IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, and CLARK COUNTY, WASHINGTON, *et al*., Plaintiffs, v. S.M.R. JEWELL, in her official capacity as Secretary of the United States Department of Interior, *et al*., Defendants, and COWLITZ INDIAN TRIBE, Intervenor-Defendant.	Case No. 1:13-cv-00849 BJR

***AMICUS BRIEF* OF SAMISH INDIAN NATION**

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1. Introduction.

The Samish Indian Nation ("Samish Tribe") does not take a position on the specific questions before this court of whether the Cowlitz Indian Tribe is a tribe that qualifies under the Indian Reorganization Act and the U.S. Supreme Court decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009)("*Carcieri*") to take land into trust, or whether the land at issue in this case qualifies as restored land or initial reservation land under the Section 20 exceptions to the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A). Those questions are for the Cowlitz Tribe to address.

But Plaintiffs in this case, the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribe"), and Clark County, Washington ("Clark County") have made arguments in support of their respective summary judgment motions that have general application to Indian tribes across the United States, not just the Cowlitz Tribe, and that may, depending on the decision of this Court, result in adverse impacts to many tribes. As described in the Samish Tribe's Motion for Leave to File an Amicus Brief and below, the Samish Tribe is uniquely situated because of its history and experience with federal recognition to provide valuable information to the Court that is not otherwise available.

First, the Grand Ronde Tribe urges an interpretation of the term "recognized Indian tribe" in the definition of "Indian" and "Indian Tribe" under Section 19 of the 1934 Indian Reorganization Act (IRA), 25 U.S.C. § 479, that would limit the term to tribes that had a formal government-to-government relationship with the United States in 1934. Grand Ronde Memorandum in Support of Motion for Summary Judgment, Dkt. No. 23, pp. 13-20 (hereinafter "GR Brief"). The Samish Tribe will explain why this interpretation is wrong as a matter of fact and law, based on Samish's experience. Second, Clark County argues that the Cowlitz Tribe is not eligible to take land into trust because its tribal membership has expanded too much and the

Secretary of Interior has failed to certify that the Tribe continues to exist as a tribe. Clark County Memorandum in Support of Motion for Summary Judgment, Dkt. No. 24, pp. 24-28 (hereinafter "CC Brief"). *See also* CC Brief at 10-15 (Clark County argument on interpretation of "recognized Indian tribe"). Samish will explain, through its unique federal acknowledgment history, how this argument also lacks merit as a matter of fact and federal law.

The Samish Tribe is uniquely suited to provide relevant and useful information to the Court on these critical issues. The Samish Tribe has litigated its "recognition" status with the United States in multiple lawsuits over a period of 38 years (longer, if you incorporate earlier federal court decisions confirming Samish tribal status).[1] In the course of this lengthy litigation

[1] These cases, in chronological order, with brief summaries that will be expanded on in the following discussion as appropriate, are: *Duwamish Tribe et al. v. United States*, 79 Ct.Cl. 530, 533, 581 (1934)(Samish a party to the treaty of Point Elliott, and a separate, existing tribe; rejecting U.S. claim that Samish was a band of the Lummi Tribe - *Duwamish* was decided ten days before the IRA became law); *Samish Tribe v. United States*, 6 Ind. Cl. Comm. 169 (1958)(Samish a recognized tribe continually existing as a tribal entity from treaty times into contemporary times, and is a successor in interest to the historical Samish Tribe); *United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) ("*Washington II*")(Samish denied treaty status because it failed to prove that it had continuously maintained an organized tribal structure; Indian Claims Commission decision not relevant to treaty status); *Greene v. Babbitt*, 996 F.2d 973 (9th Cir. 1993)("*Greene I*")(denying other tribes' motions to intervene in Samish federal acknowledgment administrative proceeding); *Greene v. Lujan*, No. C89-645Z (W.D. Wash., 2-25-92), Order, Dkt. No. 169, 1992 WL 533059, *aff'd*, *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995)("*Greene II*") (reversing BIA denial of Samish federal acknowledgment for violation of due process rights of Tribe and tribal members); *Greene v. Babbitt*, 943 F.Supp. 1278 (W.D.Wash. 1996)("*Greene III*")(affirming Samish federal recognition and reinstating factual findings improperly removed by BIA that proved continuous Samish existence as an independent tribal entity); *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005)("*Washington III*")(Samish in federal acknowledgment proceeding met the standard necessary for exercise of treaty rights – continuous maintenance of an organized tribal structure from treaty times to the present; Court orders reopening of *Washington II* under FRCP 60(b)(6)); *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005)(Samish Tribe arbitrarily and capriciously dropped from BIA list of federal recognized tribes, subjecting U.S. to potential liability; federal statutes not money mandating for purposes of allowing compensation; Samish should have been historically recognized during period when BIA dropped Samish from its internal list of recognized tribes); *United States v. Washington*, 593

process, the Samish Tribe uncovered and established facts relevant to the issue of recognition of Indian tribes that will be useful to the Court in deciding the substantive issues raised by Grand Ronde and Clark County's summary judgment motions.

2. "Recognition" and "Recognized Indian Tribe" as those terms are used in the Indian Reorganization Act should be given a broad, common sense interpretation.

The Grand Ronde Tribe and Clark County both argue that the term "recognized Indian tribe" at 25 U.S.C. § 479 is a term of art that must be limited in scope to formal federal recognition as of the date of enactment of the IRA in 1934, as the term "now under federal jurisdiction" was interpreted by the Supreme Court in the 2009 *Carcieri* decision. This argument is contradicted by legal precedent and by the history of federal Indian affairs. As Samish will show in this section, "federal recognition," a different term, is a term of art that arose after enactment of the IRA in 1934. See Cohen's Handbook of Federal Indian Law, §3.02[3], p. 134 (2012 ed.)(hereinafter "2012 Cohen"). The particular history of the Samish Tribe illustrates the problems with Plaintiffs' arguments on this issue. The Samish Tribe agrees with and incorporates herein the general policy and IRA arguments advanced by amicus United Southern and Eastern Tribes (USET).

F.3d 790 (9th Cir. 2010)(*en banc*)("*Samish*")(overruling *Washington III* because of conflict in Circuit decisions; treaty rights and federal recognition separate legal issues; no grounds to reopen *Washington II* treaty rights decision under FRCP 60(b)(6)); *Samish Indian Nation v. United States*, 657 F.3d 1330 (Fed.Cir. 2011)(affirming 2005 Samish Federal Circuit decision that Samish arbitrarily dropped from internal BIA list of recognized tribes; finding one federal statute money mandating for purposes of federal liability).

In addition, there are two administrative Samish federal acknowledgment decisions that were part of the *Greene* decisions cited above. They are *Greene v. Babbitt*, Dkt. No. Ind. 93-1, Dept. of Interior, Office of Hearings and Appeals, Recommended Decision in Favor of Samish Federal Acknowledgment, Aug. 31, 1995 ("Torbett Decision"), and Assistant Secretary – Indian Affairs Ada Deer, Final Decision to Acknowledge the Samish Tribe, Nov. 8, 1995 ("Deer Decision"). Relevant portions of these two administrative decisions are attached as Exhibits to this amicus brief.

Statutes passed for the benefit of Indian tribes must be liberally construed in favor of the Indians, *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942), with ambiguities resolved in favor of the Indians. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973). As such, the IRA must be interpreted to the benefit of tribes, which it was supposed to protect, revitalize and enhance, and any definitional ambiguities should be resolved in their favor.

a. Legislative History of the Indian Reorganization Act.

It is clear from the legislative history of the IRA that Congress intended the phrase "recognized Indian tribe" to have a different meaning than "now under federal jurisdiction" in § 479. Grand Ronde and Clark County, by arguing that the term "recognized Indian tribe" means formal political recognition by the United States, is attempting to merge "recognized Indian tribe" with the amendatory language added by Commissioner Collier – "now under federal jurisdiction" – which requires positive federal action acknowledging that the tribe is under the supervision or control of the federal government.[2] *See Senate Hearings on the Indian Reorganization Act*, Hearings before the Committee on Indian Affairs, United States Senate, 73rd Cong., 2d Sess. on S. 2755 and S.3645, April 26- May 17, 1934 ("1934 Senate Hearings"), p. 266, AR 135301. Such merger is unwarranted. The Hearings demonstrate the fallacy of Plaintiffs' argument on this issue. Senators Wheeler and O'Mahoney engaged in a colloquy over

[2] Interestingly, there is no dispute that the Samish Tribe was under the jurisdiction of the Bureau of Indian Affairs (BIA), since the Agency expressly acknowledged this relationship both before and after 1934. *See, e.g.*, Ltr. dated Sept. 5, 1913, from Cato Sells, Comm'r of Indian Affairs to Dr. Chas M. Buchanan, Supt., Tulalip Indian Agency; Ltr. Dated March 1, 1927, from Tulalip Agency Superintendent to Rev. Wm. Brewster Humphrey; Ltr. Dated April 6, 1929, from Agency Farmer to Aug. F. Duclos, Tulalip Agency Superintendent; Ltr. Dated March 24, 1955, from Melvin L. Robertson, Western Washington BIA Agency Superintendent to R.J. Wilson, all attached as Exhibit 1 to this Memo. Since definition of the term "federal recognition" was not worked out until the 1970s, these statements were likely also an acknowledgment that the Samish Tribe was recognized, with no express statement. Samish is likely one of tribes discussed in Justice Breyer's *Carcieri* concurrence that was recognized but the federal government did not know it at the time. 555 U.S. at 397-98.

the meaning of the term "tribe" in the proposed IRA, saying as drafted the term "recognized Indian tribe" encompasses almost every tribe, even if they no longer act or exist as a separate political entity. *Id.* Senator Wheeler states that a limitation should be put on the term recognized Indian tribe to exclude certain tribes – those no longer acting as Indians – from the benefits of the IRA, whereupon Commissioner Collier suggests adding the language "now under federal jurisdiction" after "recognized Indian tribe," to limit the act to the Indians now under Federal jurisdiction. *Id.*

The Senate colloquy cites one Indian tribe, the Catawbas, as an example of the need for such a limitation. *Id.* Everyone involved in the discussion certainly acknowledged the Catawba Tribe's existence, but the Senators in 1934 believed it was no longer under federal supervision. One Senator referred to them as "the most pathetic and deplorable Indian tribe that I have discovered." *Id.* at 263. In 1934, the federal government apparently was not actively exercising supervisory control over the tribe or providing services to it or its members. There is a distinct difference between the terms "recognized tribe" and "now under federal jurisdiction."[3]

b. All Indian tribes exist as sovereign political entities, whether they are recognized formally by the United States or not.

Plaintiffs take a wrong turn in their argument when they try to equate the term "recognized Indian tribe" in § 479 with "federal recognition" of a tribe, *e.g.*, GR brief at 14. They also try to dismiss "cognitive" or "ethnological" existence as a tribe as an alleged racial category in favor of political existence as a tribe as the sole factor that brings a tribe under the U.S. Constitution. *Id.* at 14-16. These attempted distinctions confuse and distort a number of

[3] If Congress had intended that both terms be determined as of 1934, it should have made the amended section read "an Indian tribe now recognized and under federal jurisdiction." Such language should have made both terms, under the *Carcieri* decision, determinable as of June 18, 1934. Congress did not do so.

different legal principles. All Indian tribes that exist cognitively or ethnologically are political entities – they exercise political control over their members and territory. This concept has been recognized since the first days of the Republic. In *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831), the Supreme Court held that an Indian tribe is "a distinct political society separated from others, capable of managing its own affairs and governing itself." *See Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 112-13 (1919)(*Cherokee Nation* held that Indian tribes are "uniformly treated as a distinct political society capable of engaging in treaty stipulations.") (emphasis added); *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985)("At one time [Indian tribes] exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. . . . Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decision, provides significant protection for the individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled North America.").

As these quotations show, Plaintiffs are improperly trying to conflate two distinct concepts. First, all Indian tribes are political and ethnological entities, and this is the sense the term "recognized Indian tribe" was used in the IRA because all tribes that exist cognitively or ethnologically also exercise political authority over their members, independent of the United States. Second, all existing Indian tribes have the power as sovereign political entities to engage in treaty negotiations or other actions that will bring them under federal jurisdiction and supervision. At that point, a government-to-government relationship is formed between the tribe and the United States, and a "recognized tribe" becomes "federally recognized."

An example from the early history of the United States demonstrates the fallacy of Plaintiffs' arguments on this issue. During Lewis and Clark's expedition from 1803 to 1805 to the Pacific Northwest, it encountered powerful Indian tribes such as the Shoshone and Nez Perce who controlled vast swathes of territory and who could have exterminated the expedition at any time. *See* Ambrose, Stephen E., *Undaunted Courage* (1996), pp. 187-210, 272-304. These tribes clearly existed and exercised political authority, and thus were "recognized" Indian tribes under any common sense definition of that term. But these two tribes would not become "federally recognized" – the term of art - for another fifty years or more when treaties were entered into with each tribe and ratified. "Federal" recognition occurs when the either Congress or the Executive Branch acknowledges the existence of a tribe through treaty, statues, ratified agreement, the administrative federal acknowledgment process, or otherwise. *See* 2012 Cohen, *supra*, at §3.02[4], p. 137; 25 U.S.C. § 479a ("Indian tribe" means any tribal entity "that the Secretary of Interior acknowledges to exist as an Indian tribe" - enacted in 1994).

c. Tribal Existence is the key element for recognition.

The key to the term recognition, whether by itself or as the term of art - "federal recognition," is tribal existence. A tribe must exist to be federally recognized as an Indian tribe and come under Congress' constitutional power over Indian tribes. The seminal Indian law treatise, Felix S. Cohen's 1942 Handbook of Federal Indian Law (U.S. G.P.O.)(hereinafter "1942 Cohen"), pp. 268-77, discusses this issue at great length. Relevant pages of 1942 Cohen attached to this memo as Exhibit 2. The sole obligation of the federal government is to determine whether a tribe exists, for purposes of "determining whether any legislative, administrative or judicial power with respect to Indian 'tribes' extended to a particular group of Indians." 1942 Cohen, p. 268; Letter dated June 7, 1974, from Acting Deputy Commissioner of Indian Affairs LaFollette

Butler to Henry M. Jackson, Chairman, Senate Committee on Interior & Insular Affairs (hereinafter 1974 Butler Letter), p. 3. (Butler Letter attached as Exhibit 3). *See Joint Tribal Council of Passamaquoddy Tribe v.* Morton, 528 F.2d 370 (1st Cir. 1975)(Tribe that existed in the cultural sense entitled to federal protection even though not formally federally recognized); *United States v. Washington*, 520 F.2d 676, 692-93 (9th Cir. 1975) ("Nonrecognition of the tribe by the federal government . . . may result in loss of statutory benefits but can have no impact on vested treaty rights."). The United States does not have power to create a tribe, only the power to determine that a tribe already exists. 1974 Butler Letter, p. 3 ("it seems important to note the significance of the term Federal recognition – not creation. It is our assumption that the term means that there is an entity – something in being."); Deposition of Scott Fitzmorris Keep, Dec. 17, 1993, *Greene v. Babbitt*, Dkt. No. Indian 93-1, U.S. Dept. of Interior, Office of Hearings and Appeals (hereinafter "1993 Keep Deposition"), pp. 34, 107-08. Keep Deposition attached as Exhibit 4.[4] A tribe that can show that it exists is entitled to federal recognition. This is the only test that the Cowlitz Tribe must satisfy to meet the term of art, "federal recognition."[5]

[4] This distinction is a bit of a false dichotomy because the United States does "create" tribes in some limited situations, but the distinction highlights the difference between general "recognition" as an Indian tribe, and "federal recognition" of a "tribe" by the United States. As Cohen pointed out in 1942, the United States does "sometimes . . . for administrative and political purposes," create new tribes by lumping together or "amalgamating" several tribes and "treat[ing] (them), politically, as a single tribe." 1942 Cohen at 268. *See United States v. Oregon*, 29 F.3d 481, 485 (9th Cir. 1994)("Yakima Treaty of 1855 envisioned the creation of a successor tribe, a 'Yakima Nation' comprised of all the people represented by the signatories to the Treaty."); 1993 Keep Deposition, p. 107 ("Secretary's authority to create, if you will, tribes was limited to the authority under the Indian Reorganization Act to organize or reorganize Indian tribes on a reservation and to acquire land and reorganize organizations for half-blood communities."). But this limited authority to "create" a new tribe still requires pre-existing tribes or previous recognition of a tribe's existence.

[5] As such, interpretation of the word "recognized" in § 479 is analogous to the more recent judicial interpretation of the term "restored" in the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii). *E.g., Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney*, 369 F.3d 960, 967 (words must be given their ordinary, contemporary common

d. Federal policy evolved after enactment of the IRA regarding "federal recognition" of Indian tribes.

Actual history supports the conclusion that "recognized Indian tribe" as used in the IRA is not synonymous with the term "federally recognized Indian tribe" as that term is understood in a modern context. During its extended federal acknowledgment proceeding, the Samish Tribe extensively investigated the concept of federal recognition. The Samish Tribe had always believed it was recognized since it was a signatory to the 1855 Treaty of Point Elliott, and was surprised when the federal government in the early 1970s first began stating that the Samish Tribe was unrecognized. *See* Torbett Decision, *supra*, App. B, p. 21, FF # 110 (relevant pages of Torbett Decision attached as Ex. 5); *Samish Indian Nation*, *supra*, 419 F.3d at 1359-60. It was these statements that first led the Samish Tribe to petition for confirmation of its federal recognition in 1972, *Greene III*, 943 F.Supp. at 1281, and then to file a petition for federal acknowledgment in 1979 after the Bureau of Indian Affairs adopted formal federal acknowledgment regulations in 1978. *Id.* As part of this process, the Samish Tribe pursued discovery about how it "lost" its federal recognition. One of the core principles of federal recognition is that being a signatory to a ratified treaty is express federal recognition of that tribe. 1942 Cohen at 268-71; 2012 Cohen at 136. Such recognition, once accorded, generally can be terminated only by express congressional action. USET Amicus Brief; 2012 Cohen, *supra*, at 164; *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). *See Samish Indian Nation*, *supra*, 419F.3d at 1369-70 (three means by which the federal government can recognize a tribe, including a treaty).

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dictionary meaning in the absence of an indication that Congress intended the word to be interpreted differently).

Following is a summary of what the Samish Tribe uncovered about federal recognition in discovery during its federal acknowledgment proceeding.

There was no such thing as formal "federal recognition" in 1934 when the IRA was enacted, and there was no defined federal recognition process or formal list of federally recognized tribes. All of these things developed after the IRA was enacted on June 18, 1934, as a result of the IRA.[6] Before the IRA, determination of the existence of an Indian tribe and whether it was "federally recognized" had occurred in only a few situations. *See* 1942 Cohen, Ex. 2, at 268-72; 2012 Cohen at 142-44 (Indian Depredations Act); *Montoya v. United States*, 180 U.S. 261, 266 (1901); *United States v. Holliday*, 70 U.S. 407 (1865); *The Kansas Indians*, 72 U.S. 737 (1866). After enactment of the IRA in 1934, determination of tribal status increased because the Department of Interior, usually through an individual Solicitor's opinion, had to determine whether certain (but not all) tribes were eligible to organize under the IRA. 1942 Cohen at, Ex. 2, at 270-71.[7] These determinations occurred on an ad hoc basis. *Samish Indian Nation, supra*, 657

[6] For example, the Grand Ronde Tribe asserts that Commissioner John Collier created a list of 258 tribes "eligible to vote to organize under the Act" "at the time of the IRA's enactment." GR Brief at 25. This statement is incorrect. The list, known as the Haas List, was not created until 1947, thirteen years after passage of the IRA. Theodore H. Haas, Chief Counsel, U.S. Indian Service: *Ten Years of Tribal Government Under I.R.A.* (U.S. Indian Service 1947), attached in its entirety as Exhibit 6 to this brief. *See Carcieri, supra*, 555 U.S. at 398 (Breyer, J., citing list and noting that tribes were wrongfully left of it). It is a list of tribes that actually voted to accept or reject the IRA (p. 13), and that "organized" by adopting a constitution or corporate charter of some kind. There is no indication anywhere in that document that it was intended to be a comprehensive list of all Indian tribes eligible to vote under the IRA, or of all the tribes that were recognized as tribes in 1934. For example, the BIA has continued to organize additional tribes under the IRA after 1934 as those tribes have come to the attention of the federal government.

[7] Even though the Samish Tribe submitted a formal resolution to Commissioner Collier in 1934 approving the IRA, reprinted in the 1934 Senate Hearings at p. 411, AR 135446, it was held ineligible to organize under the IRA because the Tribe did not reside on a reservation. *See* 25 U.S.C. § 479; 1993 Keep Deposition, Ex. 4, pp. 77-78, 107; Ltr. Dated April 22, 1975, from Western Washington BIA Agency Superintendent to John Gurney, attached as Exhibit 11 (Samish ineligible to organize to obtain federal services because they are a "landless tribe"). It was not until 1980 that the Department reversed its position on this issue, holding that the on-

F.3d at 1332 (citing *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272-73 (9th Cir. 2004)); 1993 Keep Deposition, Ex. 4, p. 112. There was no formal recognition process or criteria until 1978. *Samish Indian Nation, id. See* 1974 Butler Letter, Ex. 3, p. 3 ("Consistency of practice in giving 'Federal recognition' is difficult to discern.").

In his 1942 treatise on Indian law, eight years after enactment of the IRA, Felix Cohen laid out, based on prior court decisions and determinations of eligibility under the IRA, "the considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a 'tribe' or 'band'." 1942 Cohen, Ex. 2, at 271. These five considerations became known as the "Cohen criteria," and have controlled federal recognition determinations since that time. *See, e.g.*, 1974 Butler Letter, Ex. 3, pp. 3-6 (determining which tribes were eligible for treaty exercise under the Boldt decision, *United States v. Washington*, 384 F.Supp. 312 (W.D.Wash. 1974)(*Washington I*)); 1993 Keep Deposition, Ex. 4, pp. 20-22, 30, 37-38, 75-77, 105, 110-12 (same); *Kahawaiolaa, supra*, 386 F.3d at 1273 n.2. The primary drafter of the 1978 Federal Acknowledgment Regulations, Scott Keep, *see* 1993 Keep Deposition, Ex. 4, p. 98, testified that when the Department was drafting the FAR regulations, they were just trying to "distill" the Cohen criteria and to explain them more clearly, not create new criteria. *Id.* at 30, 106, 110. Therefore, there was no "federal recognition" definition, process or criteria that Congress could have been referring to in 1934 when it enacted the IRA using the term "recognized Indian tribe" at 25 U.S.C. § 479, because the term did not yet exist.

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reservation organizational proscription in the IRA only applied to individual Indians seeking to organize, not tribes. Memo dated October 1, 1980, from Associate Solicitor, Indian Affairs, to Deputy Asst. Sec. – Indian Affairs ("1980 Stillaguamish Memo"), pp. 1-6, Memo attached as Exhibit 7. This was too late for Samish.

e. Experience of the Samish Tribe with "federal recognition."

The Samish Tribe came up against the "ad hoc" nature of federal recognition policy starting in the 1960s. When Judge Boldt confirmed off-reservation treaty fishing rights for 14 tribes in early 1974, he also held that his ruling would apply to "any additional treaty tribe determined by the court that the tribe is a treaty tribe." *Washington I*, 384 F.Supp. at 414. This statement set off a mad scramble by the federal government to determine which other groups or tribal entities might qualify as treaty tribes under the court's ruling. *See* 1974 Butler Letter, Ex. 3; 1993 Keep Deposition, Ex. 4, *passim*. A number of additional tribes, including the Samish Tribe, intervened in *U.S. v. Washington* to establish their treaty status. *See Washington II*, 476 F.Supp. 1101. The federal government first divided tribes into whether they were recognized or not. 1974 Butler Letter, Ex. 3, p. 2; Memo from Commissioner of Indian Affairs to Secretary of Interior, July 24, 1974, "Federal Recognition of treaty tribes not parties to United States v. Washington" ("1974 Treaty Tribes Memo"), attached as Exhibit 8.

It was at this point in the early 1970s that the Samish Tribe discovered that the United States was saying for the first time that the Samish Tribe was not federally recognized. *See Washington II*, *supra*, 476 F.Supp. at 1111 (only federally recognized treaty tribes can exercise treaty rights; Samish not recognized), *rev'd*, 641 F.2d at 1372; Torbett Decision, Ex. 5 at App. B, p,. 21, FF# 110 (U.S. opposed Samish intervention in *U.S. v. Washington* on the grounds that Samish was not a recognized tribe). It was not until the administrative trial in 1994 that the Samish Tribe found out why the United States had taken the position in *U.S. v. Washington* that the Samish Tribe was no longer federally recognized.[8] Patricia Simmons, a Tribal Relations

[8] Samish got its first inkling of the existence of this list when it deposed Scott Keep in December 1993, where he disclosed that there was a BIA clerk, Patricia Simmons, who had compiled an

Specialist with the BIA, testified that she was tasked in the mid-1960s with developing an internal Department list of the tribes "with whom we had dealings." Transcript of Hearing, *Greene v. Babbitt*, Dkt. No. Indian 93-1, Office of Hearings and Appeals, Aug. 23, 1994, p. 347 ("Simmons Testimony"), Transcript attached as Exhibit 9; Torbett Decision, Ex. 5, App. B, FF # 1. The Department was concerned because it had no formal way to respond to congressional and public inquiries about particular tribes. Ex. 9, *id.* at 347, 353.

Ms. Simmons testified that when she compiled her first internal list of tribes in 1966, the Samish Tribe was on that list as an "unorganized" tribe – a tribe not organized pursuant to the IRA. Torbett Decision, Ex. 5, App. B, FF# 3. Ms. Simmons testified that she sent that list out to BIA Area Offices for comment, and when she revised her list in 1969, Samish was no longer on it. Ms. Simmons testified that in revising the list, the Department decided to "stick to what we knew," and to restrict the list to tribes with formally approved organizational documents. Simmons Testimony, Ex. 9, pp. 349, 361; Torbett Decision, Ex. 5, App. B, FF#1. *See Samish Indian* Nation, supra, 657 F.3d at 1332-33. Although Ms. Simmons and the Department lacked the authority to determine which tribes were federally recognized or not, the Department began using the list as a list of federally recognized tribes. Simmons Testimony, Ex. 9, p. 348; Torbett Decision, Ex. 5, App. B, FF#1. The United States consulted this list when the Samish Tribe intervened in *U.S. v. Washington* to establish its treaty status, and took the position that Samish was unrecognized and therefore not entitled to treaty status. Ex. 9, *id.*, p. 353 The federal district court reviewing the Samish Federal Acknowledgment decision in 1996 found that Ms. Simmons' action in omitting Samish in 1969 from the revised list of recognized Indian tribes was arbitrary

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informal, internal list of "tribal entities" that was being used as an internal cheat sheet by the Department on which tribes were federally recognized. Keep Deposition, Ex. 4, pp. 41-44.

and capricious and without adequate explanation. *Greene III*, 943 F.Supp. at 1284, 1288 n. 13; *Samish Indian Nation*, 419 F.3d 1373-74.

This vindication in 1996 did not help the Samish Tribe when it intervened in *U.S. v. Washington* in 1974 to obtain treaty status. Samish had first petitioned for recognition in 1972, *Samish Nation*, 419 F.3d at 1360. Then in *Washington I* Judge Boldt had confirmed treaty status for two unrecognized tribes, Stillaguamish and Upper Skagit, and one "unorganized" tribe, Sauk-Suiattle, based on minimal findings such as an Indian Claims Commission case determining successorship, and constitutions and membership rolls not yet approved by the federal government.[9] *Washington I*, 384 F.Supp. at 375-76, 378-79. Samish, with a 1958 Indian Claims Commission decision finding it to be the successor to the historical Samish Tribe, *see* fn.1, supra, submitted a constitution and membership roll to the Department of Interior and in 1974 and 1975 repeated its request for federal recognition. The Department, struggling to figure out what its recognition criteria, process and authority were, "froze" Samish's and other tribes' pending recognition petitions. Ltr. Dated July 22, 1975 from Morris Thompson, Comm'r of Indian Affairs, to Frank LaFontaine, Small Tribes of Western Washington, attached as Exhibit 10 (petitions for federal recognition being held until Department completes review of its federal recognition policy); 1993 Keep Deposition, Ex. 4, pp. 25-26. Not until final regulations were adopted in 1978 and Samish submitted a new federal acknowledgment petition in 1979 was its recognition petition revived. By that time the district court had ruled against Samish treaty rights on the ground that that the Samish Tribe was not recognized, 476 F.Supp. 1101, and then Samish's recognition petition was rejected in 1982 and 1987 because of the 1979 adverse treaty

[9] While treaty status for these two tribes was confirmed while they were unrecognized, they were not permitted to exercise treaty fishing rights until they became recognized, so the federal government would be assured that Tribe would have the capacity to regulate its fishing and would know who was eligible to exercise those rights. *Id.* at 415.

decision. *See* 47 Federal Register 50110 (Oct. 29, 1982); 52 Federal Register 3709 (Feb. 5, 1987). These adverse federal acknowledgment decisions were not reversed until 1995 and 1996. Samish was caught in the vise of conflicting and inconsistent federal recognition policies.

Also, the United States in 1974 became concerned with Judge Boldt's ruling that two unrecognized tribes were entitled to treaty status, because no identifiable standards had been enunciated to allow the United States to properly evaluate which unrecognized tribes were entitled to treaty status. There was internal debate within the Department of Interior Solicitors' Office about whether the concept of recognition was useful or had any "utility" in determining tribal status. 1993 Keep Deposition, Ex. 4, pp. 34-36. George Dysart, the special U.S. Attorney representing the United States in *U.S. v. Washington* (he was an attorney in the Regional Solicitor's Office), had responsibility for developing the United States' position in the case and adopted his own standard for determining whether a tribe was entitled to treaty status – whether a tribe has continuously maintained an organized tribal structure – taken from *Washington I*. 1993 Keep Deposition, Ex. 4, at 34-36, 81; *Washington I*, 520 F.2d at 693. The district court decision had not adopted findings on this standard for the early unrecognized tribes. That standard was incorporated in findings of fact presented by Mr. Dysart to the district court at the conclusion of the Samish treaty intervention proceeding, *id.*, and the submitted findings were signed by the Court without substantial change. *Washington II*, 641 F.2d at 1370-71. Special Assistant U.S. Attorney Dysart's standard became the treaty standard in *U.S. v. Washington*. *Id.* at 1371. Because Samish did not present evidence directed at this standard in its district court proceeding, it was denied treaty status. *Washington II*. When the Samish Tribe had the opportunity to fully litigate this issue and successfully achieved federal re-recognition in its federal acknowledgment proceeding from 1994-96, it met the standard necessary for the exercise of treaty rights.

Washington III¸394 F.3d at 1157-59, *rev'd on other grounds*, *Samish*, 593 F.3d 790. Federal acknowledgment under the administrative federal acknowledgment regulations for Samish, therefore, was a conclusion that the Samish Tribe had been recognized from the time its ancestors signed a treaty in 1855, even though the federal government temporarily denied the existence of the Tribe's federal recognition between 1969 and 1996. *See Samish Indian Nation, supra*, 419 F.3d at 1369, 1374.

f. Discussion.

As this history and discussion demonstrates, Congress could not possibly have intended to equate the term "federal recognition" with the term "recognized Indian tribe" in Section 19 of the IRA. The term "federal recognition" or "federally-recognized tribe" did not exist and had no accepted definition in 1934. While these terms have become well-understood and commonly used since passage of the Indian Self-Determination Act in 1975, 25 U.S.C. § 450 et seq., and enactment of the Federal Acknowledgment Regulations in 1978, the United States struggled between 1934 and the mid-1970s to develop any consistency in its policy of federally recognizing tribes. As such there was no accepted term "federally recognized tribe" that Congress could have used when it enacted the IRA in 1934.

As a final example on this issue, it would be useful for the Court to evaluate how the tribal plaintiff in this case – the Confederated Tribes of the Grand Ronde Community of Oregon – fares under its own argument that formal federal recognition of a tribe is required in 1934 for that tribe to be eligible for the Indian Reorganization Act. There is no indication in the record that the "Confederated Tribes of Grand Ronde Community of Oregon" existed as a federally recognized tribe on the date the IRA was enacted. As shown by the Grand Ronde Tribe's

termination in 1954 and restoration in 1984, it was only organized as a corporation under Section 17 of the IRA, 25 U.S.C. § 477, in 1936, two years after enactment of the IRA..[10]

3. Proper Interpretation of 25 C.F.R. § 83.12(b), Federal Acknowledgment Regulations.

The Samish Tribe's experience with federal acknowledgment and re-recognition from 1972 through1996 highlights the absurdity of Clark County's argument with regard to 25 C.F.R. § 83.12(b). Clark County Brief, pp. 24-28.

a. Samish Federal Acknowledgment history.

The Samish Tribe was a party to the 1855 Treaty of Point Elliott, ratified in 1859. 12 Stat. 927. Although the Samish Tribe did not end up settling on any of the small reservations established under that treaty, the Tribe was always a "recognized tribe" until the federal government "cut off" federal Indian benefits and services to tribal members in the 1970s. *See* pp. 12-14, *supra*. The Samish Tribe petitioned the federal government in 1972, 1974 and 1975 for re-recognition (Samish would say it was asking for confirmation that it was already recognized), *Greene III*, supra, 943 F.Supp. at 1281; *Washington III*, 394 F.3d at 1155-56, *cert. denied*, 546

[10] 25 U.S.C. § 691 et seq. (Western Oregon Indians Termination Act); 25 U.S.C. § 713 et seq. (Grand Ronde Restoration Act). *See* 21 Federal Register 6244, Aug. 18, 1956, ¶ 3 (revoking the corporate charter of the Grand Ronde Community); 25 U.S.C. § 713b(a) (reinstating the corporate charter of the Grand Ronde tribe issued pursuant to 25 U.S.C. § 477); 25 U.S.C. § 713a (Confederated Tribes of Grand Ronde Community "shall be considered as one tribal unit for purposes of Federal recognition and eligibility for Federal benefits"). Organization as a corporation under 25 U.S.C. § 477 was originally restricted to a vote of individual adult Indians residing on a reservation. Act of June 18, 1934, § 17, 48 Stat. 988. This language was changed in 1990 to only allow "tribes" to organize Section 17 corporations. *See* 25 U.S.C.A. § 477, Historical and Statutory Notes. Since Grand Ronde argues that supervision and control over individuals does not equate with supervision over a tribe, GR Brief at 21, it should also be required to show federal supervision and control over a "tribe" (that did not exist until 1936) in order to have standing in the present case.

U.S. (2006), *rev'd en banc*, 593 F.3d 790 (9th Cir. 2010); *Samish Indian Nation*, *supra*, 419 F.3d at 1359-60; *Samish*, 593 F.3d at 795; *Samish Indian Nation*, *supra*, 657 F.3d at1333.

Federal acknowledgment regulations were finally adopted in 1978. 43 Fed. Reg. 39361, Sept. 5, 1978 (25 C.F.R. Part 54)(Part 54 redesignated to Part 83, 47 Fed. Reg. 13326, 13327 (March 30, 1982)). The Samish petition for recognition was resubmitted in 1979 as a petition for federal acknowledgment under the new regulations. *See* cases cited above. The Interior Department proposed to deny the Samish Tribe's revised petition for federal acknowledgment on November 4, 1982, 47 Fed. Reg. 50110, primarily based on the Samish Tribe's off-reservation treaty fishing rights decision in *Washington II*, 476 F.Supp. 1101 (W.D.Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Samish Tribe requested more time to submit additional information in support of its acknowledgment petition, and the next four years were spent in a battle over disclosure of BIA documents under the Freedom of Information Act.

The BIA issued a final denial of the Samish Tribe's federal acknowledgment petition on February 5, 1987, 52 Fed. Reg. 3709, upholding its 1982 proposed determination. The Samish Tribe appealed this determination to federal court and on February 25, 1992, the district court vacated the BIA's determination that the Samish Tribe was not entitled to federal recognition and remanded the decision to the agency to conduct a formal APA adjudication. *Greene v. Lujan*, No. C89-645Z (W.D.Wash.), Order, 1992 WL 533059, *aff'd*, *Greene II*. After extensive discovery and depositions during 1993, a full hearing was conducted before an Administrative Law Judge of the Department of the Interior Office of Hearings and Appeals from August 22-30, 1994, and a recommended decision in favor of Samish federal acknowledgment was issued on August 31, 1995. Torbett Decision, Ex. 5.

b. Samish choice of Federal Acknowledgment regulations.

This brief re-cap of the Samish Tribe's complicated federal acknowledgment history is necessary to respond to Clark County's argument about 25 C.F.R. § 83.12(b). When Samish's federal acknowledgement petition came before the Office of Hearings and Appeals in August 1994, the Samish Tribe was given the choice by the BIA whether to proceed under the original 1978 Federal Acknowledgment Regulations or under the newly published 1994 revised federal acknowledgment regulations. *See* 59 Federal Register 9280 (Feb. 25, 1994). The Samish Tribe chose to proceed under the 1978 regulations even though they impose a higher standard of proof.[11] Deer Decision, *supra* fn. 1, p. 1, relevant pages attached as Exhibit 12 to this memorandum:

> 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.

This statement is important because the 1978 Federal Acknowledgment Regulations do not include Section 83.12(b) or anything comparable. *See* 25 C.F.R. § 45.11, 43 Fed. Reg. at 39364. If Section 83.12(b) were an integral part of federal acknowledgment, the Department of Interior could not have given the Samish Tribe a choice about whether the provision would be applicable to the re-recognized Samish Tribe. What is now Section 83.12(b) appeared for the first time only in 1994 in the revised Federal Acknowledgment Regulations. Statutory authority

[11] The 1978 regulations require proof of continuous tribal existence from the point of earliest documented contact between the aboriginal tribe and the United States or other foreign non-Indian government, 43 Fed. Reg. at 39362 (§54.1(l)(definition of historical)); 39363 (§54.7(a)(requirement of continuous existence from historical times to the present)), while the 1994 regulations only require proof of continuous existence from 1900 to the present. 25 C.F.R. § 83.7(a).

for the Federal Acknowledgment regulations did not change between 1978 and 1994 (the regulations include a citation of "AUTHORITY" immediately after the section index at the beginning of the regulation; it is the same for both the 1978 and 1994 Federal Acknowledgment Regulations).

c. Secretary of Interior lacks legal authority to approve tribal membership.

Because the language of Section 83.12(b) was only added in the 1994 revisions to the Federal Acknowledgment Regulations, Clark County's argument on this issue ignores that the Secretary of Interior, even under Clark County's interpretation of the regulation, only has to approve all changes to a tribal membership roll and certify the continued existence of an Indian tribe for an extremely small portion of the 500+ recognized Indian tribes – only those few tribes acknowledged under the 1994 Federal Acknowledgment Regulations. *See* 78 Federal Register 26384 (May 6, 2013)(annual BIA list of federally recognized tribes). The Secretary of Interior is without any legal authority to approve membership rolls or certify continued tribal existence for tribes acknowledged under the 1978 Federal Acknowledgment Regulations or for any other federally recognized tribe. Clark County's argument on Section 83.12(b), if true, would improperly distinguish between different categories of federally recognized Indian tribes.

Federal law is beyond dispute that as a general matter the federal government lacks authority over tribal membership. Even the author of Section 83.12(b) acknowledges this point. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), for example, often cited as the seminal tribal membership case, the Supreme Court held that "Indian tribes are 'distinct communities, retaining their original natural rights' in matters of local self-government," including the "power to make their own substantive law in internal matters" such as membership. *See id.* at 72 n. 32 ("A tribe's right to define its own membership for tribal purposes has long

been recognized as central to its existence as an independent political community."); *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir. 2013)(BIA lacks authority to approve or disapprove tribal disenrollment). The Secretary lacks any legal authority to approve tribal rolls or certify continued tribal existence for the vast majority of tribes, and its purported authority to approve tribal membership for only federally recognized tribes acknowledged under the 1994 Federal Acknowledgment Regulations must be viewed with great skepticism.

d. Federal law prohibits discrimination between Indian tribes.

If Clark County's response is that the 1994 Federal Acknowledgment Regulations are express authority for the Secretary's membership authority over this small class of Indian tribes, the source for that authority is suspect. Two months after the 1994 Federal Acknowledgment Regulations became effective, Congress enacted the Indian Tribes Privileges and Immunities Act, codified at 25 U.S.C. §§ 476(f), (g). These sections prohibit the Department of Interior from enacting or enforcing any federal regulation that "classifies, enhances or diminishes the privileges and immunities available to [one] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes," and declare such regulations to be of "no force or effect." Clearly, 25 C.F.R. § 83.12(b) violates this prescription, and is therefore void on its face. *See Akiachak Native Community v. Salazar*, 935 F.Supp.2d 195 (D.D.C., March 31, 2013), *Akiachak Native Community v. Jewell*, ___ F.Supp.2d ___, 2013 WL 5428741 (D.D.C., Sept. 30, 2013)(regulations barring Secretary of Interior from taking land into trust only for Alaska tribes under BIA fee-to-trust regulations invalid and struck under 25 U.S.C. §§ 476(f) and (g)).

e. History of drafting of 25 C.F.R. § 83.12(b).

It is not even certain what the Department of Interior was trying to accomplish when it enacted this provision, starting with a proposed draft in 1991. This rule was developed while

Samish was litigating its federal acknowledgment determination in federal court. When the version of what was to become Section 83.12(b) was first published on September 18, 1991, 56 Federal Register 47320, 47324, the Department included the following explanation:

> In § 83.11, paragraphs (b) and (c) have been redesignated as paragraphs (c) and (d). A new paragraph (b) has been added to § 83.11 to encourage groups to submit complete and accurate lists of members. There have been instances under the present regulations in which groups have submitted partial or incomplete lists of members. Section 83.11(b) points out that the list of members submitted with the petition will be considered by the Bureau as the complete base roll for Federal funding and other Federal administrative purposes, and requires that additions must be approved by the Assistant Secretary and will be limited to descendants meeting the tribe's criteria.

The proposed rule seems directed primarily at the submission and consideration of a federal acknowledgment petition, not at tribal sovereign authority after recognition. The proposed regulation itself contains no language citing actual authority that gives the Secretary authority to approve tribal membership additions:

> (b) The list of members submitted as part of a group's documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes upon acknowledgment as an Indian tribe. For the purposes of the Bureau, any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).

56 Fed. Reg. at 47329-30.

When the final regulation was published in 1994, the Department included a response to comments submitted by some commenters on how this provision, in their opinion, violated tribal sovereignty:

> **Section 83.12(b)**
>
> Comments: Several commenters approved of the limitations prescribed by this section on the base membership roll of a newly acknowledged tribe. Others considered the limitation an infringement on tribal sovereignty.

> Response: The provision was included to clearly define tribal membership prior to acknowledgment. It was also included so that membership for purposes of Federal funding cannot later be so greatly expanded that the petitioner becomes, in effect, a different group than the one acknowledged. The acknowledgment decision rests on a determination that members of the petitioner form a cohesive social community and exercise tribal political influence. If the membership after acknowledgment expands so substantially that it changes the character of the group, then the validity of the acknowledgment decision may become questionable. The language of this section does allow for the addition to the base roll of these individuals who are politically and socially part of the tribe and who meet its membership requirements.

59 Fed. Reg. at 9292. Again, these comments reflect that the primary concern of the drafters was the membership roll submitted during the federal acknowledgment process. While the comment expresses concern about what could happen after a tribe is federally recognized, there is nothing in this comment or in the rule as adopted that cites legal authority for the Secretary of Interior to certify the continued existence of a tribe if its membership has increased by a specified percentage after federal acknowledgment.

f. There are legitimate reasons for increases in tribal membership of a federally recognized tribe which have been federally acknowledged or restored.

Clark County argues that the Department of Interior must certify that the Cowlitz Tribe still exists as a legitimate Indian tribe before it can be allowed to place land into trust status because the Tribe's membership has increased almost[12] 150% since federal acknowledgement in 2002. County Brief at 24. This assertion is unwarranted and incorrect for a number of reasons. Again, the Samish Tribe serves as a good example on this issue. In addition, Clark County's partner in challenging the Cowlitz Tribe and the United States in this case, the Confederated Tribes of the Grand Ronde Community of Oregon, presents another useful example.

The Samish Tribe was formally, finally acknowledged through the federal acknowledgment process after the federal court judgment in *Greene v. Babbitt*, No. C89-645Z

[12] Clark County claims the Tribe's membership has increased more than 150%, but this assertion is an exaggeration.

(W.D.Wash., Nov. 1, 1996), upholding the reinstatement of the Department of Interior, Office of Hearings and Appeals, Administrative Law Judge's recommended federal acknowledgment decision. The Samish Tribe's initial membership roll after achieving federal re-recognition was 307 enrolled members. The Samish Tribe's current membership roll as of October 18, 2013 is 1645, a 535% increase. There are many reasons for the increase, but primarily it is due to members "coming back" to the Samish Tribe. Samish was subject to a host of adverse federal policies and actions for almost 150 years, including the ultimate insult of dropping the Samish Tribe off the Department of Interior's internal list of recognized tribes in 1969 because of a "clerical error" and then disqualifying Samish members from eligibility for federal Indian services and benefits because Samish was no longer on the alleged recognized tribes "list." As a result, many Samish Indians, if they were able, enrolled in other federally recognized tribes to continue receiving services. Others saw no point in continuing with a tribe that the federal government said did not exist. The core of the Tribe, however, remained intact and struggled on a shoestring to overturn these adverse federal actions and achieve re-recognition status.

Once the Samish Tribe prevailed and returned to the ranks of federally-recognized tribes, Samish Indians began slowly but continuously to return to the Tribe and become enrolled members. They were always Samish in their hearts. Those that meet tribal membership criteria are welcomed back as members of the Tribe. This is a natural and reasonable result of the Samish Tribe achieving re-recognition after a hard and long struggle – the Tribe began the long and arduous process of reassuming its equal place in the ranks of recognized tribes. The Samish Tribe is not familiar with the personal circumstances of the Cowlitz Tribe's re-recognition, but it is likely that most of its membership growth since federal acknowledgment has similar roots.

Plaintiffs rely heavily on regulations and federal correspondence that reflect the long-discredited views of a specific Associate Solicitor. The Samish Tribe respectfully disagrees with Associate Solicitor for Indian Affairs Scott Keep's view of who is qualified to be a member of an Indian tribe, a view that was codified in the 1994 Federal Acknowledgment Regulation revisions. Clark County Brief, pp. 26-27, Ex. 3 (Memo dated Dec. 15, 1980). The Samish Tribe will discuss Associate Solicitor Keep again at greater length below. His public statements as attached to Clark County's brief indicate that only persons of tribal descent who have existing social or political relationships with an Indian tribe should be able to qualify for membership in that tribe, *id.*, but no existing Indian tribes have such a requirement and Mr. Keep acknowledges in his 1980 memo that the BIA has no legal authority to preempt a tribe of its sovereign authority to determine its own membership. Clark County Brief, Ex. 3, p. 1. In addition, this view ignores the fact that it is a natural and reasonable outcome of federal acknowledgment that disenfranchised members of a long suppressed tribe would want to reestablish their social and political relationship with the tribe once the tribe has been re-recognized and commenced the process of political revitalization.

Clark County's co-plaintiff in this action, the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribe") has a membership "problem" similar to that of the Cowlitz and Samish Tribes. Grand Ronde was terminated as a tribe in 1954 in the Western Oregon Indians Termination Act. 25 U.S.C. § 691 et seq. It did not enroll new members while it was terminated. The Grand Ronde Tribe was restored to federally-recognized status in 1983 in the Grand Ronde Restoration Act. 25 U.S.C. § 713 et seq. Section 7 of that Act (25 U.S.C. § 713e) directed the creation of a Restoration base roll. That base membership roll, consisting of 1101 members, was published on June 22, 1984. 49 Fed. Reg. 25688. The Grand Ronde Tribe

currently has a tribal membership of 5200 members, a 472% increase since restoration. (Grand Ronde membership statistics at http://bluebook.state.or.us (National>Oregon's Indian Tribes>Confederated Tribes of the Grand Ronde Community)). The Grand Ronde Tribe is notably quiet about Clark County's argument on 25 C.F.R. § 83.12(b), presumably because it is subject to the same alleged problem advocated by Clark County because of the huge number - 4099 members - added to its membership rolls since restoration.

Apply the argument Clark County is making on this issue against the Cowlitz Tribe for a moment against the Grand Ronde Tribe. Clark County argues that because of Cowlitz's increase in tribal membership since federal acknowledgment, the Cowlitz Tribe does not qualify under the Indian Reorganization Act, 25 U.S.C. § 465, to take land into trust until and unless the Secretary of Interior certifies first that Cowlitz is still a viable and valid Indian tribe. Cowlitz's membership has increased by 139%. Grand Ronde's membership has increased by 472%. Should not the same argument that Clark County is making against Cowlitz apply to the Grand Ronde Tribe - because of Grand Ronde's huge increase in tribal membership since restoration, the Grand Ronde Tribe is not an Indian tribe with status to challenge the potential impact of Cowlitz's fee-to-trust acquisition until and unless the Secretary of Interior certifies that Grand Ronde continues as a viable and valid Indian tribe? What is fair for one tribe should be fair for all tribes. The absurdity of this question and that fact that it has not taken place heretofore in this or any other case highlights the lack of merit of Clark County's argument on this issue.

g. Inappropriate conduct regarding adoption of 25 C.F.R. § 83.12(b).

The Samish Tribe believes 25 C.F.R. § 83.12(b) was drafted by Associate Solicitor Keep as part of his long record opposing Samish tribal status and federal acknowledgment. As an attorney in the Solicitor's office, first as a new attorney and soon as Associate Solicitor, Division

of Indian Affairs, Mr. Keep was involved in opposing the Samish Tribe from its first intervention in the *U.S. v. Washington* off-reservation treaty fishing rights case in 1974 through the conclusion of the Samish Tribe's federal acknowledgment proceeding in November 1996. 1993 Keep Deposition, Ex 4. Mr. Keep opposed Samish federal acknowledgment during these 22 years for the same reasons cited by Clark County regarding interpretation of 25 C.F.R. § 83.12(b). Associate Solicitor Keep was also the primary legal drafter of both the 1978 and 1994 Federal Acknowledgment Regulations. *Id.*, p. 98.

Associate Solicitor Keep's opposition to Samish federal acknowledgment went so far that after an eight day hearing in front of an administrative law judge and the ALJ's subsequent recommended "exhaustive" and comprehensive opinion in favor of Samish federal acknowledgment, *Greene v. Babbitt*, *supra*, 943 F.Supp. at 1282, Mr. Keep personally went to the final decision-maker, Assistant Secretary – Indian Affairs Ada Deer, on an ex parte basis, to persuade her to reject the ALJ's recommended decision in favor of Samish federal recognition. *Id.* at 1282-83. When Assistant Secretary Deer indicated that she was going to recognize the Samish Tribe, Associate Solicitor Keep successfully persuaded her to allow him rewrite and eviscerate all of the ALJ's findings of fact supporting Samish federal acknowledgment. *Id.* at 1283 and n. 9.[13] The United States acknowledged that Mr. Keep's actions regarding Samish federal recognition "constituted a fundamental violation of the Administrative Procedures Act." *Id.*, n. 8. The federal district court reinstated the ALJ's recommended findings of fact in favor of Samish federal acknowledgment, held Associate Solicitor Keep in contempt of court for

[13] As one example, even though Samish elected to proceed under the 1978 regulations, which does not have § 83.12(b), Associate Solicitor Keep inserted this same requirement in his redraft of the revised Samish acknowledgment decision. *See*, Deer Decision, Ex. 12, page 3 of decision. This membership restriction did not appear in the official federal acknowledgment notice, however. 61 Fed. Reg. 15825 (April 9, 1996).

"repeatedly demonstrat[ing] a complete lack of regard for the substantive and procedural rights of the [Samish Tribe]," and permanently enjoined him from having anything to do with the Samish Tribe ever again. *Id.* at 1288-89. The contempt of court order was later lifted, but the permanent injunction remains in effect today.[14]

Much of what Associate Solicitor Keep urged against Samish federal acknowledgment is the same position that Clark County is urging against the Cowlitz Tribe in the present case. For example, the 1987 decision denying Samish federal acknowledgment that Associate Solicitor Keep drafted reached its negative conclusion in large part because of the purported lack of political, social and blood connection of listed members to the historical Samish Tribe. 52 Federal Register at 3709. After the ALJ found that the Samish members, even those living on other reservations (because that was the only place where land was available) had continuously maintained their social and political connections with the Samish Tribe, Torbett Decision, Ex. 5, at 18-23, Associate Solicitor Keep rewrote and removed all of those findings. Ada Deer Decision, Ex. 12; *Greene v. Babbitt*, 943 F.Supp. at 1282-83. The federal district court subsequently reinstated all of the relevant findings made by the ALJ and altered by Mr. Keep. *Greene v. Babbitt*, *supra*. In the middle of this ongoing proceeding, Associate Solicitor Keep drafted regulatory language that became part of the 1994 revision of the Federal Acknowledgment Regulations, attempting to enshrine his inappropriate view of Indian tribes into federal regulation.

[14] *See* Judgment, *Greene v. Babbitt*, No. C89-645Z (W.D.Wash.), Nov. 1, 1996, attached as Exhibit 13. In addition to permanently enjoining Mr. Keep from further involvement in Samish affairs, the judgment confirms Samish's existence as a federally recognized tribe and reinstates findings confirming continuous tribal existence and federal malfeasance in dropping Samish from the list of recognized tribes in 1969.

Reliance on Associate Solicitor Keep's interpretation of federal Indian law and what should constitute an Indian tribe, as Clark County does in its summary judgment brief, should be viewed with a skeptical eye. Not only are Mr. Keep's views that Indian tribes should not be able to add members who are not already socially and politically connected to the tribe and that the Department of Interior should have approval authority over tribal membership additions contrary to undisputed federal law, acceptance of those views would result in improper discrimination between federally-recognized tribes. Clark County's arguments with regard to 25 C.F.R. § 83.12(b) have no merit and should be rejected by the Court.

4. Conclusion.

Based on the foregoing discussion, the Court should reject Plaintiffs' argument that the term "recognized Indian tribe" in Section 19 of the IRA requires formal federal recognition of a tribe in 1934, and should reject Clark County's argument that the Cowlitz Tribe cannot acquire land in trust until the Secretary of Interior certifies that the Tribe is still a viable Indian tribe under 25 C.F.R. § 83.12.

Submitted this 6th day of November, 2013.

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