ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5326
Consolidated with No. 15-5033

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

Appellant,

CLARK COUNTY, WASHINGTON, *et al.,*

Appellees,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of Interior, *et al.*,

Appellees,

COWLITZ INDIAN TRIBE,

Intervenor-Appellee.

On Appeal from the United States District Court for the District of Columbia
No. 13-cv-849-BJR, Hon. Barbara J. Rothstein, Presiding Judge

***AMICUS BRIEF* OF SAMISH INDIAN NATION IN SUPPORT OF APPELLEE SALLY JEWELL, SECRETARY OF UNITED STATES DEPARTMENT OF THE INTERIOR, AND OF INTERVENOR-APPELLEE COWLITZ INDIAN TRIBE, SUPPORTING AFFIRMANCE**

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STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Fed. R. App. P. 29(c)(5) *Amicus* Samish Indian Nation certifies the following:

(A) Samish Indian Nation's Counsel authored this brief in whole;

(B) no other party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person - other than *Amicus* Samish Indian Nation, its members, or its counsel - contributed money that was intended to fund preparing or submitting the brief.

/s/ Craig J. Dorsay
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1. Introduction: Interest of Samish Tribe.

Plaintiffs in this case, the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), and Clark County, Washington ("Clark County") have made arguments in their appellate briefs that have general application to Indian tribes across the United States and that may, depending on the decision of this Court, result in adverse impacts to many tribes, including Samish.

The Samish Tribe first began to be treated as a non-recognized tribe by the federal government in 1972 after the Tribe was dropped from an internal Interior Department list of recognized tribes by clerical error. The Tribe petitioned several times for confirmation of its recognized status and in 1979, after the original Federal Acknowledgment Regulations were published in 1978, petitioned again for recognition under those regulations. Samish was twice denied federal acknowledgement, in 1982 and 1987, and sued to overturn those decisions on APA and due process grounds. The decisions were overturned by the federal courts, and in 1994, after years of discovery and depositions, the Tribe endured an eight-day contested trial to prove its status as a recognized tribe. Samish prevailed in an administrative decision that was later confirmed by the federal court.

The Samish Tribe is uniquely suited to provide relevant and useful information to the Court on policy and law regarding federal recognition. 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

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[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; *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 distinct tribal entity from treaty times into contemporary times); *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 held not relevant to treaty status); *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene I*") (holding that treaty status and federal recognition are distinct legal issues); *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); *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; 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; Samish should have been historically recognized during period when BIA dropped Samish from its internal list of recognized tribes); *United States v. Washington*, 593 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). In addition, there are two administrative Samish federal acknowledgment decisions that were part of the *Greene* decisions cited above.

lengthy litigation 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 Appellants Grand Ronde and Clark County. All the primary parties have consented to the filing of this amicus brief.

The Samish Tribe will address four issues raised in those appeals. First, Samish will address Grand Ronde's arguments regarding interpretation of the terms "recognized Indian tribe" and "federally recognized tribe." Second, Samish will address Clark County's argument that the Indian Reorganization Act was a limited statute that only applies to tribes that have land in trust or whose members historically received allotments. Third, Samish will address Clark County's argument that the Secretary of Interior is required constantly to re-determine the tribal status of any Indian tribe whose tribal membership has increased over time. Fourth, Samish will address whether services to individual tribal members are relevant to determining tribal status.

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 were attached as Exhibits to the Samish Tribe's amicus brief below. *See* JA 0007 (District Court Docket, Dkt. # 39).

2. <u>"Recognition" and "Recognized Indian Tribe" as those terms are used in the Indian Reorganization Act should be given a broad, common sense interpretation, and were not terms of art in 1934</u>.

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" of a tribe 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 v. Salazar*, 555 U.S. 379 (2009). Appellants attempt to equate the term "recognized Indian tribe" in the IRA with the term "federally-recognized" tribe that is commonly used today. The term "federal recognition" only became a term of art forty years <u>after</u> the 1934 enactment of the IRA.[2] *See* Cohen's Handbook of Federal Indian Law, §3.02[3], p. 133-36 (2012 ed). The particular history of the Samish Tribe illustrates the problems with Plaintiffs' arguments on this issue.

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[2] As stated in *Greene II*, *supra*, Congress in 1972 began conditioning tribal eligibility for most federal Indian programs "upon status as a tribe recognized by the federal government," citing the Indian Self-Determination Act, 25 U.S.C. §§450-450n (extending benefits to Indian tribes "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."). 64 F.3d at 1269.The Department of Interior began publishing a list of such tribes in 1979. *See* 44 Fed.Reg. 7235 (Feb. 6, 1979)(list of tribes with which the federal government has a government-to-government relationship). Congress in 1994 required this list to be published annually, and called the list "the Federally Recognized Indian Tribe List." Pub.L. No. 103-454, Title I, §101, 108 Stat. 4791, codified at 25 U.S.C. §479a-1.

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 tribes. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973). The IRA was enacted for the benefit of Indian tribes and therefore must be interpreted to the benefit of tribes, which it was supposed to protect, revitalize and enhance.[3] Any definitional ambiguities must be resolved in favor of broad coverage and protection of tribes.

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. *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"), pp. 263-67, JA0342. Senators Wheeler and O'Mahoney defined the term "recognized Indian tribe" in a colloquy to encompass almost every tribe, even

[3] In its brief, Clark County makes the novel argument that the IRA was intended only "to repudiate the practice of allotment" and therefore the IRA only applies to tribes whose members received allotments. Clark County Brief, p. 12. *See id.*, pp. 18-20. This argument is wrong. The primary purpose of the IRA was to revitalize tribal governments and tribal sovereignty; one strategy to achieve this purpose was to stop the loss of tribal land since there is a significant territorial component to tribal power. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). But the larger purpose of the IRA applies to tribes that never had allotments, and the Act covers all tribes that fit the definition at 25 U.S.C. §479.

those that were in a "pathetic and deplorable condition" with whom the federal government had little or no contact. *See id.* at 266 (Sen. O'Mahoney: "the Catawbas are certainly an Indian tribe" (under the unamended definition of Indian – a member of a "recognized Indian tribe")). The term "now under federal jurisdiction" was added at the suggestion of Commissioner of Indian Affairs Collier to limit the application of the IRA to "certain types" of recognized tribes. *Id.* (O'Mahoney).[4]

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

Appellants argue that "cognitive" or "ethnological" existence as a tribe is a racial category and that a tribe becomes a political entity as a matter of law only when it is formally recognized by the United States. *E.g.* Grand Ronde Brief at 19-21. This argument is incorrect. 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*

[4] 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.

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).

It is surprising that Grand Ronde would argue that its antecedent tribes and bands did not exist as political entities recognized to exist before they entered into ratified treaties with the United States.

c. Tribal Existence is the key element for determining whether a tribe is a "recognized Indian tribe" under the IRA .

The key to the term "recognized Indian tribe" is tribal existence. Tribes like the Nez Perce Tribe in Idaho (encountered in 1805 by the Lewis & Clark Expedition) clearly existed and were recognized before they entered into treaties with the United States 50 years later. Tribes were under federal jurisdiction in 1934 for purposes of the IRA if they entered into a formal political relationship with the United States. 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 at JA 0007, Dkt. #39, 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, JA 0007, Dkt. #39, 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."). A recognized tribe that becomes formally federally recognized becomes entitled to benefits as established by federal law. Tribal existence is the only test that the Cowlitz Tribe must satisfy to prove whether it is a "recognized Indian tribe" as defined by the IRA.

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

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 currently understood. During its 17 year federal acknowledgment

proceeding, the Samish Tribe discovered substantial documentation concerning the meaning of federal recognition. The Samish Tribe became formally federally recognized in 1855 when it became a signatory to the Treaty of Point Elliott, and believed that its recognition continued unabated into the present.[5] Samish was very surprised when the federal government in the early 1970s first began stating that the Samish Tribe was unrecognized. *See* Torbett Decision, *supra*, JA 0007, Dkt. #39, Ex. 5, App. B, p. 21, FF # 110; *Samish Indian Nation*, *supra*, 419 F.3d at 1359-60. This unexpected change in position 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 under the new federal acknowledgment regulations. *Id.*

As part of its federal acknowledgment litigation, the Samish Tribe obtained discovery about how it "lost" its federal recognition once it was a signatory to a ratified Indian treaty, as follows: There was no formal concept of "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

[5] For example, the 1942 Cohen Handbook, the first authoritative compilation of what constitutes federal recognition of an Indian tribe, lists a ratified treaty as the most definitive statement of formal federal recognition. 1942 Cohen at 268-71; 2012 Cohen at 136. Such recognition, once accorded, generally can only be terminated by express congressional action. 2012 Cohen, *supra*, at 164; *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). *See Samish Indian Nation*, *supra*, 419 F.3d at 1369-70 (three means by which the federal government can recognize a tribe).

developed after the IRA was enacted, as the Department determined on a case by case basis which tribes or groups were eligible for the benefits of the Act.[6] 1942 Cohen, JA 0007, Dkt. # 39, Ex. 2, at 270-71. 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, JA 0007, Dkt. #39, Ex. 2, at 268-72; 2012 Cohen at 142-44; *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 recognition occurred on an ad hoc basis. *Samish Indian Nation*, *supra*, 657 F.3d at 1332 (citing *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272-73 (9th Cir. 2004)). No formal recognition process or criteria existed until 1978. *Samish Indian Nation*, *id. See* 1974 Butler Letter, JA 0007, Dkt. #39, Ex. 3, p. 3 ("Consistency of practice in giving 'Federal recognition' is difficult to discern.").

[6] The Grand Ronde Tribe asserted below that a list of 258 tribes created by Commissioner of Indian Affairs John Collier in 1947 was the first formal federal list of recognized tribes and was created "at the time of the IRA's enactment." JA 0003, Dkt. # 23, p. 25. This statement is incorrect. The list, known as the Haas List, was not created until 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). JA 0007, Dkt. #39, Exhibit 6. *See Carcieri*, *supra*, 555 U.S. at 398 (Breyer, J., citing Haas list). In actuality it was just a list of tribes that had actually voted to accept or reject the IRA (p. 13), or that had already "organized" under some authority other than the IRA. It was not a comprehensive list of all the tribes that were recognized as tribes in 1934.

In his 1942 treatise on Indian law, eight years after enactment of the IRA, Solicitor Felix Cohen summarized "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 been the basis since for all decisions to federally recognize a tribe. *See*, *e.g.*, 1974 Butler Letter, JA 0007, Dkt. #39, Ex. 3, pp. 3-6 (criteria used by Interior Department to determine which tribes were eligible for treaty exercise under *United States v. Washington*, 384 F.Supp. 312 (W.D.Wash. 1974)(*Washington I*)); *Kahawaiolaa*, *supra*, 386 F.3d at 1273 n.2. The primary drafter of the 1978 Federal Acknowledgment Regulations, Scott Keep, *see* 1993 Keep Deposition, JA 0007, Dkt. #39, Ex. 4, p. 98, testified that when the Department drafted those 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. The terms "recognized Indian tribe" in the IRA and "federal recognition" of a tribe cannot be synonymous.

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

The Samish Tribe first encountered the "ad hoc" nature of federal recognition and the lack of any discernible recognition process in the 1960s. When Judge Boldt confirmed off-reservation treaty fishing rights for 14 tribes in

Washington I 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 created panic in the federal government because it had no idea whether other groups or tribal entities might qualify as treaty tribes under the court's ruling, or how that determination would be made. *See* 1974 Butler Letter, JA 0007, Dkt. #39, Ex. 3; 1993 Keep Deposition, *id.*, Ex. 4, *passim*. A number of additional tribes, including the Samish Tribe, intervened in *U.S. v. Washington* claiming treaty status. *See Washington II*, 476 F.Supp. 1101.

In deciding how to react to these claims,the federal government first divided tribes into whether they were already federally recognized or not. 1974 Butler Letter, JA 0007, Dkt. #39, 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"), JA 0007, Dkt. #39, Exhibit 8.

The United States opposed Samish treaty status on the basis 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, JA 0007, Dkt. #39, Ex. 5 at App. B, p,. 21, FF# 110. It was not until the administrative federal

acknowledgment trial in 1994, however, that the Samish Tribe found out why the United States had started taking the position that the Samish Tribe was no longer federally recognized.[7] Patricia Simmons, a clerk 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, JA 0007, Dkt. #39, Exhibit 9; Torbett Decision, *Id.*, Ex. 5, App. B, FF # 1. The Department had become concerned in the 1960s because it had no formal way to respond to congressional and public inquiries about which tribes it recognized. *Id.*, Ex. 9, at 347, 353.

Ms. Simmons testified that when she compiled her first internal list of tribes in 1966, the Samish Tribe was on the list as an "unorganized" tribe – a tribe not formally organized pursuant to the IRA. Torbett Decision, *Id.*, Ex. 5, App. B, FF# 3. She sent this 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 governing documents. Simmons Testimony, *Id.*,

[7] Samish deposed Scott Keep in December 1993, where he disclosed that a BIA clerk, Patricia Simmons, had compiled an informal internal list of "tribal entities" in the late 1960s used as an internal cheat sheet by the Department as to which tribes were federally recognized and entitled to exercise treaty rights. Keep Deposition, JA 0007, Dkt. #39, Ex. 4, pp. 41-44.

Ex. 9, pp. 349, 361; Torbett Decision, *Id.*, Ex. 5, App. B, FF#1. *See Samish Indian Nation*, supra, 657 F.3d at 1332-33. Although Ms. Simmons lacked the authority to determine which tribes were federally recognized or not and there had been no express decision to make her list a formal list of recognized tribes, the Department began using it internally as a list of federally recognized tribes. Simmons Testimony, *Id.*, Ex. 9, p. 348; Torbett Decision, *Id.*, 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. Since Samish was not included on the final list, the U.S. took the position that Samish was unrecognized and therefore not entitled to treaty status. *Id.*, Ex. 9, 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 and capricious and without adequate explanation. *Greene III*, 943 F. Supp. at 1284, 1288 n. 13; *Samish Indian Nation*, 419 F.3d 1373-74.

When Samish intervened in *U.S. v. Washington* in 1974 to claim treaty fishing rights, the Department had no process to determine whether Samish was recognized or not. Struggling to figure out what its recognition criteria, process and authority even were, it "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, JA 0007, Dkt. #39, Exhibit 10; 1993 Keep Deposition, *id.*, Ex. 4, pp. 25-26. Once the Department adopted federal acknowledgment regulations in late 1978, Samish submitted another petition under those regulations. By then, however, Samish's treaty status had already been denied on the ground that it was not federally recognized. *Washington II*, 476 F.Supp. at 1106.

f. Discussion.

As the previous discussion demonstrates, Congress could not possibly have intended to equate the term "federal recognition" with the term "recognized Indian tribe" in 1934 in Section 19 of the IRA. The term "federal recognition" or "federally-recognized tribe" had no accepted definition in 1934. These terms assumed common usage only upon passage of the Indian Self-Determination Act in 1975, 25 U.S.C. § 450 et seq. Federal recognition as that term is understood today is not the same as the term "recognized Indian tribe" was used in the IRA in 1934.

3. The Indian Reorganization Act is not limited to Indian tribes with a Reservation or land base in 1934.

Appellant Clark County argues in its Brief that a tribe that did not have a "reservation," "Indian country" or "land" in 1934 could not be under federal jurisdiction and therefore could not be eligible for any of the benefits of the IRA. Clark County Brief at 7, 9, 18-22. This argument is incorrect.

The Samish Tribe was also a landless tribe, even though it was a signatory to the ratified Treaty of Point Elliott. While that treaty designated four reservations jointly for all the signatory tribes, the Samish Tribe did not go to or remain on any of those reservations. *See generally*, Torbett Decision, JA0007, Dkt. #39, Ex. 5. Samish was labelled as an "off-reservation tribe." Samish therefore has specific experience with this issue.

While the language of 25 U.S.C. §479 defining a "tribe" is clear upon close examination, there was confusion about its interpretation immediately after passage of the Act. That definition states that the term tribe refers to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." (emphasis added). When this term was first interpreted, the Department of Interior apparently interpreted it to read: "any Indian tribe residing on one reservation, organized band residing on one reservation, pueblo residing on one reservation, or the Indians residing on one reservation." Thus, in applying 25 U.S.C. §476, which allows "tribes" as defined by the IRA to organize by adopting a constitution and bylaws,[8] the Department initially only allowed a tribe or tribes "residing" together on one reservation to organize under the IRA.

[8] The "tribes" that organized under this Section are the tribes that were listed in the 1947 Haas List, *see* p. 10, n6, *supra*.

This has not been the position of the Department of Interior for the last 35 years. In 1980, the Associate Solicitor informed the Assistant Secretary for Indian Affairs that the Department's position on this issue was incorrect:

> [T]he Stillaguamish Tribe of Indians requested Secretary Andrus to reconsider the October 27, 1976, decision of then Acting Secretary Kent Frizzell declining to take land in trust for the Stillaguamish. The Acting Secretary declined to take land in trust in part because he had doubts whether the Stillaguamish fell under the definitions of "Indian" and "tribe" in Section 19 of the Indian Reorganization Act (IRA) (25 U.S.C. §479). More specifically, the Acting Secretary apparently believed that a tribe must have had a reservation or other trust land and been formally acknowledged as a tribe in 1934 in order to organize under or benefit from the IRA. Our research leads us to the conclusion that neither landownership nor formal acknowledgment in 1934 is a prerequisite to IRA land benefits . . . .

Memo dated Oct. 1, 1980, from Associate Solicitor, Indian Affairs, to Assistant Secretary-Indian Affairs, JA0007, Dkt. #39, Ex. 7.[9]

The correct interpretation of Section 479 does not require a land base in 1934 for a tribe to qualify under the IRA. Any tribe can organize under the IRA, but only the individual Indians residing on one reservation can also organize as a tribe.

The Samish Tribe was affected by the Department's initial incorrect interpretation of this Section of the IRA. Even though the Samish Tribe submitted a formal resolution to Commissioner Collier in 1934 approving the IRA, reprinted

[9] The Oct. 27, 1976 decision that is superseded by this Memo is relied upon by Clark County for this issue. Clark County Brief at 13. Apparently, Clark County did not realize the 1976 decision was overruled in 1980.

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* Ltr. Dated April 22, 1975, from Western Washington BIA Agency Superintendent to John Gurney, JA0007, Dkt. #39, Exhibit 11 (Samish ineligible to organize to obtain federal services because they are a "landless tribe"). Again, by the time this error was corrected in 1980, it was too late for Samish. Because of the incorrect initial interpretation of Section 479, they were not permitted to organize under the Act. Because they were not organized under the Act, they were classified in 1969 by a BIA clerk as not recognized. Because they were not recognized, they were denied treaty rights.

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

Clark County's Brief contains an extensive argument asserting that the Secretary of Interior was required to investigate and certify the continuing Indian identity of the Cowlitz Indian tribe before taking land into trust pursuant to 25 C.F.R. §83.12(b) and 25 U.S.C. §479. Clark County Brief, pp. 27-39. This argument is wrong as a matter of law. Again, the Samish Tribe had personal experience with this requirement in its federal acknowledgment proceeding.

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

The language of Section 83.12(b) was only added in the 1994 revisions to the Federal Acknowledgment Regulations.[10] This provision was removed from the regulations in 2015, *see* Federal Appellee's Answering Brief at 76, so, combined with the brief period of time in which the referenced provision was operative (21years) and the small number of tribes acknowledged during that time under the 1994 regulations (less than 15, according to federal congressional testimony), the provision even as applied is only relevant to an extremely small percentage of the 500+ federally recognized tribes.

It is beyond dispute that as a general matter the federal government lacks authority over tribal membership. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), for example, 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

[10] The Samish Tribe filed its original federal acknowledgment petition under the original 1978 regulations. When the denial of its petition was reversed for a full APA hearing in 1994, the Tribe was given the choice whether to proceed under the 1978 regulations or the new 1994 regulations; the Tribe chose the 1978 regulations. The Department attempted to apply Section 83.12(b) to Samish after it successfully achieved re-recognition, but the Tribe rejected the attempt.

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).

Section 83.12(b) has an extremely limited purpose, and must be read together with the requirement of 25 C.F.R. §83.7(e), which states that a petitioning tribe's membership must be directly descended from the historical tribe or tribes that the petitioning Indian group claims to be. The federal government looks at this requirement as one of the criteria it evaluates in determining whether a petitioning group is an Indian tribe under federal law.[11]

So, for example, the final determination federally acknowledging the Samish Indian Nation found that the Samish membership met this descendancy criteria. 61 Federal Register 15825, 15826 (April 9, 1996).

There is no legal authority allowing the federal government to review, let alone overturn, tribal status once a tribe is federally recognized based on the criteria set out in Section 83.12(b). At most, the provision allows the BIA to

[11] This requirement ties into the sole factor that the Supreme Court has held limits to the federal government's authority to recognize Indian tribes. In *United States v. Sandoval*, 231 U.S. 28, 46 (1913), the Court held: "It is not meant by this that Congress may bring a community or body of people within the range of this power (to determine tribal status) by arbitrarily calling them an Indian tribe, but only that in respect of distinct Indian communities the questions whether, and to what extent, and from what time they shall be recognized . . . are to be determined by Congress, and not by the courts."

review whether an individual tribal member may or may not be eligible for federal Indian services, but this provision has never been applied by the BIA to the Samish Tribe's knowledge. Except where a specific blood quantum is a requirement under a specific federal statute, the BIA provides services to all tribal members without discrimination. Section 83.12(b) has no application whatsoever to an application by the tribe to take land into trust.[12]

b. Federal law prohibits discrimination between Indian tribes.

Two months after Section 83.12(b) was adopted in 1994, Congress enacted the Indian Tribes Privileges and Immunities Act, codified at 25 U.S.C. §§ 476(f), (g), prohibiting the Department 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." Even if Section 83.12(b) applied as Clark County asserts, it only applies to tribes acknowledged under the 1994 Federal Acknowledgment Regulations. Other

[12] A parallel and equally meritless argument raised by Clark County is that the Secretary is required to evaluate whether Cowlitz tribal members were descendants of persons of Indian descent who physically resided on a reservation in 1934 under 25 U.S.C. §479. Clark County Brief at 27, 31. The IRA, 25 U.S.C. §465, by its express text allows the Secretary to take land into trust both for tribes and for individual Indians. The provision in question, to the extent it is applicable at all, only applies to whether an individual Indian is eligible to acquire land in trust; it has no relevance to whether a tribe can acquire land in trust.

federally recognized tribes are not subject to the provision. Therefore, Section 83.12(b) discriminates against a small group of tribes, and is 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*, 995 F.Supp.2d 1 (D.D.C. 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)); 995 F.Supp.2d 7 (2014).

c. 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 because the Cowlitz Tribe's membership has doubled since federal acknowledgement in 2002, this fact raises suspicion about whether Cowlitz is still a real Indian tribe. County Brief at 27-28. This suspicion and assertion is unwarranted and incorrect for a number of reasons. Again, the Samish Tribe serves as a good example on this issue.

The Samish Tribe's initial membership roll after achieving federal re-recognition was 307 enrolled members. The Samish Tribe's membership roll as of October 18, 2013 was 1645, a 535% increase over 17 years. There are many reasons for the increase, but primarily it is due to members "coming back" to the Samish Tribe now that it is federally recognized again. Samish was subject to a

host of adverse federal policies and actions for almost 150 years after being a signatory to the 1855 Point Elliott Treatyuntil it was re-recognized in 1996. As a result many Samish Indians, if they were able, moved elsewhere or enrolled in other federally recognized tribes to continue receiving services. Others saw no point in actively participating in a tribe that the federal government said did not exist. An activist core of the Tribe, however, remained intact and continued to advocate for restoration of federal recognition.

Once the Samish Tribe prevailed and returned to the ranks of federally-recognized tribes, Samish Indians began to return to the Tribe and become active members. They were always Samish in their hearts. Those that meet tribal membership criteria are welcomed back as members, and are actively participating and receiving tribal services. This is a natural and logical conseqence of the Samish Tribe's hard and long struggle to reassume its place in the ranks of recognized tribes.

Clark County's co-appellant, the Confederated Tribes of the Grand Ronde Community of Oregon, also illustrates this principle. Grand Ronde was terminated as a tribe in 1954 in the Western Oregon Indians Termination Act along with many other tribes. 25 U.S.C. § 691 et seq. Its membership scattered and many lost connection with the Tribe. Grand Ronde was restored to federally-recognized

status in 1983 in the Grand Ronde Restoration Act. The base membership roll created under that Act, 25 U.S.C. §713e, 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)). An increase in tribal membership after a sustained period of non-recognition by the federal government is normal. Clark County and its fellow Appellees offered no evidence or documentation below to suspect otherwise.

5. Receipt of federal Indian services by individual tribal members is relevant to a determination of tribal status.

Grand Ronde argues in its brief that the provision of federal Indian services or benefits to individual Cowlitz Indians cannot be used to determine whether the Cowlitz Tribe was recognized or under federal jurisdiction in 1934. Grand Ronde Brief at 34. The Samish Tribe litigated this same issue during its federal acknowledgment proceeding.

After the Department of Interior issued a final decision in 1987 denying the Samish Tribe's federal acknowledgment petition, the Samish Tribe went to federal court to overturn that decision on the ground that the BIA's decision process denied the Tribe due process. To make this claim, the Tribe had to allege

infringement of a property interest; the property interest it asserted was the termination of services and benefits to individual Samish members after the Department started taking the position that Samish was not a recognized tribe.

The Department argued in federal court that the Samish Tribe could not maintain the action because the property right belonged to individual Samish members, not the Samish Tribe. The federal courts disagreed, holding that individual Samish member's eligibility for federal services was based on their tribal membership, not their individual status, and therefore the legal status of the Samish Tribe was relevant and at issue, and the Tribe was the proper party to bring the claim. *Greene II, supra*, 64 F.3d at 1273. The same principle applies to the Cowlitz Tribe.

6. Conclusion.

Based on the foregoing discussion, the Court should reject Appellees' argument that the term "recognized Indian tribe" in Section 19 of the IRA requires formal federal recognition of a tribe in 1934, should reject Clark County's argument that the IRA does not apply to landless tribes, 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, and should reject Grand Ronde's argument that the provision of services to individual tribal members cannot be used to support tribal status.

Respectfully submitted this 15th day of December, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. (a)(7)(B) because this brief contains 6,618 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point Times New Roman.

/s/ Craig J. Dorsay
Craig J. Dorsay

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus* Brief of the Samish Indian Nation with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on December 15, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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