions of law.

OBRA, § 901, 95 Stat. at 536; *accord id.* § 901, 95 Stat. at 544, 553. For the Low Income Home Energy Assistance Program, this paragraph reads:

> (2) The amount determined under this paragraph for a fiscal year is the amount which bears the same ratio to the amount which would (but for this subsection) be allotted to such State under this title for such fiscal year . . . as the number of Indian households described in subparagraphs (A) and (B) of section 2605(b)(2) in such State with respect to which a determination under this subsection is made bears to the number of all households described in subparagraphs (A) and (B) of section 2605(b)(2) in such State.

Id. § 2604(d)(2), 95 Stat. at 895.

[29] For the Low Income Home Energy Assistance Program, an additional sentence was included in this paragraph, which provided that in situations where "there is no tribal organization serving an individual" eligible for funds, the funds will be provided to "such other entity as the

> **[144]** (4) In order for an Indian tribe or tribal organization to be eligible for an award for a fiscal year under this subsection, it shall submit to the Secretary a plan for such fiscal year which meets such criteria as the Secretary may prescribe by regulation.[30]
>
> (5) The terms "Indian tribe" and "tribal organization" mean those tribes, bands, or other organized groups of Indians recognized in the State in which they reside or considered by the Secretary of the Interior to be an Indian tribe or an Indian organization for any purpose.[31]

OBRA, § 674, 95 Stat. at 512-13 (footnotes added); *accord id.* at §§ 901, 2604, 95 Stat. at 536, 544, 553, 895-96. The regulations implementing the block grant programs contained the determination required by OBRA:

> The Secretary has determined that Indian tribes and tribal organizations would be better served by means of grants provided directly by the Secretary to such tribes and organizations out of the State's allotment of block grant funds than if the State were awarded its entire allotment. Accordingly, where provided for

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Secretary determines has the capacity to provide assistance pursuant to" the program. *See* OBRA, § 2604(d)(3), 95 Stat. at 895.

[30] This paragraph is not included in the statutory provision describing the Primary Care Block Grant program. *See* OBRA, § 901, 95 Stat. at 553.

[31] For the health-related block grant programs, the definitions of "Indian tribe" and "tribal organization" are instead derived from sections 4(b) and 4(c) of the Indian Self-Determination and Education Assistance Act. OBRA, § 901, 95 Stat. at 536, 544, 553. In addition, this paragraph is not included at all in the statutory provision describing the Low Income Home Energy Assistance Program. *See id.* § 2604, 95 Stat. at 896.

> by statute, the Secretary will, upon request of an eligible Indian tribe or tribal organization, reserve a portion of a State's allotment and, upon receipt of the complete application and related submission that meets statutory requirements, grant it directly to the tribe or organization.

45 C.F.R. § 96.41(a) (1982).

The court has previously held that the statutes and regulations comprising the OBRA block grant programs are not money-mandating sources of jurisdiction due to the programs' status as federal grant-in-aid programs. Accordingly, the court need not further analyze whether the underlying legal framework of the OBRA block grant programs is expressly money-mandating or constitutes a discretionary scheme that is money-mandating.

F. Employment and Training Programs

Plaintiff next asserts that, beginning in 1973, it was eligible to receive federal employment and training assistance.[32] Congress enacted the Comprehensive Employment and Training Act of 1973 "to provide job training and employment opportunities for economically dis-

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[32] Plaintiff cites the following statutory provisions: Job Partnership Act, Pub. L. No. 97-300, § 401, 96 Stat. 1322, 1368-69 (1982); Comprehensive Employment and Training Act of 1973, Pub. L. No. 93-203, §§ 204(a)(2), 302, 87 Stat. 839, 850, 858-59, *amended by* Youth Employment and Demonstration Projects Act of 1977, Pub. L. No. 95-93, § 303, 91 Stat. 627, 650, *and* Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, § 2, 92 Stat. 1909, 1962-63. The Job Partnership Act repealed the Comprehensive Employment and Training Act of 1973. § 184(a)(1), 96 Stat. at 1358. The funding provided by the Comprehensive Employment and Training Act of 1973 and the Job Partnership Act was and is considered to be block grants. *See GAO Block Grant Report*, *supra*, at 3, 22 & n.14, 23.

advantaged, unemployed, and underemployed persons, and to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency by establishing a flexible and decentralized system of Federal, State, and local programs." § 2, 87 Stat. at 839. Thus, under title II of the Act, states, units of local government, and "Indian tribes on Federal or State reservations and which include areas of substantial unemployment" were eligible to apply for financial assistance for transitional employment and related training and manpower services. *Id.* § 204(a), 87 Stat. at 850. Congress also found, in title III of the Act, that certain target populations deserved additional manpower services due to their "particular disadvantages in the labor market." *Id.* § 301(a), 87 Stat. at 857. One such target population was members of Indian communities, who Congress found to be seriously economically disadvantaged. *Id.* **[145]** § 302(a), 87 Stat. at 858. Thus, "because of the special relationship between the Federal Government and most of those to be served by [the additional programs] . . . [,] such programs shall be available to federally recognized Indian tribes. . . ." *Id.* § 302(b), 87 Stat. at 858. An Indian tribe was permitted to provide manpower services directly if the Secretary of the United States Department of Labor ("Secretary of Labor") determined that it was possible for the tribe to provide the services and that the tribe "demonstrated the capability to effectively administer a comprehensive manpower program. . . ." *Id.* § 302(c)(1), 87 Stat. at 858. Further, the tribe was required to submit "a comprehensive plan" to the Secretary of Labor. *Id.* However, the Secretary of Labor was free to "determine[] not to utilize Indian tribes. . . ." *Id.* § 302(d), 87 Stat. at 858.

Funds appropriated under title II of the Comprehensive Employment and Training Act of 1973 were allocated as follows:

> (a) Eighty per centum of funds available for any fiscal year under this title shall be allocated among eligible applicants in accordance with the number of unemployed residing in areas of substantial unemployment within the jurisdiction of the applicant compared to the number of unemployed residing in all such areas.
>
> (b) The remainder may be distributed by the Secretary [of Labor] in his discretion taking into account the severity of unemployment within such areas.

Id. § 202, 87 Stat. at 850. Funds appropriated under title III were allocated according to the following formula: "25 percent of the Title III allocation is based on the number of unemployed in the area, and 75 percent is based on the number of low-income persons in the area." Native American Grantees Under Section 302 of the Comprehensive Employment and Training Act, 44 Fed. Reg. 66088, 66089 (Nov. 16, 1979).

Although Congress repealed the Comprehensive Employment and Training Act of 1973 in 1982, it retained the program designed to provide Indian tribes with the additional manpower services described in title III of that Act.[33] *See* Job Partnership Act, §§ 184(a)(1), 401, 96 Stat. at 1358, 1368-69. The retained program, located in title IV of the Job Partnership Act, expanded the available programs to include all training and employ-

[33] The Job Partnership Act also provided funding to Indian tribes for summer youth employment and training programs. §§ 251-254, 96 Stat. at 1364. Plaintiff does not make a claim for these program benefits.

ment services, but was described using language substantially similar to that contained in the Comprehensive Employment and Training Act of 1973. *See id.* § 401, 96 Stat. at 1368-69. In addition, the regulations implementing the Job Partnership Act contained a slightly altered formula for allocating program funds: "The formula for allocating Title IV, Section 401 funds provides that 25 percent of the funding will be based on the number of unemployed Native Americans in the grantee's area, and 75 percent will be based on the number of poverty-level Native Americans in the grantee's area." Proposed Total Allocation Formulas, 51 Fed. Reg. 44132, 44133 (Dec. 8, 1986).

The court has previously held that the statutes and regulations constituting the employment and training programs are not money-mandating sources of jurisdiction due to the programs' status as federal grant-in-aid programs. However, even if the employment and training programs were not federal grant programs, or if grant programs were not categorically excluded from having money-mandating status, the court could not find that the underlying legal framework of the programs is money-mandating. As an initial matter, the statutes and regulations cited by plaintiff are not "reasonably amenable to the reading that [they] mandate[] a right of recovery in damages." *White Mountain Apache Tribe*, 537 U.S. at 473. The only mandatory language in the statutes provides that the additional manpower programs "shall be available to federally recognized Indian tribes," which in no way mandates the payment of money. *Accord Britell*, 372 F.3d at 1377-78 (holding that a statute providing that the government "shall contract . . . for medical care" and that an insured "is en-

titled . . . to the medical and dental care" was not money-mandating). **[146]** And, the applicable regulations contain no mandatory language at all.

In addition, plaintiff has not established that the legal framework underlying the employment and training programs constitutes a discretionary scheme that is money-mandating. First, plaintiff has not shown that the statutes and regulations it cites provide clear standards for paying money to recipients. Funds for the employment and training programs do not necessarily have to be disbursed to Indian tribes, and the statutes and regulations do not indicate when, if at all, the Secretary of Labor is required to disburse funds to tribes. Second, the statutes and regulations cited by plaintiff do not provide that precise amounts must be paid. Third, the statutes and regulations cited by plaintiff do not compel payment on satisfaction of certain conditions. Prior to the disbursement of funds directly to Indian tribes for the provision of employment and training programs, the Secretary of Labor is required to determine that it is possible for a tribe to provide the programs and that the tribe is capable of administering a comprehensive program, and the tribe is required to submit a comprehensive plan for providing the services. It is entirely conceivable that although a tribe might want to administer a program, the Secretary of Labor could conclude, for whatever reason, that it is not possible for the tribe to do so. Thus, a determination of whether a tribe should receive funding to provide employment and training programs is wholly within the discretion of the Secretary of Labor. In sum, plaintiff has not demonstrated a discretionary scheme that is money-mandating with respect to employment and training programs.

G. Department of the Interior Appropriations Acts

Finally, plaintiff contends that it received programs, services, and benefits via all of the annual appropriations acts for the period covering 1969 through 1996 pertaining to Department of the Interior and related agencies.[34] However, plaintiff fails to point to any language beyond what the court has previously addressed that could be construed as money-mandating. *See supra* Part III.C.2 (discussing the following language: "For . . . construction, repair, and improvement of Indian housing, $78,920,000, to remain available until expended[.]"). Further, "[t]he allocation of funds from a lump-sum appropriation is another administrative decision

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[34] Plaintiff cites, in addition to those already mentioned, *see supra* note 16, the following appropriations acts: Act of Dec. 30, 1982, Pub. L. No. 97-394, 96 Stat. 1966 (Fiscal Year 1983); Act of Dec. 23, 1981, Pub. L. No. 97-100, 95 Stat. 1391 (Fiscal Year 1982); Act of Dec. 12, 1980, Pub. L. No. 96-514, 94 Stat. 2957 (Fiscal Year 1981); Act of Nov. 27, 1979, Pub. L. No. 96-126, 93 Stat. 954 (Fiscal Year 1980); Act of Oct. 17, 1978, Pub. L. No. 95-465, 92 Stat. 1279 (Fiscal Year 1979); Act of July 26, 1977, Pub. L. No. 95-74, 91 Stat. 285 (Fiscal Year 1978); Department of the Interior and Related Agencies Appropriation Act, 1977, Pub. L. No. 94-373, 90 Stat. 1043 (1976); Department of the Interior and Related Agencies Appropriation Act, 1976, Pub. L. No. 94-165, 89 Stat. 977 (1975); Department of the Interior and Related Agencies Appropriation Act, 1975, Pub. L. No. 93-404, 88 Stat. 803 (1974); Department of the Interior and Related Agencies Appropriation Act, 1974, Pub. L. No. 93-120, 87 Stat. 429 (1973); Department of the Interior and Related Agencies Appropriation Act, 1973, Pub. L. No. 92-369, 86 Stat. 508 (1972); Department of the Interior and Related Agencies Appropriation Act, 1972, Pub. L. No. 92-76, 85 Stat. 229, 230 (1971); Department of the Interior and Related Agencies Appropriation Act, 1971, Pub. L. No. 91-361, 84 Stat. 669, 670 (1970); Department of the Interior and Related Agencies Appropriation Act, 1970, Pub. L. No. 91-98, 83 Stat. 147, 148 (1969); Department of the Interior and Related Agencies Appropriation Act, 1969, Pub. L. No. 90-425, 82 Stat. 425, 427 (1968).

traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Indeed, "a fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions . . . on' the agency." *Id.* (quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975)); *see also id.* at 193 (noting that "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not . . . just in the legislative history)"). Accordingly, without more specific allegations as to which provisions **[147]** of these appropriations acts are money-mandating, either in plaintiff's second amended complaint or its opposition to defendant's renewed motion to dismiss, the court declines to find the appropriations acts to be money-mandating sources of jurisdiction.

H. Conclusion

To summarize, the court lacks jurisdiction to consider allegations concerning federal grant programs, including the qualifying Housing Act programs, the Housing Improvement Program, the WIC Program, the OBRA block grant programs, and the employment and training programs. Moreover, even if the court possessed jurisdiction over federal grant-in-aid programs, the legal frameworks underlying the Housing Act grants, the Housing Improvement Program, and the employment and training programs are not otherwise money-mandating. Further, the court does not possess jurisdiction over the nongrant portions of the Housing Act or the Commodity Food Distribution Program.

Thus, the court has found that it possesses jurisdiction to entertain plaintiff's first claim for relief only with respect to the Federal Revenue Sharing program. However, by operation of the Antideficiency Act, plaintiff's Federal Revenue Sharing program allegations are moot. Accordingly, the court must dismiss the entirety of plaintiff's first claim for relief.

IV. PLAINTIFF'S SECOND CLAIM FOR RELIEF

In its second claim for relief, plaintiff seeks damages for the government's failure to properly treat it as a federally recognized Indian tribe, alleging that the statutes and regulations underlying the cited programs, services, and benefits, taken together, constitute a money-mandating network conferring jurisdiction on the Court of Federal Claims. The court previously considered this argument with respect to plaintiffs' TPA system and IHS funding process allegations, concluding that a network of statutes and regulations "could create a money-mandating source of jurisdiction in the Court of Federal Claims," but only if the network described "a fiduciary relationship between the government and Indian tribes" that was more than just a bare or general trust relationship. *Samish III*, 82 Fed. Cl. at 65-66 (citing *Navajo Nation*, 537 U.S. at 508; *White Mountain Apache Tribe*, 537 U.S. at 474; *Mitchell II*, 463 U.S. at 224, 226; *Mitchell I*, 445 U.S. at 542). In its opposition to defendant's renewed motion to dismiss, plaintiff requests that the court revisit this holding, arguing that (1) "federal recognition imposes a duty to provide services and benefits to a tribe" that can only be terminated by Congress, which did not occur in plaintiff's case; (2) there is "a strong legal, historical and moral foundation" underlying "the federal responsibility to provide assistance to

tribes"; and (3) it would be denied equal protection if it was deprived of the funding available to all other Indian tribes between 1969 and 1996. Opp'n 37-39.

While the court is sympathetic to plaintiff's plight, it must decline plaintiff's request. Plaintiff supplied no authority that supports the proposition that its network theory provides the basis for jurisdiction in the absence of a fiduciary relationship between the Indian tribe and the federal government. Indeed, plaintiff admits that "the court decisions to date which have addressed money-mandating networks have done so in the context where the government assumed responsibility for and control over a trust asset." *Id.* at 37. The court is unwilling to depart from this well-established Supreme Court precedent.[35]

[148] Applying that precedent, it is clear that plaintiff's network argument must fail. As noted previously, the elements of a qualifying fiduciary relationship are: (1) express statutory and regulatory language supporting the existence of a fiduciary relationship and (2) such elaborate or comprehensive government control over Indian property as to constitute a common-law trust.

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[35] As an aside, the court notes that plaintiff's equal protection argument lacks merit. Plaintiff correctly cites *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), in support of the proposition that "violations of equal protection can be a proper component of money-mandating claims—where implementation of a federal statute that provides for the payment of money implicates equal protection." Opp'n 39. However, there would be no occasion to adjudicate a constitutional question in the absence of a money-mandating statute. Plaintiff has turned the proposition enunciated in *Gentry* on its head by attempting to use an equal protection argument to create a money-mandating source of jurisdiction. There is no support in the case law for such an approach.

Plaintiff has not alleged that any of the statutes or regulations underlying any of the programs, services, or benefits described in its second amended complaint contain anything more than limited or bare trust language, and the court did not encounter more expansive language when reading the cited statutes and regulations. Moreover, plaintiff has not alleged the existence of a common-law trust, *i.e.*, the existence of a trustee, one or more beneficiaries, and trust property.[36] *See* Restatement (Third) of Trusts § 2, cmt. f (2003). Indeed, a common-law trust does not exist here. The only "property" at issue are the funds that plaintiff might have received if it was treated as a federally recognized Indian tribe between 1969 and 1996, but such funds are not trust property. *See Quick Bear v. Leupp*, 210 U.S. 50, 77 (1908) (distinguishing between "gratuitous appropriation of public moneys" that belong to the government and "moneys which belong to the Indians and which is administered for them by the government"). And, because plaintiff has not shown the existence of trust property, there necessarily can be no trustee to manage the trust property or beneficiary for whom the trust property is managed. Accordingly, plaintiff has failed to demonstrate a qualifying fiduciary relationship to support its network theory of jurisdiction. The court must dismiss plaintiff's second claim for relief.

V. CONCLUSION

It is readily apparent that the federal government's failure to treat plaintiff as a recognized Indian tribe between 1969 and 1996 deprived plaintiff of many of the

[36] In fact, in its response in opposition to defendant's prior motion to dismiss, plaintiff conceded that this case did not involve trust property. *Samish III*, 82 Fed. Cl. at 68.

federal benefits enjoyed by other federally recognized Indian tribes during that time period.[37] However, the relief plaintiff seeks is not available in the Court of Federal Claims. Indeed, if plaintiff is lagging behind some of its sister tribes as a result of the deprivation of federal benefits, its avenue for relief is with Congress.

For the reasons set forth above, the court **GRANTS IN PART** defendant's renewed motion to dismiss and **DISMISSES** for lack of jurisdiction (1) plaintiff's first claim for relief with respect to all remaining programs, benefits, and services except the Federal Revenue Sharing program and (2) plaintiff's second claim for relief. The court further **DISMISSES** plaintiff's Federal Revenue Sharing program allegations as **MOOT**. No costs. The clerk shall enter judgment accordingly.

IT IS SO ORDERED.

/s/ MARGARET M. SWEENEY
MARGARET M. SWEENEY
Judge

[37] It is also true that in the absence of federal recognition, plaintiff's members could have received or possibly did receive assistance under some of the programs, services, and benefits that plaintiff discusses in its second amended complaint. Thus, plaintiff's members may not have been fully deprived of benefits by virtue of the government's failure to properly recognize plaintiff.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 04-5042

SAMISH INDIAN NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: Aug. 19, 2005

Before: CLEVENGER, SCHALL and GAJARSA, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

The Samish Indian Nation ("Samish") appeal from the judgment of the United States Court of Federal Claims in favor of the United States. In two counts the Samish claimed federal benefits allegedly owed between 1969 and 1996. The trial court dismissed these counts with prejudice. In a third count the Samish claimed federal benefits allegedly owed since 1996. The trial court dismissed this count without prejudice. *Samish Indian Nation v. United States*, 58 Fed. Cl. 114 (2003) ("*Samish*").

The court concludes that two statutes on which the Samish premise their claims to benefits from 1969 to 1996, namely the Indian Self-Determination and Educa-

tion Assistance Act ("ISDA"), 25 U.S.C. §§ 450 et seq., and the Snyder Act, 25 U.S.C. §§ 2, 13, are not money-mandating for purposes of the Samish claims. These claims are not within the trial court's Tucker Act or Indian Tucker Act jurisdiction, and we affirm their dismissal.

The court concludes, however, that the Samish claims to federal benefits for the 1969 to 1996 period are not time barred. We therefore reverse the dismissal of count two on limitations grounds and remand for further proceedings to determine whether the remaining statutes underlying the claim are money-mandating.

The court affirms the dismissal, without prejudice, of the Samish claims to post-1996 benefits.

I.

The Samish contend, in essence, that but for federal misconduct they would have received federal benefits since 1969. In many cases, since the 1970s, Congress has conditioned statutory benefits to Indian tribes on federal acknowledgment. The Samish contend that the federal government wrongfully refused them this status, and the counterfactual—that they would otherwise have been acknowledged—is the first element to their claims for benefits between 1969 and 1996.

For thirty-three years the Samish have, in administrative actions, sought federal acknowledgment for statutory benefits. During that time the Samish's ability to claim treaty rights, under the 1855 Treaty of Point Elliott, has also been disputed and, as shown below, come full circle. And during that time the law has also evolved concerning the relation between recognition for

treaty purposes and recognition for statutory benefits, and more generally concerning the justiciability of federal recognition.

Federal recognition or acknowledgement is a prerequisite to an Indian tribe's right to claim benefits under federal statutes. 25 C.F.R. § 83.2 (2005). The federal government did not formalize the recognition process until 1978 with the Department of the Interior's adoption of the regulatory acknowledgment criteria now codified at 25 C.F.R. Part 83; before 1978 the executive branch accorded tribes recognition on an *ad hoc* basis. *Cf. Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272-73 (9th Cir. 2004) (discussing pre-1970s recognition process).

In 1972, the Samish first sought federal recognition for statutory benefits by petitioning the Department of the Interior. Those efforts are chronicled in several judicial opinions including, most recently, (1) *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996), and (2) United States Department of the Interior, Office of Hearings and Appeals, Recommended Decision of Administrative Law Judge Torbett in *Greene v. Babbitt*, No. Indian 93-1 (Aug. 31, 1995).

[1359] A.

The facts relevant to Samish recognition date to a treaty signed in 1855. The Samish descend from a signatory tribal party to the 1855 Treaty of Point Elliott, 12 Stat. 927, by which several tribes in the Pacific Northwest ceded land to the United States but retained various fishing rights.[1] *See United States v. Washing-*

[1] The parties signed the treaty on January 22, 1855. It became effective with Senate ratification on March 8, 1859.

ton, 641 F.2d 1368, 1373-74 (9th Cir. 1981);[2] *Duwamish v. United States*, 79 Ct. Cl. 530, 1934 WL 2033 (1934) (Finding of Fact IV); *cf. Samish Tribe of Indians v. United States*, 6 Ind. Cl. Comm. 159, 159-62 (1958).

In 1958 the Indian Claims Commission reported that the Samish were "an identifiable tribe of American Indians residing within the territorial limits of the United States along the shoreline of Guemes Island and Samish Peninsula in what is now the Northwest portion of the State of Washington." *Samish*, 6 Ind. Cl. Comm. at 159. It is unclear from the present record, however, whether Congress ever ratified this finding by legislation.

In 1966 the Bureau of Indian Affairs ("BIA") drew up a list of Indian tribes that appeared in their files. According to the BIA, the 1966 list was not intended "to be a list of federally recognized tribes as such." *Id.* The list included the Samish. This was not a formal list premised on any legal basis. At the time, the BIA pursued its duties and responsibilities in such an *ad hoc* fashion

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[2] In *Washington* the Ninth Circuit affirmed a district court finding, *United States v. Washington*, 476 F. Supp. 1101, 1106 (W.D. Wash. 1979), that the Samish, through assimilation, had lost the degree of "political and cultural cohesion" needed to claim rights under the Treaty of Point Elliott. *Washington*, 641 F.2d at 1373-74.

The Ninth Circuit, however, recently reversed a decision denying a Samish motion, under Rule 60(b)(6), to reopen the underlying district court judgment, at 476 F. Supp. 1101, in view of the Samish federal acknowledgment in 1996. *See United States v. Washington*, 394 F.3d 1152, 1161 (9th Cir. 2005) (holding "[f]ederal recognition is determinative of the issue of tribal organization," and characterizing the judgment denying the Samish treaty fishing rights as depending on findings that the Samish had not maintained an organized tribal structure); *see generally id.* at 1159-61 (discussing relation between federal recognition and criteria for signatory descendants to assert treaty rights).

that it was unable to determine which tribes were treaty recognized, and which were not.

B.

In 1969 the BIA restricted the list to tribes with a "formal organization" approved by the Interior Department. *Id.* Although the BIA employee who drew up the list had no authority to determine which groups would be accorded federal recognition, the 1969 list nonetheless became the basis on which the BIA classified the tribes. *Id.* A BIA employee testified before an Administrative Law Judge ("ALJ") in August 1994 that the Samish were removed from the 1969 list after the BIA's Portland, Oregon office, without any stated legal basis advised that the Samish were recognized ephemerally "for claims purposes only." The BIA's documentation from that time has now been lost. *Id.*

C.

In the early 1970s, Congress began conditioning statutory benefits for Indian tribes on federal recognition. *See, e.g.*, *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059, at *7 (W.D. Wash. Feb. 25, 1992) (discussing Congress's conditioning of federal benefits on recognition after the ISDA's passage in 1975). The parties appear to agree that until the early 1970s individual Samish members received various **[1360]** federal benefits, though the benefits were not necessarily premised on tribal status or recognition. The government has admitted that before 1977, "it had issued blue identity cards to Samish that made them eligible for Indian benefits." *Greene v. Babbitt*, 64 F.3d 1266, 1274 (9th Cir. 1995). The parties also appear to agree that by the mid-1970s the government stopped providing individual

Samish various benefits because the Samish tribe lacked federal recognition.

In 1972 the Samish filed their first petition for federal acknowledgement, but the Department of the Interior took no action. Six years later the Interior Department published its final regulations, now codified at 25 C.F.R. Part 83, adopting standard procedures and criteria for according formal recognition to Indian Tribes. Under these recognition criteria, the BIA must "make inquiries into the social and political structure of the petitioning tribe," developing findings that are "inherently complex and prone to mischaracterization." *Greene v. Lujan*, 1992 WL 533059, at *8.

In 1979 the Samish filed a revised petition for recognition under the new Interior Department regulations. On November 4, 1982, the Assistant Secretary of Indian Affairs published a notice recommending against recognition. *See Samish Indian Tribe; Proposed Finding Against Federal Acknowledgment*, 47 Fed. Reg. 50110 (Nov. 4, 1982). On February 5, 1987, the Secretary of the Interior ("Secretary"), without an evidentiary hearing, published a final denial of the petition. *See Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe*, 52 Fed. Reg. 3709 (Feb. 5, 1987).[3]

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[3] The BIA's notice reported the Samish did not "meet three of the criteria set forth in 25 C.F.R. § 83.7 and, therefore, [did] not meet the requirements necessary for a government-to-government relationship with the United States." 47 Fed. Reg. 50110; *accord* 52 Fed. Reg. 3709 (Final Decision). The 1987 final decision reported the Samish failed to satisfy recognition criteria 25 C.F.R. §§ 83.7(b), (c), & (e), as those criteria were then-formulated.

In April 1989 the Samish filed suit in the United States District Court for the Western District of Washington challenging, on due process grounds, the decision denying recognition. On February 25, 1992, the district court vacated the Secretary's decision and remanded to the Interior Department for formal adjudication under § 553 of the Administrative Procedures Act ("APA"). *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059 (W.D. Wash. 1992), *aff'd*, 64 F.3d 1266 (9th Cir. 1995).

The parties agreed on procedures to govern the remand. Specifically, they agreed (1) the ALJ would make written findings of fact with a recommendation to the Assistant Secretary of Indian Affairs as to whether the Samish qualified as an Indian tribe under the recognition criteria; and (2) the ALJ would consider only evidence in the existing administrative record, and any additional testimony provided at the hearing. *Greene*, 943 F. Supp. at 1282. The district court approved the agreement before remanding to Interior. *Id*.

An administrative hearing was conducted and, on August 31, 1995, the ALJ issued detailed proposed findings and recommended granting the Samish federal recognition pursuant to the criteria in 25 C.F.R. § 83.7 ("ALJ Recommendation"). He forwarded the proposed findings and recommendation to the Assistant Secretary of Indian Affairs for a final determination.

On November 8, 1995, an attorney with the Solicitor's Office in the Interior Department, with the government's expert witness from the hearing, conducted an *ex parte* meeting with the Assistant Secretary **[1361]** "for the purpose of attempting to persuade the Assistant Secretary to reject" the ALJ's recommendation of fed-

eral recognition. *Greene*, 943 F. Supp. at 1283. The government attorney had represented the Interior Department at the administrative hearing in 1994. No transcript of the meeting was made, and no effort was made to notify the Samish of the meeting with the Assistant Secretary.

That same day the Assistant Secretary issued her final decision under 25 C.F.R. Part 83. Although her decision recognized the existence of the Samish, she rejected certain proposed specific findings made by the ALJ. Among the proposed findings the Assistant Secretary rejected were:

1. The Noowhaha tribe and the Samish were at one time different tribes. Dr. Suttles and Dr. Hadja testified that the two tribes had combined probably around 1850 and they had been one tribe since that time. This conclusion of Dr. Suttles and Dr. Hadja is controverted by the Defendants but the undersigned is convinced that the conclusions drawn by these two witnesses is sound.[4]

2. Dr. Hadja explained that, although many Samish Indians had held public office on the Lummi and Swinomish Reservation, they continued to consider themselves as Samish and participate in Samish activities. . . . While individual members of Samish families living today on reservations, such as the Edwards, may have given up their Samish identity, Dr. Hadja felt that on the whole they had not (TR: 869). Samish leaders living at Swinomish were active in Swinomish af-

[4] *Greene*, 943 F. Supp. at 1283, *quoting* ALJ Recommendation at 22 (Aug. 31, 1995).

fairs as a way of gaining personal prestige, and not as a declaration of Swinomish identity (TR: 1004, TR: 1021-1022).[5]

3. A list prepared in the late 1960s by Ms. Simmons, a BIA employee, was the basis on which groups were then classified as Federally-recognized or not, but she admitted that records of Area and Agency comments have been lost (TR: 351- 352). Subsequently, her revised list was 'generally' consulted to determine groups' legal status, although paradoxically she conceded that she had no authority to make such decisions. . . . On further questioning Ms. Simmons conceded that she had no personal knowledge of the legal status of the groups she had listed under the Portland Area. . . . The earliest official references Dr. Hadja found to the tribe not being federally recognized appeared in the [early 1970s] (TR: 849).[6]

On April 9, 1996, the government published the Assistant Secretary's final decision, according recognition, in the Federal Register, without the findings listed above. *See Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe*, 61 Fed. Reg. 15825 (Apr. 9, 1996). In the Final Determination, the Secretary expressly rejected any finding suggesting that the Samish "was a recognized tribe until the 1970s." Instead, the Secretary expressly found that "[t]he Samish have not been federal

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[5] *Greene*, 943 F. Supp. at 1284, *quoting* ALJ Recommendation, Appx. B, Finding 169 (Aug. 31, 1995).

[6] *Greene*, 943 F. Supp. at 1284, *quoting* ALJ Recommendation, Appx. B, Findings 2, 3, and 110 (Aug. 31, 1995); *see also Greene*, 943 F. Supp. at 1288 n.13.

[*sic*] recognized as a separate and distinct tribe since the early 1900's, when the core of the tribe moved to the reservations."

[1362] The Samish returned to the district court and challenged the government's *ex parte* contact with the Assistant Secretary as violative of the APA and their due process rights. The Samish asked the district court to reinstate the omitted findings. In rejecting the government's standing challenge as without merit, the district court noted that the "focus and results of the ex parte contact between the government lawyer and Assistant Secretary Deer was to eliminate findings that would be favorable to the Samish in connection with their eligibility for benefits under federal law." *Greene*, 983 F. Supp. at 1285.

The district court found the omitted-facts [*sic*] satisfied several recognition criteria under 25 C.F.R. Part 83.7. Specifically, the court determined the first rejected claim satisfied recognition criteria 83.7(b) (separate existence and continuity)[7] and (e) (members descended from tribes that functioned as autonomous po-

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[7] Section 83.7(b) provides:

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

25 C.F.R. § 83.7(b) (2005). The provisions have not changed since the Interior Department last revised 25 C.F.R. § 83.7 in 1994. *See Procedures for Establishing That an American Indian Group Exists as an Indian Tribe*, 59 Fed. Reg. 9293 (Feb. 25, 1994). Unless otherwise indicated, hereinafter citations to 25 C.F.R. § 83.7 will reference the 2005 version of the regulations.

litical entities);[8] the second satisfied 83.7(b) (separate existence and continuity) and (c) (tribe has maintained political influence or authority over its members);[9] and the third satisfied 83.7(a) (government identified the tribe on a substantially continuous basis since 1900), via subsection 83.7(a)(1) (allowing proof of identification with evidence of earlier federal identification).[10] *See Greene*, 943 F. Supp. at 1283-84.

On October 15, 1996, the district court in *Greene* held for the Samish on both their APA and due process claims, and ordered the omitted findings reinstated. The court entered judgment on November 1, 1996.

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[8] Section 83.7(e) provides:

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

25 C.F.R. § 83.7(e).

[9] Section 83.7(c) provides:

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

25 C.F.R. § 83.7(c).

[10] Section 83.7(a) provides, in relevant part:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

(1) Identification as an Indian entity by Federal authorities . . . .

25 C.F.R. § 83.7(a).

D.

On October 11, 2002 the Samish commenced this action in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. The first count alleges violation of the ISDA on grounds that the government's pre-1996 refusal to accord the Samish federal recognition wrongfully prevented the Samish from obtaining self-determination contracts, 25 U.S.C. § 450f, and funds (both program money and contract support costs) the statute obligated the government to pay under such contracts to run various benefits programs, 25 [1363] U.S.C. § 450j-1(a)(1). (First Am. Compl. ("FAC") ¶¶ 23-26.) In a second count, the Samish contend that the same refusal to accord federal recognition, before 1996, wrongfully deprived the Samish of benefits that would otherwise have been available under a collection of thirty-eight specific treaties and federal statutes. (FAC ¶¶ 5, 27-31.) These statutes include, among others, the Snyder Act, 25 U.S.C. § 13. (FAC ¶¶ 5(b), 28.) Finally, in a third count, the Samish alleged that since their federal recognition in 1996 the government has continued to withhold funds that should have been provided under the same statutory authorities on which the Samish premised their second count. FAC ¶¶ 43-44.

On September 30, 2003 the trial court dismissed the action and entered judgment for the United States. On reasoning applicable to both counts for past benefits, the court ruled the Samish claims accrued in 1969. Thus, the court concluded the six year limitations period in 28 U.S.C. § 2501 barred the claims to past benefits, and it dismissed both counts with prejudice. *Samish*, 58 Fed. Cl. at 117-18, 123. Finding the Samish's 1972 peti-

tion for acknowledgement was permissive rather than mandatory, the Court of Federal Claims further held the limitations period could not be tolled for administrative exhaustion. *Id*. at 117-18. The court "confirmed" this ruling, as to the first count, in finding that because federal recognition is a prerequisite to statutory benefits, 25 C.F.R. § 83.2, the ISDA could provide only prospective relief. *Id*. at 117. Reading the last finding reinstated by the district court as holding the government's exclusion of the Samish from the 1969 BIA "list" was arbitrary, the court reasoned that (1) because this only went to "potential" government liability, (2) the Samish could have brought this action before resolving their administrative challenge. *Id*. Finding no government deception the court also rejected an equitable tolling argument made by the Samish. *Id*.

The court additionally dismissed the ISDA count for lack of subject matter jurisdiction. We read the trial court as holding that the ISDA is not "money-mandating" for claims to past benefits premised on a wrongful refusal to accord federal recognition, and thus the Samish claim under the ISDA did not come within the Court of Federal Claims' Tucker Act and Indian Tucker Act jurisdiction. *Id*. at 118-19.

Finally, the court dismissed, without prejudice, the Samish claim to benefits after recognition in 1996. Noting that, on September 14, 2002, the Samish had filed a similar claim in the United States District Court for the Western District of Washington—almost a month before filing the instant action in the Court of Federal Claims—the trial court dismissed the third Samish count for lack of jurisdiction under 28 U.S.C. § 1500. *Id*. at 122-23. The dismissal order provided, however, that the Samish

could renew their claim in the Court of Federal Claims should the district court find itself without jurisdiction to hear the first-filed, co-pending claim. On February 6, 2004, the district court in fact dismissed that first-filed, co-pending claim for lack of jurisdiction. *Samish Indian Nation v. United States Dep't of the Interior; Bureau of Indian Affairs*, No. C02-1955P (W.D. Wash. Feb. 6, 2004) (order on motion to dismiss and cross motions for summary judgment).

The Samish timely appealed, and the court has jurisdiction under 28 U.S.C. § 1295(a)(3) (2000).

II.

The court reviews *de novo* the Court of Federal Claims' dismissal for lack of jurisdiction. *See Brown v. United States*, 86 F.3d 1554, 1559 (Fed. Cir. 1996). **[1364]** Like the trial court, this court tests the sufficiency of the complaint as a matter of law, accepting as true all non-conclusory allegations of fact, construed in the light most favorable to the plaintiff. *See Bradley v. Chiron Corp.*, 136 F.3d 1317, 1321-22 (Fed. Cir. 1998); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). The court also reviews without deference the trial court's statutory interpretation. *W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003).

A.

The court begins with the ISDA claim. The court can affirm the trial court on any basis in the record. *See United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). As set forth herein, we conclude that the ISDA is not money-mandating for purposes of the Samish claim, and we affirm the dismissal on that basis.

1.

The Court of Federal Claims' Tucker Act jurisdiction depends on the substantive law the Samish have invoked. The Tucker Act waives sovereign immunity and allows the Court of Federal Claims to award damages upon proof of "any claim against the United States founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491(a)(1) (2000). The Indian Tucker Act, 28 U.S.C. § 1505, extends to Indian Tribes the same jurisdiction available to other parties under the Tucker Act. 28 U.S.C. § 1505 (2000). Tucker Act jurisdiction, however, must derive from substantive law. The relevant substantive law supports a claim within the Tucker Act's sovereign immunity waiver if, but only if, it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, 424 U.S. 392, 400 (1976); *accord United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) ("*Mitchell II*"); *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("*Mitchell I*"); *Eastport S.S. Co. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967); *cf.* 14 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3657, at 510-11 & n.40 (West 1998 & 2004 Supp.).

Where the substantive law is "reasonably amenable" to an interpretation "that it mandates a right of recovery in damages," claims arising under that law lie within the trial court's jurisdiction under the Tucker Act or Indian Tucker Act. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 469-70, 473 (2003). Because the Tucker Act provides the relevant sovereign immunity waiver, when interpreting a statute to determine whether it provides the necessary right of action the

court does not strictly construe the substantive law against the claimant. While the premise to a Tucker Act claim will not be "lightly inferred," *Mitchell II*, 463 U.S. at 218, a fair inference will do. *White Mountain*, 537 U.S. at 472-73.

The court has found Congress provided such damage remedies where the statutory text leaves the government no discretion over payment of claimed funds. But Tucker Act jurisdiction is not limited to such narrow statutory entitlements. Certain discretionary schemes also support claims within the Court of Federal Claims jurisdiction. These include statutes: (1) that provide "clear standards for paying" money to recipients; (2) that state the "precise amounts" that must be paid; or (3) as interpreted, compel payment on satisfaction of certain conditions. *Perri v. United States*, 340 F.3d 1337, 1342-43 [1365] (Fed. Cir. 2003). As explained below, the ISDA fails in these categories.

Fairly interpreted, the ISDA does not reveal congressional intent to provide the damage remedy the Samish have claimed in this action. As the Samish allege, the ISDA identifies two types of funding through self-determination contracts: (1) program money or funds for operating programs under the contracts, 25 U.S.C. § 450j-1(a)(1) (2000); and (2) contract support costs consisting "of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (2000). (*See also* FAC ¶ 24.) Absent a contract the ISDA does not confer a private damage remedy for either type of funding.

We begin with the provisions relating to program money. The objective in interpreting the ISDA is to give effect to congressional intent. *Doyon, Ltd. v. U.S.*, 214 F.3d 1309, 1314 (Fed. Cir. 2000); *In re Portola Packaging, Inc.*, 110 F.3d 786, 788 (Fed. Cir. 1997). To determine Congressional intent the court begins with the language of the statutes at issue. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). To fully understand the meaning of a statute, however, the court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

Self-determination contracts under the ISDA are a mechanism for directing benefits arising under other statutes. The benefits provided under these contracts depend on the underlying substantive law rather than the ISDA. *See* 25 U.S.C. §§ 450j-1(a)(1) (2000) (program money under self-determination contracts will be funded at level Department would have otherwise provided for specific program operation); 450j-1(b)(2)(A) (2000) (self-determination contract funding may be reduced where appropriations for specific programs or functions under contract are also reduced); *cf.* 25 U.S.C. § 450j-1(b) (2000) (funding is subject to availability of appropriations). Without an actual self-determination contract, whether these underlying grants provide a damage remedy cannot be determined by reference to the ISDA itself. For these reasons we find the nature of the Secretary's discretion to refuse a self-determination contract irrelevant to the jurisdictional question at bar, and the Samish's reliance on that limited discretion misplaced.

The ISDA's language and structure confirm the dependent nature of program money under self-

determination contract. As originally enacted, the ISDA provided self-determination contracts would encompass programs subject to (1) "the Act of April 6, 1934 (48 Stat. 596), as amended" by the ISDA; (2) "any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208)"; and (3) "any Act subsequent thereto." Pub. L. No. 93-638, § 102(a), 88 Stat. 2203, 2206 (1975). This structure remains largely unchanged. In its current form, § 450f(a)(1) provides in relevant part:

> (1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—
>
> (A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. §§ 452 et seq.];
>
> (B) which the Secretary is authorized to administer for the benefit of Indians **[1366]** under the Act of November 2, 1921 (42 Stat. 208) [e.g., the Snyder Act, now codified at 25 U.S.C. § 13], and any Act subsequent thereto;
>
> (C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. §§ 2001 et seq.];
>
> (D) administered by the Secretary for the benefit of Indians for which appropriations are made to

> agencies other than the Department of Health and Human Services or the Department of the Interior; and
>
> (E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

25 U.S.C. § 450f(a)(1) (2000). Despite the addition of §§ 450f(a)(1)(C)-(E), this remains a provision that channels program money, associated with other statutory benefits, to tribal organizations, through self-determination contracts.

Absent a contract this statutory language and structure is not reasonably read as demonstrating congressional intent to establish a damage remedy under the ISDA for non-payment of the underlying benefits, based on the wrongful refusal to accord the Samish federal recognition between 1975 and 1996 (thereby precluding entry into a self-determination contract).[11] Indeed, in its original and current forms the ISDA includes Snyder Act authorizations, 25 U.S.C. § 13, among the sources of program money subject to self-determination contracting. *See* 25 U.S.C. § 450f(a)(1)(B) (2000); 88 Stat. 2203, 2206 (1975) (citing 42 Stat. 208). But the Supreme Court has already determined the Snyder Act does not provide a damage remedy because it does not require the expenditure of general appropriations, on specific programs, for particular classes of Native Americans. *See Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (reading the Snyder

[11] The Samish concede they cannot claim past benefits under the ISDA before its enactment in 1975.

Act as giving the Secretary broad discretion how to allocate lump sum appropriations); *see also White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001), *aff'd* 537 U.S. 465 (2003). Without the government obligating itself to a self-determination contract, merely bundling Snyder Act funds into ISDA program money fails to support the damage remedy the Samish allege here. Thus, to the extent the Samish claim a damage remedy, it must derive from the various sources of program money subject to self-determination contracting.

Nor do ISDA provisions for contract support costs provide the damage remedy the Samish assert here. As recently discussed in *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003), Congress amended the ISDA in 1988 specifically to address tribal and tribal organization funding problems regarding administrative costs of federal programs subject to self-determination contracts. *Thompson*, 334 F.3d at 1080-81. As we noted, the statute originally did not require funding the administrative costs tribes incurred in federal program operation. *Id*. at 1080, discussing S. Rep. No. 100-274 (1987). Partly in response, Congress enacted the Indian Self-Determination Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285. *Id*. at 1081. This amendment added current § 450j-1(a)(2), requiring payment of contract support costs consisting of "an amount for the reasonable **[1367]** costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (2000).

On its face this section demonstrates no congressional intent to allow the Samish to seek damages for contract support costs never incurred, on contracts never created, based on a wrongful refusal to accord federal recognition. The court must construe § 450j-1(a)(2) to advance its remedial purpose, namely, removing the financial burden incurred by tribes and tribal organizations when implementing federal programs under self-determination contracts. *See Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (court should interpret remedial statute broadly to advance its remedial purpose); *Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994) ("It is of course true that courts are to construe remedial statutes liberally to effectuate their purposes."), *superseded on other grounds by* 38 U.S.C. § 7111; *United States v. Absentee Shawnee Tribe of Okla. on Behalf of Shawnee Nation*, 200 Ct. Cl. 194, 1972 WL 20807, at *3 (Ct. Cl. Dec. 12, 1972) (discussing interpretive canon). The Samish have not suffered the harm Congress intended to remedy with the support cost provisions. Since the Samish never incurred any administrative costs, because they never obtained a self-determination contract in the years at issue, no sensible reading of the ISDA would allow their present suit for these funds. Such a damage remedy, if available, would provide them nothing but a windfall. This reading would not advance the specific remedial purpose of § 450j-1(a)(2), and we do not think Congress intended that result.

We therefore conclude Congress did not intend the ISDA to provide a damage remedy for past program money, or contract support costs never incurred, based on the government's wrongful refusal to accord recognition in past years.

2.

Although fiduciary duty can also give rise to a claim for damages within the Tucker Act or Indian Tucker Act, no such theory provides a right of action for the ISDA monies claimed here. *See White Mountain*, 537 U.S. at 473-74 (discussing fiduciary relations giving rise to Indian Tucker Act jurisdiction); *Mitchell II*, 463 U.S. at 224-26. In *White Mountain*, the court recognized a difference in kind between instances where the government undertook "full" or pervasive responsibility for managing Indian land and resources, and a "bare" or "limited" trust relation in which the government undertook no resource management responsibility. *White Mountain*, 537 U.S. at 473-74. The court explained the former relationship "defined the contours" of fiduciary responsibilities "beyond the bare or minimal level, and thus could fairly be interpreted as mandating compensation through money damages if the Government faltered in its responsibilities." *Id.* at 474 (internal citation omitted), *quoting Mitchell II*, 463 U.S. at 224-26. On the merits the court found the government's conduct established a fiduciary relation triggering an obligation to preserve improvements in the property held, by statute, in trust. *See White Mountain*, 537 U.S. at 474-75 (discussing Pub. L. No. 86-392, 74 Stat. 8, and plenary authority the United States actually exercised over the Apache's trust corpus).

The Samish nowhere identify a source of fiduciary duty that would provide a damage remedy for ISDA program money or indirect costs they claim in their first count. At most, the Samish rely on the ISDA policy statement at § 450a(b). (Appellant **[1368]** Reply Br. at 13 n.7.) This congressional statement of policy fails to

create the necessary trust relation triggering a damage remedy for the program money and indirect costs the Samish claim here.[12] First, this policy statement nowhere uses the express language of a trust. By contrast, both *Mitchell II* and *White Mountain* grounded their fiduciary analysis in statutory language expressly creating a trust relation in a specific property interest. *See Mitchell II*, 463 U.S. at 224-26; *White Mountain*, 537 U.S. at 474-75. Second, this ISDA policy statement does not confer on the government pervasive or elaborate control over a trust corpus, such as would increase federal obligations beyond any long-recognized "general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. As *White Mountain* observed, that bare trust obligation does not support specific claims for damages conferring Tucker Act jurisdiction. *White Mountain*, 537 U.S. at 473-74; *cf. Mitchell I*, 445 U.S. at 542. If anything, the ISDA

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[12] Section 450a(b) provides:

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b) (2000).

has precisely the opposite effect. Instead of arrogating control and authority to the government, like regulations and conduct that gave rise to a damage remedy in *White Mountain* and *Mitchell II*, the ISDA delegates to tribal organizations authority over federal programs. And as set forth above, neither does the ISDA, of its own force, convert the underlying statutory programs into entitlements fairly analogized to a trust corpus. The Samish's attempt to fit their ISDA claim within *White Mountain*'s fiduciary framework is misplaced.[13]

For that reason we affirm the trial court's dismissal of count one for lack of subject matter jurisdiction.

B.

Instead of relying solely on the ISDA, the Samish's second count claims past benefits under a basket of thirty-eight other treaties and statutes. The Samish included within this grouping the Snyder Act. But as noted above, the Supreme Court previously determined the Snyder Act is not money-mandating and, e.g., does not provide a private damage remedy. *See Lincoln v. Vigil*, 508 U.S. 182, 194 (1993); *White Mountain Apache*, 249 F.3d at 1372 (Fed. Cir. 2001), *aff'd* 537 U.S. 465 (2003). The court therefore affirms the trial court's dismissal of the Samish's second count, insofar as it relied upon the Snyder Act.

III.

The Court of Federal Claims dismissed the Samish's second count, for past benefits, as time barred. It held

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[13] We do not decide whether any fiduciary theory supplies Tucker Act jurisdiction over the specific substantive laws, or combination of laws, asserted in the Samish's second count.

that the Samish could have brought this action as **[1369]** early as 1969, when BIA dropped the Samish from the unofficial list of 'recognized' tribes. We disagree for at least two reasons. First, as explained below, the challenge to the federal government's refusal to accord recognition is limited by the contours of the political question doctrine. Recognition is a political act that is generally non-justiciable. The Samish could not, in 1969, have established that the government's conduct was "wrongful" as required by their retroactive benefits claims here.

Second, the Samish claims did not accrue until the Samish, through their administrative challenges, obtained a final ruling by a district court under the APA that the government's refusal to accord historical acknowledgment between 1978 and 1996 was arbitrary and capricious. A claimant must bring action under the Tucker Act, 28 U.S.C. § 1491, within six years of accrual. 28 U.S.C. § 2501 (2000). The same statute of limitations applies to claims brought under the Indian Tucker Act, 28 U.S.C. § 1505. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). A claim accrues under § 2501 "when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc).[14] If a necessary element to a claim must be established in a different forum, the claim will not accrue for § 2501 until that element is finally established in the other proceeding. *See, e.g.*, *Heck v.*

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[14] *Cf. Chambers v. United States*, No. 04-5134, slip op. at 7-9 (Fed. Cir. Aug. 1, 2005) (applying *Martinez*).

Humphrey, 512 U.S. 477, 489-90 (1994); *Midgett v. United States*, 603 F.2d 835, 839 (Ct. Cl. 1979).

The Samish had to establish the necessary elements of their historic claim in a different forum. In this case the claim for historic benefits depends on their establishing that the government arbitrarily and capriciously withheld historic federal acknowledgment from the Samish before 1996. Only a district court, acting on a challenge under the APA, has authority to review the Secretary's acts concerning the executive's recognition determination under 25 C.F.R. Part 83. In this case, the district court in *Greene* identified several facts required for historic recognition of the Samish tribe. The Secretary, however, omitted the pertinent findings from the April 9, 1996 recognition determination, preventing the present action for old non-Snyder Act claims from accruing. In *Greene* the district court modified the Secretary's April 9, 1996 recognition decision by reinserting the three deleted findings.

Those findings support the premise that the Samish should have been given historic recognition and obtain standing for the claims directed to old non-Snyder Act benefits. The missing element was finally established, within the meaning of *Heck* and *Martinez*, with the effective date of the district court's modification to the Secretary's acknowledgment determination. That date was November 1, 1996, when the district court in *Greene* entered its final judgment in the APA action. In sum, the district court's reinstatement validated the historic recognition of the Samish.

A.

There are generally three means by which the federal government can recognize an Indian tribe.[15] The government **[1370]** can enter into a treaty with a tribe. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).[16] Congress can recognize a tribe by enacting a specific statute, in its powers incidental to the Indian Commerce Clause. *See, e.g.*, *Chippewa Indians of Minn. v. United States*, 307 U.S. 1, 4-5 (1939) (discussing role of Act of 1889 in recognizing the Chippewa Indians); *cf.* Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 (dividing the reservation of the Sioux Nation of Indians); U.S. Const. art. I, § 8, cl. 3 (authorizing Congress to "regulate Commerce with Foreign nations, and among the several States, and with the Indian Tribes"). Or the executive can recognize a tribe pursuant to the authority delegated by Congress. *See* 25 U.S.C. §§ 2, 9 (2000). As noted above, recognition by one mechanism does not

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[15] *See generally Felix S. Cohen's Handbook of Federal Indian Law* 3-7 (1982 ed.) (discussing tribal recognition); I American Indian Policy Review Comm'n, 95th Cong., 1st Sess., *Final Report* 462 (Comm. Print 1977) (discussing varying and ad hoc manner in which federal recognition was extended before 1977); *cf.* William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed. 2004) ("Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity."), *quoted in Kahawaiolaa*, 386 F.3d at 1273.

[16] "[The Cherokee] have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war . . . . The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."

necessarily confer recognition for all purposes.[17] In this case, the Samish challenge the federal government's refusal to accord federal acknowledgment for purposes of statutory benefits.

As a political determination, tribal recognition is not justiciable. As the Supreme Court observed in *United States v. Holliday*,

> The facts in the case certified up with the division of opinion, show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

70 U.S. (3 Wall.) 407, 419 (1865). The courts, in short, defer to the political determination made by Congress or the executive. *See also United States v. Rickert*, 188 U.S. 432, 445 (1903) ("It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the

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[17] The Ninth Circuit, in particular, suggests that treaty recognition and statutory recognition serve different purposes, with independent effect. *See Greene v. Babbitt*, 64 F.3d 1266, 1270-71 (9th Cir. 1995); *Greene v. Babbitt*, 996 F.2d 973, 976-77 (9th Cir. 1993); *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975); *see also* 25 C.F.R. § 83.8 (2005).

courts may not determine. We can only deal with the case as it exists under the legislation of Congress."); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("[I]n respect of distinctly Indian communities the questions whether, and to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.").

Examining the principles underlying this precedent in *Baker v. Carr*, 369 U.S. 186 (1962), the **[1371]** Supreme Court observed that the judicial deference to the recognition determinations by the political branches "reflects familiar attributes of political questions." *Id.* at 215; *see generally id.* at 215-17 & n.43. Discussing the general rule for recognizing foreign governments, the Court firmly distinguished between the political act of according recognition and the judicial determination that a party satisfies the status made a condition to any given statute.

> [R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.

369 U.S. at 212.[18] The Court observed that tribal recognition was a special case, because "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . [The Indians are] domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Baker*, 369 U.S. at 215 (*quoting Cherokee Nation*, 30 U.S. at 16-17). The court further recognized that, as explained in *Sandoval*, the political question principle was bounded in that it did not prevent the courts from intervening to limit Congressional overreaching under the Indian Commerce Clause.[19] In sum, the *Baker* analysis does not alter the rule that recognition is a political question.

Formulating the limits of the political question doctrine, the *Baker* opinion identified several criteria common to a non-justiciable issue.

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[18] *Accord United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 195 (1876) ("As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal . . . . ").

[19] As the Court explained,

> While "[I]t is for [Congress] * * * , and not for the courts, to determine when the true interests of the Indian require his release from (the) condition of tutelage * * * , it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe * * * ." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). Able to discern what is "distinctly Indian," *id.*, the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.

Baker, 369 U.S. at 215-17.

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious **[1372]** pronouncements by various departments on one question.

Baker, 369 U.S. at 217. Under the political question doctrine any one criterion is both necessary and sufficient. "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Id*. Before 1978 this taxonomy fully described tribal recognition. The treaty power and the Congressional power to regulate commerce with Indian tribes are plainly matters textually committed, by the constitution, to the political branches. As shown by the case law, the separation of powers reasoning underlying the final three criteria applied both in historical practice and as a matter of principle. Finally, the courts had no judi-

cially discoverable or manageable criteria by which to accord federal recognition.

In 1975, Congress established the American Indian Policy Review Commission. *See* Pub. L. No. 93-580, 88 Stat. 1910 (1975). Congress specifically instructed the Commission to make a comprehensive investigation into "the statutes and procedures for granting Federal recognition and extending services to Indian communities and individuals." *Id.*, § 2(3), 88 Stat. at 1911. In its final report, the Commission noted that no recognizable criteria applied to the federal recognition decision. "Trying to find a pattern for the administrative determination of a federally recognized Indian tribe is an exercise in futility. There is no reasonable explanation for the exclusion of more than 100 tribes from the Federal trust responsibility. . . . A number of Indian tribes are seeking to formalize relationships with the United States today but there is no available process for such actions." I American Indian Policy Review Comm'n, 95th Cong., 1st Sess., *Final Report* 462 (Comm. Print 1977) ("*Final Report*").

In response to the Commission findings, the Interior Department published regulations establishing the first detailed, systematic process by which tribal groups could obtain acknowledgment. *See Procedures For Establishing That An American Indian Group Exists As An Indian Tribe*, 43 Fed. Reg. 39361 (Sep. 5, 1978) (later codified at 25 C.F.R. Part 54). When the regulations became effective on October 2, 1978, they supplied the courts clearly manageable and objective factors by which to review federal acknowledgment determinations pursuant to the APA.

As several of our sister circuits have recognized, however, supplying these criteria did not alter the general rule of non-justiciability. *See Kahawaiolaa*, 386 F.3d at 1276;[20] *Miami Nation of Indians of Ind., Inc. v. Dep't of Interior*, 255 F.3d 342, 346-48 (7th Cir. 2001);[21] *W. Shoshone Bus .Council For and on Behalf of W. Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993);[22] *James v. United States Dep't* [1373] *of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).[23] To be sure, by adopting the acknowledgment criteria the government voluntarily bound its process within the confines of its regulations, subject to APA review by the courts. But that limitation

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[20] "[I]t is quite correct to say that a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question."

[21] "[R]ecognition lies at the heart of the doctrine of 'political questions.'" *Miami Nation*, 255 F.3d at 347.

[22] In *Western Shoshone*, the Tenth Circuit refused to second-guess the Interior Department's failure to recognize the Shoshone tribe. As it explained,

> The judiciary has historically deferred to executive and legislative determinations of tribal recognition. *See United States v. Rickert*, 188 U.S. 432, 445 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). Although this deference was originally grounded in the executive's exclusive power to govern relations with foreign governments, broad congressional power over Indian affairs justifies its continuation.

1 F.3d at 1057.

[23] "The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist."

alters neither the commitment of the federal recognition determination to the political branches, nor the regard for separation of powers that precludes judicial evaluation of those criteria in the first instance. The political determination may be circumscribed by regulation, but it is still a political act. The regulations create a limited role for judicial intervention, namely, APA review to ensure that the government followed its regulations and accorded due process. *See Miami Nation*, 255 F.3d at 348 ("By promulgating such regulations the executive brings the tribal recognition process within the scope of the Administrative Procedure Act."). Thus, under the acknowledgment regulations, the executive—not the courts—must make the recognition determination.

B.

The Samish contend that they were deprived of statutory benefits because of the "wrongful actions of the United States in refusing to treat the Samish Indian Nation as a federally recognized tribe." (FAC ¶ 29.) Because tribal recognition remains a political question, the trial court erred in holding that the Samish "could have pursued the present action in court before the administrative proceedings [concerning the Samish petition for federal acknowledgment] were concluded." *Samish*, 58 Fed. Cl. at 117. Specifically, the Samish cause of action for retroactive benefits did not accrue until they obtained a final determination from the district court, through their APA challenge, that the government's conduct underlying its refusal to accord federal recognition, before 1996, was arbitrary and capricious. *See Heck*, 512 U.S. at 489-90; *Midgett*, 603 F.2d at 839. In sum, the Samish could only obtain judicial review of the Secretary's acknowledgement decision

through an APA action in a district court. Congress plainly gave the Court of Federal Claims no role in the recognition process, and that court has no inherent authority to take part in it.[24] Moreover, the Court of Federal Claims has no power to review the Secretary's acknowledgment decisions under the APA. In view of this, we need not reach the issue of whether or not the Samish could have brought this action in 1969.

The government urges this court to hold that the Samish claims to retroactive benefits accrued on April 9, 1996, when the government accorded the Samish federal recognition. We disagree. The omitted facts go to historic recognition and were not necessary to the Secretary's acknowledgement determination going forward. The same facts, however, are central to the Samish's instant claim. Thus, although the Secretary's April 9, 1996 determination conferred standing, under 25 C.F.R. § 83.2, for the Samish to seek prospective statutory benefits, it did not establish the elements necessary to assert the present claims to past, non-Snyder Act benefits.

Rather, the district court finally established that the government wrongfully withheld the Samish federal acknowledgment, **[1374]** and disregarded facts that would have supported historic recognition, when the district court modified the Secretary's recognition decision to establish the previously omitted ALJ findings. As discussed above, those findings support the Samish contention that but for the government's arbitrary and capricious treatment the Samish would have been extended federal recognition prior to 1996. Indeed, as the

[24] No precedent of this court, or its predecessor the Court of Claims, would allow the Court of Federal Claims to delve into tribal recognition.

trial court noted, the third finding at issue provides that the government was arbitrary and capricious in dropping the Samish from the 1969 BIA list. Read in view of the ALJ's findings, on remand in *Greene*, that the BIA list "was the basis on which groups were then classified as Federally-recognized or not," the district court's determination provides a predicate "wrongful" element in this action. These findings in combination confirm the contention, central to the Samish's claims at bar, that the government was arbitrary and capricious in refusing the Samish federal acknowledgment under the regulations before 1996.

We do not suggest that the district court had authority independently to apply the recognition criteria under 25 C.F.R. Part 83. To the contrary, as set forth above, federal acknowledgment has been committed to the coordinate branches. Nonetheless, the parties do not dispute that the district court acted within its authority under the APA modifying the factual basis of the Secretary's recognition determination. The district court modified the executive order as appropriate under its authority pursuant to the APA.

The Samish claims for retroactive benefits thus accrued on November 1, 1996, when the district court entered judgment in *Greene*. With the six year limitations period under § 2501, the Samish had to file this action before November 1, 2002. Because the Samish brought this action on October 11, 2002, it is timely. Thus, the court reverses the trial court's dismissal of the Samish's second claim as time-barred.

IV.

Because the ISDA is not money-mandating for purposes of count one, we affirm the Court of Federal Claims dismissal for lack of jurisdiction. As the Snyder Act is also not money-mandating, we affirm-in-part the dismissal of count two insofar as it relies on the Snyder Act.

The Samish's remaining claim to past benefits accrued with the effective date of the district court's modification, in *Greene*, to the Secretary's findings in support of federal acknowledgment. Because the Samish brought the action before November 1, 2002, within the six year limitations period, the claim is not time-barred. Thus, except as discussed above with respect to the Snyder Act allegations we reverse the dismissal of count two.

Finally, we affirm the dismissal, without prejudice, of the Samish claim to benefits after 1996.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

Each side shall bear its own costs.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-1383 L

SAMISH INDIAN NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Sept. 30, 2003

OPINION

DAMICH, Chief Judge.

I. Introduction

Before the Court is Defendant's Motion to Dismiss (hereinafter "Def.'s Mot."). Defendant seeks dismissal of five claims asserted by the Samish Indian Nation (Plaintiff). Claims one and two allege that Defendant should have treated Plaintiff as a federally recognized tribe during the period of 1969 to 1996. Claims three and four allege that Defendant violated the promises made to Plaintiff in the Treaty of Point Elliott during the period of 1969 to 1996. Claim five alleges that Defendant violated a variety of laws after Plaintiff was federally recognized as a tribe in 1996. Because claims one, two, three, and four are barred by the statute of limita-

tions, they are dismissed. Further, even if the statute of limitations did not apply to bar Plaintiff's claims, claim one is dismissed because of lack of jurisdiction under the Indian Self-Determination Act (ISDA), and claims three and four are barred due to collateral estoppel. Claim five is also dismissed, as the Court lacks jurisdiction under 28 U.S.C. § 1500, because Plaintiff has an identical, previously filed claim pending in district court in the Western District of Washington.

For the reasons set forth herein, Defendant's Motion to Dismiss is GRANTED.

II. Background

Prior to 1969, Plaintiff allegedly received federal services and benefits available to Indian **[116]** tribes[1] and was included in a 1966 unofficial list of tribes recognized by Defendant. This list was superseded by a 1969 unofficial list. Plaintiff did not appear on that list due to an arbitrary omission made by Defendant.[2] By the early 1970s, Plaintiff was not receiving any federal aid as a

[1] Plaintiff claims that it had been receiving federal aid up until the early 1970s. Pl.'s Brief in Opp'n to the United States' Mot. to Dismiss at 4 (hereinafter "Pl.'s Opp'n"). However, the court in *Greene v. Lujan* states, "The evidence submitted by plaintiff[] does not conclusively show that the Samish received benefits because of their tribal status." No. C89-645Z, 1992 WL 533059 at *3 (W.D. Wash. Feb. 25, 1992) (denying motion for summary judgment). Further, Plaintiff does not even allege that it was receiving funds prior to 1969 *as a tribe*, stating in its opposition brief only that prior to the 1970s, "Samish *Indians* received health and other benefits provided by the United States to *members* of Indian tribes." Pl.'s Opp'n at 4 (emphasis added).

[2] The Western District of Washington district court, reinstating the finding of an Administrative Law Judge, concluded that the omission of the Samish from the unofficial 1969 list was arbitrary. *Greene v. Babbitt*, 943 F. Supp. 1278, 1288 n.13 (W.D. Wash. 1996).

tribe, and, in 1972, Plaintiff began petitioning Defendant for federal recognition. In 1978, the promulgation of 25 C.F.R. § 83.2 established that only officially recognized Indian tribes would be eligible for federal services and benefits. In 1987, the Samish's 1972 petition for recognition was denied.

Plaintiff filed suit in the United States District Court for the Western District of Washington in 1989, challenging the 1987 decision. The district court found that the 1987 decision had violated Plaintiff's Due Process rights under the Fifth Amendment to the United States Constitution; this was affirmed on appeal. Upon remand, an Administrative Law Judge (ALJ) found that the Samish had continued to exist from the time of the 1855 Treaty of Point Elliot until the present. Based on the ALJ's findings, the Assistant Secretary of Indian Affairs ruled in favor of the Samish, but omitted certain findings of fact made by the ALJ. After this, the Samish appealed to the district court in the Western District of Washington, which entered summary judgment for the Samish. This resulted in the Plaintiff obtaining federal recognition as a tribe in 1996.

Plaintiff contends that it was improperly omitted from the 1969 unofficial tribe list and, therefore, that it should have continued to be treated as a federally recognized tribe even before its 1996 recognition.

III. Analysis

The Plaintiff variably refers to itself as being not federally recognized during the period of 1969 to 1996,[3]

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[3] Am. Compl. at 16 (stating that the United States "wrongfully refused to recognize the Samish Tribe"); *Samish Indian Nation v.*

and being federally recognized but not treated as such during the same period.[4] This Court, taking into account Plaintiff's statements made in the pleadings and at oral argument, approaches this case from the standpoint that Plaintiff is claiming that it has always been a federally recognized tribe, but that it has not been treated as such. Based on this observation, the Court refrains from addressing certain arguments, such as whether the political question doctrine applies to bar this Court's consideration of certain claims.[5]

A. Claim One – Violation of the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450 *et seq*.

Plaintiff alleges that Defendant refused to treat it as a federally recognized tribe, which **[117]** prevented Plaintiff from entering into contracts and receiving funding under ISDA from 1969 until 1996. Am. Compl. at 1, 18. Plaintiff claims that it should have been treated

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United States, Aug. 5, 2003 Tr. at 33 (hereinafter "2003 Tr.") (Plaintiff's statement that "it is not until the [1996] judgment was issued that Samish was fully recognized on the basis of continual tribal existence . . . .").

[4] Am. Compl. at 1 ("the government unlawfully and arbitrarily refused to treat the Tribe as a recognized tribe."); Am. Compl. at 12 (referring to the omission from the 1969 list that caused "treatment of the Nation as not federally recognized"); Am. Compl. at 18 (stating the alleged consequences of the United States "refusing to treat the Samish Indian Nation as a federally recognized tribe"); 2003 Tr. at 7 (Plaintiff's statement that "the Tribe has always been recognized . . . . Our position is that [recognition] continued."); *Id.* at 29 (Plaintiff's statement that "[the Samish] were recognized this whole time"); Pl.'s Opp'n at 7 (referring to the "failure of the Department of the Interior to treat the Samish Tribe as a federally recognized tribe").

[5] This argument was raised by Defendant in its motion to dismiss. Def.'s Mot. at 22-29.

as a tribe during that period, because the lack of recognition was due to Defendant's 1969 clerical error. *Id.* at 11. Since ISDA was not promulgated until 1975, this claim can only involve damages for the period of 1975 through 1996.[6]

Claim One should be dismissed because (1) the statute of limitations period has expired for that claim, and (2) the Court has no jurisdiction under the ISDA.

1. Statute of Limitations

The Court of Federal Claims has jurisdiction over lawsuits filed within six years of their accrual. 28 U.S.C. § 2501 (2003). Although six years have passed from the time Plaintiff was aware of its lack of recognition as a tribe until the present action, Plaintiff argues that the statute was tolled by both the exhaustion of administrative remedies doctrine[7] and the equitable tolling doctrine.[8] Plaintiff cannot toll the statute of limitation with either exception, however, because it could have pursued the present claim independently of the resolution of administrative proceedings, and because Defendant did not deceive Plaintiff into missing the deadline for filing within the statute of limitations.

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[6] If Plaintiff did actually receive funds prior to 1969 (*see supra* note 1), Plaintiff might have a claim for continuation of those funds based on the law (other than the ISDA) under which they received funding. However, as Plaintiff has not mentioned any such basis, and since nothing in the ISDA provides that the ISDA has retroactive effect, this Court declines to examine the issue here. Furthermore, the Court notes, without determination of the issue, that Plaintiff might face the same statute of limitations problem that has necessitated the dismissal of claim one herein.

[7] Pl.'s Opp'n at 17-23.

[8] *Id.* at 23-27.

a) Exhaustion of Administrative Remedies Doctrine

Pursuant to the exhaustion of administrative remedies doctrine, a claim against the government does not accrue until all of the administrative proceedings regarding the claim are final. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 509-10 (1967); *Brighton Vill. v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995). The administrative remedies sought, however, must be mandatory, rather than permissive, in order to toll the statute of limitations. *Brighton*, 52 F.3d at 1060.

In the present case, Plaintiff had means other than the administrative process to gain federal recognition as a tribe. Plaintiff could have pursued the present action in court before the administrative proceedings were concluded. Further, eligibility under the ISDA is prospective and does not confer any retroactive benefits: "Acknowledgment of tribal existence by the Department [of the Interior] *is a prerequisite* to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2 (emphasis added). Therefore, the resolution of administrative proceedings would not have addressed Plaintiff's present claims, and it could have pursued those claims independently.

Plaintiff argues that its claims did not accrue until final judgment was entered in *Greene v. Babbitt*, in which plaintiffs Greene and the Samish Indian Tribe pursued an action challenging the Department of the Interior's tribal acknowledgment process. 943 F. Supp. 1278, 1280 (W.D. Wash. 1996). The court in *Greene* reinstated three findings of an Administrative Law Judge

that had been rejected by the Assistant Secretary of Indian Affairs during the recognition proceedings. *Id.* at 1288. One of the reinstated findings was that the omission of Plaintiff from the 1969 list was arbitrary. *Id.* at 1288 n.13. This holding, however, does not lead to the conclusion that Plaintiff was entitled to benefits for the period of 1969 to 1996. The reinstated finding only "[went] to the *potential* liability of defendants . . . for wrongfully denying plaintiffs benefits and generating twenty years of administrative proceedings and litigation." *Id.* at 1288 (emphasis added). Thus, Plaintiff could have brought the present action before the resolution of the administrative proceedings.

[118] Because the administrative proceedings were only a permissive procedure, they do not toll the statute of limitations.

b) Equitable Tolling Doctrine

In addition to claiming that the exhaustion of administrative remedies doctrine tolled the statute of limitations, Plaintiff also claims that the equitable tolling doctrine tolled the statute.[9] However, this claim is without merit. Under the equitable tolling doctrine, the statute of limitations is tolled if the party asserting the exception is delayed or misled by the opposing party into missing the statute of limitations for filing a claim. *Irwin v. United States*, 498 U.S. 89, 96 (1990). Application of the doctrine is allowed only under exceptional circumstances and only if the party asserting it has actively pursued its claim. *Irwin*, 498 U.S. at 96 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). As the Supreme Court has stated:

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[9] *See id.*

> We have allowed equitable tolling in situations where . . . the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin, 498 U.S. at 96 (citations omitted).

Plaintiff here became aware that it was not being treated as a recognized tribe by Defendant in 1969, but failed to pursue recognition until 1972. Plaintiff did not institute the present action until 2002, and could have pursued it without waiting 33 years, as discussed in Part II.A.1.a., *supra*. These time gaps show a lack of diligence in pursuing the claim on Plaintiff's part, and, as the Supreme Court has said, courts are "much less forgiving" if the Plaintiff does not "exercise due diligence in preserving his legal rights." *Irwin*, 498 U.S. at 96.

Although Defendant's omission of the Samish from a list of Indian tribes was arbitrary, Defendant did not mislead Plaintiff into missing the statute of limitations for filing the present action. The district court in which the Samish challenged the administrative recognition process found that Plaintiff's "long journey for recognition has been made more difficult by excessive delays and governmental misconduct." *Greene*, 943 F. Supp. at 1281. However, despite Plaintiff's argument to the contrary, this misconduct only affected the administrative process, while the present claim could have been pursued independently. Plaintiff presents no evidence that Defendant deceived Plaintiff into missing the filing pe-

riod. In fact, at oral argument, Plaintiff admitted that Defendant did not engage in any acts of deceit.[10]

Because Plaintiff could have pursued the present claim more diligently and because Defendant's errors during the administrative process were not misleading with respect to the present action, the statute of limitations is not tolled under the equitable tolling doctrine.

Therefore, since neither the exhaustion of administrative remedies doctrine nor the equitable tolling doctrine apply to this case, claim one is dismissed due to Plaintiff's failure to file within the statute of limitations.

2. Jurisdiction under ISDA

As stated above, Claim one is dismissed as a result of Plaintiff's failure to file its complaint within the statute of limitations. However, for purposes of completeness, the Court also notes that it does not have jurisdiction over claim one because Plaintiff and Defendant never entered into a contract under ISDA.

[119] According to the Supreme Court, "[i]t is axiomatic that the United States may not be sued without its consent." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The Court further states that, "by giving the

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[10] The transcript states the following:

THE COURT: [I]t seems that the government would have to have mislead [sic] or tricked the [Plaintiff] into missing the statute of limitations, in order for there to be equitable tolling in this case. I don't see any evidence of that, Mr. Dorsay, do you?

MR. DORSAY [counsel for Plaintiff]: There wasn't any tricking or active deceit . . . there was no active deceit or concealment. I would have to agree with that.

2003 Tr. at 39.

Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." *Id.* (citations omitted). The claims which constitute a waiver of federal immunity from lawsuits include contract claims and money-mandating statutes or regulations. *Id.* at 215-17.

Although Plaintiff brings this claim under a specific statute, ISDA (28 U.S.C. § 450f) the statute's "waiver of federal sovereign immunity is limited to 'self-determination contracts' entered into by Indian tribes or tribal organizations and the government." *Demontiney v. United States ex rel. Dep't of Interior*, 255 F.3d 801, 805 (9th Cir. 2001); *accord Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1376 (Fed. Cir. 1999) (construing ISDA as governing "self-determination contract[s]" under which the Bureau of Indian Affairs must fund programs and indirect costs to contractors); *Carlow v. United States*, 40 Fed. Cl. 773, 775 (1998). Plaintiff is not claiming a breach of an ISDA contract; in fact, it is alleging instead that Defendant refused to enter into such a contract.[11]

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[11] Outside of violations of self-determination contracts, ISDA has not been found by any court to be money-mandating. Plaintiff is unpersuasive in its argument that ISDA is analogous to statutes that provide comprehensive federal control over assets for the benefit of Indians and are considered money-mandating. *See Mitchell*, 463 U.S. at 224 (stating that these other statutes "clearly give the Federal Government full responsibility to manage Indian resources"). Under ISDA, the Government does not have comprehensive control over Indian resources because "[t]he ISDA's stated purpose is to allow Native American tribes to operate their own federal programs directly." *Babbitt*, 194 F.3d at 1376.

When the Secretary of the Interior refuses to enter into a self-determination contract, he or she must "provide the tribal organization with a hearing on the record . . . except that the tribe or tribal organization may . . . exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title." 25 U.S.C. § 450f(b)(3). Therefore, the district courts, rather than this Court, have jurisdiction to compel the Secretary to enter into self-determination contracts.

Because this Court only has jurisdiction under ISDA for claims alleging violation of self-determination contracts, and because Plaintiff's claim does not allege the existence of any such contract, this claim must be dismissed.

B. Claim Two – Violation of the Snyder Act, 25 U.S.C. §§ 2, 13 and Other Statutes for the Benefit of Tribes and Indians

Plaintiff alleges that Defendant's refusal to treat it as a recognized tribe prevented it from obtaining services and benefits under the Snyder Act and more than 30 other statutes during the period of 1969 to 1996. Am. Compl. at 19.

This claim is without merit as the statute of limitations precludes it. 28 U.S.C. § 2501. Plaintiff cannot assert either the exhaustion of administrative remedies doctrine or the equitable tolling doctrine for the reasons set forth in the discussion of claim one, *supra*: (1) Plaintiff could have pursued this action while the administrative proceedings regarding its federal recognition were under way, and (2) Defendant did not deceive Plaintiff

into missing the time period of the statute of limitations for the present action.[12] **[120]**

C. Claim Three – Breach of Treaty Rights of Recognition, Self-Government and Protection

Plaintiff alleges that it was a party to the 1855 Treaty of Point Elliott (hereinafter "Treaty"), which imposed legal duties on Defendant for its benefit. Am. Compl. at 20. Plaintiff claims that Defendant breached its Treaty obligations by refusing to provide Plaintiff with funds that were available to other Treaty-recognized tribes between 1969 and 1996. *Id.* at 21. Although Plaintiff is correct that a tribe known as the Samish were a party to the Treaty of Point Elliot, the current Samish Tribe is not descended from that tribe; therefore, the Samish have no rights under the Treaty. *See United States v. Washington*, 476 F. Supp. 1101, 1106 (W.D. Wash. 1979).

Due to the application of the statute of limitations and collateral estoppel, the Court is precluded from hearing this claim.

1. Statute of Limitations

The Court cannot proceed with claim three because Plaintiff is barred by the six-year statute of limitations.

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[12] The part of the claim requesting damages under the Snyder Act can also be dismissed on the ground that the Court does not have jurisdiction over it. Under *Mitchell*, the Court has jurisdiction over money-mandating claims that arise out of statutes or regulations. *Mitchell*, 463 U.S. at 218. The Snyder Act, however, does not support money-mandating claims. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001). Moreover, the Supreme Court has held that the general language of the Snyder Act "do[es] not translate through the medium of legislative history into legally binding obligations." *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993).

28 U.S.C. § 2501. Plaintiff was aware of Defendant's denial of benefits as early as 1969 but failed to bring any legal action prior to the present case, which was filed in 2002. Although Plaintiff's rights under the Treaty are distinct from the rights under federal recognition as a tribe, Plaintiff cannot toll the statute under either the exhaustion of administrative remedies doctrine or the equitable tolling doctrine.

The exhaustion of administrative remedies doctrine does not apply here because Plaintiff could have brought this claim when it became aware of the Treaty violations. The administrative proceedings regarding Plaintiff's recognition as a tribe had no impact on its recognition as a party to the Treaty.[13] In adjudicating Plaintiff's claims of misconduct during the Department of the Interior's tribal recognition process, the Ninth Circuit regarded "the issues of tribal treaty status and federal acknowledgment as fundamentally different." *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995). Based on the logic of the Ninth Circuit, which this Court finds persuasive, it seems certain that Plaintiff could have pursued its claim independently, without waiting for the resolution of federal recognition proceedings.

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[13] The text of official acknowledgment states that "the Samish Tribal Organization has been continuously identified throughout history as Indian or aboriginal, has existed as a distinct community since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe or families which became incorporated into that tribe." Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe, 61 Fed. Reg. 15,825, 15,826 (Bureau of Indian Affairs, Dep't of the Interior April 9, 1996). The acknowledgment, however, has no effect on Plaintiff's Treaty rights.

The equitable tolling doctrine also does not apply to this claim because Plaintiff fails to demonstrate that it was deceived or misled by Defendant into missing a filing deadline set by the statute of limitations.[14] Plaintiff's arbitrary omission from the 1969 list and the administrative delays thereafter affected only the administrative recognition proceedings, not the Treaty rights.[15]

Because the statute of limitations precludes Plaintiff from bringing claim three, the Court cannot proceed on its merits.

2. Collateral Estoppel

In addition to being barred by the statute of limitations, claim three fails under the doctrine of collateral estoppel. Plaintiff claims that Defendant breached the promises made in the 1855 Treaty of Point Elliott. Am. Compl. at 21. Plaintiff, however, already litigated and lost the issue of its participation in the Treaty. *See United States v. Washington*, 476 F. Supp. 1101, 1106 (W.D. Wash. 1979). Collateral estoppel bars re-litigation of an issue if: (1) the issue previously adjudicated is identical to the present one; (2) the issue was "actually litigated" in the previous case; (3) previous determination of the issue was necessary to the final decision; and (4) the party precluded was fully **[121]** represented. *McCandless v. Merit Sys. Prot. Bd.*, 996 F.2d 1193, 1198 (Fed. Cir. 1993).[16]

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[14] *See supra* note 10.

[15] *See* Part II.A.1.b., *supra*.

[16] The doctrine of res judicata likely does not apply, as the present lawsuit involves different parties than the previously decided cases. Res judicata bars re-litigation of a claim if "(1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on

With regard to claim three, the four elements of collateral estoppel have been satisfied. First, the identical issue regarding Plaintiff's tribal status in the Treaty has already been decided by the United States District Court for the Western District of Washington, which held that the "Samish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott." 476 F. Supp. at 1106. The district court later stated that Plaintiff was barred under res judicata from re-litigating its status as successor to the original Samish Indian Tribe and that Plaintiff was not a party to the Treaty of Point Elliott. *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059 at *2 (W.D. Wash. Feb. 25, 1992) ("The issue of whether [the Samish] are successors in interest to the Treaty of Point Elliot has already been resolved."). In reviewing this matter, the Ninth Circuit "affirmed denial of treaty rights on the independent factual finding of insufficient continuous political and cultural cohesion." *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995) (citing its decision in *United States v. Washington*, 641 F.2d 1368, 1372-74 (9th Cir. 1981)).[17]

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the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Int'l Air Response v. United States*, 302 F.3d 1363, 1368 (Fed. Cir. 2002).

[17] Plaintiff's argument on this issue is misleading. Plaintiff quotes from the Western District of Washington district court case, citing the case as saying that members of the Samish Tribe were "descendants of Samish Indians who were party to treaty of Point Elliott [sic]." (Pl.'s Opp'n at 33.) The actual words of the case state, "The Intervenor [sic] Samish Indian Tribe . . . is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott." *United States v. Washington*, 476 F. Supp. at 1105-06.

Plaintiff, however, claims that its "status as a party to the Treaty of Point Elliot was conclusively established." Pl.'s Opp'n at 3. Plaintiff cites decisions in *Duwamish v. United States*, 79 Ct. Cl. 530, 533 (1934), and *Samish Tribe*, 6 Ind. Cl. Comm. 159, 170 (1958). However, as the court in *Greene v. Lujan* states,

> [T]he issue of treaty status was finally resolved in *United States v. Washington*. The Court in *United States v. Washington* held that these prior claims involved compensation for individuals, not tribal rights, and therefore the doctrines of *res judicata* and collateral estoppel were inapplicable. The Court then determined that petitioners were not successors in interest of the treaty signatories. This holding is binding in this case and treaty issues cannot be relitigated.

1992 WL 533059 at *3 (citations omitted).

Second, Plaintiff actually litigated the issue, as it was one of the five intervener tribes in the action and had much at stake in the resolution of the claim. Plaintiff presented evidence evaluated by the court regarding its organizational structure, constitution, and previous litigation in related matters. 476 F. Supp. at 1106.

Third, the denial of Treaty status was necessary to the final decision that the Samish did not have the fishing rights in contention. *Id.* at 1111. Fishing rights were a benefit conferred under the Treaty. Therefore, denial of Treaty status had a direct effect on those rights. *Id.*

Finally, the Samish and the other four intervener tribes were jointly represented by three attorneys in the

Washington case. *Id*. at 1102. There is no indication that the representation was inadequate.

Because another court has already determined that the current Samish Indian Nation was not a party to the Treaty of Point Elliott, Plaintiff is barred from litigating the present claim.

D. Claim Four – Temporary Taking Based on Treaty Rights

As an alternative to claim three, Plaintiff alleges that Defendant's refusal to recognize **[122]** it as a tribe was a temporary taking of the rights promised to it in the Treaty of Point Elliott. Am. Compl. at 22-23. Claim four is dismissed for the same reasons as claim three, namely because the statue [*sic*] of limitations has passed and because Plaintiff was not a party to the Treaty of Point Elliott.[18]

E. Claim Five – Continuing Violation of Tribe's Rights

Plaintiff alleges that, subsequent to its official recognition as a tribe in 1996, Defendant has continued to violate its rights by denying it federal benefits and services under 38 different statutes. Am. Compl. at 23. As a result, Plaintiff requests damages for the period of 1996 to the present.

This claim must be dismissed due to lack of jurisdiction under 28 U.S.C. § 1500. Plaintiff has a prior claim pending in district court in the Western District of

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[18] *See* discussion of claim three, *supra*.

Washington,[19] which is based on the same facts as the present claim—Defendant's alleged continuing denial of services and benefits to Plaintiff, despite Plaintiff's official recognition as a tribe in 1996. Therefore, according to § 1500: "The United States Court of Federal Claims shall not have jurisdiction of *any claim* for or in respect to which the plaintiff or his assignee has *pending* in any other court any suit or process against the United States . . . ." 28 U.S.C. § 1500 (emphasis added). As the Federal Circuit has explained, "The purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time." *Johns-Manville Corp. v. United States*, 855 F.2d 1556, (Fed. Cir. 1988) (citations omitted).

Accordingly, courts have determined that the words "any claim" denote a claim in this Court that is (1) based on the same operative facts as the claim filed in another court, and (2) seeks the same relief or relief that is to some extent overlapping. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Loveladies Harbor, Inc., v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994). In this case, the operative facts are identical for both claims. Plaintiff is basing both claims on the failure of Defendant to treat it as a federally recognized tribe during the period of 1996 to the present. Plaintiff argues, however, that the relief sought in the two courts can be distinguished. Pl.'s Opp'n at 35. In the district court case, Plaintiff requests declaratory and injunctive relief, as well as monetary damages under the ISDA. The amended complaint in the action before this Court removes the claim for monetary relief based on the ISDA

[19] Plaintiff filed its complaint in district court on September 14, 2002, and filed its complaint in this Court on October 11, 2002.

but retains the request for monetary damages based on other statutes. Am. Compl. at 23-24.[20] Binding precedent dictates that, as long as the operative facts are identical, when the relief sought is for monetary damages, the legal theory on which the claim is based is irrelevant. *Keene*, 508 U.S. at 212-213 (upholding an interpretation of 28 U.S.C. § 1500 that, when the operative facts are the same, asking for relief under contract versus tort theories does not make claims distinct); *United States v. County of Cook*, 170 F.3d 1084, 1091 (Fed. Cir. 1999) (construing monetary damages based on tax law and the Fifth Amendment Takings Clause as identical relief); *Dico, Inc. v. United States*, 48 F.3d 1199, 1203 (Fed. Cir. 1995) (construing monetary damages for remediation costs versus damages based on the Fifth Amendment Takings Clause and the Due Process Clause to be identical relief).

Because Plaintiff asks for monetary damages in both courts, the relief is overlapping. Further, the district court claim was filed prior to the present action, and is therefore considered "pending" for purposes of the **[123]** statute.[21] Therefore, the Court does not have jurisdiction over the Plaintiff's fifth claim. However, although this claim must be dismissed, a dismissal under § 1500 is without prejudice and with "the unfettered right to return the claim to the docket of the court . . . should the district court determine that it is without jurisdiction

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[20] Plaintiff's amendment does not actually affect the analysis of claims under 28 U.S.C. § 1500, because, under that statute "the jurisdiction of the Court [of Federal Claims] depends upon the state of things at the time of the action brought." *Keene*, 508 U.S. at 207 (quoting *Mollah v. Torrance*, 9 U.S. (1 Wheat.) 537, 539 (1824)).

[21] *See supra* note 19.

over that [previously filed] claim." *Conn. Dep't of Children & Youth Servs.*, 16 Cl. Ct. 102, 106 (Cl. Ct. 1989).

IV. Conclusion

Claims one, two, three, and four—alleging Defendant's failure to treat Plaintiff as a federally recognized tribe and violation of promises made to Plaintiff in the Treaty of Point Elliott during the period of 1969 to 1996—are barred by the statute of limitations; as such, they are dismissed for lack of subject matter jurisdiction. Even if the statute of limitations did not apply to bar Plaintiff's claims, claim one would be barred because of lack of jurisdiction under the ISDA, and claims three and four would be barred due to collateral estoppel. Claim five, which alleges that Defendant violated a variety of laws after Plaintiff was federally recognized as a tribe in 1996, is also dismissed, because the Court lacks jurisdiction under 28 U.S.C. § 1500, due to Plaintiff's identical, previously filed claim pending in district court in the Western District of Washington.

For the aforementioned reasons, Defendant's motion to dismiss is hereby GRANTED. The Clerk of Court is instructed to dismiss claims one, two, three, and four with prejudice and to dismiss claim five without prejudice.

EDWARD J. DAMICH
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. CA9-645Z

MARGARET GREENE, ET AL., PLAINTIFFS

v.

BRUCE BABBITT, ET AL., DEFENDANTS

Jan. 13, 1997

ORDER

ZILLY, J.

Upon consideration of Scott Keep's motion pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, to alter or amend the judgment entered in this action on November 1, 1996, or, in the alternative, to reconsider the Court's Order of October 15, 1996, insofar as the Court concluded that Mr. Keep was in contempt of this Court, it is hereby ORDERED that the Order entered by this Court on October 15, 1996, docket no. 329, be amended by deleting from page 24, lines 2-3, the following language: "finds his conduct in contempt of Court and."

The Court DENIES Mr. Keeps motion to amend the judgment. The Court, based on its inherent supervisory

powers, ORDERS that Mr. Keep refrain from participating further in these proceedings for the reasons set forth in the Court's Order entered October 15, 1996. *Whiting Corp. v. White Mach. Corp.,* 567 F.2d 713, 715 (7th Cir. 1977) ("[T]he district court 'possesses broad discretion in determining whether disqualification is required in a particular case.'") (citation omitted). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 658 F.2d 1355, 1358 (9th Cir. 1981) ("[T]he district court has the prime responsibility for controlling the conduct of lawyers practicing before it. . . . "). This Order shall not preclude Mr. Keep from (1) participating in cases that primarily involve other tribes but may in some way impact or involve the Samish, (2) responding to questions posed by other staff members of the Interior Department concerning the location of items in the record, or (3) providing counsel to the Interior Department as to the rights of and obligations to other recognized tribes in the Puget Sound region area just because those rights might impact on the rights and interests of the Samish.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case No. C89-645Z

MARGARET GREENE, ET AL.

v.

BRUCE BABBITT, ET AL.

[Filed: Nov. 1, 1996]

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

(1) The Court enters judgment in favor of the plaintiff, and holds that the Department of Interior violated the Fifth Amendment due process clause and § 553 of the Administrative Procedure Act [5 U.S.C. § 553], in connection with the acknowledge-

ment process of the Samish Tribal Organization as an Indian tribe pursuant to 25 C.F.R. Part 83.

(2) The Court enters judgment confirming that the Samish Tribal Organization exists as an Indian tribe within the meaning of federal law.

(3) The following three findings of Administrative Law Judge David Torbett, originally entered on August 31, 1995 but later rejected by Assistant Secretary Deer, are reinstated:

> 1. Part of the Noowhaha tribe merged with the Samish (*see* ALJ Recommended Decision at 22; Final Determination dated November 8, 1995, at 12-13, 32).
>
> 2. Many of the Samish families that settled on the Swinomish Indian Reservation did not relinquish their Samish affiliation (*see* Final Determination at 35, and references to record contained therein).
>
> 3. The Department of Interior could not adequately explain why the Samish had been omitted from a list of federally recognized tribes prepared during the 1970s (*see* ALJ Findings 1-3; Final Determination at 16, 38-39).

(4) Counsel Scott Keep is prohibited from taking any further action in connection with this case or participating in any further proceedings involving the Samish Tribe.

(5) Plaintiff is entitled to its taxable costs against the defendants.

BRUCE RIFKIN, Clerk

By /s/ CASEY CONDON
Casey Condon
Deputy Clerk

November 1, 1996
Date

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C89-645Z

MARGARET GREENE, ET AL., PLAINTIFFS

v.

BRUCE BABBITT, ET AL., DEFENDANTS

Filed: Oct. 15, 1996

ORDER

ZILLY, District Judge.

INTRODUCTION

On November 8, 1995, Assistant Secretary of the Interior Ada Deer issued a Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe pursuant to 25 C.F.R. Part 83. In accordance with 25 C.F.R. § 83.9(h), the Secretary gave formal notice on March 29, 1996 that the Samish Tribal Organization exists as an Indian Tribe within the meaning of federal law, and published that notice in the Federal Register on April 9, 1996. 61 Fed. Reg. 15825-26. In connection with her decision to grant federal tribal recognition, the Assistant Secretary of the Interior re-

jected certain findings made by the Administrative Law Judge, David Torbett.

The plaintiffs, Margaret Greene and the Samish Indian Tribe, have brought this supplemental action pursuant to 5 U.S.C. § 706, alleging that the Department of Interior violated the Fifth Amendment Due Process Clause and § 553 of the Administrative Procedure Act (5 U.S.C. § 553), in connection with the federal acknowledgment process. Plaintiffs allege specifically that prior to issuing her final decision Assistant Secretary Ada Deer, the agency official responsible for **[1281]** making the recognition decision,[1] met ex parte with Scott Keep, the agency lawyer who represented the Bureau of Indian Affairs at the hearing before the Administrative Law Judge. Mr. Keep and his expert witness, who was also present at the ex parte hearing, urged Assistant Secretary Deer to deny tribal recognition to the Samish and to reject certain findings made by the ALJ. After that ex parte meeting, Assistant Secretary Deer granted the Samish tribal recognition but rejected certain findings that Mr. Keep urged her to reject. By motion (docket no. 276), the Samish seek to reinstate certain of the findings rejected by the Assistant Secretary. The defendants have cross-moved for summary judgment on all of plaintiffs' claims.

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[1] The determination of the Assistant Secretary is final and becomes effective 60 days after a notice appears in the Federal Register unless the Secretary of the Interior requests a reconsideration by the Assistant Secretary—Indian Affairs pursuant to 25 C.F.R. § 83.10(a)-(c). The final notice was published in the Federal Register on April 9, 1996 (61 Fed. Reg. 15825). A Supplemental Notice of Final Determination was published on May 29, 1996 (61 Fed. Reg. 26922).

The Court, having considered the briefs and supplemental responses of the parties to the five questions raised by the Court's Minute Order of April 22, 1996, and having considered the arguments of counsel at the hearing on July 18, 1996, now GRANTS plaintiffs' motion, reinstates certain Findings of the Administrative Law Judge, and finds government attorney Scott Keep in contempt of court for the reasons stated in this opinion. The Court DENIES the defendants' cross-motion.

BACKGROUND

The Samish people's quest for federal recognition as an Indian tribe has a protracted and tortured history,[2] and their long journey for recognition has been made more difficult by excessive delays and governmental misconduct.

The official journey began when the Samish Tribal Organization ("Samish") filed their first Petition for federal acknowledgment in 1972, after Congress began conditioning eligibility for most programs benefitting American Indians upon status as a tribe recognized by the federal government. Federal acknowledgment of tribal existence by the Department of Interior is a "pre-

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[2] In 1979, this Court in *United States v. State of Washington,* 476 F. Supp. 1101, 1106 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied,* 454 U.S. 1143, 102 S. Ct. 1001, 71 L. Ed. 2d 294 (1982), entered various findings which found in part that members of the Samish Indian Tribe did not "live[ ] as a continuous separate, distinct and cohesive Indian cultural or political community," and had "not maintained an organized tribal structure in a political sense." The Court then concluded that the Samish were not entitled to fishing rights. *Id*. at 1111. After this decision, the Government began to deny nonfishing benefits to the Samish. As a result, the Samish sought federal recognition as a tribe pursuant to 25 C.F.R. Part 83.

requisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2 (1995). The Department of the Interior took no action on the Samish application until 1979, one year after the Department of Interior published its final regulations governing the procedure for official recognition of Indian Tribes.[3] Ultimately, on November 4, 1982, the Assistant Secretary of Indian Affairs published a notice concluding that the Samish should not be recognized. After several years of further delay, a final decision denying tribal recognition was published in the Federal Register on February 5, 1987. *See* 52 Fed. Reg. 3709. The significance of this decision was that the Samish did not exist as an Indian tribe for federal purposes.

In April 1989, the Samish tribe and Margaret Greene, its Chairman, brought an action in this Court challenging on Fifth Amendment due process grounds the decision denying recognition. On February 25, 1992, this Court vacated the decision denying recognition to the Samish and remanded the recognition petition for a formal adjudication under § 553 of the Administrative Procedure Act ("APA"). *See Greene v. Lujan,* 1992 WL 533059 (W.D. Wash. 1992), *aff'd,* 64 F.3d 1266 [1282] (9th Cir. 1995). The Court noted in its remand order that there was evidence suggesting that "some of the deci-

[3] The new regulations were codified at 25 C.F.R. Part 83. Under those 1978 regulations, the Department of Interior conducted its own research, accepted ex parte submissions, and made final decisions without any hearing.

sion makers prejudged the case."[4] The Ninth Circuit, in affirming this Court's ruling, stated:

> Informal decision-making, behind closed doors and with an undisclosed record, is not an appropriate process for the determination of matters of such gravity.

64 F.3d at 1275.

Prior to formally remanding the case to the Secretary, this Court directed the parties to meet and attempt to agree on the procedures that would govern remand. The parties met and agreed to procedures which they set forth in a Joint Status Report. The Joint Status Report provided in part:

> The parties agreed that, following the hearing on remand, the ALJ will make written findings of fact, together with a recommendation to the Assistant Secretary—Indian Affairs as to whether the Plaintiffs are an Indian tribe, based only on the existing administrative record and the testimony produced at the hearing.
>
> The parties further agreed that either party, or amicus curiae, may submit written comments on the findings and recommendations to the Assistant Secretary—Indian Affairs, within 30 days, and that within 60 days of receiving the findings and recommendation of the ALJ, the Assistant Secretary shall either adopt or reject them, and issue a new decision

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[4] The Court's original concerns about possible prejudice were founded in part on the fact that the decision maker met ex parte with government witnesses and advocates opposed to tribal recognition.

> as to the status of Plaintiffs. If he rejects them, he shall state the basis for that rejection in writing.

Joint Status Report dated July 8, 1992 (docket no. 191) at 12. At a hearing to review the terms of the Joint Status Report, this Court approved the procedures agreed to by the parties. Transcript of Hearing held on September 18, 1992 (docket no. 214) at 47. The procedural protections agreed upon by the parties were especially important because the recognition regulations contained in 25 C.F.R. Part 83 mandate inquiry into the "social and political structure of the petitioning tribe," matters that are "inherently complex and prone to mischaracterization." Order dated February 25, 1992 (docket no. 169) at 18.

Upon remand to the agency, the matter proceeded to a hearing before Administrative Law Judge David L. Torbett. At the hearing, which lasted from August 22, 1994 to August 30, 1994, both sides presented expert witnesses and other evidence. After the hearing, on August 31, 1995, Judge Torbett issued an exhaustive opinion. The opinion contains four parts: (1) a summary of the evidence (pages 4-18); (2) a discussion and recommendation (pages 18-23); (3) an appendix discussing the burden of proof, and (4) an appendix enumerating 205 proposed findings of fact (44 pages). The Proposed Findings substantiated that the Samish met the mandatory criteria for federal acknowledgement as set forth in 25 C.F.R § 83.7. The ALJ's opinion and recommendations were then sent to the Assistant Secretary of the Interior for a final determination.

On November 8, 1995, Assistant Secretary Ada Deer issued her final decision pursuant to 25 C.F.R. Part 83 that the Samish Tribal Organization existed as an Indian Tribe. The Final Determination rejected, however, certain proposed findings of the ALJ.

Plaintiffs now challenge the proceedings before the Secretary on remand, claiming the government violated the Administrative Procedure Act and their due process rights under the Fifth Amendment. The challenge involves undisputed events which occurred after the Administrative Law Judge issued his findings and recommendations on August 31, 1995, but before the Assistant Secretary issued the Final Determination on November 8, 1995.

It is undisputed that on November 8, 1995, before a final determination, Scott Keep, an attorney with the Solicitor's Office, Department of the Interior,[5] and Dr. Roth, the [1283] government's expert witness, had an ex parte meeting with Assistant Secretary Deer[6] for the purpose of attempting to persuade the Assistant Secretary to reject the Administrative Law Judge's recom-

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[5] Mr. Keep is an experienced attorney with the Solicitor's Office of the United States Department of Interior. He has represented the Bureau of Indian Affairs, which opposes tribal recognition for the Samish, throughout these extended proceedings. Mr. Keep represented the Department of Interior during the original proceedings before this Court. Keep was also counsel for the government at every stage of the remand proceedings, including the August 1995 hearing before the Administrative Law Judge.

[6] Mr. Robert T. Anderson, Associate Solicitor, Division of Indian Affairs, was also scheduled to attend but was unable to do so. Anderson had full knowledge of the proposed meeting and its purpose. *See* Barsh Decl. Ex. J.

mendation of federal recognition.[7] Mr. Keep also gave Assistant Secretary Deer written arguments, which he had prepared, and a proposed draft of the Assistant Secretary's decision. *See* Barsh Decl, docket no. 328, Exs. G, H and I. These ex parte conversations with Assistant Secretary Deer occurred behind closed doors, and no transcript or record of the proceedings was ever made.[8] In addition, no effort was made to notify the Samish of these meetings, either before or after they occurred, and it was only months later that the Samish learned of these events after the final decision had been made. Although the Assistant Secretary ultimately concluded that the Samish should be recognized, Keep was successful in having the Assistant Secretary reject certain proposed findings of fact which are of vital importance to the Samish.[9] The Assistant Secretary instead adopted certain findings drafted and recommended by Mr. Keep.

The Assistant Secretary not only considered the information revealed during ex parte meetings, but also considered several other ex parte materials submitted

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[7] During oral argument before this Court on July 18, 1996, the government's lawyer, R. Anthony Rogers, conceded that had Keep been successful in persuading the Assistant Secretary to deny recognition, such actions would have been a violation of the Administrative Procedure Act. TR. at 39.

[8] The government attorney also conceded at oral argument that in the absence of a record, we will never know what was said. Mr. Rogers admitted that this ex parte meeting constituted a fundamental violation of the Administrative Procedure Act. TR. at 41.

[9] In rejecting the challenged proposed findings, the Assistant Secretary adopted language virtually identical to the language proposed by Mr. Keep. *See* Declaration of Russel L. Barsh, docket no. 328, at Exhibit I.

both before and after she rendered her decision in November 1995. The Tulalip Tribe submitted comments, dated October 10, 1995, Exhibit D to Declaration of Russel L. Barsh, docket no. 328; and the Swinomish Community and the Upper Skagit Tribe sent submissions after the Assistant Secretary's action. *Id*. at Exhibits E and F.

At the hearing on July 18, 1996, during oral argument on the cross-motions for summary judgment, the Samish narrowed their complaint by specifying that they have been prejudiced by Deer's rejection of three particular proposed findings. These include the ALJ's findings that (1) part of the Noowhaha tribe merged with the Samish (*see* ALJ Recommended Decision at 22; Final Determination dated November 8, 1995, at 12-13, 32); (2) many of the Samish families that settled on the Swinomish Indian Reservation did not relinquish their Samish affiliation (*see* Final Determination at 35, and references to record contained therein); and (3) the Department could not adequately explain why the Samish had been omitted from a list of federally recognized tribes prepared during the 1970s (*see* ALJ Findings 1-3; Final Determination at 16, 38-39).

With respect to the first finding, the ALJ had found:

> The Noowhaha tribe and the Samish were at one time different tribes. Dr. Suttles and Dr. Hadja testified that the two tribes had combined probably around 1850 and they had been one tribe since that time. This conclusion of Dr. Suttles and Dr. Hadja is controverted by the Defendants but the undersigned is convinced that the conclusions drawn by these two witnesses is sound.

ALJ Recommendation dated August 31, 1995, at 22. This finding supports recognition criterion 25 C.F.R. § 83.7(e), which mandates proof that "petitioner's membership consists of individuals who descend from a [1284] historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." It also supports criterion 25 C.F.R. § 83.7(b), which mandates proof that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." The ALJ's finding was based on his evaluation of the testimony presented at the hearing, including a weighing of the evidence and assessment of the credibility of the witnesses.

With respect to the second finding, the ALJ had found:

> Dr. Hadja explained that, although many Samish Indians had held public office on the Lummi and Swinomish Reservation, they continued to consider themselves as Samish and participate in Samish activities. . . . While individual members of Samish families living today on reservations, such as the Edwards, may have given up their Samish identity, Dr. Hadja felt that on the whole they had not (TR: 869). Samish leaders living at Swinomish were active in Swinomish affairs as a way of gaining personal prestige, and not as a declaration of Swinomish identity (TR: 1004, TR: 1021-1022).

Finding 169 in Appendix B to ALJ Recommendation. This finding supports recognition criterion 25 C.F.R. § 83.7(b), which mandates proof that the petitioner has maintained a "distinct community." It also supports

recognition criterion 25 C.F.R. § 83.7(c), which mandates proof that the tribe has "maintained political influence or authority over its members. . . ."

Finally, with respect to the third proposed finding, the ALJ found:

> A list prepared in the late 1960s by Ms. Simmons, a BIA employee, was the basis on which groups were then classified as Federally-recognized or not, but she admitted that records of Area and Agency comments have been lost (TR: 351-352). Subsequently, her revised list was 'generally' consulted to determine groups' legal status, although paradoxically she conceded that she had no authority to make such decisions. . . . On further questioning Ms. Simmons conceded that she had no personal knowledge of the legal status of the groups she had listed under the Portland Area. . . . The earliest official references Dr. Hadja found to the tribe not being federally recognized appeared in the [early 1970s] (TR: 849).

Findings 2, 3, and 21 in Appendix B to ALJ Recommendation. This finding supports recognition criterion 25 C.F.R. § 83.7(a), which mandates a demonstration that "[t]he petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900." Under 25 C.F.R. § 83.7(a)(1), supporting evidence may include evidence of "[i]dentification as an Indian entity by Federal authorities."

The Assistant Secretary rejected each of the three findings, as well as several others, after the ex parte meeting with Mr. Keep and the government's expert witness. The Samish urge this Court to reinstate these three findings.

ANALYSIS

1. *The Samish Have Standing.*

The government argues that because the Samish prevailed on their petition for federal recognition, they have no standing to challenge the Assistant Secretary's Final Determination. In order to have standing, a plaintiff must show some "actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S. Ct. 1601, 1607-08, 60 L. Ed. 2d 66 (1979). Here, the Samish were harmed because Assistant Secretary Deer's rejection of certain proposed findings may have preclusive effect in future litigation concerning Samish membership, claims to tribal territory, and possible government liability for past benefits. *See* II Davis & Pierce, *Administrative Law Treatise* § 13.4 (1994) ("[c]ourts routinely apply collateral estoppel to issues resolved by agencies"). Although a "party's desire for better precedent does not by itself confer standing to appeal," *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.,* 957 F.2d 120 (4th Cir. 1992), in this context, the injury is sufficient.

[1285] The focus and result of the ex parte contact between the government lawyer and Assistant Secretary Deer was to eliminate findings that would be favorable to the Samish in connection with their eligibility for benefits under federal law. A holding that the Samish lack standing would necessarily imply that the Court is powerless to review misconduct in the administrative decision making process. The Court concludes that the government's argument on standing is without merit, and the plaintiffs have standing in this case.

2. *The Government's Action Constitutes a Violation of Law*

In 1992, this Court held that the Samish were entitled to Fifth Amendment due process in connection with their recognition proceedings. The Court therefore remanded this matter to the Bureau of Indian Affairs for a formal adjudication under § 553 of the APA (5 U.S.C. § 553). The Samish now challenge the proceedings before the Assistant Secretary of the Bureau of Indian Affairs, claiming they violated the APA and Fifth Amendment due process.

The Court must review the agency's proceedings under the standards set forth in 5 U.S.C. § 706, which provides that the court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or]
> >
> > (D) without observance of procedures required by law; [or]
> >
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title . . .

The court's review, therefore, is both substantive and procedural. Even if there is "substantial evidence" in the record for an agency finding, the court must set the finding aside if the agency failed to follow the "procedures required by law" in making its determination. *Atkinson Lines, Inc. v. United States,* 381 F. Supp. 39, 41-42 (S.D. Ohio 1974) ("[t]he substantial evidence stan-

dard . . . does not exhaust the scope of review;" reviewing court has a "duty to scrutinize all aspects of the agency proceedings in order to decide whether it has acted fairly and within the proper legal framework"); *see also U.S. v. Dist. Council of N.Y.C. and Vicinity of the United Brotherhood of Carpenters,* 880 F. Supp. 1051, 1066 (S.D.N.Y.1995) ("an agency's decision can be 'arbitrary and capricious' if it was not the product of the requisite processes").

"The due process clause guarantees no person shall be deprived of life, liberty, or property without due process of law." *Guenther v. C.I.R.,* 889 F.2d 882, 884 (9th Cir. 1989). The essential ingredients of procedural due process necessarily include notice and an opportunity to be heard before an impartial and disinterested decision maker. The basic purpose of due process is to preserve "both the appearance and reality of fairness" in all adjudicative proceedings, " 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980) (quoting *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172, 71 S. Ct. 624, 649, 95 L. Ed. 817 (1951)).

The Samish contend that the ex parte meeting between attorney Keep and Assistant Secretary Deer violated the procedures required by the APA, the Fifth Amendment's Due Process Clause, and the Court's order incorporating the terms of the Joint Status Report. The Department conceded at the hearing before this Court on July 18, 1996, that the meeting was improper:

> THE COURT: Explain to me the purpose of having the government's expert witness, Doctor Roth, meet personally with the decision maker ex parte, off the record, to convey, I assume, reasons why the testimony that apparently was rejected by the administrative law judge ought to be accepted by the decision maker? Now, doesn't that seem fundamentally unfair to you.
>
> MR. ROGERS: I think it should have been done differently, Your Honor. Yes, it does. I don't know why he was called **[1286]** there. I don't know what he said when he was there.
>
> THE COURT: We'll never know, will we, because there's no record of that? . . .
>
> MR. ROGERS: No, there isn't. . . .

(TR. at 41).

The Ninth Circuit has stated that "ex parte proceedings are anathema in our system of justice." *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987). The ex parte meeting that occurred here between Assistant Secretary Deer, the decision maker, and Mr. Keep, the government advocate, represents the antithesis of due process and was fundamentally unfair to the Samish. As the Ninth Circuit previously stated in this very case, "Informal decision-making behind closed doors and with an undisclosed record is not an appropriate process for the determination of matters of such gravity." *Greene v. Babbitt*, 64 F.3d 1266, 1275 (9th Cir. 1995). Despite the Ninth Circuit's admonishment, stated in clear and unambiguous terms, the government began anew, within two months after the Ninth Circuit's

decision, to engage in informal decision-making behind closed doors, without a record.[10] The Court concludes that the government's ex parte contacts with the decision maker rendered the proceedings fundamentally unfair and violated the Samish Tribe's Fifth Amendment due process rights.

The ex parte meeting was also an express violation of the Administrative Procedure Act. Section 554(d)(2) of Title 5 provides in part:

> An Employee or Agent engaged in the performance of investigative or prosecuting functions for an Agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 557 of this Title, except as witness or counsel in public proceedings.

At oral argument on July 18, 1996, the government expressly conceded that the ex parte meeting between Keep and Deer violated 5 U.S.C. § 554(d)(2). TR. at 41. (" . . . it was violated, yes, there's no question, Your Honor.").

The government attorney, Scott Keep, was the Department of Interior's representative and counsel, and he argued and defended the Department's position in the proceedings before the Administrative Law Judge. As an advocate, he was prohibited from participating in, advising, or assisting the Assistant Secretary with her final decision as to tribal recognition for the Samish.

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[10] Scott Keep was the lawyer who argued the case before this Court in 1992, and therefore it is inconceivable that he did not read the Ninth Circuit decision sometime *before* the November 8, 1995 ex parte meeting with the Assistant Secretary.

Nevertheless, Mr. Keep, obviously unfazed by statements of disapproval from this Court and the Ninth Circuit, and with apparent disregard for both statutory and traditional standards of fair play, met directly with the ultimate decision maker and urged her to deny federal recognition to the Samish. Although unsuccessful in that attempt, he nevertheless succeeded in persuading the decision maker to reject several of the ALJ's proposed findings and instead substitute alternative findings more palatable to the Department. It is not sheer coincidence that the Final Determination signed by Assistant Secretary Ada Deer on November 8, 1995, is substantially the same as the draft decision prepared and submitted by Mr. Keep. Barsh Decl., docket no. 328, Ex. I. Accordingly, the Court concludes that the ex parte communication between Mr. Keep and Assistant Secretary Deer violated the Administrative Procedure Act.

3. *The Joint Status Report*

Plaintiffs also contend that the Government violated the Agreed Joint Status Report entered into by the parties in July 1992, and approved by the Court in September 1992. That report, docket no. 191, provided in part that written comments on the ALJ's findings and recommendations could be submitted to the Assistant Secretary within 30 days and that "within 60 days of receiving the findings and recommendation of the Administrative Law Judge, the Assistant Secretary shall either adopt or reject them, and issue a new decision as to the status of plaintiffs. . . ." The Joint Status Report also provided that the decision of the Assistant [1287] Secretary would constitute final agency action of the Department of Interior, unless the Secretary of the Interior determined

within 30 days that the decision should be reconsidered in accordance with 25 C.F.R. Part 83.

The plaintiffs contend that the Secretary of the Interior had only 30 days from the date of the Assistant Secretary's final decision to accept or reject the Assistant Secretary's decision. Because the Secretary's decision was issued more than 30 days after November 8, 1995, the date of the Assistant Secretary's decision, the plaintiffs argue the Secretary's decision was contrary to the agreement of the parties and therefore void. The Court rejects this argument. The failure of the Secretary to act within 30 days of the Assistant Secretary's decision does not render the decision void. Although a technical violation of the Joint Status Report, the Court concludes that this violation alone provides an insufficient basis for vacating the agency's decision.

The Court also rejects the plaintiffs' argument that the Joint Status Report limited the role of the Assistant Secretary to accepting or rejecting the ALJ's findings. The language of the Joint Status Report does not prohibit the Assistant Secretary from modifying the recommendations of the Administrative Law Judge, and the Court refuses to vacate the modified findings on those grounds alone.

The Court does find, however, that the Joint Status Report established the basic procedures which the parties were obligated to follow upon remand. The ex parte communications between attorney Scott Keep and the decision maker clearly were outside the procedures set forth in the Joint Status Report approved by this Court, and therefore violated the terms of the Court's order.

4. *The Remedy*

The Government acknowledges the impropriety of the previous proceedings on remand, but argues that the Court should once again remand this case to the Bureau of Indian Affairs for further proceedings. The Samish object to any further delays and contend that, at best, remand would result in reinstatement of the findings and, at worst, "it will lead to another appeal, in a dispute that has already sapped plaintiffs of 20 years of their lives." Plaintiffs' Response to Questions Posed by the Court (docket no. 312) at 10.

The purpose of this Court's original remand order in 1992 was to take this case out of the political arena and to assure that the Samish would have their claims heard by an impartial and disinterested fact finder. The procedures outlined in the Joint Status Report, and adopted by the Court, reflect this intent. This purpose was substantially frustrated, however, by the government lawyer's improper ex parte communications with the decision maker, which resulted in a violation of the plaintiffs' rights to due process.

In most cases where a litigant successfully challenges an agency's action, the appropriate remedy is to remand the proceeding for agency action not inconsistent with the decision of the reviewing court. III Davis & Pierce, *Administrative Law Treatise* § 18.1 (1994). There are, however, limitations to this rule. When "administrative misuse of procedure has delayed relief," the court is not limited to "mere remand." *Benten v. Kessler,* 799 F. Supp. 281, 291 (E.D.N.Y. 1992). The court has the "equitable power to order relief tailored to the situation." *Id.; Sierra Pacific Indus. v. Lyng,* 866

F.2d 1099, 1111 (9th Cir. 1989) (court reviewing agency action may "'adjust its relief to the exigencies of the case.'") (quoting *Ford Motor Co. v. NLRB,* 305 U.S. 364, 373, 59 S. Ct. 301, 307, 83 L. Ed. 221 (1939)).

Other courts have granted relief without remand in the social security context when the agency has caused substantial delay. *See Stone v. Heckler,* 761 F.2d 530, 533 (9th Cir. 1985) (ordering benefits rather than remanding when ALJ's finding of "not disabled" was not supported by substantial evidence, the record was fully developed, and further proceedings would "only prolong an already lengthy process"); *Kelly v. Railroad Retirement Bd.,* 625 F.2d 486, 496 (3rd Cir.1980) (refusing to remand for further proceedings when delay was already unreasonable); *Carr v. Sullivan,* 772 F. Supp. 522, 531 (E.D. Wash. 1991).

[1288] The import of these cases is that when agency delays or violations of procedural requirements are so extreme that the court has no confidence in the agency's ability to decide the matter expeditiously and fairly, it is not obligated to remand. Rather than subjecting the party challenging the agency action to further abuse, it may put an end to the matter by using its equitable powers to fashion an appropriate remedy.

This case presents unusual circumstances that make a remand inappropriate. The proceedings before the Bureau of Indian Affairs have been marred by both lengthy delays[11] and a pattern of serious procedural due

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[11] The Samish contend that the Assistant Secretary's failure to render her final agency decision within 30 days as required by the parties Court-approved stipulation, caused the tribe to miss fiscal year 1996 application deadlines for funding. Remand would further delay the

process violations. The decision to recognize the Samish took over twenty-five years, and the Department has twice disregarded the procedures mandated by the APA, the Constitution, and this Court. Mr. Keep and his superiors[12] must have recognized the fundamental unfairness involved with having Department officials argue ex parte to the agency decision maker the contentions that had already been considered and rejected by the Administrative Law Judge. The Court concludes that a remand to the agency will cause further delay and expense while subjecting the Samish to a substantial risk of suffering the same procedural violations that they have now endured twice over the past ten years.

5. *Reinstatement of Contested Findings by the Court*

The Samish seek to have the Court reinstate three particular findings of the ALJ that were rejected by the Assistant Secretary.[13] They argue that these proposed

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Samish's ability to obtain benefits which were reduced or eliminated while they fought for federal recognition.

[12] The senior legal officer of the Bureau of Indian Affairs, Associate Solicitor Robert Anderson, was also aware of Mr. Keep's involvement in the ex parte meeting with the Assistant Secretary. *See* Barsh Decl., docket no. 328, Ex. J.

[13] The three proposed findings that were rejected by the Assistant Secretary were as follows:

(A) a substantial part of the Noowhaha tribe merged historically with the Samish, such that the present-day Samish Tribe may have interests in traditional Noowhaha territory which derive through these Noowhaha family lines (*see* Final Determination at 12-13, 32);

(B) the Samish family lines that settled on the Swinomish Indian Reservation did not relinquish their Samish affiliation, so there

findings were necessary to the tribal recognition process. Plaintiffs contend that the first finding justifies including in the plaintiffs' tribe members of several families which are of Noowhaha, rather than Samish decent [*sic*]; the second finding establishes a necessary basis for the plaintiffs to continue to assert interests, as a tribe, in the traditional territory of the Samish; and the third finding goes to the potential liability of defendants, as a matter of the Federal-Indian Trust relationship, for wrongfully denying plaintiffs benefits and generating twenty years of administrative proceedings and litigation. Plaintiffs' Responses (docket no. 312) at 5-6.

Rather than remand to the Department, the Court reinstates the contested findings. Failure to do so would subject the Samish to relitigation of issues already decided in their favor by the Administrative Law Judge and improperly rejected by Assistant Secretary Deer. That would be an unacceptable outcome under all the circumstances of this case. Administrative Law Judge Torbett conducted a thorough and proper hearing on the question of the Samish's tribal status, and made exhaustive proposed findings of fact after considering all the evidence and the credibility of the witnesses. Ada Deer, the decision maker, arbitrarily and in violation of clearly established law rejected those proposed findings and inserted new findings drafted by Mr. Keep. Under

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was no historical merger of the Samish with the Swinomish (*see* Final Determination at 35); and

(C) the omission of the Samish from a list of tribes prepared by the Defendants in the 1960s was neither based on actual research, nor was it intended to be used as the basis for determining which Indian groups are to be recognized by the United States (*see* Final Determination at 16, 38-39).

these limited circumstances, where the agency has repeatedly **[1289]** demonstrated a complete lack of regard for the substantive and procedural rights of the petitioning party, and the agency's decision maker has failed to maintain her role as an impartial and disinterested adjudicator, it is appropriate for this Court to "use its equitable power to order relief tailored to the situation." *Benten,* 799 F. Supp. at 291; *see also Sierra Pacific Indus.,* 866 F.2d at 1111. In this case, the government should be bound by the findings of the Administrative Law Judge, which were prepared after all parties had an opportunity to be heard. The ALJ carefully considered and weighed all the evidence, including the testimony of the parties' witnesses, and made findings consistent with the evidence. Assistant Secretary Deer's ultimate rejection of the findings was based solely on improper ex parte contacts with one of the parties' lawyers. Under these circumstances, reinstatement of the rejected findings is the appropriate remedy.

Finally, the Court finds that Mr. Scott Keep's conduct in connection with the ex parte meeting with the Assistant Secretary was particularly egregious and in violation of the Court's order incorporating the terms of the Joint Status Report.[14] Accordingly, the Court finds

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[14] Mr. Keep has participated to some degree in discussions concerning the legal status of the Samish since mid-1974, and Mr. Keep's Branch (formerly the Branch of Tribal Government and Alaska) was involved in opposing the Samish tribe's efforts to seek a writ of certiorari to the Ninth Circuit in *United States v. Washington. See* Defendants' Opposition Brief (docket 288), Ex. 4 (interrogatory answers by Mr. Keep). He had direct involvement in the case of *United States v. Washington* as early as 1972. *See* Exhibits to Keep deposition, Ex. 1 to Plaintiffs' Reply (docket no. 293). Mr. Keep was directly involved in the ex parte contacts in the late 1980s that ultimately led this Court to

his conduct in contempt of court and ORDERS Mr. Keep to refrain in the future from taking any action in connection with this case or participating in any further proceedings involving the Samish Tribe.

CONCLUSION

The ex parte communications between the decision maker, Assistant Secretary Ada Deer, and the Department's lawyer, Scott Keep, violated the Administrative Procedure Act, the Samish Tribe's due process rights under the Fifth Amendment, and this Court's Order incorporating the terms of the Joint Status Report. Because the Bureau of Indian Affairs has repeatedly and consistently disregarded the rights of the Samish and caused extraordinary delay in the processing of the Samish's claims, the Court finds that it should grant relief without remand to the agency. The appropriate remedy under the unique circumstances of this case is to reinstate the three contested findings of the Administrative Law Judge that were arbitrarily rejected by the decision maker after her ex parte meeting with the government's lawyer.

IT IS SO ORDERED.

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remand for further proceedings under the Administrative Procedure Act.

APPENDIX H

Bureau of Indian Affairs

Supplemental Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Supplemental Notice of Final Determination.

SUMMARY: The Assistant Secretary—Indian Affairs has determined that the Samish Tribal Organization (STO) exists as an Indian tribe within the meaning of Federal law pursuant to the acknowledgment regulations, 25 CFR Part 83, that became effective October 2, 1978. The Secretary has directed that the determination be made final and effective immediately.

DATES: This supplemental notice of determination is final and effective immediately.

FOR FURTHER INFORMATION CONTACT: Office of the Assistant Secretary—Indian Affairs, (202) 208–7163.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

On March 29, 1996, the Assistant Secretary—Indian Affairs issued a notice of her determination pursuant to 25 CFR Part 83 that the Samish Tribal Organization existed as an Indian tribe. The notice instructed the Director, Portland Area Office, Bureau of Indian Affairs, to verify the membership list and to develop with the tribe a plan and budget for the implementation of

the Assistant Secretary's decision and the provision of services to the members of the Samish Tribal Organization. The notice was published in the Federal Register on April 9, 1996 (61 FR 15825).

The notice indicated that two tribes had requested that the Secretary direct the Assistant Secretary to reconsider her decision and that the Secretary was considering whether he had authority to direct the Assistant Secretary to reconsider and, if he had that authority, whether he should direct her to reconsider. The notice also indicated that the Samish Tribal Organization has not requested administrative reconsideration of the Assistant Secretary's determination to acknowledge its existence as an Indian tribe but had filed suit seeking to require a reinstatement verbatim of the Administrative Law Judge's recommended decision and findings of fact. Lastly, the notice stated that the determination would be effective 60 days after the date on which the notice appeared in the Federal Register, or June 8, unless the Secretary of the Interior requested a reconsideration by the Assistant Secretary—Indian Affairs pursuant to 25 CFR § 83.10(a)-(c).

On April 26, 1996, the Secretary responded in writing to the two requests for reconsideration. He concluded that there were significant questions as to his authority to grant the requests because of the unique terms and circumstances of the remand from the District Court which governed the Assistant Secretary's determination. The Secretary noted that, in accordance with the district court's remand to the Department, the Assistant Secretary's determination did not resolve the nature and extent of the treaty rights, if any, of the Samish Tribal Organization so the treaty rights of the tribes request-

ing reconsideration were not affected by the determination. The Secretary concluded that the Assistant Secretary's determination should be deemed final agency action and effective April 26, 1996. Accordingly, he directed that this notice be published.

Dated: May 20, 1996.

Ada E. Deer,

Assistant Secretary—Indian Affairs.

[FR Doc. 96–13438 Filed 5–23–96; 2:47 pm]

APPENDIX I

Bureau of Indian Affairs

[K00360–95/35420]

Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final determination.

SUMMARY: This determination is made pursuant to the acknowledgment regulations, 25 CFR Part 83, that became effective October 2, 1978. All citations are to those regulations unless otherwise stated.

Pursuant to 25 CFR § 83.9(h), notice is hereby given that the Assistant Secretary—Indian Affairs has determined that the Samish Tribal Organization (STO) exists as an Indian tribe within the meaning of Federal law.

This notice is based on a determination that the Samish Tribal Organization meets all of the seven mandatory criteria for acknowledgment set forth in 25 CFR § 83.7 and, therefore, meets the requirements necessary for a government-to-government relationship with the United States.

DATES: This determination is final and will become effective 60 days after the date on which this notice appears in the Federal Register unless the Secretary of the Interior requests a reconsideration by the Assistant Secretary—Indian Affairs pursuant to 25 CFR § 83.10(a)–(c).

FOR FURTHER INFORMATION CONTACT: Office of the Assistant Secretary—Indian Affairs, (202) 208–7163.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs (ASIA) by 209 DM 8.

This determination is made under the acknowledgment regulations, 25 CFR Part 83, which became effective in 1978. All citations are to those 1978 regulations. Revised acknowledgment regulations became effective March 28, 1994 (59 FR 9280). Petitioners under active consideration at the time the revised regulations became effective on March 28, 1994, were given the option to be considered under the revised regulations or the previous regulations. The Samish Tribal Organization requested in writing to be considered under the 1978 regulations.

A final determination to decline to acknowledge the Samish Tribal Organization as a tribe was published in the Federal Register on February 5, 1987 (52 FR 3709). The Secretary declined a request for reconsideration and the determination became effective May 6, 1987. In 1992 in *Greene* versus *United States*, the court declined to consider whether the STO had treaty fishing rights. However, the court vacated the 1987 determination on the grounds that a formal hearing had not been given to the petitioner on the question of its tribal status in connection with the eligibility of its members for Federal programs. The court ordered that a new hearing be held which conformed to the requirements of the Administrative Procedures [*sic*] Act. The Assistant Secretary's determination does not include a determination of the

nature or extent of the rights, if any, of the STO or its members to fish pursuant to any treaty.

Under instructions from the court and agreements between the parties, proceedings before an Administrative Law Judge (ALJ) of the Department of Interior's Office of Hearings and Appeals began in 1992. A formal hearing before the ALJ was held in Seattle, Washington, from August 22 to August 30, 1994. The court's instructions required the ALJ to make a recommended decision to the Assistant Secretary—Indian Affairs on whether the STO should be acknowledged to exist as an Indian tribe.

The ALJ signed a recommended decision to acknowledge the Samish Tribal Organization on August 31, 1995. This recommended decision was forwarded through the Director, Office of Hearings and Appeals, and received by the Assistant Secretary on September 11, 1995. Under the procedures established by the court, the parties and *amici curiae* had 30 days from the receipt of the decision by the ASIA, or until October 11, 1995, to submit comments to the ASIA on the ALJ's recommended decision. The procedures also provided that the ASIA would issue a final determination within 30 days of receipt of comments.

Comments opposing acknowledgment were received from the Swinomish Tribal Community, the Tulalip Tribes Inc., and the Upper Skagit Tribe. Comments were received from the STO urging the approval of the recommended decision, commenting on the implementation process and suggesting remedial actions to the STO deemed necessary. The chairperson of STO by memorandum of September 15 requested a meeting with the

ASIA on September 27 to discuss formal recognition and to begin the budget and natural resources process. The requested meeting with the ASIA was not held, although the former tribal chairman did speak with the ASIA briefly at a conference at the end of October. Comments were also provided to the ASIA by the Bureau of Indian Affairs, which did not participate in the deliberations on this decision.

The Assistant Secretary has determined to acknowledge the existence of the STO as an Indian tribe. The reasoning underlying her determination incorporates some of the ALJ's findings and rejects other findings. The determination incorporates additional findings based on the administrative record, including materials presented in the hearing, in order to document in the final determination that the STO satisfied mandatory criteria that the ALJ's decision did not specifically address.

In the 1987 determination, vacated by the court, the STO was found to meet the criteria in §§ 83.7 (d), (f) and (g). Both parties to the 1992 proceedings accepted that those criteria were met by the Samish Tribal Organization. No evidence or arguments were submitted sufficient to refute the proposed finding that the Samish Tribal Organization met criteria d, f, and g. Consequently, they were not at issue in the proceedings before the ALJ. We find for purposes of this decision that the Samish Tribal Organization meets the criteria in §§ 83.7 (d), (f) and (g) of the 1978 acknowledgment regulations.

We find that the Samish Tribal Organization has been continuously identified throughout history as Indian or aboriginal, has existed as a distinct community

since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe or families which became incorporated into that tribe. We conclude, therefore, that the Samish Tribal Organization has met the mandatory criteria for acknowledgment in 25 CFR 83.7, including specifically, the requirements of the criteria in §§ 83.7 (a) through (c) and 83.7(e) of the 1978 acknowledgment regulations. This determination is based on the membership list used for the 1987 administrative decision under 25 CFR Part 83. This list will become the base membership roll of the STO, subject to verification that the individuals on it consent to be listed as members.

The courts have made it clear that the issue of what treaty rights the STO may have, if any, are not an issue on remand to the Department. Therefore, we make no determination as to what rights, if any, the STO or its members may have pursuant to any treaty.

The Joint Status Report filed in July 1992 by the parties to *Greene* v. *Lujan* provided:

The decision of the Assistant Secretary shall be final agency action for the Department of the Interior, unless the Secretary of the Interior determines within 30 days that is [sic] should be reconsidered in accordance with 25 CFR Part 83, in which case the Secretary shall state the basis for this decision and establish the procedures and timetable to be followed on reconsideration.

At the hearing on the Joint Status Report, the court found that:

The government and the Samish also agree that the Assistant Secretary's decision should constitute final agency action unless the Secretary of the Interior determines within 30 days that the decision should be reconsidered.

Although the amicus argues otherwise, I will order that what the Samish and the government have agreed to will be the order of this Court and it is so ordered.

Two tribes have requested that the Secretary direct the Assistant Secretary to reconsider her decision. The Upper Skagit Indian Tribe by letter of January 3, 1996, requested that the ASIA's decision to acknowledge the STO be reversed and the matter returned to the ALJ for a full hearing on the question of the Upper Skagit Indian Tribe's successorship to the Nuwha'ha. The Swinomish Tribal Community by letter of January 5, 1996, requested that the Secretary direct reconsideration of the ASIA's decision to recognize the Samish Tribe. The Swinomish Tribal Community had been denied the right to participate before the ALJ as a party but had been granted *amicus curiae* status. Under the 1978 regulations, the Secretary can for any reason request the ASIA to reconsider and the Secretary shall make such a request in certain circumstances. *See* 25 CFR 83.10.

The Secretary is considering whether he has authority to direct the Assistant Secretary to reconsider and, if he has that authority, whether he should direct her to reconsider. The question of the Secretary's authority arises from an ambiguity in the Joint Status Report which states that the decision of the Assistant Secretary shall be final agency action but also indicated that reconsideration will be done in accordance with 25 CFR Part

83. There is also an ambiguity with regard to the time within which the Secretary must act since the time for action under Part 83 is 30 days from the date of publication of the notice in the Federal Register and the Joint Status Report simply states the decision will be made within 30 days.

In accordance with §§ 83.9 and 83.10 of the 1978 regulations, this determination will in any event become effective in 60 days from its publication in the Federal Register unless the Secretary of the Interior requests that the Assistant Secretary-Indian Affairs reconsider her decision.

The Samish Tribal Organization has not requested administrative reconsideration of the Assistant Secretary's determination to acknowledge its existence as an Indian tribe. However, STO has filed suit seeking to require a reinstatement verbatim of the ALJ's recommended decision and findings of fact.

The Director, Portland Area Office, Bureau of Indian Affairs, is instructed to verify the membership list and to develop with the tribe a plan and budget for the implementation of the ASIA's decision and the provision of services to the members of the Samish Tribal Organization.

Dated: March 29, 1996.

Ada E. Deer,
Assistant Secretary—Indian Affairs.

APPENDIX J

UNITED STATES
DEPARTMENT OF THE INTERIOR

Prepared in response to recommended finding
by Administrative Law Judge, David L. Torbett,
Aug. 31, 1995

Approved: Nov. 8, 1995

FINAL DETERMINATION
TO ACKNOWLEDGE
THE SAMISH TRIBAL ORGANIZATION
AS A TRIBE

/s/ [Ada E. Deer]
Assistant Secretary – Indian Affairs

EVALUATION OF THE SAMISH TRIBAL ORGANIZATION UNDER 25 CFR 83

INTRODUCTION

This decision of the Assistant Secretary – Indian Affairs (ASIA) is an evaluation of the Samish Tribal Organization (STO) under the acknowledgment regulations (25 CFR 83). It also includes supplementary findings concerning the history and status of the petitioner, the historical Samish tribe, and the Federal acknowledgment process.

This determination is made under the acknowledgment regulations which became effective in 1978. Revised acknowledgment regulations became effective March 28, 1994 (59 FR 9280). Petitioners under active consideration at the time the revised regulations became effective in 1994 were given the option to be considered under the revised regulations or the previous regulations. The Samish requested to be considered under the 1978 regulations.

In accordance with sections 83.9 and 83.10 of the 1978 regulations, this determination will become effective in 60 days of its publication in the *Federal Register* unless the Secretary of the Interior requests that the Assistant Secretary – Indian Affairs reconsider her decision.

ADMINISTRATIVE HISTORY

A final determination to decline to acknowledge the Samish Tribal Organization as a tribe was published in the *Federal Register* February 5, 1987 (52 FR 3709). The Secretary declined a request for reconsideration and the determination became effective May 6, 1987. In a 1992 decision in *Greene v. United States*, the court vacated the 1987 determination on the grounds that a formal hearing had not been given to the petitioner. The court ordered that a new hearing be held which conformed to the requirements for a formal adjudication under the Administrative Procedures Act.

Under instructions from the court, proceedings before an Administrative Law Judge (ALJ) of the Department of the Interior's Office of Hearings and Appeals began in 1992. A formal hearing before the ALJ was held in Seattle, Washington, from August 22 to August 30, 1994.

The court's instructions required the ALJ to make a recommended decision to the ASIA whether the STO should be acknowledged to exist as an Indian tribe.

The ALJ issued a recommended decision to acknowledge the Samish Tribal Organization. The recommended decision, which was dated August 31, 1995, was received by the ASIA on September 11, 1995. The parties and amicus curiae had 30 days from the receipt of the [2] decision by the ASIA, or until October 11, 1995, to submit comments on the ALJ's recommended decision. The procedures established by the court provided that a final determination be issued by the ASIA within 30 days of receipt of comment.

BASES OF THIS DECISION

This decision is based on weighings of evidence and findings of fact by the ALJ in his recommended decision to acknowledge the Samish. Only those findings of fact by the ALJ which are specifically referred to and accepted here form the basis of this decision. Some findings of fact by the ALJ have been rejected as clearly erroneous and contrary to evidence and testimony in the record. All findings of fact by the ALJ which are inconsistent with this report are rejected whether referred to specifically or not. This decision makes some supplementary findings of fact which are based on the ALJ's findings and our review of the record.[1]

The ALJ's recommended decision interprets some of the provisions of the acknowledgment regulations in a way

[1] We have reviewed also and considered the evidence and arguments submitted by the Swinomish Tribal Community, Tulalip Tribes, and the Upper Skagit Indian Tribe.

that departs from precedents or does not rely upon an analysis of precedents. In this decision, the Government has rejected the ALJ's interpretations which are contrary to established practice and interpretation of the regulations in previous acknowledgment decisions.

The ALJ's decision upholds the acknowledgment regulations. The ALJ's decision also agreed with the Government's position as to the standard of proof to be met in presenting and evaluating evidence that the petitioner was a tribe under the criteria in 25 CFR 83.7. The ALJ incorporated that portion of the Government's brief dealing with standards of proof into his decision and used the Government's standard in making his decision (recommended decision 3).

MEMBERSHIP OF THE SAMISH TRIBAL ORGANIZATION

In order to evaluate the character of a petitioning group, the acknowledgment findings require a complete list of the petitioner's members. In this case, there are two lists. The membership list used for the 1987 administrative decision under 25 CFR 83 will be referred to here as the 1986 list. A second list was compiled by the Government in 1994, based on several lists provided by the STO in response to a discovery request for an updated membership list, and on hearing testimony by the STO Secretary which explained the lists. This membership list will be referred to as the 1994 list.

[3] Based on a review of the evidence used by the ALJ to support his findings, it is clear that the ALJ relied on the 1986 list for purposes of defining the STO. We defer to this decision. This finding, therefore, also uses the 1986 list.

For tribes acknowledged under 25 CFR 83, the acknowledgment roll becomes the base roll of the newly acknowledged tribe. The 1986 list will be used as the base roll of the STO, subject to verification that individuals consent to be listed as members. This roll cannot be modified to such an extent that the validity of the acknowledgment decision becomes questionable. However, individuals may be added to the roll who are politically and socially part of the tribe and meet its membership requirements.

Evaluation under 25 CFR Part 83

INTRODUCTION

The acknowledgment regulations require that a petitioner must meet all seven criteria set forth in section 83.7 to be acknowledged. This decision begins with a statement of the three criteria which have not been in dispute. Separate evaluations under each of the four disputed criteria are then presented. Each evaluation describes the main findings by the ALJ which form the basis for the evaluation. In addition, each evaluation indicates the findings of the ALJ which have been rejected and the supplementary findings which have been adopted in relation to the criteria. Appended to the decision are additional and more detailed findings by the ALJ which also form the basis for this determination.

CRITERIA FOR ACKNOWLEDGMENT

To be acknowledged a petitioner must meet all of the criteria for acknowledgment in 25 CFR 83.7 of the applicable 1978 regulations. These are:

83.7(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal."

83.7(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

83.7(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other [4] authority over its members as an autonomous entity throughout history until the present.

83.7(d) A copy of the groups present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures though which the group currently governs its affairs and its members.

83.7(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity.

83.7(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

83.7(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

CRITERIA NOT IN DISPUTE

In the 1987 determination, vacated by the court, the Samish tribal Organization was found to meet the criteria in 83.7(d), (f) and (g). Both parties accepted that those criteria were met by the STO. Consequently, they were not at issue in the proceedings before the ALJ. We find for purposes of this decision that the STO meets the criteria in 983.7(d), (f) and (g).

CRITERION A—EXTERNAL IDENTIFICATION

The ALJ's decision found that "[t]hese findings of fact support the positive finding for the Petitioners as to *each* of the contested criteria (emphasis added)" (recommended decision 21). Although there was little evidence that there were external identifications of the STO for substantial periods of time, we defer to this finding. The ALJ was apparently persuaded that there had been substantially continuous external identification of the petitioner as an Indian entity and, therefore, that the STO meets the criterion in 83.7(a).

We do not, however, find the ALJ's finding 130 to be relevant to criterion (a) because it deals with the identification of individuals, which criterion (a) requires external identification of the *group's* Indian identity. This finding is therefore rejected.

[5] CRITERION B—COMMUNITY

Summary evaluation

The Samish were parties to the 1855 Treaty of Point Elliot. The Samish village at Samish Island was replaced in 1875 by a village established at New Guemes. This was maintained until around 1905. The Samish from, or associated with, this village moved to the Swinomish and Lummi Reservations. This movement began before 1900 and continued into the 1920's. After 1905, some Samish from this village became part of a small Indian settlement at Ship Harbor, which was largely Samish. This settlement persisted until approximately 1930. Some other Samish families, descendants of marriages with non-Indians, did not move to the reservations.

The reservation families continued to be somewhat distinct as a Samish community even after moving to the reservations, notwithstanding their social and political participation in the communities which emerged on those reservations. From the late 19th century to the present, the nonreservation families continued in significant contact with the reservation families, beyond simply being in the same organization, even though they had married non-Indians and lived elsewhere. A portion of these reservation and non-reservation families comprise the STO today.

Based on these findings, we conclude that the STO meets the requirements of criterion 83.7(b).

Findings by the ALJ which have been accepted

The administrative law judge found in part:

> A certain number of reservation and off reservation Samish intended to remain Samish. This core have in accordance with the regulations preserved the integrity of the Samish tribe (Recommended decision 22).
>
> There is significant evidence in the record which supports the proposition that certain off reservation Samish continued to be a part of the Samish community (Recommended decision 21).
>
> The Cumshelitsha-Whulhoten (sic) family does not live on a reservation, but they have continued to participate with the families that are not classified as being Indian descendants throughout. . . . (Recommended decision 6).

Additional findings by the ALJ relevant to this criterion are cited in the sections of adopted findings included at the end of this decision.

[6] Additional findings

These supplemental findings of fact are based on the ALJ's findings concerning the existence of community. They are also based on his interpretation of the requirement for autonomy under the regulations, as modified in this decision (see discussion under criterion 83.7(c) below).

1. The 31 percent of the 1966 STO members who are enrolled in a recognized tribe also participate socially and politically in those reservation communities. Members have filled offices and held leadership roles in organizing the tribal governments under the Indian Reorganization Act.

2. The STO maintained a 1/8 Samish blood degree membership requirement until 1974, when is was changed to lineal descendancy. Blood degree was a political issue between the reservation and non-reservation family lines in the 1970's. This conflict is evidence that the STO had made significant distinctions between members and non-members and that membership had been based on more than descendancy alone.

3. Members of the non-reservation family lines were identified on the 1920 Federal census and on employment registers of the Ship Harbor canneries in the 1920's as Indian or part-Indian. This evidence supports a finding that they were socially distinct from non-Indians.

4. Geographical dispersion of a group's membership does not foreclose tribal existence, but neither does concentration in a broadly defined geographical area provide evidence for it. While a concentration of many members within, for example, a 50-mile radius creates an opportunity for these individuals to interact on a regular basis, it is not evidence that such interaction has occurred.

Findings by the ALJ which have been rejected

1. The ALJ's findings concerning intermarriage, genealogy and blood degree from his summary of evidence, p. 9, and findings 154-63 and 191-2 in Appendix B of the recommended decision are specifically rejected.

We affirm the interpretation of the regulations, based on past decisions, that where the members of a petitioner have only distant genealogical relationships with each other, this does not provide any evidence for the exis-

tence of community. The absence of marriages among a group's members over many generations, while not necessarily evidence that a community does not exist, makes it likely that there were no social ties among members based on kinship, unless the contrary can be established using other [7] evidence. A relationship as distant as second or fifth cousin between two individuals is far too distant to presume, on genealogical evidence alone, that a significant social tie exists between them. Such a genealogical relationship may provide the basis for actual social ties or relationships characteristic of a community, but they cannot be presumed to exist without direct evidence.

2. The Department testified that certain portions of the membership "with a few exceptions, had little or no knowledge of or contact with others in the group, particularly if you filter out the possible participation in meetings of the organization." The ALJ's comment on this testimony implied that participation in the organization should be considered a valid form of social interaction to show that a community exists. This comment is specifically rejected (recommended decision 17). We affirm that a tribe is more than a voluntary association (see also discussion of voluntary organizations under criterion c).

CRITERION C—POLITICAL INFLUENCE

Summary Discussion

The historical Samish tribe as it existed off-reservation until after 1900 was centered on a distinct settlement and had well-established traditional leaders. The next generation of traditional leaders, such as Charlie Ed-

wards and Tommy Bob, moved to the reservations. They were influential among the Samish, and more generally on the reservations, as spiritual and cultural leaders as well as leaders in pursuing hunting and fishing rights. They remained active until as late as the 1940's. Charlie Edwards, perhaps the most influential person, survived until 1948. Contemporary with them were other, off-reservation leaders. These, especially Sarsfield Kavanaugh, most active from around 1912 to the late 1920's, and Donald McDowell, active from the 1930's to around 1950, were particularly important in dealing with non-Indian institutions on behalf of the Samish.

After 1951 a formal council was established which has been demonstrated to have had significant support of, and contact with, the STO membership. The council pursued goals which reflected significant interests and concerns of the membership. Internal conflicts in the 1970's demonstrated the involvement of a broad spectrum of the STO membership in its political processes.

We conclude that the STO meets the requirements of criterion 83.7(c).

Findings by the ALJ which have been accepted

[8] The existence of a community with leadership before the end of the off-reservation New Guemes settlement in 1905 was not contested in the 1987 determination and is accepted here.

The ALJ has presented several findings concerning political leadership and influence after 1905. These findings are adopted here.

The ALJ concluded:

> There is sufficient evidence in the record to show the continuation of the Samish tribal functions between 1935 and 1951. . . . There is oral history of meetings during that time and there is documentary evidence. Mary Hanson's [sic] testimony supports the proposition that the tribe continued to exist as a tribal entity during this period of time. Recommended decision 21.
>
> There are other important reasons to believe that the Samish continued to exist as a tribe during this critical period of time. There is a continuity of leadership. These leaders who emerged from one generation were often followed in succeeding generations by their children and grandchildren. They continued to maintain influence with the tribe throughout the history of the tribe. The Edwards family in particular have been leaders since almost the turn of the century and are still leaders in the tribal movement. There are other leaders such as Sas Kavanaugh and Don McDowell who demonstrated tribal leadership at certain times during the tribes history. Recommended decision 21.

Although this discussion by the ALJ refers to 1935-51 explicitly, the individuals referenced and the statements made in that discussion constitute a finding of tribal political leadership for a much longer period, from the early 1900's until the present (see also the portions of the ALJ's summary of evidence and supplementary findings of fact appended to this decision). Further, the statements and findings of fact constitute a finding of tribal political leadership which included the nonreservation families. This is a finding that the relationship between leaders and followers is based on more than

simply that the leaders are the leaders of a voluntary organization. The ALJ found that the formal organization created in 1951 was a revitalization of an existing tribe not a newly created organization.

Discussion of Criterion 83.7(c)

The most culturally distinct and socially cohesive portion of the petitioner's membership is the 31 percent that are enrolled with recognized tribes. In the 1987 final determination on the STO, the activities of this portion of the STO membership was not included [9] as evidence for the evaluation under criterion 83.7(c) because they historically have participated socially and politically in the recognized tribes.

The ALJ specifically included the activity of the members of recognized tribes in evaluating the STO. For the reasons set forth below, we find that the political participation of the petitioner's members who are also enrolled in a recognized tribe is valid evidence for meeting criterion 83.7(c) in this case. In addition, their social cohesion and social and cultural distinctions from non-Indians is valid evidence for demonstrating that the STO meets the requirements under 83.7(b) for demonstrating the existence of a community.

Criterion 83.7(c) requires the demonstration of "autonomous" political influence within the petitioning group. The regulations define "autonomous" in part as a group having ". . . its own means of making tribal decisions independent *of the control of any other Indian governing entity*" (emphasis added) (83.1(i)) of the 1978 regulations). The provisions of the regulations concerning autonomy, and the related language of 83.3(d) excluding

acknowledgment of "splinter groups" from recognized tribes, reflects the intent of the regulations that they not be used to break up an already recognized tribe. "Autonomy" is defined only in relation to the governing body of a recognized tribe, not in relation to non-Indian political bodies.

The ALJ found that being "socially and politically integrated" into another Indian community is not incompatible with "maintaining a distinct Samish identity." While maintenance of distinct tribal identities within a reservation is extremely common, the ALJ argues further that, "It is often necessary and always proper for people to participate in activities which control their immediate environment. However, in doing so, an individual's political affiliation is not changed because he or she associates with others of another political party (recommended decision 22)."

The ALJ's findings, however, could be interpreted to mean that if a petitioning group is internally cohesive and is exercising political influence within itself, the involvement of its members in another Indian political system (one which is part of a recognized tribe) would not violate the requirement under 83.7(c) that a group be politically *autonomous*. The ALJ's decision is rejected to the extent that it conflicts with the requirement for autonomous political process under the regulations.

However, in the present case, the political participation of a minority portion of a petitioner in a recognized tribe does not violate the bar to autonomy under 83.7(c) nor the prohibition in section 83.3(d) against recognizing "splinter groups" because a minority of the petitioner's

membership is involved. Where as in the present case, most of the petitioning group is not maintaining [10] a political relationship with a recognized tribe, and the petitioner is maintaining internal political processes independent of a recognized tribe, the autonomy of these processes is not violated by the additional political affiliation of a minority of its members.

The ALJ's discussion concerning Samish political participation in the reservations states in part that "to be a member of a tribe is a political affiliation and it is essentially a matter of intention on the part of the individual tribal member (recommended decision 22). His use of "intention" here is in the context of his finding that this political participation was of necessity and was therefore not an indication that political affiliation with the Samish had been abandoned. The Department continues to affirm its position that an "intent" to be part of the political process of a tribe which is not carried out or acted upon is not valid evidence for the existence of political influence within a tribe under the meaning of the regulations.

Additional findings concerning criterion c

These supplemental findings of fact are made based on the ALJ's findings concerning political influence and the interpretation, presented above, of the requirement for autonomy under the regulations.

1. The ALJ found that the political participation in the STO of members enrolled on reservations is valid evidence for political influence within the Samish. He also found that a community exists and that leadership in a broad sense exists. In the light of these findings by the

ALJ, conflicts within the STO in the 1970's over control of the STO and over what the blood degree requirement should be for membership have the character of political conflicts between interest groups or subdivisions within the STO.

While these conflicts tended to follow reservation-nonreservation lines, portions of the non-reservation Cubshelitsha line sided with the reservation Indians. Relatively large numbers of individuals were involved. This series of conflicts shows the mobilization of political interests of large sections of the membership over a sustained period. They are thus good evidence of internal political processes which support a demonstration of meeting criterion 83.7(c).

2. Because the ALJ found that the political participation in the STO of members enrolled on reservations is valid evidence for political influence within the Samish, some of the political issues raised by such individuals within the STO during the period between 1951 to present are entitled to some weight as evidence of political processes. These issues include fishing rights, whether to have a blood degree requirement for membership, cultural [11] preservation, obtaining a land base and rejecting per capita payment of the Samish claims award.

Findings by the ALJ which have been rejected

1. The ALJ's findings concerning political influence are rejected to the extent that they do not differentiate clearly between a social club or voluntary organization and a tribe. A tribe is significantly more than a voluntary organization and the ALJ's findings are rejected to the extent they imply otherwise.

To be a tribe there must be more social contact between members, and distinction from non-members, than exists in a club. Precedents in previous acknowledgment decisions as well as in court decisions and Federal law underlying the acknowledgment process have consistently made this distinction. These precedents were cited in the Department's brief but were not commented on or analyzed in the ALJ's recommended decision.

A voluntary organization consists of otherwise unconnected individuals who join an organization for limited purposes. Mere common participation in a voluntary organization does not in and of itself demonstrate that the members of a petitioner have the kind of social and political links with each other to form a social and political community within the meaning of the acknowledgment regulations.

The petitioner's witness William Sturtevant supported this view, testifying that "One can contrast it [a community] with more temporary groupings of . . . interest groups, groups of people that are meeting together, talking to each other for a limited purpose. Social clubs or professional society meetings or employees of the Bureau of Indian Affairs, or employees of the Smithsonian, in a sense those are communities, but not really what either anthropologists or the BAR definition applies, as I understand it [Tr. 40]."

2. The ALJ found that organizing for specific purposes such as government benefits or fishing rights was conclusive evidence that the tribe continued to exist and had political influence over its members (recommended decision 21). We reject the ALJ's conclusion here and elsewhere in his decision to the extent that the ALJ has

found that the creation of an organization for specific purposes in itself demonstrates political influence or internal tribal political processes under the regulations. Consistent with the regulations and their intent, as well as previous acknowledgment decisions, there must be evidence that these purposes reflect the needs and desires of the membership which have been communicated to the leadership.

[12] A voluntary organization can represent, or claim to represent, the interests of a large body of individuals without the individuals represented having significant interest in, or even knowledge about, what the council is doing. Such interest and knowledge is crucial to distinguish between a voluntary organization and a tribe.

3. The ALJ's summary of evidence (recommended decision 21) cites the STO's opening of an office, holding classes, running cultural programs and a museum and obtaining Federal grants. Operation of programs and obtaining grants are not in themselves evidence of political influence within the meaning of the regulations.

CRITERION E—ANCESTRY FROM THE HISTORICAL TRIBE

Introduction

The STO membership consists of individuals with ancestry from the historical Samish tribe and from other, non-Samish Indian families which historically became incorporated into the Samish tribe. This decision makes supplementary findings, based on the ALJ's findings, concerning the status of several family lines with ancestry from the Noowhaha tribe but not from the Samish tribe.

A supplementary finding has also been made concerning a family line whose ancestry as Samish had not been clearly established.

Additional finding concerning the Noowhaha

The ALJ found that the Samish tribe as it existed in 1926 was a tribal political unit. The Noowhaha in the present STO are descendants of specific Noowhaha families—Blackinton, Wooten and Barkhousen—which were members in 1926. Under the precedents for interpreting the acknowledgment regulations, when individual families from other tribes have become incorporated historically into a tribe, their ancestry qualifies as ancestry from the historical tribe. Therefore ancestry from the Blackinton, Wooten, and Barkhousen family lines qualifies as descent from the historical Samish tribe.

Rejected finding concerning the Noowhaha

The ALJ's finding that the Noowhaha and the Samish combined in pre-treaty times is rejected (recommended decision 22). A review of the specific findings of fact in the recommended decision (findings 63 and 67), the testimony of the plaintiff's witnesses, and their writings, which form part of the administrative record of this case, reveals that by "combined" these individuals meant that the two tribes formed an alliance in pre-treaty times (cited in Def. Brief 149). The Department has never objected to this characterization [13] of the relationship between the two tribes in pre-treaty times. However, a political alliance does not meet the requirements of criterion 83.7(e) for descent from a historical

tribe or from tribes which "combined into a *single autonomous political unit*" (emphasis added).

In addition, the Federal district court in *United States v. Washington*, No. 9213, Subproceeding 89-3 (W.D. Wash) (Shellfish) held that the present Upper Skagit Tribe is the successor to the historical Noowhaha. The district court made specific findings concerning the incorporation of Noowhaha into the Upper Skagit. These findings are consistent with the Department's previous findings concerning the Noowhaha which were that many Noowhaha joined the Upper Skagit Tribe and that the Upper Skagit had been considered to represent the Noowhaha in the past, although some Noowhaha families moved to the Swinomish and Lummi Reservations (ASIA 1982a, 1982b, 1987). The Department reaffirms that the present Upper Skagit Tribe is the successor to the historical Noowhaha.

Previously, the Indian Claims Commission, in its March 11, 1958, opinion concerning the claim of the Samish in Docket 261, rejected the Samish's contention there was a merger between the Samish and the Noowhaha tribe at the time of the Point Elliott treaty of 1855 (Indian Claims Commission 1958).

Additional Finding concerning Quacadum Wood family

Based on the ALJ's supplementary finding number 198, we conclude that the Quacadum-Wood family line, classified by the Department as only of Snohomish Indian ancestry in previous decisions, also had Samish ancestry.

The following portions of finding 198 are accepted.

> The Snohomish portion of the Tribe's membership consists of only one family line, decendants of Mary Quacadum Wood.
>
> In 1926, however, her [Mary Quacadum Wood's] daughter applied for membership in the Samish Tribe, and claimed that Mary Wood was Samish (TR:437; Exhibit D-7).
>
> Furthermore Dr. Hajda testified that Mary Wood's line "have been associated for a long time with the Samish," at least since the 1920s (TR:811).

The balance of this finding is rejected.

Evaluation under the Criterion

[14] The 1986 membership of the STO consisted of 61 percent who have Indian ancestry from the Samish tribe and 19 percent who have ancestry from Noowhaha families which historically became incorporated into the Samish tribe. The remaining members had Indian ancestry from other tribes. Thus, 80 percent of the 1986 members were descendants of the historical Samish tribe. We conclude, therefore, that the STO meets the requirements of criterion 83.7(e).

SUMMARY EVALUATION OF THE STO UNDER 25 CFR 83

The Samish Tribal Organization meets the requirements of each of the seven criteria in section 83.7 of the 1978 acknowledgment regulations. Therefore the STO meets the requirements to be acknowledged as a tribe.

[15] Additional Findings and Rejected Findings

These additional findings form part of this decision.

The Historical Distribution of Samish

The Swinomish Tribe intervened in *U.S. v. Washington* as the successor to its four constituent band, Samish, Swinomish, Lower Skagit and Kikiallus. The court ruled in its favor, finding that "The intervenor Swinomish Indian Tribal Community is the present-day entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to certain tribes and bands and groups of Indians which were parties to the Treaty of Point Elliot, 12 Stat. 927[."] (459 F. Supp. 1020 (1978)).

The Samish are one of four constituent tribes of the Swinomish Tribal Community, a recognized tribe (Upchurch 1936). The Samish, who maintained a village off-reservation during the 19th century, abandoned that village around the turn of the century. Some had moved to the Swinomish Reservation before that time, and others moved early in the 20th century. A few remained off-reservation at Ship Harbor until as late as 1930. Most of the Samish, including some historically incorporated Noowhaha families, went to the Swinomish Reservation. A smaller number went to the Lummi Reservation. A major component of the Samish at Lummi, the Cagey family, originally had gone to the Swinomish reservation and participated in that reservation's government. Only later did the Cageys move to the Lummi Reservation. A few families who descended from the Samish married non-Indians at an early date and did not go either to New Guemes or to any reservation. The

descendants of the latter represent the majority of the 1986 STO membership.

The leadership of the historic Samish tribe almost exclusively went to the Swinomish reservation. The leadership of the STO has historically included some of these leaders and individuals descended from these families, particularly the Edwards and Whulholten families.

The primary STO family lines from the reservations since 1951 have consisted of the Cagey, Whulholten, Underwood (Canadian Reserve members) and Tom (of Noowhaha descent) lines and part of the Edwards line. Most of the descendants of the Samish families who became part of the Swinomish and Lummi Reservations and those who joined Canadian Reserves identify as Samish. However, they are not members of the STO and have not appeared on any lists of members of the STO compiled from 1951 to the present.

The present-day membership includes only part of the Edwards descendants, a key family in the Samish leadership. Descendants of **[16]** the leaders from the Edwards family who are not members of the STO, but identify as Samish, are prominent today in the Swinomish Tribe's governing body. There are few living descendants of the Whulholten leadership line, and almost none are in the STO. Several reservation Samish family lines, which had individuals listed as members in 1926, now have no, or almost no, representation in the STO. These are the George, Paul, Stone and Jefferson families, which are part of the Lummi and Swinomish tribes.

Rejected findings concerning Reservation Samish

The ALJ's findings are rejected to the extent that they conclude that *all* members of recognized tribes who are of Samish ancestry and who have a Samish identity are members of the STO. The ALJ states that the four Swinomish reservation members of "Samish ancestry" who testified stated that they considered themselves Swinomish. The ALJ further states that these are "in opposition to the numerous members of the Samish tribe who live on reservations who consider themselves still to be Samish."

This contradicts the evidence in the record of this case as well as the testimony. The Samish individuals from Swinomish who testified clearly identified themselves as Samish but not members of the STO. Further, the plaintiff has admitted that there are such individuals, holding only that *certain* reservation families remained distinct.

Further, the ALJ's *overall* finding of tribal continuity is flawed because it does not recognize that there are reservation Indians who are of Samish descent and identify as Samish but are not members of the STO. There is no statement or analysis of this significant point in the ALJ's recommended decision.

Previous Federal Recognition of the Samish

The Samish have not been federally recognized as a separate and distinct tribe since the early 1900's, when the core of the tribe moved to the reservations. The court in *Greene* rejected the contention that the Samish petitioner was a recognized tribe until the 1970's in its deci-

sion of February 25, 1992. The court stated that "The evidence, when viewed in the light most favorable to the defendants, is not sufficient to establish that the BIA treated the Samish as a recognized tribe" (Order, p. 12). The testimony of the long-time STO Secretary Mary Hansen at the hearing concerning the Samish clearly identified them as unrecognized in the 1950's (TR 1038). The ALJ's supplementary finding 110 is rejected, as are all other findings to the extent that they imply that the Samish petitioner was a recognized tribe until the 1970's.

[17] Nature and Purpose of the government's research

A petitioner for acknowledgment under 25 CFR 83 has the burden to demonstrate through credible research that it meets all of the criteria in 83.7. Under section 83.6(d), "The Department shall not be responsible for the actual research on behalf of the petitioner."

The role of the Government's researchers who prepare recommended findings for the Assistant Secretary – Indian Affairs is that of evaluators who review the petitioner's research. The Government is not the primary researcher, though it may do supplementary research where necessary to complete its evaluation (see 25 CFR 83.9(a)). The Department's findings are thus based on research materials submitted by the petitioner, as supplemented and evaluated by its own research.

The comments and findings of the ALJ concerning this Department's research and the role of that research under 25 CFR 83 are based on an apparent misunderstanding of the role of this Department in the administrative process of acknowledgment. The ALJ's discus-

sion, summary of evidence, and findings on these subjects are rejected as not an accurate description of the nature and purpose of the Department's research. The rejected findings specifically include those where the Department's research is discussed on pages 7-8, 13, and 17 of the ALJ's discussion of evidence.

[18] Accepted ALJ Findings on Nature of the STO

I. Findings from the Summary of Evidence in the Recommended Decision

Introduction

The following portions of the summary of evidence in the ALJ's decision (recommended decision 4-18) are accepted and form part of the basis for this decision. Those portions not cited here or earlier in this decision are rejected as contrary to testimony and evidence in the record or contrary to established practice and interpretation of the regulations in previous acknowledgment decisions.

Excerpt

She [Yvonne Hajda] said the first generation or two following the treaty thought they [the Samish] would get a reservation of their own, but they never did. (Tr. 815). Some of the Samish moved to the Lummi reservation and others stayed off the reservation. Ibid. The off-reservation Samish continued to interact with those on the reservation by supporting each other, including pooling income and food. (Tr. 819-820). The off-reservation Samish tried gathering, but this was made increasingly

difficult because of white encroachment on what had been their lands. (Tr. 818).

Moving up to sometime around the turn of the century, Dr. Hajda testified that the Samish had an off-reservation village on Guemes Island (New Guemes Village). (Tr. 821). The village served as a religious center for the Samish, because it was the only place in the area where whites did not interfere with the holding of winter dances. (Tr. 822). The village also "served as a kind of refuge, refugee camp . . . for Indians from other areas who were being driven off" with the Samish acting as host. Ibid. "It was a Samish house.["] Ibid.

The balance of this finding is rejected.

Dr. Hajda stated that after the break-up of the village, among the places the Samish moved to included the Swinomish reservation, Anacortes and Ship Harbor. (Tr. 825). Some Samish lived at Ship Harbor seasonally and some lived there year-round. (Tr. 827). Ship Harbor had two canneries that made substantial employment of Samish people. (Tr. 825-826). The Samish cannery employees formed two baseball teams. (Tr. 828). At Ship Harbor, the Samish conducted religious activities. Ibid.

According to Dr. Hajda, the Samish held political meetings during the early part of this century, including a meeting at New [19] Guemes Village where 200 or so people attended, and meetings in 1912 or 1913. (Tr. 828-829). "(T)here certainly was organization during that time." (Tr. 829-830). She said the Samish also participated as a tribe in meetings of the Northwest Federation of Indians. (Tr. 829-831). There were numerous meetings of Samish people in 1926-27. Apparently they

were in response to legislation passed at about that time permitting Indians to sue the government for not fulfilling treaty rights. (Tr. 832).

Moving to the time of the Depression, the Samish participated politically by taking a straw poll among its members about whether to support the Indian Reorganization Act. (Tr. 837-838). The Samish also played a roll (sic) in the northwestern Washington region during the Depression in preserving the winter dance religion. (Tr. 839).

Moving to the time of World War II, the witness testified that the war made it difficult to meet because of gas rationing, men being called away for military service and people leaving the region for war-related employment. (Tr. 840). Nevertheless, "we have oral testimony that people continued) [*sic*] to meet and to discuss the things that they had been discussing. Providing people with what needed to be provided, giving help to people, the usual—(those) kinds of things. Concerned with fishing and land rights. The same things that had been there all along." (Tr. 841). She said there is also a written letter that provides evidence that a Samish council meeting was held in 1942. (Tr. 859-860).

In 1951, the Samish organized formally by adopting a tribal constitution, Dr. Hajda said. (Tr. 1951) (sic)[2]. Following the adoption, they pursued such concerns as health, social justice and employment, as well as fishing rights. (Tr. 844). Also during the 1950s, the Samish participated as a tribe in working with other Indian tribes to fight federal termination of Indian benefits. (Tr. 845).

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[2] The correct reference is page 842 of the transcript.

The Cumshelitsa-Whulhoten (sic) family does not live on a reservation, but they have continued to participate with the families that are not classified as being Indian descendants throughout—from the beginning. (Tr. 862).

In her testimony, Dr. Hajda concluded that the Samish who live on the Swinomish and Lummi reservations have the capacity to maintain their Samish identity, despite their participation in the affairs of the reservations.

"I think that many of them managed to have office or whatever it was at Swinomish or Lummi, and continued to be Samish and to [20] participate as Samish. It's not an unusual thing. If you look at the United States in general, I know a great many Indian men who vote as United States citizens. It's not either/or. They serve in the armed forces with great pride, many Indian men are proud of this. It doesn't seem to make them less Indian to have done so. So I find it difficult to think that it's an either/or choice . . . (P)eople who live on reservations may well maintain another identity, as well. It's not uncommon." (Tr. 867-868).

In her testimony, Dr. Hajda also provided examples of Samish leaders:

During the era of the New Guemes village, the Whulholten brothers provided economic leadership by running a fishery. (Tr. 823). Billy Edwards served as a Samish spiritual leader during this era. (Tr. 823-824). While Samish were living at the Ship Harbor community, Charlie Edwards served as a kind of labor boss in rounding up Samish people to work at the local canneries. (Tr. 827). Sas Kavanaugh played a leadership role in organizing Samish meetings around 1912-13. (Tr. 830). During the Depression era, Don McDowell served

a leadership role for the Samish, including helping people fill out forms for governmental assistance. (Tr. 837). Following World War II, Alfred Edwards emerged as a Samish leader, serving as president of the new Samish organization. (Tr. 843). With the establishment of a formal Samish council, it has taken a leadership role, including the mobilization of resources. (Tr. 860).

Petitioners' witness, Dr. Wayne Suttles is a professor emeritus of anthropology and linguistics at Portland State University. (He retired in 1984.) Dr. Suttles has conducted extensive field research with the Coast Samish [sic] [Salish] Indian people of northwest Washington and British Columbia, including the Samish. Some of the research was basis of his Ph.D. dissertation completed in 1951.

Dr. Suttles testified about Salish and Samish historical culture, including intermarriage among tribes and with white settlers. He said the Salish people, including the Samish, had a tradition against marrying close relatives (up to fourth cousins). (Tr. 165). The tradition included marrying outside one's tribe for economic and security reasons. (Tr. 165-167).

"(T)he reasons for this are that a marriage started a series of exchanges of foods and foods for wealth, and shared access of resources between the families marrying." (Tr. 165).

"(T)his advantage of marrying out, not only did it start exchanges, but there were political advantages. If you had inlaws somewhere else, you're less likely to be attacked by those people." (Tr. 166).

[21] The Salish Indians also intermarried with white settlers when they showed up in the early part of the

19th century and recognized them as in-laws, Dr. Suttles said. (Tr. 179-182). Intermarriage with whites dropped off after more white women came into the area and expressed prejudice against Indian women and white settlers married to them, he said. (Tr. 236).

Even with the intermarriage among tribes, specific tribal identity was maintained, Dr. Suttles said. (Tr. 202). The various tribes "were part of a social network that extended pretty much indefinitely . . . Samish had ties with the Swinomish and Skagit, Skagit had ties with the Snonomish, the Snonomish had ties with the Duwasmish, (and) so on . . . It was a kind of social continuum through marriage, a biological continuum because of kinship relations. But each of the units that was in that had a real identity, real existence." (Tr. 202).

"Sometimes people have said, well now, you're saying this was a continuum. Doesn't that mean that these local groups, tribes, whatever you call them, don't really exist? And I say no, this is not this kind of homogeneous continuum where you can't find any units within it. It is a network, and—well to use a metaphor, I think we can say that each of these local groups was a knot in the network. The network wouldn't exist without knots." (Tr. 202).

According to Dr. Suttles, evidence that the Salish people did not act as a homogenous tribe, but instead as a network of related specific tribes, including the existence of property rights among the tribes (Tr. 203); the hosting of intergroup gatherings (dances and potlaches) where one tribe was considered hosts and the other(s) guests (Tr. 199); and the existence of separate languages. (Tr. 161).

Dr. Suttles also testified about differences between the Samish and Noowhaha tribes. They spoke different languages. (Tr. 205). The Samish [sic] considered to be of higher status than Noowhaha. (Tr. 212).

Dr. Suttles also testified about the role of leaders in Salish culture. The Salish did not have head chiefs, he said. (Tr. 213). White settlers tried to force the concept onto them, he said. (Tr. 213-214). While there were no head chiefs, people took leadership roles by virtue of wealth, including ownership of property useful for hunting and fishing, and skills. (Tr. 214-216).

Dr. Suttles also testified about what distinguishes contemporary Coast Salish Indians from other people in northwestern Washington today. He said the differences include preservation of traditional ceremonies, including the winter dance (Tr. 223); participation in the Shaker Indian church (Tr. 223); pride about Indian ancestry (Tr. 224); and the wide recognition of kinship ties. (Tr. 224).

[22] Petitioners' witness, Ms. Mary Hansen, a Samish, testified about whether the Samish have acted continuously as a community during her lifetime.

Ms. Hansen recalled meetings of Samish people during the 1930s. (Tr. 1029). Also during the 30s, the Samish people looked after one another by providing food and other support to the needy. (Tr. 1032).

This looking after one another continued during World War II, Ms. Hansen said. (Tr. 1032-33). The Samish also held formal political meetings and social gatherings during the war years. (Tr. 1033).

Moving up to the 1950s, Ms. Hansen was involved in the Samish establishing a formal tribal organization in

1951. Ibid. She said the formal council was in response to passage of the Indian Claims Act, but other concerns, including concerns about sick and hungry members of the community, were also brought up in organization meetings. (Tr. 1034). Samish were also concerned about fishing rights during this time and the possible termination of federal benefits to Indians, including closing a local hospital. (Tr. 1037-39). She said correspondence was sent to the Samish membership to keep them apprised of the activities of the council. (Tr. 1039-40).

Also in the 1950s, Samish regularly were together at funerals, which were important occasions for exchanging information and getting caught up on each other. (Tr. 1036). Also in that decade, the Samish council provided $75 to Mrs. Lyons, a tribe member, after her house burned down. Ibid.

In the 1960s, the Samish made an unsuccessful effort to take over the extinct Ozette reservation. (Tr. 1040). Obtaining a land base is an important issue for the Samish and a Samish land acquisition committee was formed two years ago. (Tr. 1041).

Regarding activities on the Lummi and Swinomish reservations over the years, the Samish have held gatherings as Samish, Ms. Hansen said. (Tr. 1055-56).

Ms. Hansen also testified about Samish leaders. She said Mr. Cagey, Albert Edwards and Sas Kavanaugh were leaders during the 1930s. (Tr. 1030). According to her testimony, during the 1950s, Wayne Kavanaugh, Alfred Edwards and herself were among the people on the Intertribal Council, which was fighting against the termination of federal benefits to Indians, including the closing of a local hospital. (Tr. 1038).

Obtaining federal recognition is important, but it's not the sole concern of the Samish, Ms. Hansen testified.

[23] The Defendants (sic) witness, Holly Reckord, is chief of the Branch of Acknowledgement and Research of Indian Tribes (sic) for the Bureau of Indian Affairs.

According to Ms. Reckord, the criteria regarding exercising of political authority does not mean legal authority.

"We're not looking for a governmental kind of political authority. We're basically looking for people making decisions and having them stick.

For example, the group owns a cemetery. Somebody wants to bury their father-in-law there who is not a member of the group. Who do they go to, who makes the decision, does the decision stick. That would be the kind of political activity that we're really looking for . . .["] (Tr. 275).

She said that proof of interaction is the key to meeting criterion number two.

["]I think what we are looking for in our regulations, and the way we have applied them, is for interaction . . . (Petitioners) can show this in any number of ways. They can show this by showing us that they are doing things together. They are perhaps marrying each other, they are burying each other, they meet together. And also informal kinds of social relationships. They seem to know each other, they gossip about each other, they know what their relatives are doing, they know how they're related . . . Whatever they can show us that shows they have continued to interact, and that they are in some way separate from the surrounding community." (Tr. 266-267).

The Defendant's witness, Dr. James Paredes, is professor of anthropology at Florida State University. He has conducted extensive study of American Indians while as a professor and as a graduate student, including Chippewa, Oneida, Poarch Creek and the Machis Lower Alabama Creek Indian. He helped prepare a history of Poarch Creek to support its case for federal recognition. He also was on an Association of American Indian Affairs committee to develop a program to help unrecognized Indian groups seek federal recognition. (Tr. 276-283).

In his testimony, Dr. Paredes concluded that kinship ties play an important role in maintaining Indian communities.

"In Indian communities, kinship is especially important, given that for so many, quote, 'traditional Indian cultures,' the political, religious and economic life was predicated upon various kinds of kinship structures . . . American Indians, by virtue of being insulated, in increasingly insular communities, with prolonged patterns of intermarriage, kinship . . . continues to be an [24] important basis for the integration of that community, and for deciding who belongs and who doesn't belong." (Tr. 298-299).

Outmarriage, that is the marriage between people of Indian descent and those of no Indian descent, serves to weaken kinship ties between Indians, Dr. Paredes concluded.

"Outmarriage, in the case of Indian communities, obviously has occurred since the days of Jon Rolfe and Pocahontas . . . But in any kind of small isolated community, marriage tends to be a very effective glue in keeping people obligated to each other . . . At the sim-

plest level, outmarriage means that one has their primary, secondary and tertiary kinship loyalties divided between two kinds of communities . . . (w)heras [*sic*] inmarriage reinforces your existing kin ties . . . " (Tr. 300-301).

Dr. Paredes also concluded that keeping a common locality plays an important role in maintaining Indian communities, as well as other kinds of communities. (Tr. 297-298).

Ms. Patricia Simmons is an employee of the Branch of Tribal Relations for the Bureau of Indian Affairs.

Ms. Simmons testified for the Defendants that, starting in the mid 1960s, the branch prepared lists of Indian tribal organizations that the federal government has had dealings with. (Tr. 347). They were not intended to be lists of federally recognized tribes as such, she said. (Tr. 348).

Ms. Judy Flores is enrollment clerk for the Swinomish tribe.

She testified that, of Swinomish tribal members, 421 people, or about 72 percent of the tribe, live either on the reservation or in towns close by. (Tr. 765).

The Defendant's chief witness, Dr. George Roth is a cultural anthropologist with the Branch of Acknowledgement and Research of the Bureau of Indian Affairs. His qualifications as an expert include a Ph.D. degree in cultural anthropology with his dissertation based on a study of the Colorado River Indian and Chemehuevi Valley reservations. During his 16-year tenure with the branch, he has been the lead researcher on 13 petitions from groups of people claiming Indian descent seeking federal recognition as tribes. (Tr. 569).

"(O)ur basic conclusion [concerning the Swinomish Reservation] was that over a period of time, the reservation became increasingly a real social unit unto itself, as opposed to simply a place where a variety of people with a variety of connections were living," Dr. Roth said. (Tr. 592-593).

[25] Other evidence is the Ph.D dissertation of Natalie Roberts at the University of Washington based on field study at the Swinomish reservation, Dr. Roth said.

"Her primary thesis is that over a period of time, the Swinomish reservation evolved into a community of its own. There are a number of informal and semi-formal social institutions and clubs and things which have grown up starting around 1920, and continuing to the present, so that the tribe has become socially integrated as well as politically integrated," he said. (Tr. 599-600).

Dr. Roth indicated that the people of Samish descent living on the Lummi reservation are integrated into that reservation. He said evidence shows that Sammish (sic) people have consistently served in the Lummi tribal government since 1959. (Tr. 624-625).

[26] II. Factual Findings from Appendix B of the ALJ's Decision

Appendix B of the ALJ's decision contains additional findings [*sic*] fact. The appendix states that "The findings set out below which are adopted principally from the Petitioners brief with modifications constitute additional Findings of Fact in this case and are incorporated by reference into this opinion."

The following portions of the appendix are accepted and form part of the basis for this decision. Those portions not cited here or earlier in this decision are rejected as

contrary to testimony and evidence in the record or contrary to established practice and interpretation of the regulations in previous acknowledgment decisions.

Subject headings have been added and findings reorganized under them for clarity. The numbers are those appearing in the ALJ's decision. The numbers in the ALJ's decision were not consecutive, reflecting the latter's selection from the petitioner's proposed findings. Each numbered finding is complete here unless a notation is made that part of the language has been rejected.

Findings re Traditional Culture and 19th Century History

44. In his direct testimony, Dr. Suttles provided an overview of the aboriginal Coast Salish peoples, who included the Samish. He referred to the Salish family of languages, which were mainly spoken by peoples who inhabited the Pacific Coast of Washington State near Grays Harbor, as well as the coastlines of Puget Sound and Georgia Strait, generally near the present-day cities of Seattle and Vancouver, Canada (TR:161). Samish was one of these Salish languages, and was spoken by the people living in the southeast quadrant of the San Juan Islands, and mainland to the east of the Islands (TR:162).

45. Dr. Suttles succinctly described Coast Salish social organization in the following terms:

> The social units were, small to large, the family [and] the household. The house itself occupied during the winter was a large wooden structure made of posts and beams holding wall planks tied to them, and with roof planks laid upon them. Each house was divided into a number of sections, and each sec-

> tion was occupied by a family. Some heirarchy [sic], but sharing a lot with other members of the household.

(TR:162-163). Villages consisted of one of more houses, and villages themselves were often grouped into larger linguistic and territorial divisions, which were usually referred to as "tribes" **[27]** (TR:163). There was an upper class or elite in each house, as well as slaves, who were typically the descendants of war captives (TR:164).

46. Unlike Indians in most other parts of North America, Coast Salish reckoned descent from important ancestors on both their mother's side and father's side, with the result that all kinship groups overlapped (TR:163-164). A single family would typically have roots in more than one village or geographic area (TR:164, TR:166). By custom, "you had to marry somebody you weren't closely related to, or [at] least people didn't know you were closely related," and closeness in this instance meant the fourth degree or fifth descending generation (TR:165). Thus "the ideal thing was to seek some non-relative of a family of about equal status in some other place. And maybe even the more distant the better" (TR:165). Marriages were generally arranged, especially among high-status families (TR:165).

47. Long-distance marriages served an economic function, because each marriage resulted in a series of exchanges of wealth, enabling houses to share in the resources harvested over a very large geographic area (TR: 165-166, TR:169-170). They also served a political function since "If you had in-laws somewhere else, you're less likely to be attacked by those peoples," which was a distinct advantage in a region where raids and fighting were quite common (TR:166). Dr. Suttles noted

that his study of the Lummi revealed that, collectively, they had managed to arrange marriages with all of the tribes surrounding them (TR:166). Differences of language were not an obstacle to this kind of strategic intermarriage, and several languages might be spoken in the same house (TR:190).

53. According to Dr. Suttles, there was no formal system of chiefs or principal leaders among the aboriginal Coast Salish. Every family had its own leader, and the wealthier men in the village were particularly important and influential because they could give feasts (TR:213-215). There were also special-purpose leaders, whose influence was based on the ownership of some expensive technology' (such as a deer net or fish weir) or on [*sic*]

54. In the 1820s, the Hudsons [*sic*] Bay Company tried to encourage some men to assume a more formal role as chiefs; in the 1850s, similarly, U.S. officials tried to identify a small number of "head chiefs" for treaty purposes (TR:214). These efforts did not displace aboriginal patterns of flexible, informal and special-function leadership, however.

55. Among Coast Salish, intermarriage with non-Indians began as soon as the Hudson Bay Company established its trading post at Fort Langley in the 1820s (TR:179-180). The Bay Company "discovered it was good to form alliances with the local people" this way, Dr. Suttles observed, "And the local people were very [28] eager to form these alliances" as well (TR:180). To illustrate this point, he gave two examples of white in-laws helping protect their Samish relatives from encroaching settlers (TR:180-181). Marriages with non-Indians occurred "everywhere" among Coast Salish peo-

ples, but Dr. Suttles was not aware of any statistical data on its precise extent (TR:238-239).

59. Dr. Suttles did not think that the establishment of reservations put an end to traditional patterns of long-distance marriage, but that Indians, [*sic*] mobility was reduced. Many received individual allotments of land on particular reservations, for example, and they were likely to remain where their land was and identify with that place (TR:191). It was his impression that mobility, long-distance marriage and marriages with non-Indians continued to be more frequent among those Indians who did not move to reservations (TR:192). At the same time, sharing food from different parts of the region was still common among Coast Salish people both on and off-reservation. (Tr. 221).

60. Dr. Suttles described the aboriginal territory of the Samish as having been bounded by the southeast tip of San Juan Island, Deception Pass, Padilla Bay, Samish Bay, Chuckanut Bay, and the northern end of Lopez Island (TR:192-193, Exhibit J-1). During the earliest period of contact (in the early 1800s) there were villages on the south shore of Guemes Island, at March's Point on Fidalgo Bay and on Samish Island (TR:193-194). As a result of epidemics and raids by northern Indians, all of the Samish appear to have concentrated in one village on Samish Island by Treaty time, which is to say the 1850s (TR:194-195).

68. According to Dr. Hajda, the Samish believed that they were going to obtain their own reservation under the treaty (TR:815). After the treaty, the Samish were told to go the the Lummi Indian Reservation, but by the 1860s only about one-third of them were still living there, though others continued to come there occa-

sionally to collect their Treaty annuities (TR:212, TR:815). "It seemed pretty clear that they didn't think they were going to get what they thought was theirs," and resisted limitations on their freedom of movement, as well as efforts to convert them to Christianity (TR: 242, TR:815).

69. Dr. Hajda explained that Indian life on 19th-century reservations was controlled by U.S. Indian Agents, and traditional ceremonies were forbidden after 1884 (TR:816). Treaty annuities were often delivered late; "you might be hungry, you might not have enough land to support yourself" (TR:816). Survival offreservation was also difficult, but for different reasons. White settlers tried to drive Indians from the land; the Samish living on Samish Island moved to Guemes Island after Dan Dingwall, a local storekeeper, shot one of them (TR:817). Indians on the reservations were encouraged to farm, **[29]** although the land was not really suitable for agriculture, while Indians living offreservation found it increasingly difficult to fish or hunt, and increasingly went to work for whites as loggers and hop-pickers (TR:818). For instance, Annie Lyons tried to support herself by digging and selling shellfish, but after local whites accused her of stealing oysters and "gave her a bad time," she married a man from the Swinomish Reservation and moved there (TR:819).

72. By 1876, conflicts with local settlers on Samish Island persuaded the Samish chere [*sic*] to the west side of Guemes Island, where they built a single longhouse (TR:195, TR: 242; the "New Guemes" house or village).

73. Dr. Hajda characterized the New Guemes Island house as a kind of "refuge" for Samish families that were being driven off their lands by white settlers

(TR:805). Two men took the initiative of acquiring the house site—Bob Edwards, who was of Samish and Noowhaha ancestry, and Citizen Sam, step-nephew to Whulholten, who was Samish (TR:805). The New Guemes house also became a kind of refugee camp for families from other areas who were being driven off their lands; they apear [*sic*] to have built smaller houses near the Samish longhouse (TR:822).

74. Nine different families lived together in the Guemes Island house in 1880 (TR:195, Exhibit P-2)[3] They had mainly Samish, Noowhaha and Klallam ancestry, but about half of them also had other connections or spoke other languages (TR:195). For comparative purposes, Dr. Suttles described the complex composition of the last traditional longhouse on the Lummi Indian Reservation, also in the 1880s, which he described as "pretty typical" of Coast Salish houses (TR:198-199).

75. Dr. Hajda noted that these nine families formed two clusters, one associated with the Edwards and the other with Whulholten. They both self-identified as Samish, although it was unclear to her exactly how they had originally been related (TR:801). "There was a considerable representation of people who had been brought in by marriage,, as well, which was customary (TR:802). The Samish were not all concentrated in this one house or village, moreover, although it served for many years as a headquarters (TR:804).

76. Samish people continued to fish and hunt; unlike the Indians on the nearby Lummi Reservation, they

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[3] Charlie Edwards, one of Dr. Suttles' informants, lived in the house as a child, together with the father of another one of his informants, Annie Lyons (TR:196-197).

generally did not [30] practice farming (TR:243). Their principal organized activity as a group continued to be the holding of ceremonials, at New Guemes village, to which Indians of other tribes were invited (TR:-243). The New Guemes house even had its own baseball team at the turn of the century (TR:263).

77. Dr. Suttles' impression was that there was never any all-purpose leader in the house, although Charlie Edwards and Annie Lyons' father, Whulholten, were the owners or managers of reef net locations (TR:240, TR:801, TR:823).

78. In the 1890s, the Samish may have continued to control as many as three or four reef-net sites in the San Juan Islands, including sites owned by the families of Charlie Edwards and Annie Lyons (TR:245-247). Other important economic sites included a Samish halibut-fishing camp on Cypress Island, a halibut-fishing and salmon-trolling area at South Beach, salmon weirs on the Samish River and Whitehall Creek, and large beds of oysters and clams on both ends of Samish Island (TR:250-251). Although the reef-net sites were very important, their produce had to be complemented by others resources harvested under the supervision of other Samish families (TR:251, TR:254).

80. By the 1890s, the Samish were selling their salmon to canneries, for instance at Friday Harbor, and making a new commercial business of extracting dogfish (shark) liver oil for sale at Samish Bay (TR:220). Others earned cash by digging shellfish and hawking them around white settlements (TR:220).

81. Dr. Suttles observed that, when the U.S. and Canadian governments tried to suppress the traditional winter dance, "it maintained itself, particularly in places

off the reservation like the Samish village on Guemes Island, which had winter dances and potlatches right up to the time it was abandoned, I guess" (TR:176). Guemes Island was therefore for many years:

> . . . a very important ceremonial center for people on the reservations as well as off the reservations, because of the reservations you did have the agents and the missionaries sort of looking askance at this kind of activity, or trying actively to suppress it. People of the reservation were free to do it. The Samish were a center of that.

(TR:177-178). Charlie Edwards, a leader of the winter dances in the 1940s when Dr. Suttles began his research, was clearly identified as Samish, as was Tommy Bob, who performed the important function of purifying or exorcizing the house before the ceremony began (TR:178-179).

84. Some people from the New Guemes house, like Charlie Edwards, went to the Swinomish Reservation; others, like Harry Lyons, went back to Samish Island (TR:241). Harry Lyons' [31] daughter Annie eventually moved to the Swinomish Reservation, but had relatives off-reservation and on the Lummi Reservation (TR:248). The Cageys married into families that had obtained of land on the Lummi Reservation (TR:591). According to Dr. Hajda, this was typical of the region: aboriginal houses divided, some families moving to different reservations, and others continuing to live offreservation (TR:819). Related families continued to share income and assist one another, however (TR:819-820).

85. Billy and Bob Edwards were part of a group of families that moved to Ship Harbor, near Anacortes;

Whulholten's sister Cubshelitsa moved to the town of Anacortes (TR:241, TR: 825). There were two canneries at Ship Harbor, the Fidalgo Island Packing Company and Alaska Packers; both employed Indians, Chinese, and whites in different seasonal crews (TR:825-826). The Fidalgo Island company hired Charlie Edwards as a "runner," or recruiter, and he found jobs for his Samish kin (TR:826). There was soon "a little cluster of shacks" on the company's property, where several Samish families lived year-round (TR:826-827). They had small gardens, their own baseball team, and Billy Edwards kept a small "smokehouse" there for religious gatherings (TR:828).

Findings re the Noowhaha Tribe

62. Dr. Suttles, who had studied the relationship between the Noowhaha and Samish in the early 1950s, noted that the aboriginal territory of the Noowhaha extended from the north end include the Samish River drainage, Samish Lake and part of the Skagit River drainage (TR:204-205, Exhibit J-1). one [*sic*] important village was at Bayview, another at Bow, but most of the villages were farther inland in "prairie areas, which provided good hunting and foraging for roots and bulbs as opposed to fisheries [*sic*] (TR:205). The Noowhaha spoke a Salish language different from Samish, but Samish people Dr. Suttles had interviewed in the 1950s spoke both (TR:205-206).

63. According to Dr. Suttles, the Noowhaha were called "Stick" Samish, from the Chinook Jargon term for "forests", or sometimes Upper Samish, since they lived inland from the saltwater Samish (TR:206). They were tied by kinship with both the Samish, downriver, and

with Upper Skagit people farther upstream; at least some Noowhaha families built their houses beside the Samish house on Samish Island (TR:207). Dr. Suttle's [*sic*] considered it very likely that the Samish gradually expanded eastward, into what originally had been Noowhaha territory, leading to conflicts that were finally settled by arranged marriages between them—probably in the 1850s or a little earlier (TR:209-211). By the time the Samish built their new house on Guemes Island in 1876, some Noowhaha families were living with them (TR:210).

[32] 64. Some people of Noowhaha descent are enrolled today with the Upper Skagit, and others with the Samish (TR:248). Dr. Suttles had also met people of Noowhaha descent on the Swinomish Reservation, in the 1950s (TR:248). He was unaware of any contemporary organized Noowhaha group that might constitute the core of a continuing community (TR:248-249).

The balance of this finding is rejected.

65. Dr. Hajda "reserved judgment" on Dr. Suttles' surmise that there had been early warfare between the Samish and Noowhaha, but she agreed that "certainly the Samish and the Noowhaha had established what looks like a symbiotic relationship" involving "dependence and superiority," or a "patron-client" relationship (TR:799-800). The Samish protected the Noowhaha from raiders, and in return obtained access to resources farther inland. At some time in the 19th century, however, the Samish population declined, and some Noowhaha families gained higher status—in particular the family of Pateus, a treaty signer (TR:800). In more recent times, Samish and Noowhaha people lived together in the Guemes Island house and near the towns

of Bow and Edison, and fished together (TR:804, TR:810).

Findings re Community:

101. Some of the people who moved away for wartime jobs, or served in armed forces, did not return to the Tribe's traditional area when the war ended (TR:842). Other Indian tribes, and non-Indian communities, had the same experience (TR:842). The main Samish destinations after the war were Seattle and Bremerton, about an hour and a half by car to Anacortes (TR:842). Mrs. Hansen confirmed Dr. Hajda's observations in this regard (TR:1033).

104. Mrs. Hansen explained that communication with Tribal members was maintained by letters and postcards (TR:1039-1040).

141. Dr. Hajda noted for example that the Cubshelitsa-Whulholten family has always lived off-reservation, but it has always been actively involved with on-reservation Samish families (TR:862).

146. In the course of the original administrative proceedings and this remand, the Tribe produced copies of membership lists from as early as the 1920s. Dr. Hajda cautioned that these lists were never thought of as formal membership rolls, and were not reliable or complete evidence of who was actually interacting socially within the community (TR:870-871). In any event, key families such as the Edwards and Cubshelitsa-Whulholten lines, could be found on all of these lists (TR:871). Like other Northwest Indians, the Samish would have had a relatively stable core group of families,

[33] to which various peripheral families attached themselves from time to time (TR:872).

Findings re Political Influence (20th Century)

87. A new phase of organized Samish political activity began at about this time (TR:828). There were meetings about land rights in 1912 and 1913 (TR:829). It was at this same time that the Northwest Federation of Indians was organized by Thomas Bishop, a Snohomish Indian, and he travelled throughout the region urging Indian communities to organize and demand the fulfillment of their sixty-year-old treaties (TR:829). Sas Kavanaugh, part of the Edwards family, was the main organizer for the Samish (TR:830). Dr. Hajda explained that Kavanaugh was typical of a new breed of leaders who had more schooling and experience with "the white world" (TR:830). They did not replace traditional leaders like Billy and Charlie Edwards, but provided complementary specialized skills, "which again is a traditional pattern" (TR:830).

88. The Samish participated in the Northwest Federation as a distinct group, rather than as individuals; membership was by tribe (TR:831). The Federation did not start off seeking compensation for land. "They wanted land" (TR:831). Enabling legislation was eventually adopted by Congress opening the courts to these claims (TR:832).

The balance of this finding is rejected.

92. Mrs. Hansen recalled attending Samish meetings in the 1930s where they discussed the proposed Indian Reorganization Act, and many elders required interpretation (TR:1029). Meetings were held at the

American Hall in LaConner; the hall was owned by the Swinomish, but the Samish paid rent and hosted the meetings (TR:1055-1056). Several Samish men often simply met informally at the Cageys' house at Lummi, "or on my great-grandmother's farm where we lived," to talk about problems such as land, health or housing, and then report back to the other families (TR:1031-1032). She remembered Alfred Edwards and George Cagey acting as leaders at that time (TR:1030). Her father would also frequently visit elderly Samish people to help them with "a little something" or some money (TR:1032).

94. During the Depression, Dr. Hajda testified, the canneries at Ship Harbor did less business and shut down from time to time, never again able to employ as many Indians as they had in the 1920s (TR:836). New Samish leaders emerged who had more education and more experience with government bureaucracy. Don McDowell, from the Whulholten-Cubshelitsa family line, was a notable example who "went around and visited people to see what kinds of help they needed" for many years (TR:837).

[34] 97. During the Second World War, young Samish men were overseas, some people left the Anacortes area to find jobs in war industries in south Puget Sound like the Bremerton shipyards, and it was more difficult to meet frequently as a group because of gas rationing (TR:840). Several older Samish leaders also passed away in the 1940s, including Charlie Edwards, the Cagey brothers, and Don McDowell (TR:840-841). This also had an adverse effect on organized political activity (TR:841). There are few records of meetings during that period, but oral history tells of meetings to discuss

land rights, fishing, and helping people out as before (TR:841; TR:859-860). Treaty Days were still being celebrated, but there were smaller crowds (TR:841).

98. Mrs. Hansen recalled that gas rationing restricted mobility, so she kept abreast of Tribal meetings by staying in touch with relatives who could still attend (TR:1033). There was money to share with needy Samish relatives during the war years from earnings at the shipyards, and at the Boeing aircraft factory (TR:1032-1033).

102. The war produced a new generation of Samish leaders who were more concerned with "organization"; many had been union men, and brought a concern for issues such as paying dues, and following Roberts Rules of Order (TR:842-843). Continuity was provided by Alfred Edwards, son of Charlie Edwards, who became the president of the new, post-war Samish Tribal organization; Mary McDowell Hansen, daughter of Don McDowell, became Tribal Secretary. While many individual members of the Council were new, on the whole they came from the same families as the pre-war Council (TR:843).

106. The Samish Tribe provided money and volunteers to fight proposals to terminate Federal responsibilities to all Washington Indian tribes, in the 1950s (TR:845, TR:1038-1039). Reservation and landless tribes joined together in an organization called the Intertribal Council, and Mrs. Hansen was its first secretary (TR: 845-846, TR: 1038). Each tribe had its own delegates, including Tulalips, Swinomish and Lummi as well as Samish, Snohomish and others (TR:1039).

111. The dispute over Federal recognition led to a loss of confidence in the Tribal Council, political divi-

sions, and a temporary change of leaders (TR:850, TR:854, TR:961, TR:1063).[4] [35] Samish families which had consistently occupied key positions were unrepresented from 1975, when Margaret Greene was "ousted" as chairperson, to 1980, when Ken Hansen was elected chairman (TR:1046-1047). Dr. Hajda noted that Ken Hansen, son of Mrs. Hansen, brought youth and enthusiasm to the Tribal Council and helped mediate between different families, mobilizing support for the fight for Federal recognition (TR: 851-852). Recognition became "a focus, both positive and negative, for tribal activity" from that time forward, requiring continuing efforts to raise cash donations, recruit volunteers, and organize travel (TR:860-861).

The balance of this finding is rejected.

121. Dr. Hajda explained that past and present leadership has included reservation and non-reservation families. Margaret Greene, currently chairperson of the Tribe, is from the Cagey family, who are residents of the Lummi Reservation, while Tribal secretary Mary Hansen is of the Cubshelitsa-Whulholten line, who never lived on reservations (TR:875-876). A generation earlier, similarly, Charlie Edwards represented a family residing on the Swinomish Reservation, while Sas Kavanaugh came from offreservation (TR:876). Mrs. Hansen confirmed this based upon her own personal experience (TR:1047-1048).

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[4] Mrs. Hansen identified the Wooten, Penter, and Cayou families with this coup (TR:1064-1064)[.] She explained that they had not been active in Tribal affairs before or since. As discussed below, the Cayou line is now regarded as being of doubtful Samish ancestry by both the Tribe and the Government.

The balance of this footnote is rejected.

187. With regard to "political authority," Dr. Hajda explained that in the case of the Samish, leaders have been;

> [p]eople who have skills in dealing with situations that are of concern. Mary Ann Cladoosby (TR:1028-1029; also TR:805, TR:825, TR:837). Those concerns have changed over the years, obviously. In that sense, I think it's a continuation of earlier patterns, where you had different leaders for different sorts of activities or aspects of life. It wasn't necessarily power and influence, but connections that would be useful for activities that the tribe might want to carry out, for instance. People who had education, people who were seen as having spiritual power, that sort of thing.

Findings on Reservation Participation

169. Dr. Hajda explained that, although many Samish Indians had held public office on the Lummi and Swinomish Reservations, they continued to consider themselves as Samish and participate in Samish activities (TR:867).

The balance of this finding is rejected.

170. Dr. Hajda described the Cagey family, who live in a distinct part of the Lummi Reservation locally known as Samish Hill, and have hosted Samish events there; some had identified chiefly as Samish, others as Lummi (TR:1000-1001). Dr. Hajda also **[36]** observed that there have been a number of complaints of discrimination against Samish people at Lummi, including job discrimination and verbal harassment (TR:1018-1019).

172. Dr. Hajda explained that, even among reservation Indians like the Warm Springs today, "tribal" identity is situational—that is, it may depend on the occasion or the purpose of the question (TR:897-898). A person of Samish descent may choose to assert that identity in certain circumstances but not others (TR:897).

The balance of this finding is rejected.

174. Dr. Roth acknowledged that as a general proposition, a person can be a member of two communities at the same time, and that some overlap in the membership of communities does not necessarily jeopardize their autonomy or distinctness (TR:680-681). He conceded that Samish people who were participating in Swinomish Reservation activities, were also participating in Samish social and political activities (TR: 682).

Findings concerning the Acknowledgment Regulations

131[5]. Dr. Sturtevant cautioned against confusing the concept of a "community" with that of a "tribe, " noting that a tribe may consist of more than one community (TR:40-41, TR:76-77). At the same time, he explained that a "community" tends to be broader in membership than a group of people related by marriage, and more permanent and broader in its interests than a social club or professional society (TR:41). He indicated that he would approach the task of evaluating the existence or nature of a "community" by looking for "networks of communication," including "how much people know about other people, when they see them, what they see them for, what they know about them," and the fre-

[5] The ALJ's decision at page 26 contains two findings numbered 131. This accepted finding 131 appears second.

quency and nature of interactions between them (TR:42, TR:78).

132. In this respect, Dr. Sturtevant considered that the new, expanded definitions of "community" and "political authority" incorporated into 25 C.F.R. Part 83 by amendment in 1994 bring these criteria closer to the common understanding of anthropologists of these terms (TR:64-65). He stressed the usefulness of flexibility in the evidence required at different stages of a group's history, and of interpreting evidence in the context if the history, geography, culture and social organization of the group in Question [*sic*] (TR:59-60, TR:62). He also observed that no real Indian tribe would display all of the attributes of a [37] "community" listed in 25 C.F.R. Part 83, as amended, particularly in modern times, and welcomed the fact that the amended regulations do not require this (TR:65).

133. According to Dr. Sturtevant, 25 C.F.R. Part 83 reflects a belief that Federal recognition should be based on "the persistence of social groups," and it is therefore important to realize that "the group can continue and does continue through time, whereas the cultural features, the behavior, the way of being, changes" (TR:66) what is distinctive about the group today may not be aboriginal; he cautioned against looking for stereotypes such as "war dances" and basket-making (TR:66-67). Moreover it is frequently the case that "in most respects their behavior and their interaction is not distinguishable from the characteristics of behavior among their non-Indian neighbors" (TR:67-68). Indeed, it is "very common" for Indians to participate actively in neighboring non-Indian communities (TR:69-70). He noted that about half of the Indians in the United States

today live in cities, rather than predominantly Indian settlements (TR:74). The primary difference between Indian and non-Indian communities today, he stated, is mainly a matter of ancestry, rather than particular cultural characteristics (TR:71).

134. Dr. Roth paraphrased this criterion as "some substantial body . . . of social connectedness and social distinction" (TR:664). He observed that there is no body of comparative data on the social connectedness of the members of Federally-recognized reservation tribes, but that in a case like the Samish, the analysis must take account of difficulties created by landlessness and nonrecognition: "Obviously there's a lot of things you can't expect a group to be able to do,' (TR:663, TR:665).

135. In Dr. Sturtevant's research experience, highly dispersed Indian tribes maintained a "community" by gathering periodically for special occasions, or maintaining kinship connections with at least some other people in the community (TR:74-75). In contrast with an "association" an Indian community has a historical relationship with a homeland some where—although "they don't by any means all necessarily live there,,[*sic*]—and shares more than one purpose or interest (TR:125-126, TR:149).

136. Dr. Roth explained that he looks for some evidence that the peripheral members are connected with the core, but not necessarily connected with each other (TR:728). The core is a hub of communication with the periphery and need not consist of people living together in a geographical settlement (TR:728).

The balance of this finding is rejected.

137. Dr. Suttles likewise observed that the term "community" was often used to refer to a "closed group of face-to-face relations with people within it, closed to outsiders." This fit [38] the Okinawan village he had studied, but not aboriginal Coast Salish societies (TR:200). However, Coast Salish houses were "communities" in the sense of cooperation and exchange (TR:201). The Samish longhouse of the 1880s on Guemes Island was a "community" in this sense, even though its inhabitants had mixed ancestries and spoke several languages (TR:201).

138. Dr. Suttles testified that in the Coast Salish region as a whole, "Indian" identity was not only being asserted today through distinctly Indian religious activity, such as the winter dances and Indian Shaker Church, but through acute consciousness of kinship ties and loyalty to the extended family (TR:223-224). Dr. Hajda indicated that, based on her experience with Coast Salish and Columbia River Indian tribes, the Coast Salish today are more preoccupied with ancestry or kinship as a basis of Indian identity (TR:883).

139. Dr. Paredes also agreed that kinship is "central to defining who we are," and that this can be "especially" true in Indian communities (TR:298-299).

The balance of this finding is rejected.

Miscellaneous Findings

1. Ms. Simmons, an employee of the Bureau of Indian Affairs for 30 years, testified that she began preparing lists of Indian tribes "with whom we had dealings" in 1966 (TR:347, TR:349). Her preliminary list was "based on a review of the files" in her office, and

was circulated among staff for comment (TR:347-348). "It was never intended to be a list of federally recognized tribes as such," she recalled; "it may have evolved into that," however, under Congressional pressure to make clearer distinctions between recognized and non-recognized tribes (TR:348). By 1969, she had restricted her list to "those groups who had a formal organization approved by the Department" (TR: 349350, TR:357).

2. Ms. Simmons explained that initially, "we just listed everybody that there was a file records section for" in the Bureau's Washington, D.C. offices (TR:351, TR:36). The draft was then sent to Area Offices and Agency Superintendents to identify which of the groups listed had a "formal relationship" with them.

The balance of this finding is rejected.

3. Under cross-examination, Ms. Simmons identified an early draft of the list she prepared in 1966, which includes the Samish Tribe on page 14 (TR:355, Exhibit P-3). She recalled that the Samish had been taken off her 1969 list because the Bureauls [*sic*] Portland Area advised her that they were "recognized for claims [39] purposes only," but she had no record of this (TR:355, TR:358359, Exhibit P-4).

The balance of this finding is rejected.

15. The Tribe called Ms. Hansen, who had served on its council and as its secretary since the 1950s. Mrs. Hansen is the great[-]granddaughter of Cubshelitsa, sister of Whulholten, one of the leaders of the Samish village on Guemes Island a century ago, and daughter of Don McDowell, Samish Tribal leader in the 1930s; she was given the name Cubshelitsa by Whulhoten's grand-

daughter, Mary Ann Cladoosby (TR:1028-1029; also TR:805, TR:825, TR:837).

21. Dr. Sturtevant is the curator of North American ethnology at the Smithsonian Institution in Washington, D.C., with which he has been affiliated in various capacities since 1956 (TR:31). He has conducted anthropological fieldwork among Indian tribes in various regions of the United States including the Seminoles of Florida, the Senecas of New York, and the Pomo in California, as well as field research in Mexico and Burma (TR:32-34). By his own calculation, he has visited communities belonging to every American Indian cultural region except the Plateau (TR:34). He has also conducted historical research using a variety of print and graphic materials (TR:37-38).

22. Dr. Sturtevant has been the general editor of the Smithsonian Institution's encyclopedic *Handbook of North American Indians*, which is being written by leading anthropologists and historians under the sponsorship of an Act of Congress, summarizing existing knowledge of Indian cultures and history (TR:35-36). His editorial role includes selecting experts to prepare various chapters, and evaluating their work professionally (TR:37).

23. Dr. Sturtevant was also invited, by the Government defendants, to participate in a workshop in January 1992, to advise them on reforming their procedures for determining whether particular groups are Indian tribes under 25 C.F.R. Part 83 (TR:58).

24. Dr. Suttles is professor emeritus at Portland State University in Portland, Oregon, where he began teaching anthropology and linguistics in 1966 (TR:154).

Since he began his studies, before the Second World War, his research has focussed on the Coast Salish peoples of northern Washington and southern British Columbia, including Semiahmoo, Lummi, Samish, Saanich, Songhees, Sooke, Nooksack, Swinomish, Skagit, Katzie, Cowichan, Chilliwack and Musqueam (TR:154-156). Dr. Sturtevant regards him as the primary expert on the culture and society of Coast Salish Indians, and on that basis had arranged for him to edit the volume of the *Handbook of North American Indians* devoted to the Northwest Coast (TR:39).

[40] 26. Dr. Suttles began interviewing Samish elders in 1947, and in 1951 was asked by the attorneys representing a number of tribes in the area to testify on their behalf before the Indian Claims Commission; among the Samish he knew at that time were Charlie and Alfred Edwards, Tommy Bob, Annie Lyons, and Mary Hansen (TR:157; TR:222). He testified that he had remained in contact "off and on" with Samish people (TR: 158).

28. Dr. Hajda, an independent researcher, completed her doctorate in anthropology at the University of Washington in 1984. Her thesis, on the social organization of lower Columbia River Indians, drew heavily on historical records . . .

The balance of this finding is rejected.

29. Dr. Hajda has continued this cultural and historical research as a consultant to the Indian tribes of the Warm Springs and Grand Ronde Reservations, and, under contract with the U.S. Forest Service, on the Yakima Reservation in Washington (TR:765-786). Her field research has focussed on Indians of coastal Oregon

and southwestern Washington, and in this connection she has studied with Dr. Suttles at Portland State University (TR:787). Dr. Sturtevant and Dr. Suttles arranged for her to prepare a chapter for the volume of the *Handbook of North American Indians* on Northwest Indians (TR:39).

33. Prior to his employment at BAR, Dr. Roth obtained a doctorate in cultural anthropology at Northwestern University based on his study of social integration on two multi-tribal Indian reservations in Arizona, Chemehuevi and Colorado River (TR:569). This work involved living for 18 months on the reservations, and comprised his "primary" experience with field research, as well as considerable archival study (TR:571). He also spent a month studying the political system in Tecate, Mexico (TR:572).

35. Since joining the staff at BAR, Dr. Roth has made 13 or 14 field visits, averaging a week or two, to evaluate petitioning communities, as well as field trips to Maine, Texas and Oklahoma in connection with proposed Federal legislation (TR:572-573). As a BAR anthropologist he is responsible for checking the quality of petitioners' research data, and conducting additional research and analysis (TR:576-577).

39. Once at Florida State University, Dr. Paredes became interested in the Poarch Creek Indians of Mississippi (sic), and in 1971 began what he described as a "long and continued steady relationship" with them as a researcher (TR:279-280). He helped them prepare their successful case for Federal recognition as an Indian tribe, and then, he supposed as a result of that work, BAR contracted with him to spend two weeks collecting

archival materials on another petitioning Indian [41] group, the Lower Alabama Creeks (TR:281-282). More recently, he was consulted by the Brotherton Indians of Wisconsin on means of seeking Federal recognition (TR:284). Like Dr. Sturtevant, he had participated in the workshop convened by BAR in 1992 to discuss reforming procedures under 25 C.F.R. Part 83 (TR:58, TR:293).

66. Counsel for the Government also asked Dr. Suttles to explain the origins of the Indians who were living until the early 20th century at Mitchell Bay on San Juan Island. Dr. Suttles believed they had mostly been of Cowichan and Saanich (Vancouver Island) origin, possibly with some Samish and Lummi ancestry as well (TR:242-243). These families, it should be noted, have comprised less than 10 percent of the Tribe's members according to both parties' figures.

199. The Tribe stipulated in the course of the hearing that there were legitimate questions about the ancestry of the Cayou and Viereck lines (TR:478), accounting for roughly 9 percent of the current membership. Dr. Hajda agreed that there were "reasonable grounds" for raising such questions (TR:812-813, TR:907) adding that two other small families of debatable ancestry, listed on the Tribe's older membership lists, have since died out (TR:813-814).

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APPENDIX K

UNITED STATES
DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS

Docket No. Indian 93-1

MARGARET GREENE, ET AL., APPELLANTS

v.

BRUCE BABBITT, ET AL., DEFENDANTS

Aug. 31, 1995

RECOMMENDED DECISION

Before: Administrative Law Judge Torbett

This matter was heard by the undersigned on August 22-30, 1994, in Seattle, Washington. At the conclusion of the hearing, a schedule for the filing of briefs was set which has now been met. These briefs, along with the relevant parts of the entire record, have been considered in reaching a decision in this case. Where appropriate, parts of these briefs may, with or without attribution, be incorporated verbatim into this opinion.

Procedural History

This matter has an extensive procedural history, only a part of which needs to be recounted here. In a deci-

sion dated February 25, 1992, the United States District Court for the Western District of Washington found that the hearing afforded the Petitioner on their petition for recognition as an Indian tribe under 25 C.F.R. Part 83 did not comport with due process. The Court ordered a new hearing which would have procedures to meet the constitutional requirements of due process.[1] The trial was held under procedures agreed to by the parties with the object of providing a hearing wherein all parties could present any relevant evidence to the issue being tried.

The undersigned is of the opinion that both parties to this case have now had a fair trial. Any objections to the pretrial procedure or that which was followed at the trial or all objections otherwise, including the Petitioner's objection to Defendant's motion to amend it's [*sic*] post hearing brief, are now specifically overruled. All the evidence which was presented and not rejected at the trial will be considered as a part of the record of this case. The trial, of course, was not perfect but then what else is?

Issue

There is but one issue to be determined in this case, that is should the Samish be recognized as an Indian tribe under the provisions of 25 C.F.R. Part 83. The criterion [*sic*] for recognition contained in the regulation are as follows:

(a) A statement of facts establishing that the petitioner has been identified from historical times until the

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[1] The District Court was affirmed in *Greene v. Babbitt*, No. 92-73010 (9th Cir. August 22, 1995).

present on a substantially continuous basis, as "American Indian," or "aboriginal."

* * *

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity.

* * *

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

(g) the petitioner is not, nor are its members, the subject of congressional legislation which has ["]expressly terminated or forbidden the Federal relationship."

It is agreed by the parties that the Petitioner must meet all seven (7) criteria and only four (4) of these are in dispute. They are the criterion [*sic*] governing identification as an Indian entity (criterion a); distinct community (criterion b); political authority and influence (criterion c); and descendancy from a tribe (criterion e). It should be noted that in the aforementioned decision of the United States District Court for the Western District of Washington that that Court declined to find the regulations set out above unconstitutional.

Burden and Standard of Proof

The Petitioners have claimed that there should be a presumption that they are an Indian tribe which must be overcome by the Defendant. The undersigned agrees with the Defendant that it is established that the Petitioners have the burden of proof and are not entitled to any presumptions based on the claim that its members descended from a treaty tribe.[2]

As to the standard of proof the undersigned agrees with the Defendant's stated position as to this issue and incorporates that part of the Defendant's brief on this issue into this opinion as Appendix A. This part of the Defendant's brief starts in the middle of page 41 and continues through the end of page 49. Briefly, the standard of proof is a preponderance of the evidence standard as enunciated in *Steadman vs. SEC*, 450 U.S. 91 (1981). Also, the quality of evidence presented must

[2] The Samish were signers of the 1855 Point Elliott Treaty.

show a "reasonable likelihood of the validity of the facts relating to that criterion". The Defendants correctly state that the evidentiary standard which must be met by the Petitioners requires minimum quantity and quality measures as to each of the four contested criterion [*sic*].

Summary of Evidence

Petitioner's witness, Yvonne Hajda, has a Ph.D. in social anthropology. The topic of her thesis was social organization of Indian culture in lower Columbia River region from 1792-1830. She has been an independent researcher and consultant on anthropological matters since 1984. She prepared an anthropological report on Samish as part of the acknowledgement process. (Tr. 783-787).

In her testimony, Dr. Hajda concluded that the history of Samish activities from treaty time until present day supports the proposition that the Samish have functioned continuously as a community.

She said the first generation or two following the treaty thought they would get a reservation of their own, but they never did. (Tr. 815). Some of the Samish moved to the Lummi reservation and others stayed off the reservation. Ibid. The off-reservation Samish continued to interact with those on the reservation by supporting each other, including pooling income and food. (Tr. 819-820). The off-reservation Samish tried to continue with their traditional Indian lifestyle of hunting and gathering, but this was made increasingly difficult because of white encroachment on what had been their lands. (Tr. 818).

Moving up to sometime around the turn of the century, Dr. Hajda testified that the Samish had an off-reservation village on Guemes Island (New Guemes Village). (Tr. 821). The village served as a religious center for the Samish, because it was the only place in the area where whites did not interfere with the holding of winter dances. (Tr. 822). The village also "served as a kind of refuge, refugee camp . . . for Indians from other areas who were being driven off" with the Samish acting as host. Ibid. "It was a Samish house." Ibid. The village began breaking up sometime around 1900-1910, but people continued to live there until the 1920s. (Tr. 824). Even after people began moving away, the village was used for ceremonial purposes. Ibid. After the house was lost in the 1920s, the Samish participated as a group in religious activities held at other tribe's smokehouses. (Tr. 835).

Dr. Hajda stated that after the break-up of the village, among the places the Samish moved to included the Swinomish reservation, Anacortes and Ship Harbor. (Tr. 825). Some Samish lived at Ship Harbor seasonally and some lived there year-round. (Tr. 827). Ship Harbor had two canneries that made substantial employment of Samish people. (Tr. 825-826). The Samish cannery employees formed two baseball teams. (Tr. 828). At Ship Harbor, the Samish conducted religious activities. Ibid.

According to Dr. Hajda, the Samish held political meetings during the early part of this century, including a meeting at New Guemes Village where 200 or so people attended, and meetings in 1912 or 1913. (Tr. 828-829). "(T)here certainly was organization during that time." (Tr. 829-830). She said the Samish also partici-

pated as a tribe in meetings of the Northwest Federation of Indians. (Tr. 829-831). There were numerous meetings of Samish people in 1926-27. Apparently they were in response to legislation passed at about that time permitting Indians to sue the government for not fulfilling treaty rights. (Tr. 832).

Also, during the early part of this century (1900 to mid or late 20s), the Samish met together for Treaty Day celebrations and canoe races. (Tr. 833).

Moving to the time of the Depression, the Samish participated politically by taking a straw poll among its members about whether to support the Indian Reorganization Act. (Tr. 837-838). The Samish also played a roll [*sic*] in the northwestern Washington region during the Depression in preserving the winter dance religion. (Tr. 839).

Moving to the time of World War II, the witness testified that the war made it difficult to meet because of gas rationing, men being called away for military service and people leaving the region for war-related employment. (Tr. 840). Nevertheless, "we have oral testimony that people continue(d) to meet and to discuss the things that they had been discussing. Providing people with what needed to be provided, giving help to people, the usual—(those) kinds of things. Concerned with fishing and land rights. The same things that had been there all along." (Tr. 841). She said there is also a written letter that provides evidence that a Samish council meeting was held in 1942. (Tr. 859-860).

In 1951, the Samish organized formally by adopting a tribal constitution, Dr. Hajda said. (Tr. 1951). Following the adoption, they pursued such concerns as health, social justice and employment, as well as fishing rights.

(Tr. 844). Also during the 1950s, the Samish participated as a tribe in working with other Indian tribes to fight federal termination of Indian benefits. (Tr. 845). She said the Samish also played a formal role during this time as members of Affiliated Tribes of the Northwest, Small Tribes of Western Washington and the National Congress of American Indians.

During the 1960s, the Samish participated in economic development activities by obtaining federal grants from the War on Poverty programs. (Tr. 847).

From [*sic*] 1970s on, the Samish met together as part of the effort to obtain federal recognition, according to Dr. Hajda's testimony. (Tr. 847-854). In the last eight to ten years, the Samish have acted collectively as a community by operating a food bank, participating with the city of Ship Harbor and real estate developers in the effort to develop the community, and putting in the Maiden statue (an important symbol of Samish culture and history) at Deception Pass. (Tr. 855-856). The Samish also continue to participate as Samish in winter dances in the region. (Tr. 858).

Dr. Hajda also concluded that the distinction the government makes that classifies Samish living on the reservation as Samish Indians and those living off the reservation as Indian descendants is not reasonable.

"I don't find it reasonable. I've never understood it." (Tr. 861). For example, "the Cagey family had a white ancestor. Are they Indian descendants? I don't believe they're classified as such by the government. Probably because they're living on the reservation. Therefore they become whole bloods.

The Cumshelitsa-Whulhoten family does not live on a reservation, but they have continued to participate with the families that are not classified as being Indian descendants throughout—from the beginning. I think one could go on this way. I don't think the distinction is relevant in those terms. It may be a way of classifying people who are really doing other kinds of activities, but to call them descendants, against real Samish, I think is very distinctive." (Tr. 862). By "distinctive" the witness apparently means misleading.

In her testimony, Dr. Hajda concluded that the Samish who live on the Swinomish and Lummi reservations have the capacity to maintain their Samish identity, despite their participation in the affairs of the reservations.

"I think that many of them managed to have office or whatever it was at Swinomish or Lummi, and continued to be Samish and to participate as Samish. It's not an unusual thing. If you look at the United States in general, I know of a great many Indian men who vote as United States citizens. It's not either/or. They serve in the armed forces with great pride, many Indian men are proud of this. It doesn't seem to make them less Indian to have done so. So I find it difficult to think that it's an either/or choice . . . (P)eople who live on reservations may well maintain another identity, as well. It's not uncommom [*sic*]." (Tr. 867-868).

Dr. Hajda testified that the makeup of the Samish is similar to that of other Indian tribes in the Pacific Northwest.

The diversity of ancestry in the Samish is similar to that of other Indian tribes in the Pacific Northwest. (Tr. 876). Also, she said, other tribes in the region are simi-

lar to the Samish in their level of geographical disbursement. (Tr. 878-879). Basically, the Samish are similar to other Indian tribes in the region. (Tr. 882). Gaps in historical documents are also to be found in dealing other peoples' histories in the region. (Tr. 881-882).

Dr. Hajda testified that the fluctuation in Samish membership roles between 1920s and 1950s-1970s is not meaningful. (Tr. 870-871).

In her testimony, Dr. Hajda also provided examples of Samish leaders:

During the era of the New Guemes village, the Whulholten brothers provided economic leadership by running a fishery. (Tr. 823). Billy Edwards served as a Samish spiritual leader during this era. (Tr. 823-824). While Samish were living at the Ship Harbor community, Charlie Edwards served as a kind of labor boss in rounding up Samish people to work at the local canneries. (Tr. 827). Sas Kavanaugh played a leadership role in organizing Samish meetings around 1912-13. (Tr. 830). During the Depression era, Don McDowell served a leadership role for the Samish, including helping people fill out forms for governmental assistance. (Tr. 837). Following World War II, Alfred Edwards emerged as a Samish leader, serving as president of the new Samish organization. (Tr. 843). With the establishment of a formal Samish council, it has taken a leadership role, including the mobilization of resources. (Tr. 860).

Petitioners' witness, Dr. William Sturtevant testified that he did not think the government methods of evaluating the petition for recognition were proper. Dr. Sturtevant is curator of North American ethnology in the department of anthropology at the Smithsonian Institution. He has been with the Smithsonian since 1956.

Dr. Sturtevant has conducted extensive field research with American Indian tribes, most extensively with the Seminole in Florida. (Tr. 31-33).

Dr. Sturtevant testified to problems he sees with the government's research methods.

"I think most of it would have trouble passing muster in a Ph.D. orals exam. How did you get to these results. Or a preliminary, before you go out to do the research on which your Ph.D. is based, how do you propose to get these results . . . I think most of these things would have difficulty in passing that kind of standard . . . (I)t's kind of sloppy and unprofessional research . . . ." (Tr. 111).

" . . . I'm not saying that everything that's in the record (from the government) should be thrown out and discounted. It depends. But certainly it seems to me less thorough, less professional, less believable, in the Samish case, than expert witnesses and evidence from the other side, the Samish side." (Tr. 113).

He indicated that the government's researchers did not spend enough time in the field with the Samish to overcome their (the Samish) natural bias against the government. Because of the bias, Dr. Sturtevant said, the government's researchers should have spent more time with the Samish than the petitioner's researchers did, rather than the other way around. (Tr. 142-143).

He indicated that the government relied too much on telephone research. (Tr. 116). Dr. Sturtevant's opinion is that face-to-face research is more accurate, because you get a better reading of the person's responsiveness to the questions by also seeing their facial expressions. (Tr. 116). Also, he said, people are more likely to be

perfunctory in telephone interviews and not give the whole story. (Tr. 116-117).

Dr. Sturtevant also indicated that the government's procedures are flawed because they relied too much on direct questions. He said beginning with general questions before working in the direct questions is a more accurate procedure. This is because direct questions tend to produce biased responses, he said. (Tr. 42-44).

Dr. Sturtevant also testified about the role of political leadership in an Indian tribe not recognized by the federal government.

". . . (T)here's going to be much skimpier formal documentation, I think, for an unrecognized group than for a recognized group. People aren't going to sign papers by virtue of their political office, because the outside world doesn't recognize that they have any political office." (Tr. 84).

Dr. Sturtevant wouldn't expect to find a formal tribal council and there probably will be disagreement on who is chief. (Tr. 83). (He said the notion of formal leaders was a concept forced on the Indians by the white man in any event). (Tr. 82-83). Leaders will be found, but they may lead for different purposes, he said. (Tr. 85).

Regarding the meaning of silence in political situations, in Indian culture a person's abstaining from voting is more likely to mean they really vote "no", Dr. Sturtevant said. (Tr. 92-93).

Dr. Sturtevant also testified about the role of genealogy and kinship in determining cultural identity. He indicated that he puts as much emphasis on people's oral understandings about who they're related to than on formal documentation of bloodlines.

"(I)t's really necessary to work back and forth between living people and what they can tell you and the old documents, and to check one against the other. And often they supplement each other, they give hints and direct bits of information that you can then better interpret by looking at the other source of information." (Tr. 103).

The reasons include problems with the accuracy and completeness of the records, especially the accurate use of Indian names, Dr. Sturtevant said. (Tr. 98, 102-103). Also, people may have a shared understanding that they belong to the same clan by descending from a common ancestor, but it can't be traced back far enough to prove genealogically, he said. (Tr. 100-101).

Dr. Sturtevant discounted characterizations about a culture based solely on bloodlines.

"I think one should be careful about making generalizations purely on the basis of blood. Partly because there's a tendency in this society and maybe many societies to overemphasize the importance of biology. It's what we call racism . . . I think there's a risk to assuming that just because they do or they don't have Indian ancestry, then they must be otherwise." (Tr. 105).

He noted that in many modern Indian communities, there's usually a higher degree of non-Indian ancestry than the official records say. (Tr. 105). He also said that social relations play the predominant factor in shaping a person's cultural identity, as opposed to ancestry. (Tr. 109-110).

Petitioners' witness, Dr. Wayne Suttles is a professor emeritus of anthropology and linguistics at Portland State University. (He retired in 1984.) Dr. Suttles has

conducted extensive field research with the Coast Samish Indian people of northwest Washington and British Columbia, including the Samish. Some of the research was [*sic*] basis of his Ph.D. dissertation completed in 1951.

Dr. Suttles testified about Salish and Samish historical culture, including intermarriage among tribes and with white settlers. He said the Salish people, including the Samish, had a tradition against marrying close relatives (up to fourth cousins). (Tr. 165). The tradition included marrying outside one's tribe for economic and security reasons. (Tr. 165-167).

"(T)he reasons for this are that a marriage started a series of exchanges of foods and foods for wealth, and shared access of resources between the families marrying." (Tr. 165).

"(T)his advantage of marrying out, not only did it start exchanges, but there were political advantages. If you had in-laws somewhere else, you're less likely to be attacked by those people." (Tr. 166).

The Salish Indians also intermarried with white settlers when they showed up in the early part of the 19th century and recognized them as in-laws, Dr. Suttles said. (Tr. 179-182). Intermarriage with whites dropped off after more white women came into the area and expressed prejudice against Indian women and white settlers married to them, he said. (Tr. 236).

Even with the intermarriage among tribes, specific tribal identity was maintained, Dr. Suttles said. (Tr. 202). The various tribes "were part of a social network that extended pretty much indefinitely . . . Samish had ties with the Swinomish and Skagit, Skagit had ties with

the Snonomish, the Snonomish had ties with the Duwasmish, (and) so on . . . It was a kind of social continuum through marriage, a biological continuum because of kinship relations. But each of the units that was in that had a real identity, real existence." (Tr. 202).

"Sometimes people have said, well now, you're saying this was a continuum. Doesn't that mean that these local groups, tribes, whatever you call them, don't really exist? And I say no, this is not this kind of homogeneous continuum where you can't find any units within it. It is a network, and—well to use a metaphor, I think we can say that each of these local groups was a knot in the network. The network wouldn't exist without knots." (Tr. 202).

According to Dr. Suttles, evidence that the Salish people did not act as a homogenous tribe, but instead as a network of related specific tribes, include the existence of property rights among the tribes (Tr. 203); the hosting of intergroup gatherings (dances and potlaches) where one tribe was considered hosts and the other(s) guests (Tr. 199); and the existence of separate languages. (Tr. 161).

Dr. Suttles also testified about differences between the Samish and Noowhaha tribes: They spoke different languages. (Tr. 205). The Samish considered [*sic*] to be of higher status than Noowhaha. (Tr. 212).

Dr. Suttles also testified about the role of leaders in Salish culture. The Salish did not have head chiefs, he said. (Tr. 213). White settlers tried to force the concept onto them, he said. (Tr. 213-214). While there were no head chiefs, people took leadership roles by virtue of

wealth, including ownership of property useful for hunting and fishing, and skills. (Tr. 214-216).

Dr. Suttles also testified about what distinguishes contemporary Coast Salish Indians from other people in northwestern Washington today. He said the differences include preservation of traditional ceremonies, including the winter dance (Tr. 223); participation in the Shaker Indian church (Tr. 223); pride about Indian ancestry (Tr. 224); and the wide recognition of kinship ties. (Tr. 224).

According to Dr. Suttles, Charlie Edwards' family and Annie Lyons' family did not own the only important economic sites for Samish people as a whole. (Tr. 249-251).

Dr. Suttles also testified about why some Samish families moved to the reservation in 19th century and others did not.

"I can only say from my general knowledge that it seemed likely that people moved onto reservations when they had relatives there who were well-established, where they felt they were going to be at home. And those who did not move on were those who felt less at home." (Tr. 251).

Petitioners' witness, Ms. Mary Hansen, a Samish, testified about whether the Samish have acted continuously as a community during her lifetime.

Ms. Hansen recalled meetings of Samish people during the 1930s. (Tr. 1029). Also during the 30s, the Samish people looked after one another by providing food and other support to the needy. (Tr. 1032).

This looking after one another continued during World War II, Ms. Hansen said. (Tr. 1032-33). The Samish also held formal political meetings and social gatherings during the war years. (Tr. 1033).

Moving up to the 1950s, Ms. Hansen was involved in the Samish establishing a formal tribal organization in 1951. Ibid. She said the formal council was in response to passage of the Indian Claims Act, but other concerns, including concerns about sick and hungry members of the community, were also brought up in organization meetings. (Tr. 1034). Samish were also concerned about fishing rights during this time and the possible termination of federal benefits to Indians, including closing a local hospital. (Tr. 1037-39). She said correspondence was sent to the Samish membership to keep them apprised of the activities of the council. (Tr. 1039-40).

Also in the 1950s, Samish regularly were together at funerals, which were important occasions for exchanging information and getting caught up on each other. (Tr. 1036). Also in that decade, the Samish council provided $75 to Mrs. Lyons, a tribe member, after her house burned down. Ibid.

In the 1960s, the Samish made an unsuccessful effort to take over the extinct Ozette reservation. (Tr. 1040). Obtaining a land base is an important issue for the Samish and a Samish land acquisition committee was formed two years ago. (Tr. 1041).

Ms. Hansen testified that in the 1970s the Samish, by obtaining federal funding, established an office in Anacortes. Ibid. Also by virtue of obtaining federal funding or other sources of aid during the decade, the Samish attempted to set up a canning operation and conducted classes. (Tr. 1042). Cultural preservation, in-

cluding preservation of sacred objects, became a priority of the Samish in the 1970s. (Tr. 1043).

According to Ms. Hansen, Samish group activities from the 1980s on have included operation of a food bank (Tr. 1051-52), a seniors nutrition program (Tr. 1052-53), a preschool (Tr. 1052), speaking to other groups in the community (Tr. 1051), holding gatherings at the Maiden of Deception Pass (Ibid), and trying to establish a cultural center museum at Ship Harbor (Tr. 1057).

Regarding activities on the Lummi and Swinomish reservations over the years, the Samish have held gatherings as Samish, Ms. Hansen said. (Tr. 1055-56).

Ms. Hansen also testified about Samish leaders. She said Mr. Cagey, Albert Edwards and Sas Kavanaugh were leaders during the 1930s. (Tr. 1030). According to her testimony, during the 1950s, Wayne Kavanaugh, Alfred Edwards and herself were among the people on the Intertribal Council, which was fighting against the termination of federal benefits to Indians, including the closing of a local hospital. (Tr. 1038).

Ms. Hansen testified that Cheryl Wheeler's analysis of the Samish's historical tribal council minutes is basically consistent with her recollections of the meetings. (Tr. 1059).

Obtaining federal recognition is important, but it's not the sole concern of the Samish, Ms. Hansen testified.

"I think federal recognition is the key to all these other doors that are out there. Without that we're losing programs because the state follows federal guidelines. We're not included in some state programs because we're not federally recognized. No, we have great ambitions for economic development, training for our

children, our grandchildren at this point. No, we see a continuation of the tribe. We have a very proud heritage, and we certainly aren't going to turn it into garbage." (Tr. 1060).

It would appear to the undersigned that this testimony is an affirmative answer to counsel inquiries as to whether the Samish have other concerns outside of federal recognition. That is, they were not just meeting solely for the purposes of obtaining federal recognition as the Defendants contend.

The Defendants [*sic*] witness, Holly Reckord, is chief of the Branch of Acknowledgement and Research of Indian Tribes for the Bureau of Indian Affairs.

Ms. Reckord described seven mandatory criteria that a petitioner must meet under federal regulations to be recognized as a tribe. These criteria have been previously set out in this opinion.

According to Ms. Reckord, in deciding whether the standards are met or not, the branch does not use the "preponderance of the evidence standard," as meant in the legal sense.

"I think we're mostly coming at it from the point of view of anthropologists, genealogists and historians." (Tr. 273).

According to Ms. Reckord, the criteria regarding exercising of political authority does not mean legal authority.

"We're not looking for a governmental kind of political authority. We're basically looking for people making decisions and having them stick.

For example, the group owns a cemetery. Somebody wants to bury their father-in-law there who is not a member of the group. Who do they go to, who makes the decision, does the decision stick. That would be the kind of political activity that we're really looking for." (Tr. 275).

She said that proof of interaction is the key to meeting criterion number two.

". . . I think what we are looking for in our regulations, and the way we have applied them, is for interaction . . . (Petitioners) can show this in any number of ways. They can show this by showing us that they are doing things together. They are perhaps marrying each other, they are burying each other, they meet together. And also informal kinds of social relationships. They seem to know each other, they gossip about each other, they know what their relatives are doing, they know how they're related . . . Whatever they can show us that shows they have continued to interact, and that they are in some way separate from the surrounding community." (Tr. 266-267).

The Defendant's witness, Dr. James Paredes, is professor of anthropology at Florida State University. He has conducted extensive study of American Indians while as a professor and as a graduate student, including Chippewa, Oneida, Poarch Creek and the Machis Lower Alabama Creek Indian. He helped prepare a history of Poarch Creek to support its case for federal recognition. He also was on an Association of American Indian Affairs committee to develop a program to help unrecognized Indian groups seek federal recognition. (Tr. 276-283).

In his testimony, Dr. Paredes concluded that kinship ties play an important role in maintaining Indian communities.

"In Indian communities, kinship is especially important, given that for so many, quote, 'traditional Indian cultures,' the political, religious and economic life was predicated upon various kinds of kinship structures . . . American Indians, by virtue of being insulated, in increasingly insular communities, with prolonged patterns of intermarriage, kinship . . . continues to be an important basis for the integration of that community, and for deciding who belongs and who doesn't belong." (Tr. 298-299).

Outmarriage, that is the marriage between people of Indian descent and those of no Indian descent, serves to weaken kinship ties between Indians, Dr. Paredes concluded.

"Outmarriage, in the case of Indian communities, obviously has occurred since the days of Jon Rolfe and Pocahontas . . . But in any kind of small isolated community, marriage tends to be a very effective glue in keeping people obligated to each other . . . At the simplest level, outmarriage means that one has their primary, secondary and tertiary kinship loyalties divided between two kinds of communities . . . (w)heras [*sic*] inmarriage reinforces your existing kin ties . . ." (Tr. 300-301).

Dr. Paredes also concluded that keeping a common locality plays an important role in maintaining Indian communities, as well as other kinds of communities. (Tr. 297-298).

Ms. Patricia Simmons is an employee of the Branch of Tribal Relations for the Bureau of Indian Affairs.

Ms. Simmons testified for the Defendants that, starting in the mid 1960s, the branch prepared lists of Indian tribal organizations that the federal government has had dealings with. (Tr. 347). They were not intended to be lists of federally recognized tribes as such, she said. (Tr. 348).

The Defendant's witnesses, Laura Wilbur, Chester Cayou, Barbara James and Susan Wilbur are people of Samish descent who are members of Swinomish tribe, live on the tribe's reservation and participate in tribal government.

All four testified that they are not aware of any incidents of discrimination in Swinomish tribal affairs against tribal members of Samish descent. (Tr. 510 (Laura Wilbur), 530 (Cayou), 548 (James), and 777 (Susan Wilbur).

According to Laura Wilbur, Ms. James and Susan Wilbur, Swinomish tribal government officials include people of Samish descent. (Tr. 510-511, 548, 777).

Laura Wilbur provided an example of Samish not being discriminated against: the Swinomish reservation community approved $450 for the funeral of Alfred Edwards, a Samish leader. This was the same amount as everyone else got, she said. (Tr. 511-512).

During cross examination, Mr. Barsh moved to disqualify Cayou as a witness because he couldn't remember preparing an affidavit regarding the case. (Tr. 542).

Also during cross examination, Ms. James said she attended a gathering of Samish people at the Maiden at

Deception Pass and admitted that Samish were considered the hosts for the gathering. (Tr. 556-557). She testified that she participates in Indian smokehouse dancing ceremonies and said Indians would typically be reluctant to give much information about the activity to outsiders. (Tr. 558-559). Ms. James also said that the Samish sit as a group in smokehouse activities. (Tr. 559-560).

Ms. Lynn McMillion is a genealogist for the Branch of Acknowledgement and Research of Bureau of Indian Affairs.

She testified concerning the branch's review of documents presented by the Samish to show that they descended from a historical tribe. The issue of descendency is not disputed in this case with the exception of the Noowhaha.

Ms. Judy Flores is enrollment clerk for the Swinomish tribe.

She testified that, of Swinomish tribal members, 421 people, or about 72 percent of the tribe, live either on the reservation or in towns close by. (Tr. 765).

The Defendant's chief witness, Dr. George Roth is a cultural anthropologist with the Branch of Acknowledgement and Research of the Bureau of Indian Affairs. His qualifications as an expert include a Ph.D. degree in cultural anthropology with his dissertation based on a study of the Colorado River Indian and Chemehuevi Valley reservations. During his 16-year tenure with the branch, he has been the lead researcher on 13 petitions from groups of people claiming Indian descent seeking federal recognition as tribes. (Tr. 569).

In his testimony, Dr. Roth concluded that the people of Samish descent living at the Swinomish reservation, like the people residing at the reservation who descend from other tribes, have been fully integrated into reservation life such that they no longer exist as a separate community of their own.

"(O)ur basic conclusion was that over a period of time, the reservation became increasingly a real social unit unto itself, as opposed to simply a place where a variety of people with a variety of connections were living," Dr. Roth said. (Tr. 592-593).

He said evidence for the conclusion includes Samish leaders' participation in the reservation's official business, as reflected by their signatures on documents. The documents include a 1917 letter to the Commissioner of Indian Affairs regarding whether male Indians are subject to the draft (Tr. 594); a 1926 petition to the agency responsible for the reservation asking that dances not be allowed at the reservation's public hall due to liquor problems (Tr. 595); and documents pertaining to the organization of the Swinomish reservation community under the Indian Reorganization Act (Tr. 596-597).

Other evidence is the Ph.D. dissertation of Natalie Roberts at the University of Washington based on field study at the Swinomish reservation, Dr. Roth said.

"Her primary thesis is that over a period of time, the Swinomish reservation evolved into a community of its own. There are a number of informal and semi-formal social institutions and clubs and things which have grown up starting around 1920, and continuing to the present, so that the tribe has become socially integrated as well as politically integrated," he said. (Tr. 599-600).

Dr. Roth indicated that the people of Samish descent living on the Lummi reservation are integrated into that reservation. He said evidence shows that Sammish [*sic*] people have consistently served in the Lummi tribal government since 1959. (Tr. 624-625).

Dr. Roth concluded that the people of Samish descent living off reservation do not have a high enough degree of social connectedness to be considered a community on their own. They are lacking in kin ties and geographical proximity, as well as lacking in other types of social ties such as common clubs or churches or informal visiting, he said. (Tr. 616).

Samish living off reservation "with a few exceptions, had little or no knowledge of or contact with others in the group. Particularly if you filter out the possible participation in meetings of the organization," he said. Ibid. Dr. Roth did not elaborate why participation in the organization should not be considered a valid form of social interaction.

Dr. Roth also concluded that the Samish living off reservation do not have significant contact with Samish living on reservation, with the exception of participation in the organization. (Tr. 619-620).

Under cross examination, Dr. Roth indicated that a specific level of proof is not used by the branch to determine how much interaction must be shown to meet the criteria for recognition. Instead, the branch uses an evolving standard based on "professional judgment".

"Our procedure, of course, is to pull together all the information that's available to us on the various kinds of social contact or social relations that we, I guess, if you will, come to an agreement that this is significant kind of

evidence. It's the sort of thing that's laid out in the regs. And again, if it's a very, very strong case, then I think the thinking doesn't really go too much beyond that. Enough is really kind of a threshold question, how much is just enough contact to be okay, versus not quite enough contact to be okay.

And I'm afraid we just go on our—I'd say we would go on our professional judgment, within this strong and weak end of the scale. I suspect we have to some extent evolved—have kind of an evolving standard as we work on cases that are, if you will, somewhat towards the middle." (Tr. 665-666).

Dr. Roth concluded that, regarding the criterium [*sic*] that tribal leaders must exercise political leadership, little evidence has been presented to prove or disprove that the Samish meet this standard. (Tr. 632).

Dr. Roth testified that a formal organization that included Samish people was created in 1926 to pursue legal claims against the federal government. (Tr. 601). The creation of the organization should not be considered a formalization of the Samish tribe, he concluded.

"(W)e looked very closely at this group in an attempt to determine what it was, and what it means in the process of trying to determine what's going on with the Samish . . . The minutes are almost entirely concerned with the mechanics of pursuing the claims . . . (T)he people that were enrolled in it were . . . quite a varied combination of people. It included reservation Samish, as well as the descendants of these pioneer families . . . The oral history . . . indicated that it was a joint organization with the Swinomish, which also suggests that it was for a limited purpose. They had a single secretary, a single treasurer.

Our conclusion was that this was—because of the diversity of the enrollment, that this was not in itself a formalization of the Samish tribe, but an organization which brought together a number of people with varying degrees of background, and varying degrees of social connection with each other, to help pursue the claim . . . ." (Tr. 603).

In response to a question from the undersigned, Dr. Roth said there is no set number regarding how many individuals it takes to make up a tribe. (Tr. 752). He said there has to be proof of desecendency back to a historical tribe. (Tr. 753).

The undersigned asked Dr. Roth whether the purpose of the criteria should be taken as a way of showing that a group of people asking for recognition have continuously maintained their intention of being an Indian tribe. While not agreeing to this analysis outright, the witness did not appear able to dispute this proposition. (Tr. 754-755).

Discussion and Conclusions

The opinions rendered in the District Court decision and the United States Court of Appeals decision affirming that District Court both state in essence that a policy decision based on a governmental investigation does not give due process to the Petitioners in their efforts to obtain federal recognition as an Indian Tribe. These courts insist that something more is needed and that the Administrative Procedure Act is an appropriate mechanism to afford the Petitioners due process in this particular case. To the undersigned the right to due process means a right to a hearing where the parties are allowed to present evidence which pertains to the issues and to confront and cross-examine the witnesses. To the un-

dersigned it follows that the parties so entitled are entitled to a due process decision, that is, a decision based on the weight of the evidence adduced at the hearing.

On this basis, the recognition regulations themselves and not their history and development are of paramount significance. These regulations now have the force of law, and as they are clear in their meaning, there is no need to even consult the regulatory history. Stated plainly, if the Petitioners have by a simple preponderance of the reliable, probative and material evidence made a case which taken as a whole tends to show the truth of the Petitioners [*sic*] allegations, then they are entitled to recognition.

Under this standard, there is no question that there is a preponderance of evidence to support the Petitioners as to each and every element contained in the recognition regulations. Further, there is no question that the quality of the evidence demonstrates that it is reasonable and believable that the Samish have continually existed as an Indian tribe up until this very day. The quality of proof supports the Petitioner as to each element contained in the recognition regulations.

Before commenting further on the proof it should be stated that it is the opinion of the undersigned that all of the witnesses were truthful. Each witnesses testified credibly and each is entitled to be believed under oath. Chester Cayou had some difficulty with his recollection but this is not a reason to discount his testimony in its entirety.

There are no conflicts in the testimony as to the facts that haven't been resolved. The only contentious matters are those of conflicting interpretations.

For instance, Dr. Hadja and Dr. Roth draw different conclusions based essentially on the same facts. The Petitioners insist that since Dr. Hadja had a better opportunity for observing the tribe and examining the evidence that she should be believed as opposed to Dr. Roth. Specific expert anthropological conclusions supported by the record are evidence. Where Dr. Hadja and Dr. Roth or the other witnesses draw anthropological or other expert conclusions which are in conflict, the undersigned has in his finding of fact resolved the conflict or made a judgment as to which conclusion is the most believable.

Dr. Hadja and Dr. Roth are not the ultimate finders of fact. Their conclusions or that of the other witnesses that the Petitioners ultimately meet or do not meet the criteria of the recognition regulations are legal conclusions and are not entitled to any weight in this type of proceeding.

Now, having considered the testimony set out above the undersigned is of the opinion that the testimony of the Petitioners' witnesses is accurate and factual. The undersigned accepts this testimony and the expert conclusions of the Petitioners' witnesses as the facts of this case. Further, the undersigned makes the additional findings of fact which are included and set out in Appendix B to this opinion. These findings of fact support the positive finding for the Petitioners as to each of the contested criteria.

It would serve no purpose to re-summarize the testimony of the Petitioners' witnesses. This testimony firmly supports the petitioners' position and needs no explanation. However, it is incumbent on the undersigned to considered [*sic*] some of the Defendant's testi-

mony and their conclusions which are necessarily rejected by the undersigned's decision.

Dr. Roth testified for the Defendants in principle opposition to the position taken by Petitioners. His testimony did not seriously controvert the factual basis of the Petitioner's petition. His conclusions, however, based on these facts were radically different.

He testified that the Samish who lived on the established reservations such as the Swinomish and the Lummi had integrated into those reservations and become a part of those tribes. His basis in part for this testimony is that the Samish leaders participated in official reservation business.

Further, he refers to the Ph.D. dissertation of Natalie Roberts. He stated that her primary thesis is that the Swinomish Reservation evolved into a community of its own and that the Indians who were there had become socially and politically integrated. This was around 1920, according to Dr. Roth. Dr. Roth seems to contradict himself in that the evidence is practically unrebutted that the Samish continued to survive as a tribe even by Dr. Roth's standards up until the 1930's.

In another contradiction as to the evidence that the reservation Samish have merged with the Lummi, Dr. Roth testifies that the Samish consistently served in the Lummi tribal government since 1959. This is true but this was well after 1951 when the Samish formally reorganized and it can hardly be disputed that the Samish were not a tribe from that point on.

Dr. Suttles [*sic*] testimony negates the Natalie Roberts dissertation. It shows that many Samish families, like the Edwards family and others, still maintained

their distinct identity as Samish even though they participated in reservation affairs.

Speaking generally, the heart of the Defendant's case is their assertion that the true Indian Reservation Samish have integrated with other Indian tribes and that other Non-Reservation Samish are simply Indian descendants and are not Indian enough to be considered part of an Indian community. The undersigned specifically rejects this position as not being supported by the evidence. There is significant evidence in the record which supports the proposition that certain off reservation Samish continued to be a part of the Samish community.

There is no anthropological reason why the Samish who lived on reservations which were admittedly made up of many different tribes could not participate in the reservation activities and still maintain their Samish identity. The individuals who testified at the hearing who said that even though they had Samish blood that they considered themselves Swinomish spoke only for themselves. This is in opposition to the numerous members of the Samish tribe who live on reservations who consider themselves still to be Samish.

There is sufficient evidence in the record to show the continuation of the Samish tribal functions between 1935 and 1951. This period is probably the most seriously contested. There is oral history of meetings during that time and there is documentary evidence. Mary Hanson's testimony supports the proposition that the tribe continued to exist as a tribal entity during this period of time.

There are other important reasons to believe that the Samish continued to exist as a tribe during this critical

period of time. There is a continuity of leadership. These leaders who emerged from one generation were often followed in succeeding generations by their children and grandchildren. They continued to maintain influence with the tribe throughout the history of the tribe. The Edwards family in particular have been leaders since almost the turn of the century and are still leaders in the tribal movement. There are other leaders such as Sas Kavanaugh and Don McDowell who demonstrated tribal leadership at certain times during the tribe's history.

Dr. Roth questions the Samish existence, stating that the Samish organized only for specific purposes; that is, to pursue claims such as government benefits or fishing rights. It is this showing up for specific purposes that convinces the undersigned that the tribe continues to exist. Whenever there was any reason for the Samish to demonstrate their existence, they immediately rose to the occasion. When there was ever an issue before it, leaders appeared and the tribe immediately took action. To the undersigned's mind, this is conclusive evidence that the tribe continued to exist and to have political influence and authority with its members.

The Noowhaha[3] tribe and the Samish were at one time different tribes. Dr. Suttles and Dr. Hadja testified that the two tribes had combined probably around 1850 and that they had been one tribe since that time. This conclusion of Dr. Suttles and Dr. Hadja is controverted by the Defendants but the undersigned is con-

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[3] The record in this case reflects different spellings of the names of certain tribes. The undersigned has tried to consistently use an identical spelling for each tribe.

vinced that the conclusions drawn by these two witnesses are sound.

The undersigned observes that the Samish never had a reservation. They did manage to maintain separate living areas for a good many years until these were lost to white encroachment. Then they were required to live either on the reservations of other tribes or to live independently on non-Indian lands. Those who lived on non-Indian land apparently intermarried with non-Indians considerably more than those who lived on reservation land. The Defendants argue that these circumstances led to a disintegration of the tribe at least in so far as the recognition regulations were concerned.

To be a member of a tribe is a political affiliation and it is essentially a matter of intention on the part of the individual tribal member. It is not a matter of blood nor is it necessarily a matter of living in the same immediate area. It is often necessary and always proper for people to participate in activities which control their immediate environment. However, in doing so, an individual's political affiliation is not changed because he or she associates with others of another political party.

The evidence in this case clearly demonstrates that a certain number of reservation and off reservation Samish intended to remain Samish and are Samish. This is their choice. This core of people have in accordance with the recognition regulations preserved the integrity of the Samish tribe. Because of them, the Samish should be recognized formerly [*sic*] as an Indian tribe.

This decision constitutes a recommendation to the Assistant Secretary for Indian Affairs that the Petition-

ers be formerly [sic] recognized by the federal government as the Samish Indian Tribe.

DAVID TORBETT
David Torbett
Administrative Law Judge

[APPENDIX A OMITTED]

APPENDIX B

The findings set out below which are adopted principally from the Petitioners [*sic*] brief with modifications constitute additional Findings of Fact in this case and are incorporated by reference into this opinion.

1. Ms. Simmons, an employee of the Bureau of Indian Affairs for 30 years, testified that she began preparing lists of Indian tribes "with whom we had dealings" in 1966 (TR:347, TR:349). Her preliminary list was "based on a review of the files" in her office, and was circulated among staff for comment (TR:347-348). "It was never intended to be a list of federally recognized tribes as such," she recalled; "it may have evolved into that," however, under Congressional pressure to make clearer distinctions between recognized and nonrecognized tribes (TR:348). By 1969, she had restricted her list to "those groups who had a formal organization approved by the Department" (TR:349-350, TR:357).

2. Ms. Simmons explained that, initially, "we just listed everybody that there was a file records section for" in the Bureau's Washington, D.C. offices (TR:351, TR:36). The draft was then sent to Area Offices and

Agency Superintendents to identify which of the groups listed had a "formal relationship" with them. This was the basis on which groups were then classified as Federally-recognized or not, but she admitted that records of Area and Agency comments have been lost (TR:351-352). Subsequently, her revised list was "generally" consulted to determine groups' legal status, although paradoxically she conceded that she had no authority to make such decisions (TR:353, TR:363).

3. Under cross-examination, Ms. Simmons identified an early draft of the list she prepared in 1966, which includes the Samish Tribe on page 14 (TR:355, Exhibit P-3). She recalled that the Samish had been taken off her 1969 list because the Bureau's Portland Area advised her that they were "recognized for claims purposes only," but she had no record of this (TR:355, TR:358-359, Exhibit P-4). On further questioning she conceded that she had no personal knowledge of the legal status of the groups she had listed under the Portland Area, and had relied upon the comments, now lost, which were made by the Portland Area (TR:367-368).

7. In 1978, the Defendants adopted standard procedures and criteria for reviewing the legal status of non-Federally-recognized groups, set out, as amended, in 25 C.F.R. Part 83. The Tribe submitted a petition for consideration under these regulations in 1979, which was denied in 1987. 52 Fed. Reg. 3709. The Tribe subsequently challenged the denial on constitutional Due Process grounds, resulting in this remand.

8. Petitions for Federal acknowledgment are processed by the Branch of Acknowledgment and Research (BAR), in the Bureau of Indian Affairs. Ms. Reckord, who is currently chief of the Branch, described in detail

the procedures her staff follows in evaluating the evidence contained in petitions (TR:261-264). She also summarized the seven criteria for Federal acknowledgment of an Indian tribe contained in 25 C.F.R. 83.7 (TR:264-268). Since Ms. Reckord began working at BAR *after* its final administrative determination against the Samish Indian Tribe, however, she has no direct knowledge of the research methods actually utilized by Dr. Roth and other BAR staff members to study the Samish, hence her testimony is of very limited probative value.

14. The parties also called a number of Indian witnesses. Defendants called four members of the Swinomish tribe's governing body, or senate—Laura Wilbur, Chester Cayou, Sr., Barbara Jean James, and Susan Day Wilbur—as well as the Swinomish tribal enrollment clerk, Judy Flores. Mr. Cayou's credibility was strained by his denial of having ever made the affidavit previously submitted by Defendants as the foundation for his testimony (TR:542-543) and his insistence that he had never served on the Samish Tribe's fish committee (TR:539-540), contradicted by the minutes of the committee (Exhibit P-31, added to the hearing record by leave of the ALJ, TR:540).

15. The Tribe called Ms. Hansen, who had served on its council and as its secretary since the 1950s. Mrs. Hansen is the great-granddaughter of Cubshelitsa, sister of Whulholten, one of the leaders of the Samish village on Guemes Island a century ago, and daughter of Don McDowell, Samish Tribal leader in the 1930s; she was given the name Cubshelitsa by Whulholten's granddaughter, Mary Ann Cladoosby (TR:1028-1029; also TR:805, TR:825, TR:837).

21. Dr. Sturtevant is the curator of North American ethnology at the Smithsonian Institution in Washington, D.C., with which he has been affiliated in various capacities since 1956 (TR:31). He has conducted anthropological fieldwork among Indian tribes in various regions of the United States including the Seminoles of Florida, the Senecas of New York, and the Pomo in California, as well as field research in Mexico and Burma (TR:32-34). By his own calculation, he has visited communities belonging to every American Indian cultural region except the Plateau (TR:34). He has also conducted historical research using a variety of print and graphic materials (TR:37-38).

22. Dr. Sturtevant has been the general editor of the Smithsonian Institution's encyclopedic *Handbook of North American Indians*, which is being written by leading anthropologists and historians under the sponsorship of an Act of Congress, summarizing existing knowledge of Indian cultures and history (TR:35-36). His editorial role includes selecting experts to prepare various chapters, and evaluating their work professionally (TR:37).

23. Dr. Sturtevant was also invited, by the Government defendants, to participate in a workshop in January 1992, to advise them on reforming their procedures for determining whether particular groups are Indian tribes under 25 C.F.R. Part 83 (TR:58).

24. Dr. Suttles is professor emeritus at Portland State University in Portland, Oregon, where he began teaching anthropology and linguistics in 1966 (TR:154). Since he began his studies, before the Second World War, his research has focussed on the Coast Salish peoples of northern Washington and southern British Co-

lumbia, including Semiahmoo, Lummi, Samish, Saanich, Songhees, Sooke, Nooksack, Swinomish, Skagit, Katzie, Cowichan, Chilliwack and Musqueam (TR:154-156). Dr. Sturtevant regards him as the primary expert on the culture and society of Coast Salish Indians, and on that basis had arranged for him to edit the volume of the *Handbook of North American Indians* devoted to the Northwest Coast (TR:39).

25. Dr. Suttles explained that he had studied several different Coast Salish languages and dialects and understood "about three-quarters" of what he heard, although he did not regard himself as fluent (TR:160). He is presently working on a grammar, for the British Columbia Museum (TR:160-161).

26. Dr. Suttles began interviewing Samish elders in 1947, and in 1951 was asked by the attorneys representing a number of tribes in the area to testify on their behalf before the Indian Claims Commission; among the Samish he knew at that time were Charlie and Alfred Edwards, Tommy Bob, Annie Lyons, and Mary Hansen (TR:157; TR:222). He testified that he had remained in contact "off and on" with Samish people (TR:158).

27. In addition to his experience with Coast Salish peoples like the Samish, Dr. Suttles referred to research he had conducted with Indians further north along the Pacific Coast such as the Tsimshian, Kwakiutl, Bella Coola and Cloquallum, as well as the Northern Paiutes in Nevada, and the Okinawans in Japan (TR:158-159).

28. Dr. Hajda, an independent researcher, completed her doctorate in anthropology at the University of Washington in 1984. Her thesis, on the social organization of lower Columbia River Indians, drew heavily on historical records, as well as interviews with Indians on

the Warm Springs and Grand Ronde reservations (TR:783-784, TR:887-888).

29. Dr. Hajda has continued this cultural and historical research as a consultant to the Indian tribes of the Warm Springs and Grand Ronde Reservations, and, under contract with the U.S. Forest Service, on the Yakima Reservation in Washington (TR:765-786). Her field research has focussed on Indians of coastal Oregon and southwestern Washington, and in this connection she has studied with Dr. Suttles at Portland State University (TR:787). Dr. Sturtevant and Dr. Suttles arranged for her to prepare a chapter for the volume of the *Handbook of North American Indians* on Northwest Indians (TR:39).

30. Dr. Hajda explained that she was referred to the Samish Tribe by Dr. Suttles, after the anthropologist originally assisting the Tribe, Dr. Snyder, fell ill (TR:787). She understood that her assignment was to assemble and analyze the materials assembled by Dr. Snyder and the Tribe, which was largely historical (TR:788). After she reviewed this material, it was decided that she should interview some of the oldest living members of the Tribe, and also conduct a survey of the members (TR:788). The elders came to the Tribe's offices with their families, to hear what they had to say (TR:788). Summaries of these interviews were submitted to BAR during the course of the previous administrative proceedings,[1] and the tapes were submitted here as Exhibit D-27.

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[1] In cross-examination, Dr. Hajda explained that the typed summaries of the interviews had been prepared by Plaintiffs' counsel, Mr. Russel Barsh (TR:965). She recalled no inconsistencies between the tapes and the summaries (TR:966-968). Defendants deposed Mr.

31. While doing this, Dr. Hajda continued to consult with Dr. Suttles from time to time, and borrowed his old field notes (TR:790-791). Her active research on the Tribe's case was completed in 1987, but she has continued to re-evaluate her conclusions on the basis of more recently discovered historical documentation (TR:791, TR:889-890). In response to Defendants' cross-examination, she stressed that the Tribe had made no suggestions as to what she should include in her research findings (TR:932). She also clarified that she had reviewed all documents that she could find in the Tribe' [*sic*] possession up through 1987 (TR:991).

32. Dr. Roth has been employed for the past 16 years by BAR, where he has been their lead researcher on 13 Federal acknowledgment petitions (TR:568-569). He has been involved to some extent in internal reviews of six petitions from the Puget Sound area, including the Samish Tribe (TR:570, TR:574-575). He was not among the 11 scholars Dr. Sturtevant identified in his testimony as "well-known as specialists in one area or another of Coast Salish," however (TR:39-40). He estimated that he has spent a total of between five to 10 weeks doing field research for BAR on various Coast Salish peoples (TR:636-637).

33. Prior to his employment at BAR, Dr. Roth obtained a doctorate in cultural anthropology at Northwestern University based on his study of social integration on two multi-tribal Indian reservations in Arizona, Chemehuevi and Colorado River (TR:569). This work

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Barsh, who stated that he had a B.A. in social anthropology from Harvard University, had done fieldwork in Fiji as well as North America, and had published his studies in a number of academic journals (BARSH DEP:**; TR:1009).

involved living for 18 months on the reservations, and comprised his "primary" experience with field research, as well as considerable archival study (TR:571). He also spent a month studying the political system in Tecate, Mexico (TR:572).

35. Since joining the staff at BAR, Dr. Roth has made 13 or 14 field visits, averaging a week or two, to evaluate petitioning communities, as well as field trips to Maine, Texas and Oklahoma in connection with proposed Federal legislation (TR:572-573). As a BAR anthropologist he is responsible for checking the quality of petitioners' research data, and conducting additional research and analysis (TR:576-577).

36. Ms. McMillion has been employed by BAR since it was organized 16 years ago, as staff genealogist (TR:379). Her training in this field has consisted of attending annual conferences and workshops, and holds [*sic*] a special certificate in Indian genealogical research; she has taught genealogical research methods several [*sic*] continuing education programs as well (TR:380-381). Before joining BAR, she worked independently as a genealogist (TRL:382). At BAR, she has worked on six cases, including the Samish, as well as "special studies" for the office (TR:385-386).

37. Ms. McMillion has no anthropological training, and stressed that her research on the Samish case was strictly documentary (TR:417).

38. Dr. Paredes, anthropology professor at Florida State University, obtained his doctorate from the University of New Mexico after writing a thesis on Chippewa Indians in Minnesota cities (TR:277). He worked as research coordinator of a Minnesota mental health center which had about 10 percent Indians in its

service population, and as a community development specialist with the University of Minnesota. (TR:277-278). He briefly taught anthropology and American Indian studies at Bemidji State College before completing his doctorate (TR:278).

39. Once at Florida State University, Dr. Paredes became interested in the Poarch Creek Indians of Mississippi, and in 1971 began what he described as a "long and continued steady relationship" with them as a researcher (TR:279-280).[2] He helped them prepare their successful case for Federal recognition as an Indian tribe, and then, he supposed as a result of that work, BAR contracted with him to spend two weeks collecting archival materials on another petitioning Indian group, the Lower Alabama Creeks (TR:281-282). More recently, he was consulted by the Brotherton Indians of Wisconsin on means of seeking Federal recognition (TR:284). Like Dr. Sturtevant, he had participated in the workshop convened by BAR in 1992 to discuss reforming procedures under 25 C.F.R. Part 83 (TR:58, TR:293).

40. Dr. Paredes felt it was also relevant that he had served on the scientific and statistical committee of the Gulf of Mexico Fishery Management Council, advising on socio-cultural impact issues involving non-Indian communities (TR:284-286, TR:303). In cross-examination he maintained that there was "a very strong parallel" between his fishery work and the work

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[2] He described briefly the research methods he had used in that work, involving archival material and direct observation (TR:294-296), which appeared to be the same as those reportedly employed by Dr. Hajda and Dr. Roth, the principal experts called by the Tribe and the Defendants respectively.

of BAR because it involved "try[ing] to see that all the relevant published and unpublished studies have been incorporated" into the decision (TR:305).

41. Dr. Paredes stated that he had "[n]ot one bit" of field research experience with any Coast Salish Indians, nor any direct knowledge of the Samish (TR:339).

42. Ms. Forcia did not testify at the hearing but was deposed in 1993 by the parties. She holds a B.A. in sociology from Oakland University and did some graduate work at American University (FORCIA DEP:4). Her experience in interviewing and field research apparently was obtained in the context of serving as a State investigator in child abuse cases (DEP:4). She had not studied Northwest Indian ethnography, was unable to identify experts in that field when asked, and claimed that she had not done ethnography as an employee of BAR (DEP:3-4). Her first visit to Northwest Indian communities was in connection with the Samish case and she had no other direct experience with Northwest Indians (DEP:7).

43. Mr. Shapard explained that Ms. Forcia was asked to undertake some of the fieldwork in the Samish case as a kind of "experiment" (SHAPARD DEP:42-43, 83). "I think Lynn Forcia may have been at loose ends and we were looking for something for her to do" (SHAPARD DEP:81). In his testimony, Dr. Roth also referred to Ms. Forcia's participation as an "experiment" (TR:643).

44. In his direct testimony, Dr. Suttles provided an overview of the aboriginal Coast Salish peoples, who included the Samish. He referred to the Salish family of languages, which were mainly spoken by peoples who inhabited the Pacific Coast of Washington State near

Grays Harbor, as well as the coastlines of Puget Sound and Georgia Strait, generally near the present-day cities of Seattle and Vancouver, Canada (TR:161). Samish was one of these Salish languages, and was spoken by the people living in the southeast quadrant of the San Juan Islands, and mainland to the east of the Islands (TR:162).

45. Dr. Suttles succinctly described Coast Salish social organization in the following terms:

> The social units were, small to large, the family [and] the household. The house itself occupied during the winter was a large wooden structure made of posts and beams holding wall planks tied to them, and with roof planks laid upon them. Each house was divided into a number of sections, and each section was occupied by a family. Some heirarchy [sic], but sharing a lot with other members of the household.

(TR:162-163). Villages consisted of one or more houses, and villages themselves were often grouped into larger linguistic and territorial divisions, which were usually referred to as "tribes" (TR:163). There was an upper class or elite in each house, as well as slaves, who were typically the descendants of war captives (TR:164).

46. Unlike Indians in most other parts of North America, Coast Salish reckoned descent from important ancestors on both their mother's side and father's side, with the result that all kinship groups overlapped (TR:163-164). A single family would typically have roots in more than one village or geographic area (TR:164, TR:166). By custom, "you had to marry somebody you weren't closely related to, or [at] least people didn't know you were closely related," and closeness in this

instance meant the fourth degree or fifth descending generation (TR:165). Thus "the ideal thing was to seek some non-relative of a family of about equal status in some other place. And maybe even the more distant the better" (TR:165). Marriages were generally arranged, especially among high-status families (TR:165).

47. Long-distance marriages served an economic function, because each marriage resulted in a series of exchanges of wealth, enabling houses to share in the resources harvested over a very large geographic area (TR:165-166, TR:169-170). They also served a political function since "If you had in-laws somewhere else, you're less likely to be attacked by those peoples," which was a distinct advantage in a region where raids and fighting were quite common (TR:166). Dr. Suttles noted that his study of the Lummi revealed that, collectively, they had managed to arrange marriages with all of the tribes surrounding them (TR:166). Differences of language were not an obstacle to this kind of strategic intermarriage, and several languages might be spoken in the same house (TR:190).

48. Each individual would accordingly have grandparents from as many as four different houses, and enjoy rights in each house;[3] they were "alternate homes" in the Coast Salish language, places where you could go if you didn't get along where you were already living (TR:166-167). Although there was some tendency for a newly-married couple to reside with the husband's relatives, moreover, this was by no means uniformly the case (TR:167-168). A house would therefore include peo-

[3] Dr. Suttles presented two genealogies that showed even more complex interconnections among houses over several generations (TR:185-189 and Exhibit P-1).

ple related to each other through their mothers as well as their fathers (TR:168). Since changes of residence were common—for example, after a dispute—there were no fixed social, or kinship boundaries between Coast Salish groups (TR:168-169, TR:172-174). Similarly, resources such as fishing locations had to be shared with all kin, regardless of their residence (TR:174).

49. Each family owned its own section of the house and could take the planks with them if they left (TR:241). When moving from one house to another, people did not automatically relinquish their former rights —although there was always the possibility of eventually being treated as an "outsider" (TR:252). People might make extended visits to other related houses lasting years, or change their residence permanently as a result of a dispute, marriages, or deaths (TR:807-808). Indeed, Dr. Hajda indicated that it would not be easy for an outsider to tell, at any one time, which people living in a particular house considered it their primary attachment, since identity was determined by intentions, rather than simply physical residence (TR:808).

50. Disputes over kinship rights were settled by holding a potlatch, or feast where each side paid as many witnesses as possible to support their respective claims (TR:175). Potlatches were also used to assert claims to hereditary family names, which were a major part of identity and social status:

> [A]n individual, if he wants to be anyone or she wants to be anyone, has to have a name, and be given a name at a formal gathering, ith [*sic*] guests paid to witness this. And then to be called by that name at

> other formal gatherings. That is what good status was in the old days, and still is to some degree.

(TR:175). A high-status person might be particularly associated with the house in which he exercised leadership, but would still enjoy some claims elsewhere (TR:190-191).

51. Identification with a particular house was asserted whenever the families sharing the house jointly hosted an important gathering, such as a "potlatch" feast or "winter dance" (TR:199).[4] At a potlatch each family would "individually display its inherited privileges, name its children, honor its dead, or whatever, . . . one after another" (TR:199-200). These activities required the combined wealth and work of every family in the house (TR:219, TR:806). "This was a way of establishing status for the household head [and] for the village," Dr. Hajda noted; "It made their name good" (TR:806).

52. Another way people strengthened their association with a specific house was through the acquisition of a special name, and the periodic renewal of claims to that name (TR:807). Dr. Hajda explained:

> [I]n those days of course there were no documents with which to write down what the name was, so witnesses would be called in at an event, at a feast, the name was given publicly, members of the related families would stand up and testify about the former holder of the name, how they had known the previous

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[4] Dr. Suttles described "winter dances" as occasions at which people who had experienced visions or gained spiritual powers would gather to dance and sing (TR:176). The traditional longhouse in which gatherings of this sort still take place is called a "smokehouse".

> holder, how they know the family, and in general, establish firmly what the ancestry of the person and the name was. So this was another way of asserting one's identity.

(TR:806-807).

53. According to Dr. Suttles, there was no formal system of chiefs or principal leaders among the aboriginal Coast Salish. Every family had its own leader, and the wealthier men in the village were particularly important and influential because they could give feasts (TR:213-215). There were also special-purpose leaders, whose influence was based on the ownership of some expensive technology (such as a deer net or fish weir) or on their ritual knowledge (TR:216). Dr. Suttles suggested in fact that a majority of the "good" people in any Coast Salish village exercised personal leadership for some specific purposes (TR:216-217). This included experts in large-scale fishing or hunting, who organized these activities by "hiring" kinfolk to participate (TR:217-219). For example, Dr. Suttles referred to the inheritance of reef-net sites and the use of potlatches to maintain claims to them (TR:245-246).

54. In the 1820s, the Hudsons [*sic*] Bay Company tried to encourage some men to assume a more formal role as chiefs; in the 1850s, similarly, U.S. officials tried to identify a small number of "head chiefs" for treaty purposes (TR:214). These efforts did not displace aboriginal patterns of flexible, informal and special-function leadership, however.

55. Among Coast Salish, intermarriage with non-Indians began as soon as the Hudson Bay Company established its trading post at Fort Langley in the 1820s

(TR:179-180). The Bay Company "discovered it was good to form alliances with the local people" this way, Dr. Suttles observed, "And the local people were very eager to form these alliances" as well (TR:180). To illustrate this point, he gave two examples of white in-laws helping protect their Samish relatives from encroaching settlers (TR:180-181). Marriages with non-Indians occurred "everywhere" among Coast Salish peoples, but Dr. Suttles was not aware of any statistical data on its precise extent (TR:238-239).

56. This explanation was restated by Dr. Hajda, who noted that Coast Salish Indians had not experienced the direct military conflicts with settlers that occurred elsewhere, and were therefore much more open to mixed marriages (TR:863). Most of the early settlers were single men, moreover, so they had little choice in establishing families (TR:863). Settlers enjoyed economic resources that made them attractive matches (TR:864, TR:915). They could also defend their Indian in-laws' rights to remain on their own lands (TR:864). These "squaw men" were viewed with disdain by other settlers, however, and their mixed-race children were not accepted in white society (TR:865, TR:890-891). As a result, the children may have had little choice but to consider themselves as Indians (TR:865). She noted in cross-examination that this prejudice gradually declined but has never completely disappeared (TR:909).

57. Dr. Hajda moreover explained that the social contrasts between a Samish Indian and a settler would have been less, even a century ago, than the contrasts between a Samish and an Indian from another region of the country (TR:917).

58. Dr. Roth contended that mixed marriages changed their meaning and effects after the major influx of settlers in the 1860s, which created a shortage of white women (TR:586-587).

> [A]lthough they were certainly stable marriages, . . . in a number of cases, at least in the region, the wives were sent back to he [*sic*] tribe. I'm not sure with or without the kids. In any case, it no longer became an appropriate thing from the viewpoint of the whites, I don't know what the viewpoint of the Indians was at this point in time, to marry Indian women. So that there's a real shift. And apparently at the time some of the pioneers said, you know, take it or leave it, this is my wife. Others took a different view of it.

(TR:587-588). Dr. Roth did not challenge Dr. Hajda's contention that children of mixed ancestry would have been more welcome among Indians. He did admit that families of mixed ancestry maintained relationships with Indian tribes and produced some tribal leaders (TR:588).

59. Dr. Suttles did not think that the establishment of reservations put an end to traditional patterns of long-distance marriage, but that Indians' mobility was reduced. Many received individual allotments of land on particular reservations, for example, and they were likely to remain where their land was and identify with that place (TR:191). It was his impression that mobility, long-distance marriage and marriages with non-Indians continued to be more frequent among those Indians who did not move to reservations (TR:192). At the same time, sharing food from different parts of the region was

still common among Coast Salish people both on and off-reservation (TR:221).

60. Dr. Suttles described the aboriginal territory of the Samish as having been bounded by the southeast tip of San Juan Island, Deception Pass, Padilla Bay, Samish Bay, Chuckanut Bay, and the northern end of Lopez Island (TR:192-193, Exhibit J-1). During the earliest period of contact (in the early 1800s) there were villages on the south shore of Guemes Island, at March's Point on Fidalgo Bay and on Samish Island (TR:193-194). As a result of epidemics and raids by northern Indians, all of the Samish appear to have concentrated in one village on Samish Island by Treaty time, which is to say the 1850s (TR:194-195).

61. The aboriginal relationship between the Samish and Noowhaha was a major issue in this case; Defendants argued that as many as one-fifth of the contemporary membership of the Tribe have Noowhaha, rather than Samish ancestry.

62. Dr. Suttles, who had studied the relationship between the Noowhaha and Samish in the early 1950s, noted that the aboriginal territory of the Noowhaha extended from the north end of Swinomish Channel to as far as Chuckanut Bay, and inland to include the Samish River drainage, Samish Lake and part of the Skagit River drainage (TR:204-205, Exhibit J-1). One important village was at Bayview, another at Bow, but most of the villages were farther inland in "prairie" areas, which provided good hunting and foraging for roots and bulbs as opposed to fisheries (TR:205). The Noowhaha spoke a Salish language different from Samish, but Samish people Dr. Suttles had interviewed in the 1950s spoke both (TR:205-206).

63. According to Dr. Suttles, the Noowhaha were called "Stick" Samish, from the Chinook Jargon term for "forests", or sometimes Upper Samish, since they lived inland from the saltwater Samish (TR:206). They were tied by kinship with both the Samish, downriver, and with Upper Skagit people farther upstream; at least some Noowhaha families built their houses beside the Samish house on Samish Island (TR:207). Dr. Suttles considered it very likely that the Samish gradually expanded eastward, into what originally had been Noowhaha territory, leading to conflicts that were finally settled by arranged marriages between them—probably in the 1850s or a little earlier (TR:209-211). By the time the Samish built their new house on Guemes Island in 1876, some Noowhaha families were living with them (TR:210).

64. Some people of Noowhaha descent are enrolled today with the Upper Skagit, and others with the Samish (TR:248). Dr. Suttles had also met people of Noowhaha descent on the Swinomish Reservation, in the 1950s (TR:248). He was unaware of any contemporary organized Noowhaha group that might constitute the core of a continuing community (TR:248-249). Dr. Hajda also felt that "pretty much" all Noowhaha had been absorbed by other groups by the time of the Treaty (TR:809, TR:810-811).

65. Dr. Hajda "reserved judgment" on Dr. Suttles' surmise that there had been early warfare between the Samish and Noowhaha, but she agreed that "certainly the Samish and the Noowhaha had established what looks like a symbiotic relationship" involving "dependence and superiority," or a "patron-client" relationship (TR:799-800). The Samish protected the Noowhaha

from raiders, and in return obtained access to resources farther inland. At some time in the 19th century, however, the Samish population declined, and some Noowhaha families gained higher status—in particular the family of Pateus, a treaty signer (TR:800). In more recent times, Samish and Noowhaha people lived together in the Guemes Island house and near the towns of Bow and Edison, and fished together (TR:804, TR:810).

66. Counsel for the Government also asked Dr. Suttles to explain the origins of the Indians who were living until the early 20th century at Mitchell Bay on San Juan Island. Dr. Suttles believed they had mostly been of Cowichan and Saanich (Vancouver Island) origin, possibly with some Samish and Lummi ancestry as well (TR:242-243). These families, it should be noted, have comprised less than 10 percent of the Tribe's members according to both parties' figures.

67. As Dr. Roth noted, the Samish were signatories to the 1855 Treaty of Point Elliott, which set aside reservations at Swinomish and Lummi, just south and north of Samish territory (TR:583-584).

68. According to Dr. Hajda, the Samish believed that they were going to obtain their own reservation under the treaty (TR:815). After the treaty, the Samish were told to go the [*sic*] the Lummi Indian Reservation, but by the 1860s only about one-third of them were still living there, though others continued to come there occasionally to collect their Treaty annuities (TR:212, TR:815). "It seemed pretty clear that they didn't think they were going to get what they thought was theirs," and resisted limitations on their freedom of movement,

as well as efforts to convert them to Christianity (TR:242, TR:815).

69. Dr. Hajda explained that Indian life on 19th-century reservations was controlled by U.S. Indian Agents, and traditional ceremonies were forbidden after 1884 (TR:816). Treaty annuities were often delivered late; "you might be hungry, you might not have enough land to support yourself" (TR:816). Survival off-reservation was also difficult, but for different reasons. White settlers tried to drive Indians from the land; the Samish living on Samish Island moved to Guemes Island after Dan Dingwall, a local storekeeper, shot one of them (TR:817). Indians on the reservations were encouraged to farm, although the land was not really suitable for agriculture, while Indians living off-reservation found it increasingly difficult to fish or hunt, and increasingly went to work for whites as loggers and hop-pickers (TR:818). For instance, Annie Lyons tried to support herself by digging and selling shellfish, but after local whites accused her of stealing oysters and "gave her a bad time," she married a man from the Swinomish Reservation and moved there (TR:819).

70. Dr. Suttles surmised that Samish people moved to reservations if they had close relatives already well-established there (TR:251). He suspected that those who did not relocate were afraid of being treated as outsiders who lacked legitimate rights to local resources (TR:253). Dr. Roth agreed that pressure from white settlers forced an increasing number of Puget Sound Indians, including Samish, to take up lands on reservations, but noted that all available reservation lands had been allotted out by 1910 (TR:588-589).

71. Dr. Roth contended that up to two-thirds of the Indians of Samish ancestry eventually moved to reservations, and that many did not later seek membership in the Samish Tribe (TR:668-670). As discussed above, however, the number of Coast Salish people who could trace descent to a particular village was always considerably larger than the number of people who maintained *primary identification* with that village, since most individuals enjoyed multiple tribal ancestries.

72. By 1876, conflicts with local settlers on Samish Island persuaded the Samish there to the west side of Guemes Island, where they built a single longhouse (TR:195, TR:242; the "New Guemes" house or village).

73. Dr. Hajda characterized the New Guemes Island house as a kind of "refuge" for Samish families that were being driven off their lands by white settlers (TR:805). Two men took the initiative of acquiring the house site—Bob Edwards, who was of Samish and Noowhaha ancestry, and Citizen Sam, step-nephew to Whulholten, who was Samish (TR:805). The New Guemes house also became a kind of refugee camp for families from other areas who were being driven off their lands; they apear [*sic*] to have built smaller houses near the Samish longhouse (TR:822).

74. Nine different families lived together in the Guemes Island house in 1880 (TR:195, Exhibit P-2)[5] They had mainly Samish, Noowhaha and Klallam ancestry, but about half of them also had other connections or spoke other languages (TR:195). For comparative pur-

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[5] Charlie Edwards, one of Dr. Suttles' informants, lived in the house as a child, together with the father of another one of his informants, Annie Lyons (TR:196-197).

poses, Dr. Suttles described the complex composition of the last traditional longhouse on the Lummi Indian Reservation, also in the 1880s, which he described as "pretty typical" of Coast Salish houses (TR:198-199).

75. Dr. Hajda noted that these nine families formed two clusters, one associated with the Edwards and the other with Whulholten. They both self-identified as Samish, although it was unclear to her exactly how they had originally been related (TR:801). "There was a considerable representation of people who had been brought in by marriage" as well, which was customary (TR:802). The Samish were not all concentrated in this one house or village, moreover, although it served for many years as a headquarters (TR:804).

76. Samish people continued to fish and hunt; unlike the Indians on the nearby Lummi Reservation, they generally did not practice farming (TR:243). Their principal organized activity as a group continued to be the holding of ceremonials, at New Guemes village, to which Indians of other tribes were invited (TR:243). The New Guemes house even had its own baseball team at the turn of the century (TR:236).

77. Dr. Suttles' impression was that there was never any all-purpose leader in the house, although Charlie Edwards and Annie Lyons' father, Whulholten, were the owners or managers of reef net locations (TR:240, TR:801, TR:823).

78. In the 1890s, the Samish may have continued to control as many as three or four reef-net sites in the San Juan Islands, including sites owned by the families of Charlie Edwards and Annie Lyons (TR:245-247). Other important economic sites included a Samish halibut-fishing camp on Cypress Island, a halibut-fishing and

salmon-trolling area at South Beach, salmon weirs on the Samish River and Whitehill Creek, and large beds of oysters and clams on both ends of Samish Island (TR:250-251). Although the reef-net sites were very important, their produce had to be complemented by others [*sic*] resources harvested under the supervision of other Samish families (TR:251, TR:254).

79. Mr. Cayou, one of Defendants' Swinomish witnesses, identified the areas he had known as Samish fishing sites as late as the 1940s, when many Indian fishermen began ignoring the customary boundaries between different tribes' harvesting sites (TR:538). Indeed, he admitted that the Swinomish tribe had used his family's claims of Samish ancestry as their basis for successfully asserting Swinomish treaty fishing rights in the San Juan Islands (TR:539).

80. By the 1890s, the Samish were selling their salmon to canneries, for instance at Friday Harbor, and making a new commercial business of extracting dogfish (shark) liver oil for sale at Samish Bay (TR:220). Others earned cash by digging shellfish and hawking them around white settlements (TR:220).

81. Dr. Suttles observed that, when the U.S. and Canadian governments tried to suppress the traditional winter dance, "it maintained itself, particularly in places off the reservation like the Samish village on Guemes Island, which had winter dances and potlatches right up to the time it was abandoned, I guess" (TR:176). Guemes Island was therefore for many years:

> . . . a very important ceremonial center for people on the reservations as well as off the reservations, because of [*sic*] the reservations you did have the

> agents and the missionaries sort of looking askance at this kind of activitiy [*sic*], or trying actively to suppress it. People of the reservation were free to do it. The Samish were a center of that.

(TR:177-178). Charlie Edwards, a leader in the winter dances in the 1940s when Dr. Suttles began his research, was clearly identified as Samish, as was Tommy Bob, who performed the important function of purifying or exorcising the house before the ceremony began (TR:178-179).

82. The role of the New Guemes Samish house in preserving traditional religious ceremonies was confirmed by Dr. Hajda, who noted that Indian people from all over Puget Sound reportedly went to feasts and dances there (TR:822-823).

83. The traditional New Guemes Island longhouse continued to be used, while many Samish families built newer individual European-style frame houses built nearby (TR:196). Settlers eventually moved into the area to take advantage of a local spring, however, and pressured the Samish to leave (TR:824). Some Samish remained until at least the 1920s, and there is a record of a big Samish gathering at the longhouse called by Jim Charles in 1907, with about 200 guests (TR:824).[6]

84. Some people from the New Guemes house, like Charlie Edwards, went to the Swinomish Reservation; others, like Harry Lyons, went back to Samish Island (TR:241). Harry Lyons' daughter Annie eventually moved to the Swinomish Reservation, but had relatives

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[6] In her testimony Mrs. Hansen made reference to sacred objects from the New Guemes house that were sent to Canada for safekeeping when the Samish were forced from the land (TR:1043).

off-reservation and on the Lummi Reservation (TR:248). The Cageys married into families that had obtained of land on the Lummi Reservation (TR:591). According to Dr. Hajda, this was typical of the region: aboriginal houses divided, some families moving to different reservations, and others continuing to live off-reservation (TR:819). Related families continued to share income and assist one another, however (TR:819-820).

85. Billy and Bob Edwards were part of a group of families that moved to Ship Harbor, near Anacortes; Whulholten's sister Cubshelitsa moved to the town of Anacortes (TR:241, TR:825).[7] There were two canneries at Ship Harbor, the Fidalgo Island Packing Company and Alaska Packers; both employed Indians, Chinese, and whites in different seasonal crews (TR:825-826). The Fidalgo Island company hired Charlie Edwards as a "runner," or recruiter, and he found jobs for his Samish kin (TR:826). There was soon "a little cluster of shacks" on the company's property, where several Samish families lived year-round (TR:826-827). They had small gardens, their own baseball team, and Billy Edwards kept a small "smokehouse" there for religious gatherings (TR:828).

86. Dr. Roth contended that some of these year-round families may not have been Samish but did not identify them (TR:590). When counsel for the Tribe read him portions of the statements of two Swinomish elders, supporting Dr. Hajda' s conclusion that the permanent residents of Ship Harbor were Samish (TR:674-

[7] The ALJ takes judicial notice that Anacortes, Ship Harbor (part of contemporary Anacortes), and the Swinomish Reservation are all within about ten miles of each other (Exhibit J-1).

675),[8] Dr. Roth conceded that Ship Harbor had been "a good-sized Indian village" that was "in large part Samish" (TR:675). He also conceded that it would have been typical of a Coast Salish Indian village to include families related by marriage (TR:675-676). He could not recall his basis for concluding that this village had disappeared by the 1930s (TR:676).

87. A new phase of organized Samish political activity began at about this time (TR:828). There were meetings about land rights in 1912 and 1913 (TR:829). It was at this same time that the Northwest Federation of Indians was organized by Thomas Bishop, a Snohomish Indian, and he travelled throughout the region urging Indian communities to organize and demand the fulfillment of their sixty-year-old treaties (TR:829). Sas Kavanaugh, part of the Edwards family, was the main organizer for the Samish (TR:830). Dr. Hajda explained that Kavanaugh was typical of a new breed of leaders who had more schooling and experience with "the white world" (TR:830). They did not replace traditional leaders like Billy and Charlie Edwards, but provided complementary specialized skills, "[w]hich again is a traditional pattern" (TR:830).

88. The Samish participated in the Northwest Federation as a distinct group, rather than as individuals; membership was by tribe (TR:831). The Federation did not start off seeking compensation for land. "They wanted land" (TR:831). Enabling legislation was eventually adopted by Congress opening the courts to these claims (TR:832). Dr. Roth agreed that the Anacortes branch of the Northwest Federation appeared to be a

[8] The original statements of Bertha Dan and Laura Edwards are found in volume 9 of the Administrative Record.

Samish organization but said he "didn't actually know that much" about its functioning (TR:601).

89. Dr. Hajda noted that the Samish began taking formal applications for membership in 1926, but did not think this was directly related to claims litigation since official membership rolls were not required by the enabling legislation (TR:832). Those Samish collecting membership applications in the 1920s were "pretty much" the same as those who had been holding political meetings in the 1910s (TR:832-833). While land rights appeared to be the major focus of Samish political activity in the 1920s, fishing rights was also emerging as a concern (TR:832-833).

91. A tabulation of the minutes of 125 Samish Tribal Council meetings since 1926 showed that claims and fishing rights were the main topics of discussion, followed by education, health and other social concerns (TR:927, TR:942; Exhibit P-24).[9] Contrary to what Dr. Roth stated, the earliest recorded meetings devoted less than half of their agendas to claims (TR:692 referring to Exhibit P-24), a point that he conceded he did not recall (TR:693).

92. Mrs. Hansen recalled attending Samish meetings in the 1930s where they discussed the proposed Indian Reorganization Act, and many elders required intepretation [*sic*] (TR:1029). Meetings were held at the American Hall in LaConner; the hall was owned by the

[9] The tabulation in Exhibit D-24 was prepared by Ms. Cheryl Wheeler, a graduate student in history at Western Washington University and was merely summarized by Dr. Hajda in response to Defendants' questions on cross-examination (TR:942, TR:1059). The original Council minutes are reproduced in full in the Administrative Record, volumes 13 and 30.

Swinomish, but the Samish paid rent and hosted the meetings (TR:1055-1056). Several Samish men often simply met informally at the Cageys' house at Lummi, "or on my great-grandmother's farm where we lived," to talk about problems such as land, health or housing, and then report back to the other families (TR:1031-1032). She remembered Alfred Edwards and George Cagey acting as leaders at that time (TR:1030). Her father would also frequently visit elderly Samish people to help them with "a little something" or some money (TR:1032).

93. On the social front, Dr. Hajda noted that Charlie Edwards used to race his own all-Samish canoe, the Question Mark, in the Indian races sponsored by Puget Sound towns in the 1920s (TR:833-834). Samish from both on- and off-reservation families also continued to participate as a distinct group in inter-tribal activities such as winter dances and annual Treaty Day celebrations (TR:834). There were certain songs and dances that were identified as Samish in the smokehouse religion, and the Samish participants would be seated together in the smokehouse and called Samish (TR:835-836). Ms. James, a smokehouse dancer called by Defendants, testified that the Samish still sit in certain places for these cermonies [*sic*] (TR:560). After the loss of the New Guemes longhouse, however, they could no longer act as the sponsors or hosts (TR:835).[10]

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[10] Ms. James, one of Defendants' witnesses, is enrolled as Swinomish, although she is of mixed Samish, Klallam, Swinomish, and Lower Skagit descent (TR:561). She is a "red paint dancer" in the smokehouse, and explained that she inherited this particular medicine from her Samish ancestors (TR:558, TR:561).

94. During the Depression, Dr. Hajda testified, the canneries at Ship Harbor did less business and shut down from time to time, never again able to employ as many Indians as they had in the 1920s (TR:836). New Samish leaders emerged who had more education and more experience with government bureaucracy. Don McDowell, from the Whulholten-Cubshelitsa family line, was a notable example who "went around and visited people to see what kinds of help they needed" for many years (TR:837).

95. McDowell knew John Collier, the Commissioner of Indian Affairs at the time, and he helped promote Collier's Indian Reorganization Act to other Puget Sound tribes, as president of the Northwest Federation of American Indians (TR:684-685, 838-639). Dr. Hajda likened this to the way aboriginal Coast Salish leaders enlarged their personal prestige and the status of their own villages, by asserting regional leadership roles. Bereft of land or resources in the 1930s, the Samish were able to gain prestige by being regional political organizers (TR:839).

96. The Samish were permitted to vote as a distinct group in the 1934 referendum on the proposed Indian Reorganization Act. When individual Indian tribes were later asked to vote on whether they wanted the Act to apply to them, however, only reservation residents were allowed to vote, leaving out the Samish who were living off-reservation (TR:838). Dr. Roth acknowledged that he had not done any research to evaluate if the Samish living at Swinomish actually voted, or viewed their vote as a way of separating themselves from other Samish (TR:688).

97. During the Second World War, young Samish men were overseas, some people left the Anacortes area to find jobs in war industries in south Puget Sound like the Bremerton shipyards, and it was more difficult to meet frequently as a group because of gas rationing (TR:840). Several older Samish leaders also passed away in the 1940s, including Charlie Edwards, the Cagey brothers, and Don McDowell (TR:840-841). This also had an adverse effect on organized political activity (TR:841). There are few records of meetings during that period, but oral history tells of meetings to discuss land rights, fishing, and helping people out as before (TR:841; TR:859-860). Treaty Days were still being celebrated, but there were smaller crowds (TR:841).

98. Mrs. Hansen recalled that gas rationing restricted mobility, so she kept abreast of Tribal meetings by staying in touch with relatives who could still attend (TR:1033). There was money to share with needy Samish relatives during the war years from earnings at the shipyards, and at the Boeing aircraft factory (TR:1032-1033).

99. Dr. Roth noted that there was little documentation that the Tribe continued to function formally after 1935 (TR:603). He conceded that there is oral history of meetings after that date, however, indicating that "perhaps" the Tribe survived (TR:607-608). "[S]ome meetings were going on," he admitted, but to him their purpose was unclear (TR:608, TR:689, TR:691). Under further questioning, he stated that he had no factual basis to conclude that Samish meetings after 1935 changed their nature or purposes, only that they were "of a smaller scale" than previously (TR:694). He attributed this to the court's dismissal of the Tribe's claims in 1935

(TR:695), but admitted he knew of other tribes that did not meet for two to five years because of the War, and agreed that the absence of young Samish men in the Armed Forces would be a "reasonable explanation" of smaller, less frequent meetings (TR:695).

100. While Dr. Roth acknowledged that Samish continued to participate in "intertribal" social and religious activities during the 1940s, he argued that he could not tell whether they were participating in these activities as individual Indians or as a tribe (TR:699-700). However, he admitted he did [*sic*] had no idea whether this distinction could be made, in any case, as a matter of research methodology (TR:700).

101. Some of the people who moved away for wartime jobs, or served in armed forces, did not return to the Tribe's traditional area when the war ended (TR:842). Other Indian tribes, and non-Indian communities, had the same experience (TR:842). The main Samish destinations after the war were Seattle and Bremerton, about an hour and a half by car to Anacortes (TR:842). Mrs. Hansen confirmed Dr. Hajda's observations in this regard (TR:1033).

102. The war produced a new generation of Samish leaders who were more concerned with "organization"; many had been union men, and brought a concern for issues such as paying dues, and following Roberts Rules of Order (TR:842-843). Continuity was provided by Alfred Edwards, son of Charlie Edwards, who became the president of the new, post-war Samish Tribal organization; Mary McDowell Hansen, daughter of Don McDowell, became Tribal Secretary. While many individual members of the Council were new, on the whole they

came from the same families as the pre-war Council (TR:843).

104. Mrs. Hansen explained that communication with Tribal members was maintained by letters and postcards (TR:1039-1040).

105. Dr. Hajda also referred to increasing activity concerning health and employment, as well as renewed fishing rights advocacy, which led to about 150 individual Samish being issued "blue cards" in the 1950s by the Bureau of Indian Affairs to identify them as Samish entitled to exercise Treaty fishing and hunting rights (TR:844-845, TR:1072). The wartime dispersal of Samish people required new means of communication in this period (TR:846). Dr. Roth agreed that the Samish Tribe pursued concerns such as health and education after 1951, (TR:693).

106. The Samish Tribe provided money and volunteers to fight proposals to terminate Federal responsibilities to all Washington Indian tribes, in the 1950s (TR:845, TR:1038-1039). Reservation and landless tribes joined together in an organization called the Intertribal Council, and Mrs. Hansen was its first secretary (TR:845-846, TR:1038). Each tribe had its own delegates, including Tulalips, Swinomish and Lummi as well as Samish, Snohomish and others (TR:1039).

107. In the late 1960s, the Tribe began to obtain grants from Federal War on Poverty programs (TR:847; TR:1041-1042). It also attempted to regain a land base, including an unsuccessful bid to obtain the Ozette Reservation, which was no longer inhabited (TR:1040-1041).

108. The Samish became members, as a tribe, of the Affiliated Tribes of the Northwest, the Small Tribes

Organization of Western Washington, and the National Congress of American Indians (TR:846). They obtained grants through STOWW to open an office in Anacortes in 1972, and later to build a small fish-smoking and canning shop (TR:1041-1042).

109. In 1971, the Indian Claims Commission awarded the Samish roughly $5,400, which the Tribe refused to accept as a per capita payment to individual Tribal members and is still accruing interest (TR:847-848; TR:1043-1044). According to Mrs. Hansen the Tribe wanted land instead (TR:1043). The claims judgment put pressure on the Tribe to formalize its membership and, with assistance from the Bureau of Indian Affairs, to revise its constitution (TR:848), and develop a more formal roll of its members, which "through no fault of the Samish" was never finished (TR:388). The Tribe's new membership criteria, requiring evidence of Indian ancestry without any minimum blood degree, had been adopted on the advice of the Bureau of Indian Affairs (TR:451-455).

110. The earliest official references Dr. Hajda found to the Tribe not being Federally-recognized appeared in the same period (TR:849). Then in 1975, the Defendants opposed the Tribe's motion to intervene in the Northwest Indian treaty fishing-rights litigation on the grounds that they were not a recognized Indian tribe.

111. The dispute over Federal recognition led to a loss of confidence in the Tribal Council, political divisions, and a temporary change of leaders (TR:850,

TR:854, TR:961, TR:1063).[11] Samish families which had consistently occupied key positions were unrepresented from 1975, when Margaret Greene was "ousted" as chairperson, to 1980, when Ken Hansen was elected chairman (TR:1046-1047). Dr. Hajda noted that Ken Hansen, son of Mrs. Hansen, brought youth and enthusiasm to the Tribal Council and helped mediate between different families, mobilizing support for the fight for Federal recognition (TR:851-852). Recognition became "a focus, both positive and negative, for tribal activity" from that time forward, requiring continuing efforts to raise cash donations, recruit volunteers, and organize travel (TR:860-861). The Tribe also received grants for this purpose from the Administration for Native Americans, a part of the U.S. Department of Health and Human Services (TR:1056).

112. The fight for Federal recognition caused special problems for the Samish who were then living on reservations; the Cagey family on the Lummi Reservation was experiencing discrimination for supporting the Samish (TR:853).

113. Mrs. Hansen described the effects of the administrative decision against the Tribe in 1987 as "devastating" (TR:1048). It took several more years before they "kind of squared our shoulders up and said, by golly, we're going to be back" (TR:1049). She expressed

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[11] Mrs. Hansen identified the Wooten, Penter, and Cayou families with this coup (TR:1064-1064). She explained that they had not been active in Tribal affairs before or since. As discussed below, the Cayou line is now regarded as being of doubtful Samish ancestry by both the Tribe and the Government. The families in question comprise less than 3 per cent of the persons on the Tribe's membership lists, however.

optimism for the next generation of Samish, but added, "We just wish we could give them a home" (TR:1050).

114. Defendants' counsel confronted Dr. Hajda with the computer print-out of responses to a survey the Tribe had conducted of its members in 1983, which he contended showed that the majority of them were opposed to seeking Federal recognition (TR:976-977; Exhibit D-28). As she had not previously seen this document, she declined to try to interpret it (TR:976, TR:1013).[12] On redirect, however, Plaintiffs' counsel drew Dr. Hajda's attention to another question from the same survey, which asked expressly, "Are you willing to help the Samish tribe get Federal recognition?" to which 78 percent of respondents replied affirmatively (TR:1014-1015).[13]

115. During the period of time Dr. Hajda assisted the Tribe on Federal acknowledgment, a number of community projects other than recognition were still being pursued. The Tribe organized a privately-funded food bank that was open to non-Indian people as well as Samish, as well as a pre-school with State funding, and a series of luncheons for elders (TR:855-856).[14] The

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[12] The question actually posed by the 1983 survey, which Defendants' counsel did not share with the witness, was: "What do you feel are the three most important *cultural* needs of the Samish people?" (TR:1013, emphasis supplied). It would be reasonable to suppose that few Tribal members would have regarded Federal recognition as a "cultural" need.

[13] Dr. Roth stated in his direct testimony that "only one person out of 188 said that federal [sic] recognition was important" in this 1983 survey (TR:633). This is manifestly incorrect on the face of Exhibit D-28.

[14] Mrs. Hansen explained that many of these programs are financed and operated today through partnerships with Federally-recognized

Tribe also participated in negotiations with real-estate developers and the City of Anacortes over including a cultural center in a planned development at Ship Harbor (TR:855).

116. It was also during this period that the Tribe erected a statue of "the Maiden" in a public park at Deception Pass, with cooperation from the City and County.

> The Maiden was supposed to be a woman who was married to one of the sea creatures in order that the sea would provide food to the Samish. So it symbolizes the relationship, the cooperative or the symbiotic relationship between the Samish and the sea and its resources. It's a really rather unique story.

(TR:856). When the statue was dedicated there was traditional singing and witnesses were invited from all around, Dr. Hajda observed, in the manner of aboriginal ceremonial events, a Samish day "sponsored by the Samish" (TR:856-857, TR:1051).

117. Dr. Hajda reported that the Maiden statue has continued to serve "as a symbolic focus" for the Tribe (TR:855-856). She had attended a Tribal meeting there in the summer of 1993, and was impressed that an elder from Swinomish, Laura Edwards, had insisted on bringing a plate of food to the Maiden and singing to her to honor the Samish (TR:857). Ken Hansen's traditional wedding potlatch was held there in July 1994, a month before the hearing in this case (TR:857, TR:1051). Ms. James, one of Defendants' witnesses and a member of the Swinomish government, said that the Samish "took

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tribes, such as the Sauk-Suiattle, the Northwest Intertribal Council, and the State of Washington (TR:1052-1054).

the responsibility of having the Maiden—I would say, in my terms, taking care of the spirit" (TR:556). She also confirmed that people of many tribes had come to witness the event, in the traditional manner (TR:557).

118. Dr. Hajda noted that Samish continue to participate, "as Samish," in winter dances. She recalled there having been 20 Samish smokehouse dancers when she did her research, which supported by their families, represented "a considerably larger group". This included the families of the current chairperson, Margaret Greene, and previous chairperson, Ken Hansen (TR:858). Traditional Samish names continue to be bestowed at such events (TR:858). Mrs. Hansen explained that when a Samish has passed away, the speakers at the memorial in the smokehouse would all be Samish; she also referred to a recent memorial service for Mrs. Greene's daughter held in the Lummi Reservation smokehouse, but hosted by the Samish (TR:1055).

119. Another significant continuing manifestation of Samish identity, according to Dr. Hajda, has been a feeling of deprivation—first, from not being given land, and more recently from being denied recognition as an Indian tribe (TR:874-875). She emphasized the Tribe's repeated attempts to regain a land base as evidence of its "impressive" record of asserting its distinct identity (TR:875).

120. According to Dr. Hajda, the Tribal Council broadly represents the Samish families which have traditionally been politically active; she observed that this reflects voters' belief that family balance should be maintained (TR:859, TR:921-922, TR:924). She conceded that smaller or less active families might not con-

sistently be represented, however (TR:925, TR:1001-1002).

121. Dr. Hajda explained that past and present leadership has included reservation and non-reservation families. Margaret Greene, currently chairperson of the Tribe, is from the Cagey family, who are residents of the Lummi Reservation, while Tribal secretary Mary Hansen is of the Cubshelitsa-Whulholten line, who never lived on reservations (TR:875-876). A generation earlier, similarly, Charlie Edwards represented a family residing on the Swinomish Reservation, while Sas Kavanaugh came from off-reservation (TR:876). Mrs. Hansen confirmed this based upon her own personal experience (TR:1047-1048).

122. During her research, "there was lots of volunteer help at that time in the [Tribe's] office," as well as donations of money (TR:861). Much of the Tribe's current operations, including food bank and school programs, are financed through inter-tribal organizations comprised of both recognized and non-recognized tribes (TR:1052-1054). Mrs. Greene is currently secretary of both the Northwest Intertribal Council, and the Small Tribes Organization of Western Washington (TR:1054).

123. According to Mrs. Hansen, the Tribe is still actively involved in the City's Ship Harbor development planning, and also participates in Federal and State environmental-impact reviews affecting its territory (TR:1057-1058).

124. At Defendants' request the Tribe produced an updated mailing list and voting list, both prepared by Mrs. Hansen (Exhibits D-10 and D-20; TR:1065). She explained that there has been a moratorium on approving membership applications since 1987, as a result of

the present dispute (TR:1065-1066). Adults have only been added to these lists upon their own request, so they represent only such persons of Samish descent who wish to be identified as Samish (TR:1067, TR:1073).

125. Dr. Hajda concluded generally that as far as she could tell, most of the members of the Tribe are descendants of Samish and historically related families; have continued to assert their collective identity, by varying means, since the time of their Treaty in 1855; and remain genuinely committed to being Samish (TR:873). She also concluded that at least two major families provided a continuity of leadership since Treaty times (TR:873). In her opinion, the Samish Tribe falls within the normal range of social and cultural variation of Northwest Indian tribes as a whole (TR:882). Where they differ from other tribes, the differences are attributable to is in [*sic*] the consequences, for their way of life, of non-recognition by the Defendants (TR:883).[15] She stressed that she not only stands by her 1987 conclusions, but "could make them stronger now" (TR:791-792; also TR:994).

126. Dr. Suttles, who of all the expert witnesses had the longest and most extensive experience with Coast Salish peoples, including Samish, found Dr. Hajda's assessment of the Samish "persuasive" at the time he first read it (TR:231). He did not indicate that

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[15] Dr. Hajda observed that the Indians on the Grand Ronde Reservation in Oregon, where she has done her most extensive research, "don't look particularly Indian" as a result of intermarriage, and have even begun to adopt elements of Plains Indian cultures as a means of reasserting their Indian identity (TR:880). By comparison, the Samish are closer to the average situation among contemporary Indian tribes (TR:882).

he had departed from that conclusion in the intervening years.

130. In the previous administrative proceedings on the Samish under 25 C.F.R. Part 83, the Secretary of the Interior found that they met the requirement of 25 C.F.R. 83.7(a), identification throughout history as Indian. Defendants made no contention at the remand hearing that they had a factual basis for reopening their previous finding on this point and conceded, in Ms. McMillion's testimony, that substantially all, if not all of the Tribe's members are of Indian ancestry (TR:413-414).

131. Ms. McMillion testified that she had insufficient data to confirm the Indian ancestry of just one family, the Vierecks, comprising just 9 out of 590 current Tribal members (TR:415-417), or 1.5 percent. The Tribe stipulated that it had its own doubts about this family and one other, the Cayous, and was planning to ask them to show cause why they should not be removed as members (TR:478; TR:812-813, TR:907).[16]

131[*sic*]. Dr. Sturtevant cautioned against confusing the concept of a "community" with that of a "tribe," noting that a tribe may consist of more than one community (TR:40-41, TR:76-71). At the same time, he explained that a "community" tends to be broader in membership than a group of people related by marriage, and more permanent and broader in its interests than a social club or professional society (TR:41). He indicated that he

[16] At the hearing, the Tribe's counsel confronted Ms. McMillion with a book by Karen Jones Lamb, *Native American Wives of San Juan Settlers* (1994) identifying Jenny Viereck as an Indian from the Queen Charlotte Islands. Ms. McMillion was neither familiar with this book, nor with the Indians who live on those islands (TR:439-440).

would approach the task of evaluating the existence or nature of a "community" by looking for "networks of communication," including "how much people know about other people[, w]hen they see them, what they see them for, what they know about them," and the frequency and nature of interactions between them (TR:42, TR:78).

132. In this respect, Dr. Sturtevant considered that the new, expanded definitions of "community" and "political authority" incorporated into 25 C.F.R. Part 83 by amendment in 1994 bring these criteria closer to the common understanding of anthropologists of these terms (TR:64-65). He stressed the usefulness of flexibility in the evidence required at different stages of a group's history, and of interpreting evidence in the context if the history, geography, culture and social organization of the group in question (TR:59-60, TR:62). He also observed that no real Indian tribe would display *all* of the attributes of a "community" listed in 25 C.F.R. Part 83, as amended, particularly in modern times, and welcomed the fact that the amended regulations do not require this (TR:65).

133. According to Dr. Sturtevant, 25 C.F.R. Part 83 reflects a belief that Federal recognition should be based on "the persistence of social groups," and it is therefore important to realize that "the group can continue and does continue through time, whereas the cultural features, the behavior, the way of being, changes" (TR:66). What is distinctive about the group today may not be aboriginal; he cautioned against looking for stereotypes such as "war dances" and basket-making (TR:66-67). Moreover it is frequently the case that "in most respects their behavior and their interaction is not

distinguishable from the characteristics of behavior among their non-Indian neighbors" (TR:67-68). Indeed, it is "very common" for Indians to participate actively in neighboring non-Indian communities (TR:69-70). He noted that about half of the Indians in the United States today live in cities, rather than predominantly Indian settlements (TR:74). The primary difference between Indian and non-Indian communities today, he stated, is mainly a matter of ancestry, rather than particular cultural characteristics (TR:71).

134. Dr. Roth paraphrased this criterion as "some substantial body . . . of social connectedness and social distinction" (TR:664). He observed that there is no body of comparative data on the social connectedness of the members of Federally-recognized reservation tribes, but that in a case like the Samish, the analysis must take account of difficulties created by landlessness and non-recognition: "Obviously there's a lot of things you can't expect a group to be able to do" (TR:663, TR:665).

135. In Dr. Sturtevant's research experience, highly dispersed Indian tribes maintained a "community" by gathering periodically for special occasions, or maintaining kinship connections with at least some other people in the community (TR:74-75). In contrast with an "association" an Indian community has a historical relationship with a homeland some where [*sic*]—although "they don't by any means all necessarily live there" —and shares more than one purpose or interest (TR:125-126, TR:149).

136. It was likewise BAR's policy, at least until Mr. Shapard retired as chief of the unit, to regard a "community" as a set of "concentric circles" of decreasing degrees of involvement, around a "core" of very active

people (SHAPARD DEP:83). Dr. Roth explained that he looks for some evidence that the peripheral members are connected with the core, but not necessarily connected with each other (TR:728). The core is a hub of communication with the periphery and need not consist of people living together in a geographical settlement (TR:728).

137. Dr. Suttles likewise observed that the term "community" was often used to refer to a "closed group of face-to-face relations with people within it, closed to outsiders." This fit the Okinawan village he had studied, but not aboriginal Coast Salish societies (TR:200). However, Coast Salish houses were "communities" in the sense of cooperation and exchange (TR:201). The Samish longhouse of the 1880s on Guemes Island was a "community" in this sense, even though its inhabitants had mixed ancestries and spoke several languages (TR:201).

138. Dr. Suttles testified that in the Coast Salish region as a whole, "Indian" identity was not only being asserted today through distinctly Indian religious activity, such as the winter dances and Indian Shaker Church, but through acute consciousness of kinship ties and loyalty to the extended family (TR:223-224). Dr. Hajda indicated that, based on her experience with Coast Salish and Columbia River Indian tribes, the Coast Salish today are more preoccupied with ancestry or kinship as a basis of Indian identity (TR:883).

139. Dr. Paredes also agreed that kinship is "central to defining who we are," and that this can be "especially" true in Indian communities (TR:298-299). Although he feared that there were many groups claiming to be Indian tribes in the Southeast, without legitimate

foundation, he admitted that he had not explored the extent to which this was true of any other part of the country (TR:343-344). He did not express any opinion on the Samish Tribe.

141. Dr. Hajda noted for example that the Cubshelitsa-Whulholten family has always lived off-reservation, but it has always been actively involved with on-reservation Samish families (TR:862).

142. To justify his conclusion that the "Indian descendants" comprised a distinct population, Dr. Roth ultimately relied on the fact that the 1975-1980 political split within the Tribe had involved instances of "questioning the Samish ancestry of people" on each side (TR:702). He admitted that the Samish themselves had not expressly equated people's authenticity with whether they lived on a reservation, but maintained that this was the real basis for the dispute (TR:702, TR:706). It was noted above, however, that both Dr. Roth and Dr. Hajda recognized that one side to the dispute was led by Margaret Cagey, from a reservation family, and Ken Hansen from the off-reservation Cubshelitsa-Whulholten family line. Dr. Roth's analysis is contradicted by facts he admitted in his own testimony.

143. Both Dr. Hajda and Dr. Roth encountered negative remarks made by some Samish interviewees about other Samish families, often couched in racial terms. Dr. Roth thought it significant that "two or three" of the people he interviewed complained that the Tribe was "run by white men" (TR:644). Dr. Hajda took this as normal:

> It would be very difficult to find any such community where you did not have people saying bad things about each other. I don't think there would be any

> Indian group worth their salt if they didn't have a few bad things to say about each other.

(TR:789-790). She also explained that it was commonplace for Indians to tease other Indians, including relatives, about being white men or half-breeds, so that comments of this sort in interviews should not be taken literally (TR:1010, referring to TR:971-972; TR:1019). Indeed, Dr. Roth himself argued that talk of "dirty linen" and conflicts are "actually to the benefit of the group," evidence of social interaction (TR:581).

144. Dr. Roth also recognized that the non-reservation Samish families living around the City of Anacortes include several politically active individuals, as well as some who are active in traditional religion as well (TR:709-710).

145. When asked in cross-examination how he could distinguish between an "Indian descendant" and a "reservation Samish" if he met them both on the street, Dr. Roth insisted that it would suffice to ask them to *which families* they belonged (TR:711). What is unclear, then, is how Dr. Roth could tell how genuinely Indian each person's *ancestors* had been, if he could not provide a profile of what he would look for in the descendant—other than, perhaps, Indian blood quantum.

146. In the course of the original administrative proceedings and this remand, the Tribe produced copies of membership lists from as early as the 1920s. Dr. Hajda cautioned that these lists were never thought of as formal membership rolls, and were not reliable or complete evidence of who was actually interacting socially within the community (TR:870-871). In any event, key families such as the Edwards and Cubshelitsa-

Whulholten lines, could be found on all of these lists (TR:871). Like other Northwest Indians, the Samish would have had a relatively stable core group of families, to which various peripheral families attached themselves from time to time (TR:872).

147. Defendants' expert, Dr. Paredes, argued that if a group of people pick up their mail at the same post office "That's a community," or as he subsequently rephrased his reply, "one aspect of being a community" (TR:307). He conceded that the BAR regulations were amended, in 1994, to delete any geographical requirements for a "community," but argued that he could not imagine social interaction without "a core group at some locality, in some ways" (TR:308, TR:310). This might be a church or ceremonial site that is used and maintained (TR:308-309). It could also be a central office or meeting place (TR:309). He also contended that this emphasis on geography was supported by "ordinary dictionary definitions of community" (TR:297).

148. As indicated above, however, this view was not only rejected by Dr. Sturtevant as contrary to current thinking among anthropologists, but was rejected by Defendants after consultations with experts in the field in 1992.

149. Dr. Roth acknowledged that an Indian tribe could be maintained by purely electronic communications, without a settlement or any physical contact, the genuine issue under the regulations being the maintenance of social relations (TR:755).

154. Dr. Sturtevant was very explicit in his rejection of Dr. Paredes' line of reasoning:

> I think one should be careful about making generaliza-tions [*sic*] purely on the basis of blood. Partly because there's a tendency in this society and maybe many societies to overemphasize the importance of biology. It's what we call racism.

(TR:105). In his experience, the use of terms such as "pure blood" or "mixed blood" in Indian communities was "more cultural and social than biological," a metaphor for political tendencies "like Republicans and Democrats" rather than a way of defining who belonged to the community (TR:106). He gave examples of individuals of mixed ancestry who were important traditional community leaders, and observed that reservation Indian tribes today commonly have no more than half "Indian blood"—although their proportion of "Indian blood" was usually overstated in official documents (TR:106-107).

155. According to Dr. Sturtevant, the principal factors determining an individual's cultural affiliation would be "[w]ho they talked to, who their friends were, who they associated with, . . . what kind of attention are the old people paying to them", and therefore, generally, whether they are treated like Indians by the relatives with [*sic*] they have formed a close relationship (TR:108). Children of mixed ancestry would have at least some contact with both societies and cultures, but tend to favor one over the other depending on the pattern of their own socialization (TR:109). In his opinion, then, "ancestry really is hardly relevant," in ascertaining an individual's cultural identity, compared to actual upbringing and social relations (TR:109-110). Statistical correlation between mixed ancestry and cultural behavior, he argued, would be very slight (TR:105).

156. Under cross-examination, Dr. Sturtevant distinguished between the questions of "Indian blood," and "blood degree". He noted that while the Government and Indians agree that an Indian tribe must consist of people who have at least *some* Indian ancestry, they do not agree about *how much* is necessary (TR:129). Federally-recognized tribes differ in their own internal requirements, and most have experienced a decrease over time in their "blood degree" (TR:129).[17] It would be "reasonable" to suppose that a child who had more Indian relatives would be raised as an Indian, but "you'd better check that presumption before you act on it" (TR:130-131). For example, "quite a few . . . full-blooded Navajo children . . . are adopted and raised by non-Indian Mormons" (TR:130). He maintained that the most "knowledgeable and friendly people" in the Indian communities he had studied were not necessarily those who were physically more Indian; degree of blood had been irrelevant (TR:133).

157. In her testimony, Dr. Hajda observed that by 1877, one-eighth of the Swinomish Indians (a Federally recognized tribe, on a reservation) were already of mixed ancestry according to the Indian Agent (TR:865). She stressed that most of the white parents were single men, separated by long distance from their own families (TR:865), which according to Dr. Paredes' analysis (TR:318) would suggest that the children had the most opportunity to interact with their Indian mothers' rela-

[17] There was some confusion between counsel for Defendants and the witness over whether *all* Federally-recognized Indian tribes currently require some *minimum amount* of Indian blood to qualify for membership (TR:131-132). This is irrelevant in any case, since 25 C.F.R. 83.7(d) does not require any minimum degree of Indian ancestry to be an Indian tribe.

tives. In any case, she agreed with Dr. Sturtevant that cultural identity is not a matter of blood, but of "circumstances," and gave as an example the current tribal chairman on the Umatilla Indian reservation, in Oregon (TR:866). She was personally aware of many contemporary mixed couples who were raising their children as Indians (TR:867). She also pointed out that the average blood quantum of Puget Sound Indians today was no more than 50 percent, and probably even lower among reservation tribes in Oregon (TR:997-998).

158. Dr. Hajda denied that blood quantum can be an objective measure of social behavior, however, pointing out that many children are born from very brief acquaintances between their parents, or are raised by persons other than their biological kin (TR:912-914). Even if a child has more non-Indian kin than Indian kin, s/he may spend more time with the Indian relatives (TR:998-999). Social ties rather than biological factors determine individual identity, hence the consequences of each marriage must be considered individually (TR:917, TR:994).

159. While she conceded Defendants' argument that people tend to marry those with whom they frequently associate (TR:910), Dr. Hajda stressed that marriage did not necessitate a relinquishment of either partner's cultural identity (TR:995). The Samish had not consistently married non-Indians, moreover, despite Defendants' contentions to the contrary (TR:910).

160. Dr. Hajda noted that Indians living on reservations today lack a free choice in selecting non-Indian marriage partners because of rules that restrict health services and other benefits on the basis of blood quantum (TR:878). As a result, reservation Indians may be more likely to marry other Indians than largely off-

reservation groups such as the Samish, but this does not necessarily mean that they are more "Indian" in social or cultural terms.

161. Dr. Roth conceded that the average Indian blood quantum of Puget Sound reservation Indians may be as low as one-quarter today (TR:712). He acknowledged that mixed ancestry is only one factor in determining a person's social and cultural orientation, but when asked about other factors, repeatedly returned to mixed ancestry (TR:713-714). Dr. Roth himself recognized that "the real issue is who people interact with," but the principal measure of interaction he had explored in his Samish research was marriage or "genealogical distance" (TR:714-715, TR:717). He "would not claim" that he was familiar with any published research on the validity of inferring a child's cultural orientation from mixed ancestry, however (TR:717).[18] He moreover recognized that Coast Salish Indians maintained their identities although customarily marrying into distant villages that spoke different languages (TR:719). Indeed, his own doctoral dissertation described a group of people of predominantly non-Indian ancestry, many of whom were accepted as Chemehuevi Indians by the Chemehuevis themselves (TR:719-721). Dr. Roth finally restated his position, arguing that marrying outsiders raises a "suspicion" of social breakdown, which Dr. Hajda's research had not convinced him was unwarranted (TR:721, TR:723).

162. It may also merit noting that Mr. Shapard stated repeatedly that, when he was chief of BAR, he was *instructed* by the Solicitor's Office *not* to use blood

[18] The validity of such inferences, as a general matter, is reviewed at considerable length below.

quantum as a test of Indianness, although personally he felt that it was relevant (SHAPARD DEP:94-96, DEP:125, DEP:128). It is not clear why the Solicitor's Office has reversed this position in the present remand proceeding. Dr. Roth clearly acknowledged that the regulations do not, in his opinion, require tribal members to have any particular amount of Indian blood, only descendancy (TR:753).

163. This extended debate is relevant to the case at hand only because Dr. Roth argued that roughly half of the Tribe's members were what he termed "Indian descendants," and not Indians, on the grounds of their descent from early mixed marriages (TR:605-606). He implied, without further evidence,[19] that these "Indian descendants" were socially and culturally separated from the Samish Tribe proper. This appears to be an inference based on blood quantum. As such it must be rejected.

168. Dr. Hajda cautioned that Dr. Roberts' work had been submitted to Swinomish tribal officials for approval and may reflect their position (TR:931-932). She also observed that Dr. Roberts had not examined the relationships between the Samish living on the Swinomish Reservation, and the Samish families who lived elsewhere (TR:1003). It appeared to Dr. Hajda that Dr. Roberts simply made an "assumption" that all of the

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[19] Dr. Roth did refer to the fact that several members of one of the families in question, the Blackintons, appeared on the 1920 Census as "one-half Indian" or "one-fourth Indian," and suggested that this was evidence of their "character" or of "how they were viewed at the time" (TR:605-606). Surely, the 1920 Census was measuring race, not the way individual respondents were "viewed," culturally, by their neighbors.

Indians living on the Swinomish Reservation had relinquished any other tribal ties (TR:1002-1003).

169. Dr. Hajda explained that, although many Samish Indians had held public office on the Lummi and Swinomish Reservations, they continued to consider themselves as Samish and participate in Samish activities (TR:867). She compared this to American Indians who had served in the U.S. armed forces, without considering themselves any less Indian as a consequence, and to the situation of the Welsh (her own ancestry), who participated actively in British politics but fiercely retained their own distinct national identity (TR:868). While individual members of Samish families living today on reservations, such as the Edwards, may have given up their Samish identity, Dr. Hajda felt that on the whole they had not (TR:869). Samish leaders living at Swinomish were active in Swinomish affairs as a way of gaining personal prestige, and not as a declaration of Swinomish identity (TR:1004, TR:1021-1022).

170. Dr. Hajda described the Cagey family, who live in a distinct part of the Lummi Reservation locally known as Samish Hill, and have hosted Samish events there; some had identified chiefly as Samish, others as Lummi (TR:1000-1001). Dr. Hajda also observed that there have been a number of complaints of discrimination against Samish people at Lummi, including job discrimination and verbal harassment (TR:1018-1019).

171. Dr. Hajda also pointed out that the legal formalities involved in tribal membership today make it difficult for Indians to change their tribal affiliations or to retain multiple tribal affiliations (TR:870, TR:991-992). This may encourage reservation Indians to be [*sic*] limit their choice of marriage partners.

172. Dr. Hajda explained that, even among reservation Indians like the Warm Springs today, "tribal" identity is situational—that is, it may depend on the occasion or the purpose of the question (TR:897-898). A person of Samish descent may choose to assert that identity in certain circumstances but not others (TR:897). She distinguished this kind of self-identification when interacting with other Indians, from official membership in a tribal organization (TR:898). No simple rule, such as residence, can be used to ascertain an individual's "primary" identity (TR:899). This had been particularly true since the establishment of Indian reservations, because formal membership in a reservation tribe involves eligibility for benefits that can be lost if individuals move elsewhere (TR:992). Identifying with a *single* "tribe" is, in reality, a post-Treaty phenomenon among Coast Salish people (TR:896).

173. In the final analysis, according to Dr. Hajda, it is necessary to ask people directly what they regard as their "primary" allegiance or identity (TR:993).

174. Dr. Roth acknowledged that as a general proposition, a person can be a member of two communities at the same time, and that some overlap in the membership of communities does not necessarily jeopardize their autonomy or distinctness (TR:680-681). He conceded that Samish people who were participating in Swinomish Reservation activities, were also participating in Samish social and political activities (TR:682).

183. Dr. Sturtevant cautioned that present-day Indian "tribes" tend to be more formally organized than "communities," generally as a result of Federal Government policies requiring the identification of leaders and decisionmaking procedures (TR:81-83). Indian commu-

nities that had not been Federally-recognized or administered would not be expected to have political structures as clearcut or consistent as those which are Federally-recognized; people might disagree, for example, over who is the main leader (TR:83). There might be a number of informal leaders, in the sense of people who are often consulted, or asked for help, but no formal decisionmakers (TR:84-85). As a consequence, the community may have little consistent documentation of its activities (TR:84).

184. In response to a question by the ALJ, Ms. Record, currently chief of BAR, agreed that the regulations could not reasonably require legal control of the groups [*sic*] member [*sic*] or their territory, since exercising such authority depends on first being Federally-recognized (TR:275-276).

185. According to Dr. Sturtevant the existence of organized activities implies the existence of organizers or leaders (TR:88). The fact that certain individuals assume the responsibility for determining whether an anthropologist will be permitted to interview people, and make the necessary contacts, is evidence of political processes in a community (TR:90). He warned against over-simplification, observing that people may be leaders for different purposes and differ considerably in their degree of authority:

> I suppose that no political leader is going to get unanimous support on everything, in any society, unless it's a dictatorship, in which case there may be support, but silent opposition. So it's a matter of degree.

(TR:91). The meaning of silence or inaction can only be interpreted, moreover, by examining specific cases to see if decisions are actually followed (TR:87, TR:94-95). It cannot simply be assumed that Indians' failure to particiate [*sic*] in decisions, or to vote cannot [*sic*], means that they reject the decisions or leaders involved (TR:127-128).

186. Dr. Roth acknowledged that the regulations do not demand evidence of that [*sic*] a group's formal organization has continued uninterrupted over time (TR:724). With respect to changes of the group's membership, he explained that it would be necessary to study the reasons why changes had occurred; questions would also be raised by "extreme instability" involving "totally different people" (TR:724-725). He explained this by reference to BAR's analysis of the Poarch Creeks, a case upon which he had worked, where the leaders of the Poarch Creek community created a formal organization including a wider collection of persons of Creek ancestry, "as a political strategy" in the 1940s (TR:726). He felt it was crucial to that case that there were leaders who served functions of a social character, apart from claims (TR:726). This may also have been true of Samish leaders in the 1920s, Dr. Roth observed, adding he did not personally consider it "fatal" to the Samish Tribe's case that there had been some shift of membership in the 1950s (TR:727).

187. With regard to "political authority," Dr. Hajda explained that in the case of the Samish, leaders have been:

> [p]eople who have skills in dealing with situations that are of concern. Those concerns have changed over the years, obviously. In that sense, I think it's

> a continuation of earlier patterns, where you had different leaders for different sorts of activities or aspects of life. It wasn't necessarily power and influence, but connections that would be useful for activities that the tribe might want to carry out, for instance. People who had education, people who were seen as having spiritual power, that sort of thing.

(TR:922). This was an individual matter, rather than the inheritance of authority through family lines (TR:922-923).

188. Dr. Roth contended that "there wasn't really information to, say, strongly disprove" the existence of genuine Samish leadership, "there just wasn't a lot of information, period" (TR:632, TR:658). He spoke, necessarily, of the information available to him when he reviewed this case as a BAR employee more than seven years ago, not the information adduced at this hearing, at which he said nothing to rebut Dr. Hajda's testimony. Consequently, Dr. Hajda's testimony on criterion "c" must be accepted, as long as it suffices to make out a *prima facie* showing of the continued existence of Samish leaders with political authority, in the culturally-appropriate terms outlined by Dr. Suttles.

189. Ms. McMillion, BAR staff genealogist, explained that ancestry can be determined from Federal, State, and local records, or affidavits by tribal elders or leaders (TR:383, TR:391). The Samish Tribe provided her with ancestry charts for each of the Tribe's 590 members, as well as family trees showing the earlier relationships between the families (TR:393-395). Ms. McMillion checked these charts against a variety of other documents, including published historical studies and newspaper clippings, then spent two weeks in Wash-

ington State looking for other documents in local collections (TR:399-401). She also asked the Tribe for full documentation on a "selection" of its families (TR:412-413). [*sic*]190. On cross-examination, Ms. McMillion clarified that she had spent one to two hours in the Samish Tribal office during her field trip to Washington State, and examined only one family file (TR:417-418). She noted that the Bureau of Indian Affairs had prepared a roll of Samish Indians for the purposes of distributing the Tribe's 1971 judgment in the Indian Claims Commission, but that it had never been completed and approved by the Secretary (TR:392). Ms. McMillion explained that this roll had been withdrawn and re-evaluated at the recommendation of BAR (TR:420-422). The only result of this re-evaluation Ms. McMillion was able to recall, was to reclassify some families as Noowhaha instead of Samish (TR:421-423).[20] The true identity of these families appears to be the main issue between the parties under criterion "e".

191. Dr. Sturtevant distinguished between "genealogy" and "kinship" in his testimony; the former is concerned with lines of descent, and the latter with actual behavior and social relationships (TR:96-97). Thus a "family tree" prepared by a genealogist provides little information about how much individuals interact, what they think of each other, or how they treat one another (TR:99). He underscored the fact that many societies have social systems based on "descent groups" or clans which claim to have common ancestors, but this cannot

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[20] Ms. McMillion testified that claims judgment rolls were generally prepared by Bureau of Indian Affairs staff who were not trained to do genealogical research (TR:490, TR:497-498). She was not aware of any other judgment roll being withdrawn by the Bureau, however (TR:499).

be specifically traced (TR:100-101). He compared this with adoption, which creates important social relationships between genealogically-unrelated people (TR:100). Biological ancestry is not a prerequisite for kinship (TR:101).

192. Dr. Sturtevant observed that while dates of birth or marriage may be more accurately recorded in documents, the nature of relationships among a group of people is better preserved in their memories (TR:98). Documents are particularly unreliable if they were recorded by persons who come from a different culture and speak a different language, and therefore may not have the same understanding of kinship terms such as "cousin" (TR:102). He also cautioned that the names actually used and remembered by kinfolk may differ from those which appear in documents (TR:98). In his experience, documents relating to Indian ancestry are often inaccurate or incomplete, and must be compared with oral history kept by Indian families.

193. In dealing with Northwest Indians, Dr. Hajda cautioned that there is a typical pattern of very diverse tribal ancestry, including serial marriages to spouses from different tribes (TR:876-877). As a result, it is impossible to identify an individual's "tribe" simply by tracing his genealogy. Changes of residence are also typical (TR:877), making residence an unreliable test of an individual's "tribe". The decision to take up residence in one village did not necessarily cut ties with other villages (TR:895-896). This was as much true of the Samish, as other tribes in the region (TR:892-894). She emphasized that she had not only relied on the genealogical data provided by the Samish Tribal office in

drawing her conclusions, but field notes obtained from other scholars such as Wayne Suttles (TR:994).

194. Ms. McMillion acknowledged that the records she used to establish Samish genealogies did not necessarily indicate all of their ancestral linkages (TR:419-420). If an individual had a Samish ancester [*sic*] as well as Swinomish and Lummi ancestors, for example, only the Lummi ancestor might be identified in records prepared many years ago by non-Indians. Ms. McMillion acknowledged that the credibility and reliabilty [*sic*] of such records depends on who prepared them, and why (TR:465). Moreover, she agreed that written records of Indians' ancestry had "presumably" been based on asking Indians who they were (TR:467). Neither Ms. McMillion nor Dr. Roth could explain how Indian Agents determined the ancestries of Indians a century ago, in the records they used (TR:471, TR:673).

195. Ms. McMillion recalled that the Tribe and local Bureau employees had "work[ed] pretty closely together" on the the [*sic*] 1975 claims judgment roll (TR:425), which viewed Noowhaha families as Samish. She admitted that she did not know whether this decision was based upon discussions with Samish elders (TR:426), and stressed that her conclusion to treat the Noowhaha as a separate group was based strictly on what she could find in archival material (TR:427). She conceded that the association of families over generations is evidence that they consider themselves the same tribe for purposes of criterion "e" (TR:429-431). This would be for the BAR anthropologist to assess, however (TR:434-435).[21]

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[21] Ms. McMillion conceded that individuals had no greater incentive to seek Samish membership, than membership in any other Indian

196. BAR staff concluded that 74 percent of the Tribe's members are of "historic Samish" ancestry, 11 percent of Noowhaha ancestry, 3 percent Snohomish, and the rest descended from other tribes (TR:435-436). The decision to classify the Noowhaha as a separate group was Dr. Roth's, Ms. McMillion emphasized, rather than hers (TR:436). In her opinion, however, had the Noowhaha and Samish been treated as one group, making up 85 percent of the current Tribe's membership, this "probably" would have been sufficient to satisfy criterion "e," since BAR had accepted even lower percentages in other cases (TR:477-478).[22]

197. Dr. Hajda testified that all of the families of Noowhaha ancestry in the Tribe's membership had been integrated into the Samish Tribe by the [*sic*] sometime in the 19th century (TR:813). She estimated that she had doubts about the Samish ancestry, or longstanding Samish affiliations, of about five percent of the current membership of the Tribe (TR:814). If the Noowhaha and Samish did combine historically, as both Dr. Hajda and Dr. Suttles testified, then, the proportion of Tribal members with a common tribal ancestry under criterion "e" is 85-95 percent—enough, according to Defendants' own expert, to meet this test.

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tribes to which they had some ancestral links (TR:472-473). Applications for membership in one Indian tribe are thus no more likely to be biased or self-serving than applications to another.

[22] It should be noted that the Tribe's decision to reopen the status of the Viereck and Cayou family lines, announced at the hearing, would have the effect of changing these percentages to 81 percent Samish and 12 percent Noowhaha, or a total of 93 percent demonstrated Samish and/ or Noowhaha ancestry. See below, paragraph 199.

198. The Snohomish portion of the Tribe's membership consists of only one family line, descendants of Mary Quacadum Wood. Ms. McMillion had based her classification on an affidavit Mary Quacadum Wood submitted in 1918 to Charles Roblin, special Indian Agent, stating that she was a Snohomish (TR:436-437; Exhibit D-7). In 1926, however, her daughter applied for membership in the Samish Tribe, and claimed that Mary Wood was Samish (TR:437; Exhibit D-7). Ms. McMillion conceded that it was possible, among Coast Salish Indians, to assert multiple affiliations (TR:437-438, TR:444). She agreed that she might even identify her own ethnic background differently in different circumstances (TR:441). She insisted, however, that the 1918 affidavit was better evidence because affiants were asked to list "all of their ancestry" (TR:443). Counsel for the Tribe produced the instructions from 1918, which Ms. McMillion conceded asked the affiants to identify only *two* grandparents, leaving two unreported (TR:499-503, Exhibit D-9). It is consequently possible that Mary Wood was of both Snohomish and Samish ancestry. Furthermore Dr. Hajda testified that Mary Wood's line "have been associated for a long time with the Samish," at least since [*sic*] 1920s (TR:811). Dr. Hajda also observed that the tribal classifications in Roblin's records were frequently erroneous or misleading (TR:793).

199. The Tribe stipulated in the course of the hearing that there were legitimate questions about the ancestry of the Cayou and Viereck lines (TR:478), accounting for roughly 9 percent of the current membership. Dr. Hajda agreed that there were "reasonable grounds" for raising such questions (TR:812-813, TR:907) adding that two other small families of debatable ancestry,

listed on the Tribe's older membership lists, have since died out. (TR:813-814).

200. Dr. Roth claimed that 90 percent of the Samish Tribal members he identified as "reservation Samish," excepting those living in Canada, were actually enrolled members of a reservation tribe (TR:623). Using his own figures that would represent 14 percent of the Tribe's current membership. Ms. McMillion testified that her original estimate of the overlap had been 9 percent, based on data she obtained from Gosta Dag in the Bureau of Indian Affairs, the original source for which she did not know (TR:402, TR:448-449). She further stated that Samish members were dually enrolled on both the Lummi and Swinomish Reservations, but she had only obtained a formal comparison of the Samish and Swinomish membership lists (TR:409-410). She had not asked the Tribe, or any of the dually-enrolled individuals about the reasons for dual enrollment, nor established that they were even aware of being listed on two rolls (TR:449-450). She was unaware of the extent to which the memberships of the Federally-recognized tribes in the Northwest overlap (TR:451).

201. Defendants introduced four witnesses and a number of exhibits at the hearing for the purpose of establishing the extent to which Samish Tribal members are dually enrolled on the Swinomish Reservation. This centered on a list of "Swinomish Members Dually Enrolled in the Samish Tribe" and a table of "Swinomish Base Roll Membership, 1935, of Samish Ancestry," both of them prepared for BAR by Swinomish tribal officials (TR:407-409).

202. Swinomish Indian Tribal Community Ordinance No. 35 provided for a base roll, prepared in 1976,

consisting of all persons who were deemed to have been living of the Swinomish Reservation in 1935 (TR:458; *see* AR Exhibit IV-B-55-2). Ms. McMillion conceded that a person could be listed on that base roll without having any Swinomish Indian ancestry, and without having chosen to be listed (TR:459-461). She did not know how membership was determined before 1976 (TR:461). Confronted with a Bureau document showing that there had been *no* approved Swinomish roll prior to 1976, she admitted that she had never checked the accuracy of the Swinomish rolls before comparing it with Samish Tribal membership lists (TR:462-464, AR Exhibit IV-A-9-57).

203. Ms. Laura Wilbur, a member of the Swinomish enrollment committee, explained that the committee consists of five tribal members (TR:512). At first she stated that anyone of Samish descent could enroll on the Swinomish Reservation, but after further questioning could not recall whether the Swinomish constitution required descent from an individual listed on the 1935 Swinomish base roll, which she knew did not include all Samish families (TR:515).

204. Ms. Flores, employed as the Swinomish tribal enrollment clerk for the past four years, testified that the Swinomish enrollment committee had decided which individuals in Exhibit D-5 had Samish ancestry "from their memory," not from records (TR:766). Ms. Flores had no knowledge of how many people on the Swinomish rolls have non-Swinomish ancestry, other than those who have some Samish ancestry (TR:768). She was also unable to explain why some individuals show more total Indian blood on the Swinomish membership roll than on Samish membership lists, how the the [*sic*] Swinomish base roll had been prepared, or that the Swinomish base

roll had been prepared in 1976, not 1935 (TR:769-771). Ms. Flores did explain that new members would have to seek approval by the enrollment committee and the Swinomish senate, a discretionary decision (TR:772-775). This contradicted Ms. Laura Wilbur's testimony that any person of Samish descendant [*sic*] could enroll at Swinomish.

205. The purpose of criterion "f," suggested by 25 C.F.R. 83.2(d), is to prevent part of an existing Federally-recognized Indian tribe from splitting away and demanding Federal recognition as a new and separate entity (see also TR:630 [Dr. Roth]). Apart from the small size of the overlap here, this is not a case of a Lummi or Swinomish faction that is trying to split away, but, as Dr. Hajda's testimony plainly showed, a small number of strongly self-identified Samish families which have been forced to live on reservations as a means of survival, and cling to their Samish primary identity.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C89-645Z

MARGARET GREENE, IN HER CAPACITY AS CHAIRMAN OF THE SAMISH INDIAN TRIBE OF WASHINGTON, ET AL., PLAINTIFFS

v.

MANUEL LUJAN, JR., IN HIS CAPACITY AS SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS

TULALIP TRIBES OF WASHINGTON, AMICUS CURIAE

Filed: Feb. 25, 1992

ORDER

ZILLY, District Judge.

The Bureau of Indian Affairs (BIA) determined under 25 C.F.R. § 83 that the Samish do not exist as an Indian Tribe. The determination was made through informal adjudication, and the Samish were not afforded a hearing or an opportunity to cross-examine witnesses.

The Samish moved for summary judgment that the regulations violate due process on their face, and that the procedures followed by the BIA in making its determination violate due process. The Samish argue that

they have a right to formal adjudicatory procedures because they have a property interest in their status as a tribe. The Government cross moved for summary judgment on the due process issue, and argues that formal agency adjudication is not mandated by the Constitution because the Samish do not have a vested property interest in their status as a tribe. The Government also moved for summary judgment affirming the Department of the Interior's denial of certain FOIA requests by plaintiffs.

The Tulalip Tribes, appearing as *amicus curiae,* argue that plaintiffs' administrative acknowledgment claim is precluded because it is based on the same argument rejected in *United States v. Washington,* 476 F. Supp. 1101 (W.D. Wash. 1979), 641 F.2d 1368 (9th Cir. 1981), *cert. den[ied]* 454 U.S. 1143 (1982).

The Court, in a hearing on October 18, 1991, ruled that the regulations are not unconstitutional on their face. *See* Hearings on Motions, October 18, 1991, p. 60. The Court also ordered the Government to produce all documents requested by plaintiffs within 30 days except the pre-decisional drafts of the Assistant Secretary's 1982 decision. *Id.* at 65-70. Plaintiff was ordered to treat the documents as confidential. *Id.* The Court deferred ruling on the constitutionality of the procedures followed in the administrative hearing. Additional briefing was requested on what benefits or rights, if any, the Samish received because of their status as a tribe which were subsequently denied. The Court specified four areas of inquiry: (1) litigation surrounding the failure of the Samish to receive a reservation; (2) actions of the Bureau of Indian Affairs which may estop them from arguing the Samish is not a tribe; (3) rights relating to

Indian Schools; and (4) Indian health benefits. The Court concluded "if I'm satisfied that the plaintiffs have been receiving benefits and those benefits were cut off, and those benefits were resulting from the Government's dealing with them as a tribe, then I'm going to implicate the Fifth Amendment and we're going to determine what that means. If I'm satisfied that they were receiving benefits as others would receive and not because of their tribal status, I'm going to deny the plaintiffs' motion in its entirety. . . ." Transcript, October 18, 1991 Hearing, p. 16.

For the reasons stated below, the Court finds that plaintiffs have a property interest in their status as a recognized tribe, and are entitled to a formal adjudication under the Administrative Procedures [*sic*] Act (APA), 5 U.S.C. § 553.

A. *Government benefits distinguished from treaty rights.*

Treaty rights and the loss of Government benefits due to non-recognition are two distinct issues. Treaty rights are determined by whether the party in question is a successor in interest of a treaty signatory. Government benefits are based on Government recognition of the party as a tribe. The Ninth Circuit, addressing this question, stated that "nonrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981).

The United States has acknowledged the distinction between these two issues. In an April 22, 1981 letter to the Bureau of Indian Affairs, the Tulalip Tribe pre-

sented to the Government the same preclusion argument set forth in the *amicus* brief. *See* Plaintiff's Memorandum, Exhibit 8-2; Tulalip Tribes' Memorandum as *Amicus Curiae.* The Director of the Office of Indian Services of the BIA responded:

> We appreciate your view on the legal effect of the 9th Circuit's decision. However, because the evidence submitted in support of several of the petitions for Federal acknowledgment was substantially different than that which was before Judge Boldt at the time he made the decision which was affirmed by the 9th Circuit, we are not now persuaded that the 9th Circuit's decision is necessarily dispositive of the claims by these groups to Federal acknowledgment as Indian tribes.

Plaintiffs' Memorandum, Exhibit 8-3.

The issue of whether plaintiffs are successors in interest to the Treaty of Point Elliot has already been resolved. The Court in *United States v. Washington* affirmed the District Court finding that the Samish lacked the necessary political and cultural cohesion to constitute a successor in interest to the Treaty of Point Elliot. 641 F.2d 1368. This Court, in an earlier order, held that plaintiffs are barred under the doctrine of *res judicata* from relitigating its [*sic*] status as the political successor to the aboriginal Samish Indian Tribe. Order Granting Federal Defendants Motion for Partial Summary Judgment, September 20, 1990.

Plaintiffs, therefore, have no rights under the Treaty of Point Elliot. The present case deals solely with acknowledgment as it pertains to eligibility for Government benefits.

B. *Summary judgment standard.*

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, the question is whether the evidence, together with permissible inferences drawn from that evidence, is sufficient to establish a "genuine issue as to any material fact." *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539 (9th Cir. 1989), *cert. denied,* 493 U.S. 809 (1989). Inferences may be drawn from underlying undisputed facts, such as background or contextual facts, as well as from disputed underlying facts which the judge must assume will be resolved at trial in favor of the nonmoving party. *Phelps Dodge,* 865 F.2d at 1545.

C. *The due process requirement.*

For the Fifth Amendment to apply, plaintiff must be found to have a protected property interest. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). The hallmark of property is an individual entitlement. "Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Id.*

The Supreme Court has held that continued receipt of Government benefits is a statutorily created property interest protected by the Fifth and Fourteenth Amendments. *See Matthews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 576, 92 S. Ct. 2701, 33 L. Ed. 2d 548

(1972). Under the Supreme Court's analysis, a person obtains a property interest in a benefit once it is acquired. "While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Logan*, 455 U.S. at 432, quoting *Vitek v. Jones,* 445 U.S. 480, 490-91, n.6, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

D. *Did the Government cut off already acquired benefits?*

The parties were asked to submit additional evidence and briefing on the issue of whether the Samish received benefits based on tribal status, and then had those benefits taken away. The evidence submitted by plaintiffs does not conclusively show that the Samish received benefits because of their tribal status. The evidence does indicate, however, that the Government cut off the benefits of individual members of the Samish tribe without due process when acknowledgment became a prerequisite to continuing eligibility.

(1) Litigation surrounding the failure of the Samish to receive a reservation.

Plaintiffs submit substantial evidence that prior to the ruling in *United States v. Washington*, the Samish were viewed as successors in interest to the Treaty of Point Elliot. In 1934, the Court of Claims found that the Samish Tribe was a party to the Treaty of Point Elliot, and that the Samish petitioners in that case were entitled to payment in accordance with the treaty.

Duwamish et al. v. United States, 79 Ct. Cl. 530 (1934). In 1958, the Indian Claims Commission similarly found that the petitioner was "the tribal organization of Samish Indians whose predecessors in interest ceded their lands . . . under the Treaty of Point Elliot," and awarded petitioners additional monies under the Treaty. *The Samish Tribe of Indians v. United States*, 6 Indian Claims Commission 159, Findings of Fact No. 2 (March 11, 1958).

These decisions dealt with treaty rights, not statutory benefits, and therefore are not directly relevant to the due process analysis. Furthermore, the issue of treaty status was finally resolved in *United States v. Washington.* The court in *United States v. Washington* held that these prior claims involved compensation for individuals, not tribal rights, and therefore the doctrines of *res judicata* and collateral estoppel were inapplicable. 641 F.2d at 1374. The Court then determined that petitioners were not successors in interest of the treaty signatories. This holding is binding in this case and treaty issues cannot be relitigated.

One aspect of the Court of Claims ruling, however, is relevant to the present inquiry. The Court of Claims offset money owed to the petitioners by the value of Indian benefits appropriated by Congress. The Court determined that

> During the period from July 1, 1854, to June 30, 1929, the records of the General Accounting Office disclose that the United States, out of gratuity appropriations made by the Congress, expended a total of $1,712,608.77 for the benefit of the tribes and

> bands, parties to the treaty of Point Elliott of January 22, 1855.

Duwamish et al. v. United States, 79 Ct. Cl. 530, Findings of Fact XXXIII. The Court then held that the gratuities exceeded the amount owed under the treaty and dismissed the case.

The nature of these "gratuities" is unclear. If the government included in this figure benefits given to members of tribes on an individual basis regardless of tribal status, then the gratuities are not significant. If, however, the gratuities were given to the Samish tribe itself, they constitute evidence that as of 1929, the Samish received government benefits based on at least tacit acknowledgment of their existence as a tribe. There is not sufficient evidence in the record to determine the nature of the gratuities.

The Samish allege that the Indian Claims Commission made a similar offset for services provided by the United States between 1855 and 1946. Barsh Declaration, ¶ 11. There is nothing in the Commission's holding supporting this allegation. The Commission found in 1963 that the Samish were entitled to $17,000 under the treaty, and the Government had paid only $11,245.04 in consideration. *Samish Tribe of Indians v. United States*, 13 Indian Claims Commission 583, 605 (1963). The determination of gratuitous offsets was deferred for a later hearing. *Id.* at 606. The Final Award entered in 1971 noted that the Government "makes no claims for offsets in this case" and ordered the payment of the unpaid consideration. *Samish Tribe of Indians v. United States*, 26 Indian Claims Court 318 (1971).

Plaintiffs have not adequately shown that the gratuities which were treated as offsets were given to the Samish based on their status as a tribe. Plaintiffs' motion for summary judgment based on the rulings of the Court of Claims and the Indian Claims Commission is therefore DENIED.

(2) Alleged Acts of Recognition by the BIA which estop them from arguing the Samish is not a tribe.

The Wheeler-Howard (Indian Reorganization) Act of 1934 was the first legal basis on which the Federal Government began to make distinctions between recognized and non-recognized Indian tribes. *See* Barsh Declaration, ¶ 14. Petitioners claim that various actions by the Government led them to believe they were recognized under the Act, and the Government is now estopped from arguing otherwise.

Plaintiffs submit numerous documents to support their claim that they were recognized. None of the documents, however, provide conclusive evidence. First, plaintiffs present evidence that they were among the bands asked to hold a "referendum to vote on Howard-Wheeler bill." Barsh Declaration, Exhibit 10. The Government argues that the referendum was an incidental sampling of Indian views with no legal significance. Defendants' Supplemental Memo, pp. 9-10. Plaintiffs' evidence does not show the significance of the vote.

Secondly, plaintiffs submit a rough draft of a bill in which the United States Government considered terminating supervision over Indian property in 1953. The bill lists the Samish Indian Tribe as one of the groups affected. Barsh Declaration, ¶ 15, Exhibit 11. The legis-

lation, however, applies to "the following Indian tribes, bands, communities, organizations, or groups, and the individual members thereof. . . ." Barsh Declaration, Exhibit 11. This language indicates that the scope of the bill was intended to be wider than recognized tribes. Furthermore, this is not the type of document from which one can reasonably determine the official status of a tribe.

Plaintiffs also point to the issuance of blue cards to Samish tribal members by the BIA in the 1950s. These blue cards, however, do not shed any light on the question of tribal recognition. As plaintiffs' exhibit indicates, the sole criteria for a blue card is proof that the individual seeking the card is a descendant of a treaty tribe. Barsh Declaration, Exhibit 22. There is no requirement that one belong to a tribe which is officially recognized. The local superintendent of the BIA in a 1962 letter reminded tribal governing bodies that "As you know, the State does not recognize the blue card, formerly issued by the Bureau, as proof of tribal membership. . . ." Defendants Supplemental Memo, Exhibit J.

Fourthly, plaintiffs submit various pieces of correspondence between the superintendent of the Western Washington BIA office and Samish leaders. The letters address the renewal of the Samish Tribe's claims attorney contract, the acquisition of a reservation, and the need for the BIA to be apprised of "the Tribe's credit and funding needs." Barsh Declaration, Exhibit 15; *see also* Exhibits 13, 14, 16, 17. The Tulalip argue that these documents do not establish official Government recognition because plaintiffs have not shown that local BIA authorities had authority to engage in official dealings which would bind the United States to a recognition de-

cision. Tulalip Tribe's Supplemental Memo, p. 10. The position of the Tulalip is supported by *Hoopa Valley Tribe v. Christie*, 805 F.2d 874 (1986). In *Hoopa*, the Ninth Circuit held that the provision of services, absent a ratified treaty or the enactment of a statute, do not create a property right. *Id.* at 879.

Furthermore, the Tulalip and the Government have presented affirmative evidence indicating that the Samish knew they were not recognized. Mary McDowell Hansen, in direct examination in *United States v. Washington,* stated that in 1953, the BIA "almost promised us recognition if we filled out these forms." Jones Declaration, Exhibit 10, at p. 216. Later in her testimony, Ms. Hansen noted that the BIA made other requests and the Samish "thought we were on the verge of recognition again." *Id.* at 219. Kenneth C. Hansen, the former Samish Tribal Chairman, states that "Prior to the early 1970s, I was aware that the Bureau of Indian Affairs did not recognize us as an 'organized' tribe as it was defined by the Indian Reorganization Act of 1934." Hansen Declaration, ¶ 9.

The evidence, when viewed in the light most favorable to the defendants, is not sufficient to establish that the BIA treated the Samish as a recognized tribe. Plaintiffs' motion for summary judgment on this basis is therefore DENIED. The Government is not estopped from arguing that the Samish should not be acknowledged.

(3) Health Benefits and Rights relating to Indian Schools.

The treaty of Point Elliot included provisions for education and health (Article XIV). These provisions

are not the subject of the present inquiry. The issue before the Court is whether plaintiffs received statutory benefits based on their status as a tribe. Plaintiffs note that "Many Samish Indians were able to attend Indian schools or utilize Indian health facilities in the 1920s through the 1950s, although few records exist which can be used to establish the specific legal basis on which they were deemed eligible." Barsh Declaration, ¶ 28. Plaintiffs' Exhibit 21 is a letter of recommendation from the Superintendent of the Tulalip Indian Agency which allegedly shows that Mary McDowell was given educational assistance by the Bureau of Indian Affairs based on her membership in the Samish Indian Tribe. The evidence is unconvincing. No express statement to that effect is made—the letter simply states that Ms. McDowell is a Samish of one-fourth Indian blood who lives on the Tulalip reservation. Aid could easily have been given based on the blood quantum and residence on a reservation, regardless of tribal affiliation.

Plaintiffs' evidence that health benefits were received based on tribal status is likewise inconclusive. Plaintiffs note that the Indian Hospital in Tacoma requested a copy of the Samish's reorganization meeting minutes. Barsh Declaration, Exhibit 24. This is inconclusive. The evidence does not show that the hospital required or even considered tribal membership in determining health benefits.

Plaintiffs' second piece of evidence regarding health services also fails to show benefits were received based on tribal status. The Portland Area Indian Health Service made a determination in 1971 that the Samish were eligible for services provided by the Indian Health Service "based on the findings of the Indian Claims commis-

sion that the Samish were participants in the Point Elliott Treaty. . . .” Barsh Declaration, Exhibit 25. Benefits received because of treaty status are not relevant to the present inquiry. There is no reference to statutory benefits provided to plaintiffs because of their status as an acknowledged tribe.

In general, petitioners admit that it is “never clear, in Federal records from 1921 to the early 1970s, whether services are being provided to individual Indians simply because they are Indians, because they are the descendants of treaty signatories, or because they are members of particular tribes.” Barsh Declaration, ¶ 27. Plaintiffs note that the distinction between treaties and Congressional appropriations was blurry before 1921, but that “Through the 1920s, tribal membership as such was not required for Indians to be eligible for general Indian services.” *Id.* at ¶¶ 22, 24.

In sum, there is a material factual dispute which cannot be resolved as a matter of law as to whether the Samish Tribe or its members received statutory benefits based on tribal status. Therefore, summary judgment on this basis is DENIED.

(4) Loss of benefits of tribal members following the 1975 Indian Self-Determination Act.

While the evidence does not establish that the Samish received benefits based on their tribal status, the evidence does show that members of the Samish tribe began to lose benefits after 1975 because of their lack of recognition. The 1975 Indian Self-Determination Act introduced the phrase “Indian tribes . . . recognized as eligible for the special programs and services provided by the United States to Indians because of

their status as Indians." 25 U.S.C. § 450b(e); Barsh Declaration, ¶ 26. Following the enactment of this legislation, Congress made recognition of a tribe an express condition of eligibility for a wide range of special Indian programs. *See, e.g.*, Indian Financing Act, 25 U.S.C. § 1452(c); Indian Health Care Improvement Act, 25 U.S.C. § 1603(d); Indian Child Welfare Act, 25 U.S.C. § 1903(8); Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2403(3), Tribally-Controlled Schools Act, 25 U.S.C. § 2511(2); Indian Law Enforcement Reform Act, 25 U.S.C. § 2801(5); Native American Languages Act, 25 U.S.C. 2902(5); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(7); and Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10). The Government acknowledges that benefit programs were tightened up to limit benefits to tribal members. Defendants' Supplemental Memo, p. 12.

In and of itself, the decision to alter or amend benefit programs does not implicate the Fifth Amendment. In each case, the legislative determination provides all the process that is due. *Logan*, 455 U.S. at 433, citing *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46, 36 S. Ct. 141, 60 L. Ed. 372 (1915). The issue in this case, however, is whether an administrative agency, in applying the amended legislation, can terminate the benefits of a current recipient without implicating the Fifth Amendment. In other words, is a recipient of benefits entitled to a hearing to determine whether she qualifies under the amended criteria?

The Government argues that plaintiffs have no property interest in tribal recognition because recognition itself does not entitle the Samish to any benefits. Tribal

recognition is merely a prerequisite for benefit programs which Congress may authorize. The Government cites the acknowledgment regulations which state:

> While the newly recognized tribe shall be eligible for benefits and services, acknowledgment of tribal existence will not create an immediate entitlement to existing Bureau of Indian Affairs programs. Such programs shall become available upon appropriation of funds by Congress.

25 C.F.R. § 83.11(b).

The Court must reject this attempt by the BIA to sidestep the due process requirements of the Fifth Amendment by creating a two tiered decision-making process. Samish Indians are being denied benefits which they previously received because of a Government decision that they are not a recognized tribe. It is sophistry to argue that the decision not to recognize the Samish as a tribe is unrelated to the discontinuation of benefits previously received. The protections of the Fifth Amendment would be seriously impaired if this Court allowed the Government to cut off benefits without a hearing by creating new eligibility requirements and then summarily holding that current benefit recipients do not meet the new requirements.

The aim of the Fifth Amendment is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth*, 408 U.S. at 577. Members of the Samish tribe have for years received a variety of benefits from the government. Before those benefits are taken away, the Samish ought to have the opportunity to demonstrate in a hearing that they continue to qualify for these programs. To

decide otherwise is to create a loophole through which the basic aim of the Fifth Amendment can be undermined. Administrative agencies should not be allowed to cut off benefits to any or all recipients without procedural safeguards every time Congress alters the eligibility requirements of a Government program.

E. *What process is due?*

"Due process does not have a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). It is "flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). How much protection is required depends on a consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

All three of these factors weigh in favor of a formal adjudication. The private interest that will be affected in this case is substantial. If the Samish are denied recognition, they will be cut off from numerous entitlement

programs designed to protect and advance the interests of Indians. Unlike the typical situation in which an individual is threatened with the deprivation of a benefit under one particular program, this case involves the loss of numerous benefits to a whole group of people.

The risk of erroneous deprivation in this case is also high. 25 C.F.R. § 83.7 requires the BIA to make inquiries into the social and political structure of the petitioning tribe. Such matters are inherently complex and prone to mischaracterization.

Moreover, a formal hearing is likely to minimize the chance of an erroneous decision. A hearing will allow the Samish to present evidence of their cultural and political bonds, and challenge generalizations about the tribe that they believe are incorrect. Decision-making is undoubtedly aided by input and analysis from the group being characterized.

In sum, the burden that a formal hearing will put on the agency is substantially outweighed by the material impact of non-recognition on the lives of numerous people, and the danger of an erroneous decision. Due process mandates that plaintiffs be given a formal adjudication under the APA, 5 U.S.C. § 554, with the right to present evidence and cross-examine experts before a neutral judge. "Hearings compelled by reason of the due process Fifth Amendment requirements are treated for purposes of 5 U.S.C. § 554 as required by 'statute.'" *Clardy v. Levi*, 545 F.2d 1241, 1244 (9th Cir. 1976), citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950).

The informal administrative hearing held by the BIA did not meet the due process requirements. Plaintiffs

were not given an opportunity to cross-examine the BIA's experts or present their own experts, research materials relied on by the decision-makers were withheld from the plaintiffs, and there is evidence that would lead an objective bystander to believe that some of the decision-makers prejudged the case. Therefore, plaintiffs' motion for summary judgment is GRANTED. The court orders the BIA to vacate its determination that the plaintiffs are not a recognized tribe, and hold a new hearing which conforms with the APA requirements for a formal adjudication. This matter should therefore be remanded to the BIA for a formal adjudication under the Administrative Procedures Act, 5 U.S.C. § 553 consistent with this ruling. The Clerk of the Court is directed to enter judgment in this case in favor of plaintiffs pursuant to this Order

IT IS SO ORDERED.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2010-5067

SAMISH INDIAN NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: Jan. 28, 2012]

Appeal from the United States Court of
Federal Claims in case no. 02-CV-1383,
Judge Margaret M. Sweeney

ORDER

NOTE: This order is nonprecedential.

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 2, 2012.

FOR THE COURT,

/s/ JAN HORBALY/LB
JAN HORBALY
Clerk

Dated: 01/26/2012

cc: Craig J. Dorsay
Thekla Hansen-Young

APPENDIX N

UNITED STATES COURT OF FEDERAL CLAIMS

Case No. 02-1383L

SAMISH INDIAN NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Jan. 30, 2006

SECOND AMENDED COMPLAINT

Plaintiff Samish Indian Nation, a federally recognized Indian tribe, for its Second Amended Complaint hereby alleges as follows:

Nature of Action

1. The Samish Indian Nation ("Tribe") has continuously existed as an Indian tribe from the time of the Treaty of Point Elliott, 12 Stat. 927, in 1855 up to the present. While the Tribe was entitled throughout its history to recognition by the federal government as an existing Indian tribe, for the period 1969 to 1996 the federal government wrongfully and arbitrarily refused to treat the Tribe as a recognized tribe. The Tribe was entitled to historical recognition before 1996.

2. As a result of the federal government's wrongful actions, the Samish Indian Nation and its members were denied valuable rights, programs, services and benefits from 1969 to 1996 which were provided by the United States under money mandating federal laws to other federally recognized Indian tribes. The Samish Indian Nation seeks compensation from the United States for this wrongful denial or withholding of rights, programs, services and benefits to the Samish Indian Nation and its members during the period 1969 to 1996.

Parties

3. The Samish Indian Nation is a federally recognized Indian tribe, recognized by the United States as a sovereign Indian tribe with legal rights and responsibilities, and eligible for the special rights, programs, services and benefits provided by the United States to Indian tribes, and recognized as possessing powers of self-government. The Samish Indian Nation operates under a written constitution that affirms the authority of the Tribe to act on its own behalf in a governmental capacity and on behalf of its members. In particular, the Samish Constitution at Article VI, Section 2(1) vests the Samish Tribal Council with authority to present and prosecute any claims on behalf of the Tribe or Tribal members.

4. Defendant United States of America ("United States") has numerous trust responsibilities owed to the Tribe, including a duty to preserve and protect the Tribe's legal rights and its status as a sovereign government and to rationally and equitably distribute and allocate funding, services and benefits to the Tribe as part of its duty to provide funding, services and benefits to all

federally recognized tribes under money mandating federal statutes.

Jurisdiction

5. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1491, 1505. This is an action arising under the Constitution, treaties, and laws of the United States, including but not limited to the statutes listed in paragraph 30 of this Second Amended Complaint.

6. Congress has established a broad array of federally-funded programs, services and benefits to serve federally recognized tribes and their members. In each case covered by this Second Amended Complaint, Congress has established the program, service or benefit, and has appropriated funds over the course of many years, to meet the economic, social services, educational, health and other critical needs of federally recognized tribes and their members. The programs, services and benefits covered by this Second Amended Complaint are made available to all eligible federally recognized tribes (and tribal members) who meet established program criteria, are not awarded on a competitive basis, and are allocated or distributed in a manner such that the amount due can be readily ascertained. These programs, services and benefits include those described in paragraph 30.

Background Facts

7. The Samish Indian Nation (also known as the Samish Tribe or Samish Indian Tribe) was a signatory to the Treaty of Point Elliott, which was negotiated and

signed in 1855 and ratified by the United States Senate in 1859. 12 Stat. 927.

8. The Indian Claims Commission in *Samish Tribe* v. *United States,* 6 Ind. Claims Comm'n 159, Docket No. 261 (1958), held that the Samish Tribe was the descendant and successor in interest of the Samish Indians of aboriginal times, that the Samish Tribe and its members have continued as a tribal entity into contemporary times, and that the Samish Tribe was a tribal organization whose predecessors in interest along with other groups of Indians, ceded their lands, under the Treaty of Point Elliott to the United States. Under the Indian Claims Commission's ruling, the modem Samish Tribe was held to have a right to sue for damages for the loss of the Tribe's lands under the 1855 Treaty of Point Elliott. The Samish Tribe recovered damages in its Indian Claims Commission proceeding, which award was ratified by Congress pursuant to the Indian Tribal Judgment Funds Use and Distribution Act, Pub. L. No. 93-l34, 87 Stat. 466 (1973), *codified as amended at* 25 U.S.C. §§ 1401-1407.

9. In 1969, the United States, through wrongful actions of federal employees and officials within the Department of the Interior, arbitrarily and capriciously omitted the Samish Indian Nation from a list of Indian tribes that had been prepared by the Department of the Interior. While the list was not intended to be a list of federally recognized tribes, it was nevertheless used by the United States to identify federally recognized Indian tribes. There was no lawful authority to create such a list and there was no rational basis for excluding the Samish Indian Nation from the list. But this omission of the Samish Indian Nation from the list, and the result-

ing treatment of the Tribe as not federally recognized, caused the Tribe and its members to be deprived of all of the programs, benefits and services afforded by the United States to all other federally recognized Indian tribes and their members for the period 1969 to November 1996.

10. Faced with a total lack of federal support and assistance because of the federal government's wrongful treatment and denial of recognition, the Samish Indian Nation vigorously sought confirmation of its federally recognized status for many years. In an effort to confirm their status as a federally recognized tribe, the Samish Indian Nation in 1972 first petitioned for recognition as an Indian tribe by the United States. After extensive delays by the government, on February 5, 1987, the Assistant Secretary for Indian Affairs issued a decision denying the Tribe's petition for recognition.

11. In April 1989, the Samish Indian Nation filed suit in the United States District Court for the Western District of Washington challenging the Assistant Secretary's adverse recognition decision on Fifth Amendment due process grounds—as the decision was rendered without a hearing or other fundamental due process protections for the Tribe.

12. The federal district court found that the Department's 1989 recognition decision violated due process, as the Samish were not afforded a hearing, and, in particular, were "not given an opportunity to cross-examine the BIA's experts or present their own experts, research materials relied on by the decision makers were withheld from the plaintiffs, and there is evidence that would lead an objective bystander to believe that some of the

decision-makers prejudged the case." *Greene* v. *Lujan*, No. C89-645, 1992 WL 533059, at *9 (W.D. Wash. Feb. 25, 1992). The District Court's decision was affirmed on appeal. 64 F.3d 1266 (9th Cir. 1995).

13. On remand, an administrative law judge was appointed to hear the Tribe's claim of a right to federal recognition. On August 31, 1995, the Administrative Law Judge issued an exhaustive opinion and concluded that the Samish Tribe has continually existed as an Indian tribe from treaty time to the present. *Greene v. Babbitt*, Docket No. Indian 93-1, U.S. Dep't of the Interior, Office of Hearings and Appeals, Recommended Decision of Admin. Law Judge Torbett, at 19 (Aug. 13, 1995).

14. The Administrative Law Judge's decision was considered by Assistant Secretary of Indian Affairs Ada Deer, who was responsible for issuing the Department's final decision. On November 8, 1995, the Assistant Secretary issued a determination in favor of Samish recognition. But the Assistant Secretary in her ruling rejected certain essential findings made by the Administrative Law Judge in support of Samish recognition.

15. The Samish Indian Nation appealed Assistant Secretary Deer's determination on behalf of Samish recognition (but with essential factual findings removed) to federal court asking the Court to reinstate the Administrative Law Judge's factual findings that had been deleted by the Assistant Secretary. On October 15, 1996 in *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996), the District Court entered a judgment for the Samish Indian Nation. As a result of the government's history of misconduct in denying the due process rights of the

Tribe, the Court reinstated the findings that had been improperly omitted from the Assistant Secretary's decision recognizing the Tribe rather than remand the matter to the Agency for further proceedings.

16. Among the findings at issue in federal court was one which provided that:

> the omission of the Samish from a list of tribes prepared by the Defendants in the 1960s was neither based on actual research, nor was it intended to be used as the basis for determining which Indian groups are to be recognized by the United States (*see* Final Determination at 16, 38-39).

Id. at 1288 n.13. This finding was removed from the Administrative Law Judge's recommended decision in favor of the Samish by Assistant Secretary Deer in her final decision for the BIA.

17. The Tribe argued, and the Court agreed, that this finding was deleted by the Assistant Secretary at the ex parte urging of a government attorney to avoid governmental liability for past federal services and benefits to which the Samish Tribe would have been entitled if they had continued to be a recognized Indian tribe after 1969. The Court found the government's ex parte contacts to be wrongful, found the Administrative Judge's factual findings and legal conclusions on this issue to be exhaustive and well reasoned, and restored the finding.

18. The United States did not appeal the District Court's October 15, 1996 decision in *Greene v. Babbitt*.

19. The federal government has a trust responsibility to federally recognized Indian tribes. This trust responsibility arises from Treaties, statutes and the course of dealings between the United States and the tribes, over the span of many years. Various aspects of the trust responsibility have been recognized and codified in various federal statutes. These include, but are not limited to the Treaty of Point Elliott, 12 Stat. 927 (1855), to which the Samish Indian Nation was a signatory party; the Indian Reorganization Act of 1934, ch. 576, § 1, 148 Stat. 984, *codified as amended at* 25 U.S.C. §§ 461-479, which confirms the federal government's trust responsibility to preserve and protect tribal self-government by allowing Indian tribes to reorganize their governments and by allowing the Secretary of Interior to acquire land in trust for the benefit of Indian tribes; the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4792, *codified at* 25 U.S.C. § 479a-1, which confirms the Department of Interior's trust responsibility to protect and preserve tribal self-government of all federally recognized Indian tribes, and the statutes listed in paragraph 30.

20. The trust responsibility provides an important backdrop to the federal funding of programs for federally recognized tribes and their members. The United States has a trust responsibility with respect to every federally recognized tribe.

21. Because the trust responsibility protects all federally recognized tribes, the federal government must treat all tribes fairly, and must not take action that diminishes (or eliminates) the privileges or benefits of any federally recognized tribe in a fashion that is not ratio-

nal in comparison with that enjoyed by other federally recognized tribes. 25 U.S.C. §§ 476(f), (g).

22. Every tribe that is federally recognized today receives—either directly or through programs or services delivered by a federal agency—some amount of federal funds by virtue of being a federally recognized tribe.[1] While the timing and amount of federal funding each tribe receives may vary under rational formulas adopted by the agency, every federally recognized tribe (including newly recognized tribes) eventually receives federal funds for various programs and services.

23. Every tribe that was federally recognized as of 1969 today receives some amount of federal funds by virtue of being a federally recognized tribe. The only exception to this would be tribes, if any, that were terminated by Congressional action after 1969 and have not been restored to federal recognition. The plaintiff is aware of no such tribe.

24. Every tribe that became federally recognized by administrative or legislative means between 1969 and 1996 today receives some amount of federal funds by virtue of being a federally recognized tribe.

25. Congress appropriated substantial funding for the benefit of all Indian tribes and members of Indian tribes during the period from 1969 to 1996, pursuant to a number of federal authorizing statutes. In one of two ways (federal agency funding to benefit a tribe or its

[1] For purposes of brevity, when referring to federal funds, we use the term "receives" to mean that the federal funds are either provided directly from the federal government to the tribe, or expended by the federal government specifically for the benefit of the tribe or its members.

members, or direct funding to the tribe or members themselves), every federally recognized tribe received some measure of federal funding under one or more of these statutes, between 1969 and 1996. Such funding must be distributed to tribes based upon a rational or equitable formula.

26. The Samish Indian Nation and Samish tribal members received no funds appropriated by Congress and distributed to or expended on behalf of federally recognized tribes during the period from 1969 through April 8, 1996. No federally recognized tribe (except for the Samish Indian Nation which should have been treated like other recognized tribes), was completely deprived of federal funding from 1969 to 1996.

27. Some of the funds provided to all other federally recognized tribes and their members by the federal government were allocated based on each tribe's trust land base. Federally recognized tribes throughout the continental United States and in particular those tribes in Northwest Washington who became recognized during or as part of the treaty fishing rights litigation in *United States v. Washington*, known as the *Boldt* litigation, *see* 384 F. Supp. 312 (W.D. Wash. 1974), received or obtained reservations for the residence of tribal members and for other tribal purposes. The Samish Tribe, because the United States treated it as unrecognized during this period and because the United States took the position that it was not eligible to acquire land in trust under the Indian Reorganization Act, 25 U.S.C. § 465, did not receive a reservation and did not obtain any lands in trust. The United States declared that the Samish Indian Nation was not eligible for services, benefits and funding provided to other Indian tribes be-

cause it did not have a federal land base and because the United States did not recognize the Tribe. If the Samish Tribe had been properly recognized by the United States during the period 1969 to 1996, the Tribe would have obtained a land base held in trust by the United States for the benefit of the Tribe and would have qualified for federal programs and funds which were tied to the existence of a tribal reservation or land base.

28. The Samish Indian Nation was harmed by the United States' wrongful denial of recognition of the Tribe between 1969 and 1996. Samish tribal members were denied federal services and benefits made available to members of all other federally recognized tribes during this period of time because the United States wrongfully refused to recognize the Samish Tribe. Indian people across the United States suffered from severe social and economic deficits throughout this period. The quality of life for Indian people—whether measured by poverty, health conditions, housing, educational opportunities, unemployment or other indicators—was far below that of any other group in the United States. For members of federally recognized tribes, there was a range of federal programs, benefits and services, including those described in paragraph 30, which sought to ameliorate in some measure the dire living conditions faced by all Indians nationwide. But as a result of the failure of the United States to recognize the Tribe, Samish members were denied desperately needed health care, social services and benefits, education funding and benefits, housing assistance and benefits, and other benefits and services provided by the Unites States to members of federally recognized Indian tribes. This denial of services and benefits resulted in harm to Samish tribal members

and their families, causing them to continue to suffer from serious unmet needs in health care, education, and all other areas.

29. The Samish Indian Nation was harmed by the United States' wrongful denial of recognition to the Samish Indian Nation between 1969 and 1996 in other ways as well. During this period, tribes throughout the United States were able, through implementation of the Self-Determination policy and with federal assistance, to develop their governmental systems and infrastructure, to provide governmental services and benefits to their members such as housing, to begin to make economic progress to address decades of accumulated poverty, to preserve and advance tribal culture and traditions, and to continue operation as a tribal government for the benefit of its people. But, as a result of the United States' failure to recognize the Samish Indian Nation, the Tribe was unable to move forward in these areas on the same basis as all other federally recognized tribes. The federal government's wrongful failure to recognize the Samish Indian Nation during this 27 year period put the Samish Tribe behind all other federally recognized tribes with regard to economic development, the provision of programs and services to its members, and in the development of tribal government and tribal community.

30. The programs, services and benefits provided by the United States during some or all of the period 1969 to 1996 to eligible federally recognized tribes and their members—along with their statutory basis and eligibility requirements—include the following:

a. Tribal Priority Allocations. (i) The Bureau of Indian Affairs provides funding to support a broad

range of programs, services and benefits to federally-recognized tribes. These are collectively referred to as "Tribal Priority Allocations," ("TPA"), a term that includes the following categories of BIA programs: Tribal Government, Human Services, Education, Public Safety and Justice, Community Development, Resources Management, Trust Services and General Administration. Within each of these program categories are several specific programs—each of which is a component of TPA. Every federally recognized tribe receives some TPA funds every year. In general, once a federally recognized tribe receives TPA funds, that amount becomes part of that tribe's "base funding," and the tribe receives that amount in subsequent years as well (subject only to action by Congress to increase or decrease funding for that program within TPA).

(ii) In the years beginning in 1969, but prior to the existence of TPA, the programs that are now part of TPA were funded as part of the BIA budget, within the category of "Operation of Indian Programs." During those years, as well, once a tribe received funding for such a program, that funding became a part of the base amount that was (subject to appropriations levels rising or falling) routinely provided to that tribe in subsequent years.

(iii) Every year, Congress appropriates funds for TPA as part of the Appropriations Act for Interior and Related Agencies. The Appropriations Acts for Interior and Related Agencies for the fiscal years 1969 to 1996 are listed in paragraph 30.o. In doing so, Congress acts with the understanding, arising from representations by the Interior Department and longstanding practice, that every federally recognized tribe will receive some TPA

funding each year. Congress has never authorized the Interior Department to provide TPA to less than all federally recognized tribes.

(iv) Congress has also enacted several authorizing statutes that support various programs within TPA. These include the Johnson-O'Malley Act, ch. 147, 48 Stat. 596 (1934), *codified as amended at* 25 U.S.C. §§ 452-457, the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, *codified at* 25 U.S.C. §§ 1901-1963, the Higher Education Tribal Grant Authorization Act, Pub. L. No. 102-325, pt. B, 106 Stat. 798 (1992), *codified at* 25 U.S.C. §§ 3301-3307, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, tit. IV, subtit. C, 100 Stat. 3207, *codified as amended at* 25 U.S.C. §§ 2401-2478, and the Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, tit. IV, 104 Stat. 4544 (1990), *codified at,* 25 U.S.C. §§ 3201-3211. Together with the annual Interior Appropriations Acts, these statutes provide a network of statutes that are money-mandating for purposes of the claim by a federally recognized tribe that it was wrongfully deprived of TPA funds. This is so because this network of statutes can fairly be interpreted to provide some funds for all federally recognized tribes, and the failure of the government to abide by that purpose can fairly be interpreted to give rise to a claim for money damages.

b. Housing under the 1937 Housing Act. Since 1961, the United States has provided federal financial assistance to Indian tribes to construct, operate and maintain housing for their members pursuant to the Housing Act of 1937, ch. 896, 50 Stat. 888, and the amendments to that Act—Housing and Community De-

velopment Act of 1974, Pub. L. No. 93-383, §§ 102(1)(a), 103, 201, 210, 88 Stat. 633; Housing and Community Development Act of 1977, Pub. L. No. 95-128, §§ 102(a)(16), 103(a), 901, 91 Stat. 1111; Indian Housing Act of 1988, Pub. L. No. 100-358, 102 Stat. 676—(hereinafter "1937 Housing Act"). Tribes were eligible to receive financial assistance under the 1937 Housing Act if they were federally recognized, had authority to exercise governmental powers, sought such financial assistance by adopting an ordinance to establish a Housing Authority that would implement the programs authorized by the Act, and had or were able to establish the administrative capability to carry out the housing project. *See* S. Comm. On Interior and Insular Affairs, 94th Cong., *Indian Housing Effort in United States with Selected Appendixes,* 213,237 (Comm. Print 1975) (reprinting eligibility criteria); *see also* 24 C.F.R. §§ 805.109, 805.205 (1976); 24 C.F.R. § 905.126 (1991).

c. Housing Improvement Program. In conjunction with the financial assistance provided to Indian tribes and their members under the 1937 Housing Act, the United States provided additional financial assistance for housing for federally recognized Indian tribes and their members through the Housing Improvement Program (HIP) operated by the Bureau of Indian Affairs. Funding for the HIP program was provided by Congress in annual Interior Department Appropriations Acts described in paragraph 30.o below and administered pursuant to BIA regulations, *see, e.g.* 25 C.F.R. pt. 261 (1976); 25 C.F.R. pt. 256 (1983); 25 C.F.R. pt. 256 (1995). Financial assistance under HIP was provided to Indians who were members or descendants of members of federally recognized tribes in need of housing that

could not be met through other sources. 25 C.F.R. §§ 261.2(e), (f) (1976); 25 C.F.R. §§ 256.2(e), (f), 256.5 (1983); 25 C.F.R. §§ 256.2, 256.6 (1995)

d. Health Care. Throughout the period at issue in this suit, the United States provided hospital, medical, dental, mental health, and preventative care to Indians who were enrolled members of federally recognized tribes. Such care was provided either directly by the United States through the Indian Health Service (IHS), or, to the extent an IHS facility was not available for the service needed, indirectly by third party health care providers whose services were paid by federal funds under a program known as the contract health care (or contract medical care) program. Since 1976, these services have been provided in large part pursuant to the Indian Health Care Improvement Act (IHCIA), Pub. L. No. 94-437, tit. II, § 201, 90 Stat. 1400 (1976), and the amendments to that Act—Indian Health Care Amendments of 1980, Pub. L. No. 96-537, 94 Stat. 3173; Indian Health Care Amendments of 1988, Pub. L. No. 100-713, 102 Stat. 4784; Indian Health Amendments of 1992, Pub. L. No. 102-573, 108 Stat. 4526, *codified as amended at, inter alia,* 25 U.S.C. § 162—and funded through the annual appropriations covering both direct and contract health care services for Indians. *See* Interior Department Appropriations Acts as set out in paragraph 30.o. Under the Indian Health Care Improvement Act and its amendments, Indians who are enrolled members of federally recognized tribes have been eligible for and received direct and contract health care services (IHCIA, tit. I, §§ 4(c), (d), codified at 25 U.S.C. §§ 1603(c), (d)), while federally recognized Indian tribes have been entitled to contract with IHS to operate health care facilities

and provide health care services. 25 U.S.C. §§ 1621(d), 1680a.

e. Supplemental Nutrition Program for Women Infants and Children (WIC). Since 1973, federally recognized Indian tribes have been entitled to receive federal funds to administer a supplemental food programs (known as the "WIC" program) to aid pregnant and post-partum women, infants and children. National School Lunch and Child Nutrition Act Amendments of 1973, Pub. L. No. 93-150, § 6(a), 87 Stat. 563, 729, amending the Child Nutrition Act of 1966, Pub. L. No. 89-642, § 17, 86 Stat. 729, *codified as amended at* 42 U.S.C. §§ 1786, 1786(b)(13), 1786(c)(2)(A). Funding for the WIC program has been allocated among the States, state agencies, and Indian tribes pursuant to a formula, 25 U.S.C. § 1786(h), under which all federally recognized tribes seeking to participate in the program have been able to do so.

f. Federal Revenue-Sharing. From 1972 until September 30, 1983, federally-recognized Indians tribes received federal funds under the State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919, *as amended and extended* by the State and Local Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341, and State and Local Fiscal Assistance Act Amendments of 1980, Pub. L. No. 96-604, 94 Stat. 3516, *formerly codified at* 31 U.S.C.§§ 1221 *et seq.* By this act, the United States distributed federal funds to States, local governments, and federally recognized Indian tribes on a formula basis. Pub. L. No. 92-512 §§ 107, 108(b)(4), 86 Stat. at 922. The funds were made available to all such governments for purposes of public safety (law enforcement and fire protection), environ-

mental protection, public transportation, health, social services for the poor or aged, financial administration, and ordinary and necessary capital expenditures authorized by law. Pub. L. No. 92-512 at § 103.

g. Community Services Block Grants (CSBG). Beginning in 1981, federally-recognized Indian tribes were entitled to request and receive federal funds to address and combat problems of poverty. Funding was authorized under Title VI, Subtitle B of the Omnibus Budget Reconciliation Act (OBRA) of 1981, Pub. L. No. 97-35, § 671, § 674(c), 95 Stat. 357, *codified at* 42 U.S.C. §§ 9903(d), 9911, which was an amendment of the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508. Under the 1981 statute and the regulations implementing it, the Secretary of the Department of Health and Human Services "determined that members of Indian tribes and tribal organizations would be better served by direct Federal funding than by funding through the States in every instance that the Indian tribe or tribal organization requests direct funding," 46 Fed. Reg. 48,582, 48,586. (Oct. 1, 1981), and accordingly, that CSBG funding would be provided to an Indian tribe upon the tribe's request. *Id. see* [*sic*] *also* 45 C.F.R. § 96.41 (1984). The amount of funds made available to such tribes, like the funding made available to states under this program, was based on a formula under which all participating tribes like all participating states, were funded. OBRA of 1981 at § 674(c)(2), *codified at* 42 U.S.C. § 9911(b).

h. Preventive Health and Health Services Block Grants. Beginning in 1981, federally recognized Indian tribes were entitled to request and receive federal funds to establish health care programs and provide preven-

tive health care services. Funding was authorized under Title IX, Subtitle A of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 § 901,95 Stat. 535, *codified at* 42 U.S.C. §§ 300w, 300w-l(d). Under the 1981 statute and the regulations implementing it, the Secretary of the Department of Health and Human Services "determined that members of Indian tribes and tribal organizations would be better served by direct Federal funding than by funding through the States in every instance that the Indian tribe or tribal organization requests direct funding," 46 Fed. Reg. 48,582, 48,586 (Oct. 1, 1981), and accordingly, that Preventive Health and Health Service Block Grant funding would be provided to an Indian tribe upon the tribe's request. *Id., see also* 45 C.F.R. § 96.41 (1984). The amount of funds made available to such tribes, like the funding made available to states under this program, was based on a formula under which all participating tribes, like all participating states, were funded. OBRA of 1981, § 901, *codified at* 42 U.S.C. § 300w-1(d)(3).

i. Alcohol and Drug Abuse and Mental Health Services Block Grants. Beginning in 1981, federally recognized Indian tribes were entitled to request and receive federal funds to address and combat substance abuse and mental health problems in a tribe's community. Funding was authorized under Title IX, Subtitle A of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 § 901, 95 Stat. 543, *codified as amended at* 42 U.S.C. §§ 300x, 300x-33. Under the 1981 statute and the regulations implementing it, the Secretary of the Department of Health and Human Services "determined that members of Indian tribes and tribal organizations would be better served by direct Federal funding than

by funding through the States in every instance that the Indian tribe or tribal organization requests direct funding," 46 Fed. Reg. 48,582, 48,586 (Oct. 1, 1981), and accordingly, that Alcohol and Drug Abuse and Mental Health Services Block Grant funding would be provided to an Indian tribe upon the tribe's request. *Id.; see also* 45 C.F.R. § 96.41 (1984). The amount of funds made available to such tribes, like the funding made available to the states under this program, was based on a formula under which all participating tribes like all participating states, were funded. OBRA of 1981 at § 901, *codified as amended at* 42 U.S.C. § 300x-33(d)(1) (now known as the Mental Health and Substance Abuse Block Grants).

j. Primary Care Health Block Grants. From 1981 until 1986, federally-recognized Indian tribes were entitled to request and receive federal funds to provide primary health care services. Funding was authorized under Title IX, Subtitle A of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 901, 95 Stat. 552 *formerly codified* at 42 U.S.C. §§ 300y, 300y-4, until its repeal by the Health Services Amendment Act of 1986, Pub. L. No. 99-280, § 5, 100 Stat. 400. Under the 1981 statute and the regulations implementing it, the Secretary of the Department of Health and Human Services "determined that members of Indian tribes and tribal organizations would be better served by direct Federal funding than by funding through the States in every instance that the Indian tribe or tribal organization requests direct funding," 46 Fed. Reg. 48,582, 48,586 (Oct. 1, 1981), and accordingly, that Primary Care Block Grant funding would be provided to an Indian tribe upon the tribe's request. *Id.; see also* 45 C.F.R.

§ 96.41 (1984). The amount of funds made available to such tribes, like the funding made available to states under this program, was based on a formula under which all participating tribes like all participating states, were funded. OBRA of 1981 at § 901, *formerly codified at* 42 U.S.C.§ 300y-4.

k. The Low Income Home Energy Assistance Program (LIHEAP). Beginning in 1980, federally recognized Indian tribes were entitled to request and receive federal funds to provide low income home energy assistance to their members. Funding was authorized initially under the Home Energy Assistance Act of 1980, Pub. L. No. 96-223, tit. III, 94 Stat. 229, *formerly codified at* 42 U.S.C. §§ 8601-8612, and thereafter under Title XXVI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2601-2611, 95 Stat. 893, *codified as amended,* 42 U.S.C. §§ 8621-8630. Under the statute and the regulations implementing it, the Secretary of the Department of Health and Human Services "determined that members of Indian tribes and tribal organizations would be better served by direct federal funding than by funding through the States in every instance that the Indian tribe or tribal organization requests direct funding," 46 Fed. Reg. 48,582, 48,586 (Oct. 1, 1981), and accordingly, that funding for the LIHEAP program would be provided to an Indian tribe upon the tribe's request it be authorized to administer the program. *Id.; see also* 45 C.F.R. § 96.41 (1983). The amount of funds made available to such tribes, like the funding made available to the states under this program, was based on a formula based on the number of Indian households to be served by the program. OBRA of 1981 at § 2604(d)(2); 42 U.S.C. § 8623(d)(2).

l. Commodity Food Program. Throughout the period covered by this suit, federally recognized Indian tribes were entitled to receive from the federal government financial assistance and surplus federal foods and commodities for distribution to low income persons in need. The program, known as the Commodity Food Program, was authorized by the Agricultural Act of 1949, Pub. L. No. 81-439, tit. IV, ch. 792, § 416, 63 Stat. 1061. Under the Act and the regulations implementing [*sic*], federally recognized Indian tribes were entitled to administer the program within the tribe's reservation or other area over which the tribe exercised jurisdiction upon the submission of an application to do so and showing that it is potentially capable of administering the program. *See* 7 C.F.R. §§ 253.2, 253.3, 253.4 (1984).

m. Food Stamp program. Beginning in 1977, federally recognized Indian tribes were entitled to receive from the federal government financial assistance to administer the Food Stamp program for their eligible low income members. Tribal administration of the Food Stamp program was authorized by title XIII of the Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913, *codified as amended at* 7 U.S.C. §§ 2011-2036. Under the Act and the regulations implementing it, federally recognized Indian tribes were entitled to administer the program within the tribe's reservation or other area over which the tribe exercised jurisdiction upon the submission of an application to do so and showing that it is potentially capable of administering the program. *See* Pub. L. No. 95-113 at § 3(p); 7 C.F.R. pt. 281 (1984).

n. Job Training—CETA and JTPA. Since December 1973, federally-recognized Indian tribes have been entitled to federal funding to provide job training and

employment opportunities to their members. The program was initially established by the Comprehensive Employment and Training Act of 1973 ("CETA"), Pub. L. No. 93-203, § 204(2), 87 Stat. 839, *as amended by* the Youth Employment and Demonstration Act of 1977, Pub. L. No. 95-93, 91 Stat. 627, the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, §§ 201, 301, 302, 92 Stat. 1909, and then replaced in 1982 by the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322 ("JTPA"). In both CETA and JTPA, Congress sought to address the drastic underemployment and economic disadvantages that exist among Native Americans and established programs to assist tribes to do this. As Congress stated in CETA, and reaffirmed in the JTPA:

> The Congress finds that (1) serious unemployment and economic disadvantage exist among members of the Indian and Alaskan Native communities; (2) there is a compelling need for the establishment of comprehensive manpower training and employment programs for members of those communities; (3) such programs are essential to the reduction of economic disadvantage among individual members of those communities and to the advancement of economic and social development in these communities consistent with their goals and lifestyles.
>
> The Congress therefore declares that, because of the special relationship between the Federal Government and most of those to be served by the provisions of this section, . . . such programs shall be available to federally recognized Indian tribes, bands, and individuals and to other groups and individuals of Native American descent. . . .

CETA, Pub. L. No. 93-303, §§ 302(a)-(b); *accord* JTPA, Pub. L. No. 97-300, § 401(b). Under both acts, federal funding was provided to federally recognized tribes which had a substantial level of unemployment (measured by an unemployment rate equal to or greater then [*sic*] 6.5% during any three month period) and the ability to administer the various programs offered, CETA, Pub. L. No. 93-303, § 204(a)(2), 302; JTPA, Pub. L. No. 97-300, § 401, with the Secretary providing technical assistance to tribes seeking to administer the program. *See* CETA, Pub. L. No. 93-303, § 207(c); JTPA, Pub. L. No. 97-300, § 401(h)(2)(i).

o. From 1969 to November 1996, Congress enacted numerous money mandating federal statutes appropriating funds for the Department of the Interior and related agencies, and appropriating funds to all other federal departments and agencies, to fund programs and services for the benefit of Indians and all Indian tribes, including: Dep't of the Interior and Related Agencies Appropriations Act for FY 1969, Pub. L. No. 90-425, 82 Stat. 425, 427 (1968); Dep't of the Interior and Related Agencies Appropriations Act for FY 1970, Pub. L. No. 91-98, 83 Stat. 147, 148 (1969); Dep't of the Interior and Related Agencies Appropriations Act for FY 1971, Pub. L. No. 91-361, 84 Stat. 669, 670 (1970); Dep't of the Interior and Related Agencies Appropriations Act for FY 1972, Pub. L. No. 92-76, 85 Stat. 229, 230 (1971); Dep't of the Interior and Related Agencies Appropriations Act for FY 1973, Pub. L. No. 92-369, 86 Stat. 508 (1972); Dep't of the Interior and Related Agencies Appropriations Act for FY 1974, Pub. L. No. 93-120, 87 Stat. 429 (1973); Dep't of the Interior and Related Agencies Appropriations Act for FY 1975, Pub. L.

No. 93-404, 88 Stat. 803 (1974); Dep't of the Interior and Related Agencies Appropriations Act for FY 1976, Pub. L. No. 94-165, 89 Stat. 977 (1975); Dep't of the Interior and Related Agencies Appropriations Act for FY 1977, Pub. L. No. 94-373, 90 Stat. 1043 (1976); Dep't of the Interior and Related Agencies Appropriations Act for FY 1978, Pub. L. No. 95-74, 91 Stat. 285 (1977); Dep't of the Interior and Related Agencies Appropriations Act for FY 1979, Pub. L. No. 95-465, 92 Stat. 1279 (1978); Dep't of the Interior and Related Agencies Appropriations Act for FY 1980, Pub. L. No. 96-126, 93 Stat. 954 (1979); Dep't of the Interior and Related Agencies Appropriations Act for FY 1981, Pub. L. No. 96-514, 94 Stat. 2957 (1980); Dep't of the Interior and Related Agencies Appropriations Act for FY 1982, Pub. L. No. 97-100, 95 Stat. 1391 (1981); Dep't of the Interior and Related Agencies Appropriations Act for FY 1983, Pub. L. No. 97-394, 96 Stat. 1966 (1982); Dep't of the Interior and Related Agencies Appropriations Act for FY 1984, Pub. L. No. 98-146, 97 Stat. 919 (1983); Dep't of the Interior and Related Agencies Appropriations Act for FY 1985, as part of the Continuing Appropriations Bill for FY 1985, Pub. L. No. 98-473, 98 Stat. 1837 (1984); Dep't of the Interior and Related Agencies Appropriations Act for FY 1986, as part of the Continuing Appropriations Bill for FY 1986, Pub. L. No. 99-190, 99 Stat. 1185 (1985); Dep't of the Interior and Related Agencies Appropriations Act for FY 1987, as part of the Continuing Appropriations Bill for FY 1987, Pub. L. No. 99-500, 100 Stat. 1783 (1986); Dep't of the Interior and Related Agencies Appropriations Act for FY 1988, as part of the Continuing Appropriations Bill for FY 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987); Dep't of the Interior and Related Agencies Appropria-

tions Act for FY 1989, Pub. L. No. 100-446, 102 Stat. 1774 (1988); Dep't of the Interior and Related Agencies Appropriations Act for FY 1990, Pub. L. No. 101-121, 103 Stat. 701 (1989); Dep't of the Interior and Related Agencies Appropriations Act for FY 1991, Pub. L. No. 101-512, 104 Stat. 1915 (1990); Dep't of the Interior and Related Agencies Appropriations Act for FY 1992, Pub. L. No. 102-154, 105 Stat. 990 (1991); Dep't of the Interior and Related Agencies Appropriations Act for FY 1993, Pub. L. No. 102-381, 106 Stat. 1374 (1992); Dep't of the Interior and Related Agencies Appropriations Act for FY 1994, Pub. L. No. 103-138, 107 Stat. 1379 (1993); Dep't of the Interior and Related Agencies Appropriations Act for FY 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994); Dep't of the Interior and Related Agencies Appropriations Act for FY 1996, Pub. L. No. 104-134, 110 Stat. 1321; Dep't of the Interior and Related Agencies Appropriations Act for FY 1997, as part of the Omnibus Consolidated Appropriations Act for FY 1997, Pub. L. No. 104-208.

PLAINTIFF'S FIRST CLAIM FOR RELIEF

Violation of Federal Statutes that Mandate Funding to All Eligible Federally recognized Indian Tribes and Their Members

31. Plaintiff re-alleges and incorporates paragraphs 1 through 30 by reference.

32. Pursuant to its trust responsibility, Congress has enacted a broad range of programs, services and benefits for the benefit of all Indian tribes and their members, including those described in paragraph 30. With respect to each such program, service or benefit, the underlying legal framework—comprised of authorizing

statutes, appropriations acts and agency regulations—establishes eligibility criteria for participation and inclusion in the program. In some instances—such as with the Tribal Priority Allocation funding provided by the Bureau of Indian Affairs—the only criterion for participation is federal recognition. For such programs, services or benefits, all federally recognized tribes benefit each year. In other instances—such as for example, the housing programs under the Housing Act of 1937, and the Preventive Health and Health Services Block Grant under the Omnibus Budget Reconciliation Act of 1981—all federally recognized tribes are eligible, provided the tribe agrees to satisfy certain administrative criteria. With respect to each of the programs, services and benefits described in paragraph 30, the Samish Indian Nation and its members were eligible at all times relevant to this action.

33. For each of the programs, services and benefits set forth in paragraph 30, the underlying statutes are money-mandating because in each instance it provides clear standards for paying money to recipients, compels payment upon the satisfaction of pre-set conditions, and the amounts that each recipient will receive can be readily determined. In enacting the statutes establishing and funding the programs, services and benefits as set forth in paragraph 30, Congress provided that all federally recognized tribes (and their members) who are eligible are to receive a share of the funds provided by Congress. While Congress in some instances provides funding to federal agencies and authorizes the agency to use that funding to benefit some, but not all, eligible recipients (as in programs where funding is awarded on a competitive basis), that is not the case with respect to

the programs, services and benefits in paragraph 30. As to those programs, services or benefits, Congress provided funding for the purpose of benefitting all eligible tribes and their members.

34. During the period 1969 to 1996, the Samish Indian Nation received no programs, services or benefits from the federal government under any federal statute or program enacted by Congress for the benefit of all tribes and their members. The wrongful actions of the United States in refusing to treat the Samish Indian Nation as a federally recognized tribe prevented the Tribe from receiving the programs, services and benefits that would otherwise have been available to it under acts of Congress.

35. Under treaties, statutes and a course of dealings, the United States has assumed a trust responsibility towards Indian tribes. Among other things, the trust responsibility means that where Congress enacts statutes that provide programs and services for the benefit of tribes and tribal members, those statutes shall be construed to require the relevant federal agency to allocate the funds Congress provides in a reasonable, rational manner. The complete exclusion of the Samish Indian Nation from the programs, services and benefits available to tribes and tribal members under these statutes was unreasonable, arbitrary and capricious, not supported by law, and in violation of the federal trust responsibility to the Tribe.

36. The wrongful actions of the United States in refusing to treat the Samish Indian Nation as a federally recognized tribe prevented the Tribe and its members from receiving programs, services and benefits available

for the benefit of all tribes and Indians under federal statutes. This violation of its statutory rights damaged the Samish Indian Nation in an amount to be determined at trial[.]

PLAINTIFF'S SECOND CLAIM FOR RELIEF

Failure to Treat the Samish Indian Nation as a Federally Recognized Indian Tribe with Respect to Federal Funding

37. Plaintiff re-alleges and incorporates paragraphs 1 through 30 by reference.

38. Only Congress has the authority to terminate a federally recognized Tribe. Termination, in the context of federal-tribal relations, means the discontinuation of 1) the federal trust responsibility, and 2) the federal funding that is provided by virtue of the Tribe's status as a federally recognized tribe.

39. Absent express Congressional authorization, federal agencies have no authority to terminate a federally recognized tribe. Since withdrawal of all federal funding for a tribe is tantamount to termination, federal agencies have no authority to withdraw or deny all federal funding to a federally recognized tribe.

40. Congress never authorized the termination of the Samish Indian Nation, and never authorized the withdrawal or denial of all federal funding for the Samish Indian Nation and its members. As a result, the federal government's failure to provide any federal funds to the Samish Indian Nation from 1969 to 1996 was, in effect, an unlawful effort to terminate the Tribe.

41. All of the federal statutes providing federal funding for programs, services and benefits for federally recognized tribes and their members, including those statutes cited in paragraph 30, together comprise a network of statutes defining a fundamental aspect of the federal government's trust responsibility to tribes.

42. Whatever the scope of its authority with respect to particular statutes, the federal government can not simply stop treating one tribe as federally recognized by implementing the entire network of federal statutes that provides federal funding for tribes and tribal members in a manner that denies all such funding to that tribe. But that is precisely what the federal government did to the Samish Indian Nation from 1969 to 1996.

43. The network of statutes described in paragraph 30 is money-mandating for purposes of a claim that the federal government treated a tribe as through [*sic*] it was not federally recognized, where such treatment has been established to be wrongful. This is so because Congress, in enacting this network of statutes, intended the statutes to provide programs, services and benefits to all federally recognized tribes, and the refusal of the federal government to comply with that core purpose—by refusing to provide any funding to a particular tribe—can fairly be interpreted as a violation of the federal government's trust responsibility to that federally recognized tribe that gives rise to a claim for money damages.

44. The wrongful actions of the United States in failing to provide the Samish Indian Nation with any funding under the network of statutes set forth in paragraph 30 from 1969 to 1996 harmed the Samish Indian Nation and its members, in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

1. That the Court enter a judgment for damages against the United States in an amount to be determined.

2. That the Court award the reasonable expenses of litigation, including attorneys fees, costs and disbursements.

3. For such other relief as is appropriate.

Dated: Jan. 30, 2006

Respectfully submitted,

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APPENDIX O

1. 28 U.S.C. 1491 provides in pertinent part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchanges Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

2. 28 U.S.C. 1505 provides:

Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or

Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

3. 31 U.S.C. 1304 (2006 & Supp. IV 2010) provides in pertinent part:

Judgments, awards, and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable—

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

* * * * *

4. 31 U.S.C. 1341 provides:

Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.