UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, Plaintiff-Appellant, v. STATE OF WASHINGTON; et al., Defendants-Appellees, SAMISH INDIAN NATION, Intervenor.	No. 20-35346
SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, Plaintiff, and SAMISH INDIAN NATION, Intervenor-Appellant, v. STATE OF WASHINGTON; et al., Defendants-Appellees.	No. 20-35353

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA, No. 3:19-cv-06227-RBL
The Honorable Ronald B. Leighton, U.S. District Court Judge

BRIEF OF INTERVENOR - APPELLANT SAMISH INDIAN NATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Intervenor, Appellant Samish Indian Nation, certifies that the Tribe does not have a parent corporation(s) and no publicly-held corporation owns stock in the Intervenor - Appellant Tribe.

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INTRODUCTION

The Samish Indian Nation ("Samish Tribe") has been before the Ninth Circuit several times regarding its treaty status and its federal recognition. The Samish Tribe was a party to the 1855 Treaty of Point Elliott but did not move to or remain on any of the reservations established under that treaty. The Samish Tribe intervened in 1974 in the *United States v. Washington* off-reservation treaty fishing litigation but was denied treaty fishing status in 1979 in *Washington II*.

Upon learning in that litigation that the federal government was now treating it as unrecognized, the Samish Tribe applied to the Department of Interior for confirmation of its status, first informally and then in 1979 in a formal petition for federal acknowledgment under the newly adopted 1978 Federal Acknowledgment Regulations. The Samish Tribe's Federal Acknowledgment petition was strongly opposed by several neighboring federally-recognized tribes who claimed that Samish federal recognition would impact their treaty fishing rights and was precluded by *Washington II*. The Ninth Circuit ruled twice in *Greene I* and *Greene II* that Samish federal recognition would not affect other tribes' treaty rights, that the other tribes had no standing to intervene and oppose Samish federal acknowledgment, and that the Samish Tribe was not precluded by *Washington II* from proving it was entitled to federal recognition as the successor, for non-treaty purposes, to the historical Samish Tribe.

The Samish Tribe successfully achieved federal administrative re-recognition in 1996, proving the same facts in its federal acknowledgment proceeding that are required to exercise treaty rights. The Samish Tribe thereafter filed a Rule 60(b)(6) motion to reopen the judgment against it in *Washington II* arguing that federal re-recognition was an extraordinary circumstance justifying its request for relief. The Ninth Circuit agreed with the Tribe in 2005 in *Washington III*, but after the district court refused to implement the Circuit's mandate, the case returned to the Ninth Circuit and was granted en banc review. The en banc Ninth Circuit in *Samish* reconciled the conflicting decisions in *Greene I* and *II* and in *Washington III*, overruling *Washington III.*

In *Samish*, the en banc Court adopted a course to guide district courts in the future in resolving the conflicting interests of tribes seeking federal recognition and tribes with existing treaty rights. The en banc Court limited the preclusive effect of *Washington II* to treaty fishing rights only and held that newly recognized tribes like the Samish Tribe could litigate other unadjudicated treaty claims in the future, but that in doing so the Tribe would have to litigate its treaty status anew and that the fact of its federal recognition would not be given even presumptive weight in that litigation. Such subsequent treaty litigation by a newly recognized tribe would have to be brought in an appropriate forum and would remain subject to technical defenses such as sovereign immunity and Rule 19 required party status.

The Snoqualmie Indian Tribe ("Snoqualmie Tribe") was also a party to *Washington II* along with the Samish Tribe. The Snoqualmie Tribe brought a straight treaty hunting rights case in 2019 against the State of Washington, claiming it had treaty hunting rights under the same treaty that the Samish Tribe is party to. The district court in dismissing the Snoqualmie Tribe's complaint misapplied and misinterpreted the en banc Court's *Samish* ruling and held that the decision in *Washington II* precludes the Snoqualmie Tribe from claiming any treaty rights, not just treaty fishing rights. The district court's ruling adversely affects the Samish Tribe by implication and undercuts its long, hard fought contested struggle to establish the right to raise unadjudicated treaty rights claims – but not treaty fishing rights – in an appropriate case or cases in the future.

The ruling of the district court on this issue must be reversed. The Samish Tribe does not join in the other arguments made by the Snoqualmie Tribe in this appeal. The Samish Tribe believes any future treaty rights claims must be brought in an appropriate forum and will remain subject to relevant legal defenses such as sovereign immunity and required party status.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. §1291, from a final decision of the district court. The Snoqualmie Indian Tribe filed a complaint for declaratory relief as to treaty status

and for injunctive relief in the United States District Court for the Western District of Washington on December 20, 2019. *Snoqualmie Indian Tribe v. State of Washington*, No. 3:19-CV-06227-RBL, W.D.Wash. The district court granted the State's Motion to Dismiss the Snoqualmie Tribe's Complaint with prejudice on March 18, 2020, SAM-ER1–12, and entered Judgment on March 23, 2020, SAM-ER13.

The Samish Tribe was not a party in the case before the district court, but the Samish Tribe was a party, along with the Snoqualmie Tribe, to the 1979 decision that the district court relied upon in dismissing the Snoqualmie Tribe's complaint: *United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash. 1979) ("*Washington II*"), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Because the Samish Tribe and the Snoqualmie Tribe were both parties to *Washington II* and were held not to have proven treaty status for treaty fishing rights in that case, the Samish Tribe is substantively affected by the district court's ruling against Snoqualmie. The Samish Tribe filed a motion for leave to intervene in this action for the limited purpose of appeal on March 24, 2020. Dkt. #41. The district court granted the Samish Tribe's motion on April 16, 2020. SAM-ER14-16. Samish timely appealed. The Samish Tribe is therefore a party to the decision of the district court, and has standing to appeal the decision of the district court.

STATEMENT OF ISSUES PRESENTED

The en banc Ninth Circuit in *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) ("*Samish*")[1] ruled that the Samish Tribe could not reopen and relitigate the treaty fishing rights claim that was decided against it in *Washington II*, but that the Samish Tribe could litigate any other treaty claim that has not yet been adjudicated in a future case by proving its treaty factual evidence "anew." This case presents the following issue for review:

1. Whether the district court, by concluding that the holding in *Washington II* precludes the Snoqualmie and Samish Tribes from litigating any treaty right claim whether previously adjudicated or not, violated the ruling of the en banc Ninth Circuit in *Samish* that a tribe that successfully achieved federal recognition after *Washington II* like the Samish or Snoqualmie Tribes is eligible in an appropriate forum to litigate treaty rights claims other than off-reservation treaty fishing rights.

STATEMENT OF THE CASE

I. FACTUAL AND LEGAL BACKGROUND

The Samish Indian Tribe was a signatory to the 1855 Treaty of Point Elliott. *See Washington II, supra,* 476 F.Supp. at 1101; *Samish Indian Nation v. United*

[1] Judge Canby refers to this en banc decision as "*Samish"* in *Evans v. Salazar*, 604 F.3d 1120, 1121 (9th Cir. 2010). The district court decision that has been appealed - dismissing the Snoqualmie Tribe's complaint - refers to the Samish Tribe's en banc decision as "*Washington IV*." The Samish Tribe will refer to the decision as *Samish*.

States, 419 F.3d 1355, 1359 (Fed. Cir. 2005) ("*Samish Indian Nation*") ("The Samish descend from a treaty signatory tribal party to the 1855 Treaty of Point Elliott, 12 Stat. 927, . . ."); *Duwamish et al. v. United States*, 79 Ct.Cl. 534, 560 (1934); *Samish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 169, 170, 172 (1958) ("[Samish Tribe] has shown itself to be the descendants and successors in interest of the Samish Indians of aboriginal times.").

Generally, a tribe that "has had treaty relations with the United States" becomes a tribe "recognized" by the United States. *Samish Indian Nation*, 419 F.3d at 1369-70 ("There are generally three means by which the federal government can recognize an Indian tribe. The government can enter into a treaty with a tribe."); Felix S. Cohen, Handbook of Federal Indian Law 270-71 (1942 ed.); *Id.*, 1982 ed., at 3-7, 13-16[2]; 2012 ed., §§ 3.02[4], 3.02[5], pp. 136, 140. Treaty rights cannot be repealed or modified except by clear and unequivocal action of Congress. *Herrera v. Wyoming*, ___ U.S. ___, 139 S.Ct. 1686, 1696-97, 203 L.Ed.2d 846 (2019) ("[T]he crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right," citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207-08 (1999) ("[T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by

[2] *See id.* at 15, fn. 83 ("By regulation the Secretary has determined that 'recognized tribe' in this statute means: '[A]ny Indian tribe which has entered into a treaty, convention or executive agreement with the Federal Government . . . .' 25 C.F.R. §52.1(g) (1978)."

implication . . . .")(Emphasis in original)); *see McGirt v. Oklahoma*, 591 U.S. ___, 2020 WL 3848063 (July 9, 2020), *5 ("authority to breach its own promises and treaties . . . belongs to Congress alone.").

Termination of a tribe, especially one subject to a treaty, requires a clear and unequivocal expression by Congress. *Washington II*, *supra*, 641 F.2d at 1371-72 ("Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so," citing *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968)); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 664 n. 15 (D. Maine 1975) ("It is clear, however, that termination of the Federal Government's responsibility for an Indian tribe requires 'plain and unambiguous action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe," citing *Menominee Tribe*, *supra*; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941); *United States v. Nice*, 241 U.S. 591, 599 (1916)).

No Congressional action or federal administrative action ever expressly terminated the existence of the Samish Indian Tribe. In 1966, the Bureau of Indian Affairs ("BIA") drew up an initial internal Department of Interior list of Indian tribes it had dealings with; the Department had never compiled a list of tribes before this. The list included the Samish Tribe as an "unorganized" tribe. *Samish Indian Nation*, *supra*, 419 F.3d at 1359. In 1969 the BIA employee who prepared

the list dropped the Samish Tribe from the list of Indian tribes "without any stated legal basis." *Id*. While this employee "had no authority to determine which groups would be afforded federal recognition," the BIA used the internal list to determine which tribes were recognized or not. *Id.*

The Federal Circuit, reviewing the record and citing the Samish Tribe's re-recognition decision in *Greene v. Babbitt*, 943 F.Supp. 1278 (W.D.Wash. 1996) ("*Greene III*"), concluded that the BIA "wrongfully withheld" historic federal recognition from the Samish Tribe, that the government was "arbitrary and capricious in dropping the Samish from the 1969 BIA list," and that the Samish Tribe should have been federally recognized by the federal government well before 1996. *Samish Indian Nation*, *supra*, 419 F.3d at 1369, 1373-74 ("[T]he Samish, through their administrative challenges, obtained a final ruling by a district court under the APA that the government's refusal to accord historical acknowledgment between 1978 and 1996 was arbitrary and capricious.").

Despite the fact that the Samish Tribe had never been "terminated" by any specific federal action or decision, the federal government, relying on this internal BIA list of tribes, began cutting off federal Indian benefits to Samish tribal members based on their membership in the Samish Tribe. *Id.* at 1359-60. By the time the Samish Tribe filed to intervene in 1974 in the *U.S. v. Washington* off-reservation treaty fishing litigation, the federal government was administratively

treating the Samish Tribe as unrecognized. *See Washington II*, *supra*, 476 F.Supp. at 1106 (FOF ¶25).[3]

The federal courts in *Washington II* denied treaty status to the Samish Tribe and four other "unrecognized" tribes including the Snoqualmie Tribe on the ground that they had failed to prove that they were a continuation of the original tribe that signed the treaties that reserved off-reservation treaty fishing rights. *E.g.*, 476 F.Supp. at 1104 ("None of the five Intervenor entities . . . is at this time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott."); 641 F.2d at 1374 ("We cannot say, then, that the [district court's] finding of insufficient political and cultural cohesion is clearly erroneous.").[4]

After discovering that the Department of Interior was starting to treat it as

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[3] This proposed finding of fact was prepared by counsel for the federal government and adopted verbatim by the district court, a disfavored practice. *Washington II*, 641 F.2d at 1371.

[4] The District Court ruled that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." 476 F.Supp. at 1111. The Court of Appeals held that "[t]his conclusion is clearly contrary to our prior holding and is foreclosed by well-settled precedent," 641 F.2d at 1371, and that the "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory [is that] the tribe must have maintained an organized tribal structure." *Id.* at 1372 (citing *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975)). The Court of Appeals applied the factual findings made by the district court to the correct legal standard and concluded that the district court's ultimate ruling that the Samish Tribe was not entitled to exercise treaty fishing rights at this time was not clearly erroneous. 641 F.2d at 1373-74. Judge Canby in dissent stated that the district court's erroneous holding that federal recognition is required to exercise treaty rights "permeated the entire factual inquiry" and would have remanded the case for a renewed factual inquiry under the correct legal standard. *Id.* at 1375. Judge Canby is also the author of the Samish Tribe's 2010 en banc decision, *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Samish*"), which is the basis for the Samish Tribe's present appeal.

unrecognized and cutting off federal Indian benefits to tribal citizens, the Samish Tribe filed its first request for confirmation of federally recognized status in 1972. *Samish Indian Nation*, *supra*, 419 F.3d at 1360; *Greene III*, *supra*, 943 F.Supp. at 1281. Until 1978, when "the Interior Department published regulations establishing the first detailed, systematic process by which tribal groups could obtain acknowledgment,"[5] "the federal government decided on an ad hoc basis which groups of Indians would be recognized as tribes." *United States v. Washington*, 394 F.3d 1152, 1156 n.5 (9th Cir. 2005) ("*Washington III*") (citing Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment,* 37 New Eng. L. Rev. 491 (2003)), *overruled on other grounds*, *Samish*, *supra*. The new regulations were "intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable" that could "establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history[6] until the present." 25 C.F.R. §83.3(a) (1983). *See id.*, §83.7 ("All the criteria in paragraphs (a) through (g) are mandatory in order for tribal existence to be acknowledged"); 83.7(c) ("A statement of facts which establishes that the

[5] *Samish Indian Nation*, *supra*, 419 F.3d at 1372 (citing *Procedures for Establishing That An American Indian Group Exists As An Indian Tribe*, 43 Fed. Reg. 39361 (Sept. 5, 1978) (later codified at 25 C.F.R. Part 83).

[6] The regulation defines "historically", "historical", or "history" to mean in relevant part "dating back to the earliest documented contact between the aboriginal tribe from which the petitioners descended and citizens of the United States, colonial or territorial governments." 25 C.F.R. §83.1(l).

petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present."); §83.7(i) ("Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in §83.7) (Emphasis added).

The Samish Tribe submitted a revised federal acknowledgment petition under the new regulations. *Samish Indian Nation*, *supra*, 419 F.3d at 1360. The BIA twice denied the Samish Tribe's petition, primarily based on the alleged preclusive effect of *Washington II*. *See Samish Indian Tribe: Proposed Finding Against Federal Acknowledgment*, 47 Fed.Reg. 50110 (Nov. 4, 1982); *Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe*, 52 Fed.Reg. 3709 (Feb. 5, 1987). The Samish Tribe appealed these decisions to federal court and in 1992 the district court reversed the BIA's adverse federal acknowledgment decision on due process grounds and remanded the proceeding for a formal adjudication under the APA. *Greene v. Babbitt*, No. C89-645Z (W.D.Wash., Feb. 25, 1992), Order, Dkt. #169, 1992 WL 533059; *Greene III*, *supra*, 943 F.Supp. at 1282.

The Tulalip Tribes appealed the district court's decision that the Samish Tribe's federal acknowledgment petition could continue, arguing that Samish federal recognition was precluded because the factual and legal inquiries under the

regulation were "nearly identical" to the factual record "that served as the basis for the allocation of fishing rights." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) ("*Greene I*"). The Ninth Circuit rejected this argument: "We recognized that the two inquiries are similar. Yet each determination services a different legal purpose and has an independent legal effect." *Id.* The Ninth Circuit reconfirmed this ruling in *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995) ("*Greene II*"):

> [T]he Tulalip Tribe emphasizes that in the petition for recognition, the Samish Tribe has not claimed to be any tribe other than the historical Samish Tribe that was party to the Treaty of Point Elliott. To the extent that the Samish rely upon historical roots in this litigation, the roots are probably the same as those they posited in *Washington II*. However, other decisions of this court demonstrate that the legal issue and the factual issue, as well as the stakes, are very different. . . . Our decision in [*Greene I*] can leave no serious doubt that our court regards the issues of tribal treaty status and federal acknowledgment as fundamentally different.

Samish's federal acknowledgment proceeding was remanded for a new APA hearing. The Office of Hearings and Appeals of the Department of Interior conducted a six-day day trial on remand in August 1994 and issued "an exhaustive opinion" on August 31, 1995, with 205 findings of fact that "substantiated that the Samish met the mandatory criteria for federal acknowledgment as set forth in 25 C.F.R. §83.7." *Greene III*, *supra*, 943 F.Supp. at 1282. These findings of fact were then forwarded to the Assistant Secretary-Indian Affairs for a final determination, *id.*, who rejected most of the ALJ's proposed findings fact based on the ex parte communications of the federal attorney representing the BIA in opposition to

Samish federal recognition. *Id.* at 1280, 1282 (Final Determination issued on Nov. 8, 1995). The findings of fact deleted by the Assistant Secretary included many "required for historic recognition of the Samish Tribe" under the federal acknowledgment regulations. *Samish Indian Nation*, *supra*, 419 F.3d at 1369.[7]

The Samish Tribe appealed the Assistant Secretary's revised Samish Federal Acknowledgment decision back to the District Court because her decision "reject[ed] certain proposed findings of fact which are of vital importance to the Samish" and were required under the Federal Acknowledgment Regulations. *Greene III*, 943 F.Supp. at 1283; *Samish*, *supra*, 593 F.3d at 796 ("The Assistant Secretary . . . deleted several findings of the [ALJ] underlying the determination that the Samish had met the regulatory requirements."). The district court found that the Department's actions in revising the ALJ's recommended decision on an ex parte basis and for political reasons "rendered the proceedings fundamentally unfair and violated the Samish Tribe's Fifth Amendment due process rights" and that the Assistant Secretary had "arbitrarily and in violation of clearly established law . . . failed to maintain her role as an impartial and disinterested adjudicator." *Greene III* at 1286, 1288-89. The district court "reinstate[d] the rejected findings" and confirmed that the Samish Tribe "exists as an Indian tribe within the meaning

[7] The Assistant Secretary published her final decision in the Federal Register on April 9, 1996, modified on May 29, 1996. 61 Fed.Reg. 15825 (April 9, 1996) (*Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe*); 61 Fed. Reg. 26922 (May 29, 1996) (*Supplemental Final Determination*).

of federal law." *Id.* at 1289; Judgment, *Greene v. Babbitt*, No. C89-645Z, W.D. Wash., Nov. 1, 1996, Dkt. #330.[8]

In 2001, the Samish Tribe filed a Fed.R.Civ.P. 60(b)(6) motion in district court to reopen the judgment against Samish in *Washington II*, based on the Tribe's federal acknowledgment. The district court denied the Samish Tribe's motion. *Samish Indian Tribe v. Washington*, 2002 WL 35646222 (W.D.Wash. 2002), *reversed and remanded*, *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Washington III*"), *cert. denied*, *Lummi Nation v. Samish Indian Tribe*, 546 U.S. 1090 (2006), *on remand*, 20 F.Supp.3d 899, 912 (W.D.Wash. 2008), *Ordering Hearing En Banc*, 579 F.3d 969 (9th Cir. 2009), *aff'd, overruling Washington III*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Samish*") (This is the full cite for all the decisions in this proceeding.).

The Samish Tribe appealed to the Ninth Circuit, which reversed the district court and remanded the proceeding. *Washington III*, 394 F.3d 1152, *supra*. The Ninth Circuit made the following relevant findings and conclusions:

> [O]ur precedent leads us to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights. We have 'defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal

[8] The Samish Tribe requests that the Court take judicial notice of this Judgment pursuant to FRE. 201(c)(2). The Judgment is attached as Ex. 1 to the end of this Brief, pp. 1-2. *See* n. 22 *infra*.

structure. *Washington II*[9], 641 F.2d at 1372. "For this purpose, tribal status is preserved if some defining characteristic or the original tribe persists in an evolving tribal community." *Id.* at 1372-73.

The following mandatory criteria for federal recognition include the following:

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

. . .

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

25 C.F.R. §83.7. (fn.7: The [1978] regulations define "historical" as "dating from first sustained contact with non-Indians." 25 C.F.R. §83.1). The Samish argue persuasively that because they met the mandatory criteria for federal recognition, they necessarily met the condition for the exercise of treaty rights.

. . .

It is undisputed that the Samish were a party to the Treaty of Point Elliott. *See*, *e.g.*, *Washington II*, 476 F.Supp. at 1106. It is also clear that the Samish "has been continuously identified throughout history as Indian or aboriginal, has existed as a distinct community since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe. 61 Fed.Reg. 15825, 15826. (fn.10: Quoting commentator who explained that under the federal

[9] The Ninth Circuit has used differing nomenclature for the various *Samish* opinions. This quote actually refers to 641 F.2d 1368 as *Washington III*, but subsequent Ninth Circuit decisions refer to 394 F.3d 1152 as *Washington III*. *See Samish*, 593 F.3d at 793. That opinion refers to 476 F.Supp. 1101 as *Washington II* and 641 F.2d 1368 without a shorthand label. 593 F.3d at 792. The Samish Tribe will refer to the 394 F.3d 1152 opinion as *Washington III*. The Ninth Circuit and district courts have also referred to the en banc opinion at 593 F.3d 790 variously as "*Samish*" and "*Washington IV*." *See* n.1, *supra*.

> acknowledgment regulations the Department of Interior cannot create or establish a tribe, only acknowledge a tribe that has always existed. Citation omitted.). As the Samish are a signatory tribe and have proved the single necessary and sufficient condition for the exercise of treaty rights, the res judicata effect of *Washington II* is all that is keeping the Samish from pursuing its treaty rights.

Washington III, 394 F.3d at 1158-60.

The district court on remand refused to follow the mandate of the Ninth Circuit in *Washington III* and once again denied the Samish Tribe's Rule 60(b)(6) motion. 20 F.Supp.3d 899, 912 (W.D.Wash. 2008).[10] The Samish Tribe appealed again. The Ninth Circuit ordered an en banc hearing to reconcile the decision in *Washington III* with the Circuit's previous Samish decisions in *Greene I* and *II*. *See Samish*, 593 F.3d at 798 n.9. In early 2010 the en banc Ninth Circuit issued an opinion written by Judge William C. Canby, Jr., affirming the remand decision of the district court. *Samish*, 593 F.3d 790. In doing so, the en banc Court reconciled the Circuit's previous Samish decisions in *Washington III* and *Greene I* and *II* by overruling *Washington III* and establishing a detailed framework to guide the district courts in future cases involving disputed federal recognition and treaty rights claims. *Samish*, 593 F.3d at 800-01.

The en banc Court concluded that its decisions in *Greene I* and *II* and

[10] *See Samish*, *supra*, 593 F.3d at 798: "In ruling on remand that considerations of finality required it to deny reopening of *Washington II*, the district court clearly violated the mandate of *Washington III*. The considerations of finality cited by the district court had all been considered and rejected by our court in *Washington III*, as had our our decisions in the *Greene* cases. We do not condone deviation from our mandates because of a disagreement with this court's reasoning."

Washington III could not be reconciled: "Each of these two conflicting lines of authority has something to be said for it, but the two cannot coexist. We conclude that *Washington III* must yield, and we overrule that decision." 593 F.3d at 798-99.

The Court did not, however, overturn *Washington III*'s factual determination that the findings in the Samish Tribe's federal acknowledgment proceeding were the same findings required for exercise of treaty rights -- in fact the *Samish* opinion repeatedly ratifies those factual findings - but held only that these inconsistent administrative factual findings did not justify reopening a judicial judgment:

> [T]he Samish Tribe now seeks reopening under Rule 60(b) on the ground that an administrative body has come to a conclusion inconsistent with the factual finding finally adjudicated by this court in *Washington II*. We have been directed to no authority upholding relief from judgment under Rule 60(b) on such a ground.

Id. at 799; *id.* at 800 ("The fact that a subsequent administrative ruling for another purpose may have made underlying inconsistent findings is no reason for undoing the finality of the *Washington II* factual determination.").[11]

The Court held that for all these reasons, the Samish Tribe was not entitled to reopen *Washington II* because of its subsequent federal recognition; such

[11] The Court cited three factors for this conclusion. First, the en banc Court disagreed with the *Washington III* Court's finding that the Samish Tribe had effectively been prevented from proving its tribal treaty status in *Washington II*. 593 F.3d at 799. Second, that the Samish Tribe had every incentive to provide all its evidence in *Washington II*, and the fact that it provided more evidence of its historical existence and governmental continuity in an administrative proceeding was not sufficient justification to reopen *Washington II*. *Id.* Third, where the decree had been in existence for decades and had engendered a complex and detailed regime of agreements and regulation, finality concerns carried great weight. *Id.* at 799-800.

reopening would be inconsistent with the considerations of finality that had led it and the Supreme Court to limit the reach of Rule 60(b)(6). *Id.* at 800. The en banc Court, along with previous Circuit decisions, expressly limited the preclusive effect of *Washington II* to the claim of treaty fishing rights: "The court (in *Greene I*, 996 F.2d at 975) ruled that the Samish Tribe could not, in its challenge to denial of recognition, relitigate *Washington II*'s denial of treaty fishing rights." *Samish*, 593 F.3d at 795.[12]

The en banc Court then set out a process and guidelines for how treaty rights claims for treaty rights other than fishing rights that have not yet been

[12] *See id.* at 793 and n. 3 ("[T]he Samish Tribe intervened in the *Washington* litigation and sought to established its entitlement to treaty fishing rights. . . . [Samish and Snoqualmie] were unsuccessful in establishing entitlement to treaty fishing rights. *Washington II*, 476 F.Supp. at 1111."); *Evans v. Salazar*, 604 F.3d 1120, 1122 (9th Cir. 2010) ("[F]our tribes, including [Snoqualmie] and Samish, intervened in [*U.S. v. Washington*] to secure their own treaty rights. All four tribes were denied treaty fishing rights. (citing *Washington II*)."; *Greene I*, 996 F.2d at 975 ("On partial summary judgment, the district court (in *Greene*) ruled that the Samish were barred from relitigating the question of treaty fishing rights because of the res judicata and collateral estoppel effects of *Washington II*."), 978 ("After the preliminary summary judgement ruling against the Samish, fishing rights went out of the case. . . . The Tulalip's fishing interest did not relate to the subject matter of the action remaining before the district court."); *Greene II*, 64 F.3d at 1270-71 ("The amicus Tulalip Tribe contends that any consideration of the Samish Tribe's petition for recognition is barred by (*Washington II*). The government has never seriously urged such issue preclusion and the district court rejected it. . . . The Tulalip Tribe has participated in this litigation because of concern that recognition of the Samish as a Tribe could lead to Samish eligibility for treaty fishing rights . . . . the treaty fishing rights issue in *Washington II* differs from the tribal acknowledgment issue in this litigation."); *Washington III*, 394 F.3d at 1154 ("After the issuance of the decision in *Washington I*, the Samish intervened to assert fishing rights under the Treaty of Point Elliott. . . . The special master therefore concluded that the Samish 'at this time' were neither a treaty tribe nor a political successor to a treaty tribe and 'presently' did not hold treaty fishing rights. . . . The district court concluded that the Samish were not entitled to treaty fishing rights.").

adjudicated[13] would be addressed for tribes like Samish that had proven in their federal acknowledgment proceedings the same facts necessary to exercise treaty rights – that they have continually existed as a separate tribal government and are a successor to the historical tribe. The Court adopted an exception to issue preclusion for such tribes, for unadjudicated treaty claims[14] that could be brought in the future:

> Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated. Such a tribe will have to proceed, however, by introducing its factual evidence anew; it cannot rely on a preclusive effect arising from the mere fact of recognition. In *Greene II*, we denied any estoppel effect of *Washington II* on the Samish Tribe's recognition proceeding, because treaty litigation and recognition proceedings were "fundamentally different" and had no effect on one another. *Greene II*, 64 F.3d at 1270. Our ruling was part of a two-way street: treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation. Indeed, to enforce the assurance in *Greene II* that treaty rights were "not affected" by recognition proceedings, the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation.

593 F.3d at 800-01.

The en banc Court upheld the decisions in *Greene I* and *II* that tribes with adjudicated treaty fishing rights were not entitled to intervene in federal

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[13] In discussing *Washington II* and the Samish Tribe's motion to reopen that judgment based on its federal acknowledgment, the en banc Court stated that finality concerns regarding treaty fishing "make us reluctant to reopen an adjudicated treaty decision." *Id.* at 801.

[14] While the district court's ultimate decision in this appeal was wrong, the Tribe agrees with the district court's distinction between "issues" and "claims" for preclusion purposes. *See* Order, SAM-ER 6-7, pp. 6-7. The issue is treaty status or "tribal continuity." Order, p. 7. The relevant "claims" are treaty fishing rights, treaty hunting rights, and treaty gathering rights. *Id.*

acknowledgment proceedings in order to preempt future speculative unadjudicated treaty claims by a newly recognized tribe:

> [W]e denied the Tulalip Tribes intervention in the Samish recognition proceedings on the ground that the "Tulalip's interest in preventing the Samish from gaining treaty fishing rights was not affected by this litigation, involving federal tribal recognition. . . ." *Greene II*, 64 F.3d at 1270. . . .
>
> There are good reasons for adhering to the rule that treaty tribes are not entitled to intervene in recognition decisions to protect against possible future assertions of treaty rights by the newly recognized tribe, whether or not that tribe has previously been the subject of a treaty rights decision. . . .
>
> It interjects unnecessary and distracting considerations into recognition proceedings if treaty tribes find it necessary or are permitted to intervene to protect against future assertion of treaty rights by the tribe seeking recognition. Such intervention has the potential to interfere unnecessarily with a tribe's establishing its entitlement to recognition because of the speculative possibility that some administrative finding may have an impact on future treaty litigation. The best way of avoiding such difficulties, we conclude, is to deny intervention by tribes seeking to protect their treaty rights, and to deny any effect of recognition in any subsequent treaty litigation. That is the course we adopt.

Id. at 801 (Emphasis added).[15]

[15] Tribes opposed to Samish treaty status have asserted that this ruling by the en banc Court was dictum because it was not necessary to the Court's ruling that the Samish Tribe was not entitled to reopen the judgment in *Washington II*. This argument is foreclosed by the Circuit's decisions in *United States v. Johnson*, 256 F.3d 895, 914-16 (9th Cir. 2001) (panel decisions); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003), and *Miller v. Gammie*, 335 F.3d 889, 901 (9th Cir. 2003) (en banc decisions). *Samish* is the law of the Circuit and must be followed. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). The en banc Court's ruling quoted above is not dictum.

II. THE PRESENT LITIGATION

The Snoqualmie Tribe initiated the proceeding that is the subject of this appeal in federal court against the State of Washington to establish its treaty hunting and gathering rights. The Samish Tribe does not join in some of the arguments made by Snoqualmie in support of its claim, but Samish does agree with Snoqualmie's argument that by virtue of the Circuit's en banc decision in *Samish* the Samish Tribe's and Snoqualmie Tribe's treaty hunting and gathering claims are not precluded by *Washington II*.

The district court applied general issue preclusion principles to conclude that the Snoqualmie Tribe was precluded by *Washington II* from asserting any treaty claim, not just the treaty fishing rights decided in *Washington II*. SAM-ER7-9, Order at 7, 9. The district court also ruled that the en banc Court's issue and claim preclusion ruling in *Samish* offering an exception to issue preclusion for unadjudicated treaty claims only applies to tribes that have never "sought treaty rights in the past," Order, SAM-ER11, p. 11. Since the district court's decision wrongfully interpreted *Samish*, it adversely affects the right of the Samish Tribe to raise unadjudicated treaty rights in the future based on *Samish*. Samish appealed the district court's decision in timely fashion.

SUMMARY OF THE ARGUMENT

The en banc Court in *Samish, supra*, ruled that while a tribe that has successfully achieved federal recognition through the federal acknowledgment process cannot use that recognition to reopen a long-standing adverse treaty status claim actually adjudicated adverse to it, it can present a treaty rights claim to treaty rights not yet adjudicated, which includes treaty hunting and gathering rights.

The Snoqualmie Tribe filed an action in the district court to claim treaty hunting and gathering rights under the Treaty of Point Elliott. The Samish Indian Nation is a party to the same treaty, and was a party along with Snoqualmie to the adverse treaty fishing rights decision in 1979 in *Washington II*. The district court ruled that the Snoqualmie Tribe is precluded by *Washington II* from claiming any treaty rights, even treaty hunting and gathering rights that have not been previously adjudicated. The district court's decision adversely affects the Samish Tribe. The district court misinterpreted and misapplied the en banc Court's decision in *Samish* in its decision. The district court prohibited the right to claim unadjudicated treaty rights like hunting and gathering that the *Samish* Court expressly held were available to the Samish Tribe for future litigation. The Samish Tribe qualifies under the *Samish* decision to make future claims for unadjudicated treaty claims. The decision of the district court is in error and must be reversed.

ARGUMENT

I. THE DISTRICT COURT MISINTERPRETED AND MISAPPLIED THE *SAMISH* NINTH CIRCUIT EN BANC DECISION

The district court misinterpreted and misapplied the Samish Indian Nation's Ninth Circuit en banc opinion in *Samish*, *supra*, to incorrectly hold that the Snoqualmie Indian Tribe – and by direct implication, the Samish Tribe -- is precluded by *Washington II* and *Samish* from claiming any treaty rights under the 1855 Treaty of Point Elliott, 12 Stat. 927 (ratified 1859), including hunting and gathering rights. SAM-ER7, Order p. 7. *Washington II* involved treaty fishing rights. *Id.* at 7, 8. That ruling is contrary to the Ninth Circuit en banc opinion in *Samish* and must be reversed.

A. Standard Of Review

The standard of review in this appeal is de novo. *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1146 (9th Cir. 2020), citing *Wagner v. Nat'l Transp. Safety Bd.*, 86 F.3d 928, 930 (9th Cir. 1996). The district court ruled as a matter of law that the Circuit's decisions in *Washington II* and in *Samish* preclude the Samish and Snoqualmie Tribes from raising any treaty claim of any kind, whether previously adjudicated or not. Order, SAM-ER1-12.

B. The District Court Erroneously Applied A General Issue Preclusion Analysis, But *Samish* Created An Issue Preclusion Exception.

The district court applied a general issue preclusion analysis in its decision.

SAM-ER7-9, Order at 7-9. The district court ruled that the federal court's decision in *Washington II* that the Snoqualmie and Samish Tribe's did not meet the standard to exercise treaty rights was "a final judgment on the merits" of that issue. SAM-ER7, Order, p.7. The district court stated that while the claim in *Washington II* "concerned fishing rights," *id.*, application of issue preclusion is generally "broader than the claim that was adjudicated[;]" "[o]therwise, issue and claim preclusion would be the same." *Id.* The district court then applied this conclusion to hold that the treaty status decision in *Washington II* for fishing rights also extended to claims for treaty hunting and gathering rights. *Id.*, SAM-ER9, at 9.

The en banc Court in *Samish*, however, set out an exception to issue preclusion for tribes like Samish and Snoqualmie – "newly recognized tribes" as defined in that decision – "to present a claim of treaty rights not yet adjudicated." 593 F.3d at 800 (Emphasis added). Only fishing rights were adjudicated in *Washington II*. The Court expressly created an exception to the general preclusive effect of the treaty status decision in *Washington II* for a narrow category of tribes and a discrete category of claims. As the only "claim" that was adjudicated in *Washington II* was off-reservation treaty fishing rights, treaty claims not yet adjudicated include treaty hunting and gathering rights.[16] The district court ignored

[16] The district court acknowledged that treaty hunting and gathering rights have never been adjudicated in the federal courts in Washington. Order, SAM-ER8, at 8 (citing *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1174 (W.D.Wash. 2014) ("noting that 'the scope of the

this essential en banc *Samish* Court's issue preclusion ruling in wrongly concluding that *Washington II* also bars the newly recognized Snoqualmie Tribe from subsequently claiming treaty hunting and gathering rights. Order, SAM-ER9, at 9. This was the essence of the district court's decision and is the issue that the Samish Tribe requests that the Court reverse and remand for further proceedings.

The Samish Tribe cannot join in Snoqualmie's other issue preclusion exception arguments or its argument that the evidence supporting its federal recognition in 1997 is a special circumstance that supports distinguishing the treaty fishing rights decision in *Washington II*. The Samish Tribe litigated these issues in *Washington III* and *Samish* and the Court ruled that neither Samish federal recognition nor other issue preclusion arguments justified reopening the off-reservation treaty fishing rights decision against Samish in *Washington II*. The Samish Tribe acknowledges that this decision is final and that *Washington II*'s ruling on treaty fishing rights cannot be revisited. *See Samish*, *supra*, 593 F.3d at 800.

The district court incorrectly concluded that the en banc Ninth Circuit's ruling in *Samish* that "[n]othing we have said precludes a newly recognized tribe . . . from attempting to . . . present a claim of treaty rights not yet adjudicated," 593

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hunting and gathering provision has not been previously litigated in federal court'"), and *Skokomish Indian Tribe v. Forsman*, 738 Fed.Appx. 406, 408 (9th Cir. 2018) ("'No plausible reading' of the *U.S. v. Washington* litigation 'supports the conclusion that [it] decided anything other than treaty fishing rights.'").

F.3d at 800, only applies to "tribes that have not sought treaty rights in the past [and] does not apply to tribes like the Snoqualmie that *have* adjudicated the essential issue for determining treaty status." Order, SAM-ER11, at 11 (Emphasis in original). This holding is a fundamental misinterpretation of the en banc Court's ruling in *Samish*, turns the Court's issue preclusion ruling on its head, and adversely and incorrectly affects the Samish Tribe, for the reasons discussed below.

C. The Ninth Circuit En Banc Issue Preclusion Exception Applies To The Samish Indian Nation As A "Newly Recognized Tribe."

The Court's narrow issue preclusion exception in *Samish* only applies to "a newly recognized tribe." 593 F.3d at 800. Exactly one paragraph before this critical label, Judge Canby, an academic authority in federal Indian law,[17] specifically defined the Samish Tribe as "the newly recognized Samish Tribe." *Id.* at n.12. It is inconceivable that the Judge Canby and the en banc Court would have used the same term in a different context within the same issue preclusion discussion. The Samish Tribe is a "newly recognized tribe" for purposes of the Court's creation of an exception to general issue preclusion principles for newly recognized tribes. The Samish Tribe believes the Snoqualmie Tribe is likely the only other tribe that fits within this narrow category of tribes, as explained below.

[17] *See* William C. Canby, Jr., American Indian Law In a Nutshell, 7th ed. (West Publishing Co., 2020).

D. Despite The Ninth Circuit En Banc's Use Of The Word "Anew," The District Court Erroneously Concluded That Only Tribes That Have Never Sought Treaty Rights Before May Bring Such Claims.

The district court concluded that *Samish* Court's issue preclusion ruling only applies to tribes that have never sought treaty rights of any kind in the past and have never had an adverse treaty rights ruling in any other case. Order, SAM-ER 11, at 11. This is an impossible interpretation and application of *Samish*.

First, the ruling of the en banc Court in *Samish* applies to "claims of treaty rights not yet adjudicated," not to *tribes* that have never adjudicated treaty rights. 593 F.3d at 800 (Emphasis added) ("Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated.").

Second, the en banc Court's issue preclusion exception ruling in *Samish* specifically applies to tribes that *have* previously adjudicated their treaty rights. For example, after stating that a newly recognized tribe may present a claim of treaty rights not yet adjudicated, the Court stated: "Such a tribe will have to proceed, however, by introducing its factual evidence anew . . . ." "Anew" means "for an additional time." Merriam-Webster's Collegiate Dictionary (11th ed. 2014), p. 47. A tribe that has never had an adverse treaty rights decision will be presenting its treaty evidence for the first time, not an additional time. The *Samish* Court

applied its issue preclusion exception to prohibit intervention by existing treaty tribes in federal acknowledgment proceedings "to protect against possible future assertions of treaty rights by the newly recognized tribe, whether or not that tribe has previously been the subject of a treaty rights decision." 593 F.3d at 801. This language makes no sense if – as the district court ruled – the Court's ruling in *Samish* only applies to tribes that have never been the subject of a treaty rights decision.

The en banc Court specifically applied its holding to "subsequent treaty litigation" by a newly recognized tribe that was subject to *Washington II*. *Id.* at 800 ("estoppel effect of *Washington II*"; "the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation"); 801 ("protect against future assertion of treaty rights"; "deny any effect of recognition in any subsequent treaty litigation. This is the course we adopt.").

Third, the *Samish* Court specifically addressed the situation of the newly recognized tribes that had never litigated a treaty rights claim earlier in its decision, holding that such tribes could also litigate treaty fishing rights claims even after the passage of time and detrimental reliance by other tribal parties. *Id.* at 800 ("[*Washington II*] does not preclude a new entrant who presents a new case for recognition of treaty rights, [but] cautions against relitigating rights that were established or denied in decisions . . . ."). These statements and the Court's opinion

itself would be unnecessary under the district court's erroneous interpretation of *Samish*.

The en banc Court's *Samish* issue preclusion exception ruling was affirmed by the Circuit just several months later in *Evans v. Salazar*, 604 F.3d 1120 (9th Cir. 2010) ("*Evans*"). There the Tulalip Tribes, appellants in *Greene I* and *II* against the Samish Tribe, sought once again to intervene in the federal acknowledgment proceeding of another unrecognized tribe that was denied treaty rights in *Washington II*, the Snohomish Tribe.[18] The Court rejected Tulalip's attempt to distinguish its Snohomish intervention request from its attempt to intervene in Samish's Federal Acknowledgment proceeding, holding that the two situations were "precisely" the same and "not materially different from their position in the *Samish* litigation." 604 F.3d at 1123.

Judge Canby made the following statements in *Evans* specifically confirming his earlier legal ruling in *Samish* that newly recognized tribes may seek unadjudicated treaty rights in subsequent treaty litigation, *id.* at 1123, and that there might be "possible future assertions of treaty rights by the newly recognized tribe." *Id.* at 1124, citing *Samish*, 593 F.3d at 801. The Court held as follows:

[18] The Snohomish Tribe was one of five tribes that were denied treaty rights in *Washington II*. *See* 476 F.Supp. at 1107. Snohomish was also one of three tribes that sought unsuccessfully to reopen *Washington II* on grounds that Judge Boldt was suffering from Alzheimers when he issued his decision in that case. *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996); Order, SAM-ER6, at 6. The Samish Tribe and the Snoqualmie Tribe were not parties to that action. Snohomish did not achieve federal acknowledgment.

> *Samish* itself establishes that recognition rulings or adjudication can have no effect in the establishment of treaty rights of the recognized tribe. Whether or not the Snohomish complaint recites the Tribe's alleged descent from a treaty signatory, the Tribe's recognition can be given no effect in subsequent attempts to establish treaty rights. *See id.* (593 F.3d) at 800-01.

604 F.3d at 1123. [19] In light of Snohomish's participation in *Washington II*, this ruling, which specifically discusses potential future claims of treaty rights by the unrecognized Snohomish Tribe if it successfully achieved recognition, would make no sense if the district court's ruling that the tribes that were parties to *Washington II* are precluded from claiming any treaty rights, even those not yet adjudicated, was correct. Order, SAM-ER 11, at 11. The two rulings cannot co-exist. The en banc Court's ruling in *Samish* obviously controls. It was specifically intended to guide future decisions by district courts. *Samish*, 593 F.3d at 798 (need to reconcile the conflict in our precedent that would otherwise "give difficulty to other district courts in the future if we did not address it.").[20]

The district court's ruling that *Samish* does not apply to tribes like Samish and Snoqualmie with previously adjudicated treaty fishing rights decisions is

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[19] Judge Canby in *Evans* also rejected Tulalip's claim that the Snohomish Tribe could not establish in its recognition proceeding that it is a successor to the historical Snohomish Tribe because of the ruling in *Washington II* that Tulalip was a successor to the Snohomish historical tribe for fishing rights purposes. *Id.* at 1123-24.

[20] The State's Motion to Dismiss Snoqualmie's complaint for treaty hunting and gathering rights argued several grounds in support. One of the grounds raised was res judicata based on *Washington II*. State's Motion to Dismiss, Dkt.#29, Feb. 6, 2020, pp. 11-14. The State, which was a party in *Samish*, made no argument that the issue preclusion exception included in *Samish* did not apply to Snoqualmie or Samish. The district court came up with that point sua sponte.

wrong and must be reversed.

E. Reversal Of The District Court Would Have Narrow Implications.

While the foregoing discussion makes it abundantly clear that the Samish Tribe believes this Court must overturn the district court's Order because it is fundamentally in violation of the en banc Court's decision in *Samish*, the Samish Tribe also wants to make it clear that reversal of the district court will not automatically lead to acknowledgment of treaty hunting and gathering rights for either the Samish or Snoqualmie Tribe. Snoqualmie will still have to establish subject matter jurisdiction and overcome state and tribal jurisdictional defenses to proceed. In addition, the Samish Tribe asserts that any decision by this Court in its favor will be narrow because it likely will only apply to the Samish and Snoqualmie Tribes. There are three reasons for these positions.

1. The issues of sovereign immunity and Fed.R.Civ.P. 19 required party status remain undecided.

In the district court, the State of Washington filed a motion to dismiss the Snoqualmie Tribe's complaint in part based on Eleventh Amendment sovereign immunity. State Motion to Dismiss, Dkt. #29, Feb. 6, 2020, p. 6. The Samish Tribe filed a Motion for Leave to file an Amicus Brief in the proceeding and attached its proposed brief to that motion in which it argued that state sovereign immunity was a jurisdictional issue and needed to be decided first by the district court before it could proceed to the merits. Dkt. #28, Feb. 6, 2020, Ex. 1, p. 6 (citing *Skokomish*

Indian Tribe v. Forsman, *supra*; *Skokomish Indian Tribe v. Goldmark*, *supra*). The Court's Order denied the Samish Tribe's motion to file an amicus brief as moot. Order, SAM-ER12, p. 12.

The Samish Tribe raised the sovereign immunity issue again in its Motion for Leave to Intervene for the Limited Purpose of Appeal, Dkt. #41, March 24, 2020, which was granted by the district court on April 16, 2020, and conferred standing on the Samish Tribe to appeal the district court's Order. Dkt. #44, p.2, SAM-ER15.

The Snoqualmie Tribe has taken the position that state sovereign immunity was overcome based on a number of arguments. The Samish Tribe does not join in Snoqualmie's arguments on this issue. The district court did not address this issue in its decision; it will have to be addressed on remand if the Court agrees with Samish's issue preclusion argument and the application of *Samish*.

Opposition tribes raised sovereign immunity as well as required party status under Fed.R.Civ.P. 19 in their motions to intervene or for leave to file amicus briefs in the proceeding below. Dkt. #17 (Motion for Leave to Intervene for Limited Purpose of Filing Motion to Dismiss); Dkt. #26 (Motion for Leave to File Amicus Curiae Brief). The district court dismissed all pending motions as moot. Order, SAM-ER12, p.12.

The district court did not address or decide the issue of state or tribal

sovereign immunity in its Order dismissing the Snoqualmie Tribe's complaint. *See* Order. Assuming this Court rules in the Samish Tribe's favor, the issue remains to be decided on remand before the court addresses Snoqualmie's treaty hunting and gathering rights claims. Samish will not go into depth on this issue in this appeal, but repeats the argument made in its Motion for Leave to Intervene for the Limited Purpose of Appeal for the information of the Court:

> The Samish Tribe's Amicus Curiae Brief urged the Court to review the State's claim of Eleventh Amendment sovereign immunity from suit and the Tulalip Tribes' request to dismiss this lawsuit under Fed.R.Civ.P. 19 before considering the merits of those parties' issue and claim preclusion defenses. State Motion to Dismiss, February 6, 2020, Dkt. #29, pp. 6-8; Tulalip Tribe's Motion to Intervene for Limited Purpose of Filing Motion to Dismiss, January 16, 2020, Dkt. #17, p. 6. *See* Snoqualmie Tribe's Response to State's Motion for Relief from Deadlines, January 27, 2020, Dkt. #20, pp. 2-3 ("[T]his case presents significant jurisdictional issues that should be addressed before the parties proceed to brief the merits of the Snoqualmie Tribe's claim to sovereign treaty rights."), p. 4 (these jurisdictional defenses include sovereign immunity, standing, lack of subject matter jurisdiction).
>
> This is the regular order of business when sovereign immunity is raised as a defense in federal court actions involving Indian tribes and States. Sovereign immunity – both tribal and State – is a jurisdictional issue that must be decided before the federal court can entertain a lawsuit. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants."); *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (9th Cir. 2015) (tribal sovereign immunity is "quasi-jurisdictional"); *Drake v. Salt River Pima-Maricopa Indian Comm.*, 411 F.Supp.3d 513 (D.Ariz. 2019); *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1183-84,

> 1193 (W.D.Wash. 2014) (State Eleventh Amendment immunity requires dismissal of suit).

Motion, Dkt. #41, March 24, 2020, pp. 2-3.

Fed.R.Civ.P. 19(a) required party status will present another obstacle to the Snoqualmie Tribe's complaint for relief upon remand. This issue was raised below but not addressed or decided in the district court's decision. The Samish Tribe raised this issue below, Samish Proposed Amicus Brief, Dkt. #28-1, Feb. 6, 2020, p. 6; Samish Motion for Leave to Intervene for the Limited Purpose of Appeal, Dkt. #41, p. 3 (citing *Skokomish Tribe v. Goldmark*, *supra*, 994 F.Supp.2d at 1190, 1192), as did other parties, State Motion to Dismiss, Dkt. #29, pp. 16-24; Tulalip Tribes Motion to Intervene as of Right for the Limited Purpose of Filing a Motion to Dismiss, Dkt. #17, Jan. 16, 2020, pp. 11-19 (Tulalip's Proposed Motion to Dismiss). Tulalips' Motion was dismissed by the district court as moot. SAM-ER12, Order, p. 12.

The Samish Tribe emphasizes, pursuant to the en banc Court's issue preclusion exception process in *Samish*, that it is only asking this Court to confirm its general right to pursue treaty hunting and gathering rights. The Samish Tribe believes the en banc Court's ruling in *Samish* is clear, but the district court and parties interpreting *Samish* obviously disagree. This Court must clarify and restate *Samish* so it is not subject to continuing dispute.

If and when Snoqualmie makes its treaty hunting and gathering claims on remand, they must occur in an appropriate forum and only after resolution of jurisdictional defenses like sovereign immunity and Rule 19 required party status. The most likely route would be for Samish to intervene when other treaty tribes file to adjudicate their treaty hunting and gathering rights, as noted by Judge Canby in *Samish*, 593 F.3d at 800 ("Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated."). This is because a tribe waives its sovereign immunity when it brings its own case. *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). There may be other avenues, but that is for future cases to address.

The Court's decision in favor of the Samish Tribe in this appeal will not automatically result in hunting and fishing treaty rights for it or for the Snoqualmie Tribe. All such a decision will say, after reaffirming *Samish*, is that each tribe has the right to pursue such a claim at an appropriate time, in an appropriate forum, litigating its treaty status anew, subject to any defenses that might be raised. Jurisdictional issues may be raised. This is why Samish intervened only for the limited purpose of appeal, to preserve its hard-won right to claim treaty hunting and gathering rights in the future.

2. The Snoqualmie Indian Tribe must prove the facts justifying its treaty status for hunting and gathering rights "anew" on remand before it can exercise those rights.

The Snoqualmie Tribe filed a motion for partial summary judgment in the district court. Dkt # 14, January 14, 2020. The motion asserted that there are no undisputed facts. It relied in part on the findings made as part of the Department of Interior's Determination to Acknowledge the Snoqualmie Tribe as an Indian tribe and the Snoqualmie Tribe's *Carcieri* analysis. *See* 62 Fed. Reg. 45864 (Aug. 29, 1997); Motion, Dkt. #14, Jan. 14, 2020, pp. 5-7, 9-10. *See Carcieri v. Salazar*, 555 U.S. 379 (2009).

The en banc Court in *Samish*, however, ruled that the fact of Snoqualmie federal recognition "cannot be given even presumptive weight in subsequent treaty litigation." 593 F.3d at 801. To gain specific treaty rights that have not been adjudicated, the Snoqualmie Tribe "will have to proceed, however, by introducing its factual evidence anew." *Id.* at 800.[21]

The Snoqualmie Tribe will have to start from the beginning on remand to establish its factual treaty status if the substance of its case can go forward. Successful establishment of treaty status is by no means certain.

[21] Tribes opposing Snoqualmie treaty hunting and gathering rights may not have had the opportunity to controvert or cross-examine evidence submitted by Snoqualmie in its Federal Acknowledgment proceeding or *Carcieri* determination. They will have that opportuity in a treaty rights proceeding. *See* Tulalip Tribes' Motion to Intervene, Dkt. #17, January 16, 2020; Motion of Seven Tribes to file an amicus brief in opposition to Snoqualmie's claim to treaty hunting and gathering rights. Dkt. #26, January 31, 2020.

3. The Ninth Circuit en banc issue preclusion exception in *Samish* is likely limited only to the Samish Indian Nation and Snoqualmie Indian Tribe.

The en banc Court's ruling in *Samish* is likely limited only to the Samish and Snoqualmie Tribes, tribes that petitioned for federal acknowledgment under the 1978 Federal Acknowledgment Regulations which have since been amended. In holding that the Samish Tribe could litigate treaty claims that had not yet been adjudicated, the en banc *Samish* Court relied heavily on the fact that the Samish Tribe had proven in its federal acknowledgment proceeding the same facts necessary to exercise treaty rights: that the Samish Tribe had "functioned as [a] continuous, separate, distinct and cohesive Indian cultural or political community" from treaty time to the present. 593 F.3d at 794. The Court held that the administrative court's "inconsistent" factual findings and conclusions in the Samish Tribe's Federal Acknowledgment did not justify reopening the long-standing judicial decision in *Washington II* on which many parties had relied. *Id.*, 593 F.3d at 799, 800. In then going on to hold that tribes like the Samish Tribe could litigate treaty rights claims not yet adjudicated, the en banc Court stated that the Samish Tribe would have to establish "its factual evidence anew" – that it has functioned as a separate Indian tribal government from treaty time to the present.

The Samish Tribe had to establish in its federal acknowledgment proceeding that it existed continuously as a tribe from treaty time (or before) to the present and

was a successor to the historical Samish Tribe because the 1978 Federal Acknowledgment Regulations required that level of proof.[22] These regulations were amended in 1994 to only require identification as "an American Indian entity on a substantially continuous basis since 1900." 59 Fed.Reg. 9280, 9295 (Feb. 25, 1994) (25 C.F.R. §83.7(a)).[23] Therefore, unlike Samish and Snoqualmie, any other tribe that seeks federal acknowledgment in the future would not have to prove that

[22]43 Fed. Reg. 39361, Sept. 5, 1978, redesignated at 47 Fed. Reg. 13327, March 30, 1982; 25 C.F.R. §83.3(a)(1991) ("This part . . . is intended to apply to groups which can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present."; 25 C.F.R. §§83.7(a) ("petitioner has been identified from historical times until the present on a substantially continuous basis, as 'American Indian.'"), 7(c) ("facts which establish that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present."). *See* 25 C.F.R. §83.1(l) ("'Historically', 'historical', or 'history' means dating back to the earliest documented contact bertween the aboriginal tribe from which the petitioners descended and citizens or officials of the United States.").

The Samish Tribe subsequently proved again that it is a succesor to the historical Samish Tribe in the context of a fee-to-trust determination that includes a "*Carcieri* analysis." *See Carcieri, supra.* Decision of the Bureau of Indian Affairs, Northwest Regional Director, on the Samish Indian Nation's Application to take the Campbell Lake South Property into Trust, Nov. 9, 2018, Attachment 1 "NW Regional Director's Analysis of Whether Samish Were Under Federal Jurisdiction in 1934", attached as Ex. 2. The Samish Tribe requests that the Court take Judicial Notice of this Decision and Analysis pursuant to FRE 201 (c)(2). *See Reyn's Pasta Bella, LCC v. Visa, USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006); *Clearly Food & Beverage, Inc. v. Top Shelf Beverage, Inc.*, 102 F.Supp.3d 1154, 1161 (W.D. Wash. 2015) (public records of administrative agencies are appropriate for judicial notice).This decision is currently on appeal to the Interior Board of Indian Appeals. *Swinomish Indian Tribal Community v. Northwest Regional Director, Bureau of Indian Affairs*, U.S. Dept of Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals, Docket No. IBIA 19-030.

[23] The Federal Acknowledgment Regulations were reformatted and modified in 2015. 80 Fed.Reg. 37887 (July 1, 2015). The 1900 standard now appears in 25 C.F.R. §83.11(a). Pursuant to 25 C.F.R. §83.3(g) in the 1994 regulations, 59 Fed.Reg. 9380, 9294 (Feb. 25, 1994), the Samish Tribe was given the choice whether to proceed under the original 1978 or revised 1994 Federal Acknowledgment Regulations. Samish chose to proceed under the more difficult 1978 regulations. *See United States v. Washington*, Subproceeding No. 01-2, Samish Indian Nation's FRCP 60(b)(6) Motion to Reopen Judgment, Dkt. #1, December 14, 2001, Ex. 7, Final Determination to Acknowledge the Samish Tribal Organization as a Tribe, Nov. 8, 1995, p.1 (Samish Tribe requested to be evaluated under the 1978 regulations). The substance of this decision was reversed and the administrative court's findings reinstated in *Greene III*, *supra*.

they are descended from a treaty tribe and have continuously existed as a tribal government from treaty time in 1855 up to the present to achieve recognition. Any federal acknowledgment under the current regulations would likely have no effect in subsequent treaty litigation or permit such newly recognized tribe to introduce its treaty evidence "anew" in any subsequent treaty litigation. *Samish*, 593 F.3d at 800.

It is therefore likely that the en banc Court's narrow exception to issue preclusion set out in *Samish* for tribes that successfully proved in Federal Acknowledgment proceedings that they have continuously existed since 1855 treaty time will not apply to any other Indian group or tribe petitioning in the future for federal acknowledgment. The en banc Court's holding that the newly recognized Samish Tribe can claim treaty rights not yet adjudicated applies to Samish and Snoqualmie, as tribes which established continuous political status back to the 1855 treaty. This means that the en banc Court's ruling in *Samish* is extremely limited and narrow and will not lead to a flurry of litigation in the future.

CONCLUSION

The Samish Tribe has been litigating its treaty status and status as a federally-recognized tribe for the last 45 years. In 2010, after litigation in several federal courts and after six federal appellate decisions, the en banc Ninth Circuit in *Samish*, while putting an end to the Samish Tribe's quest to reopen the adverse

treaty fishing rights decision against it in *Washington II*, created an exception to general issue preclusion for future litigation of unadjudicated treaty claims for tribes like Samish that in their administrative federal acknowledgment proceedings had shown the same proof necessary to exercise treaty rights – continuity of tribal government from treaty time to the present and descendancy from and successorship to the historical tribe that signed the treaty.

This issue preclusion exception created by the en banc Court is only for treaty claims that have not been previously adjudicated. Only off-reservation treaty fishing rights have been adjudicated in *U.S. v. Washington*, and many regimes and agreements have been created in reliance on that decision by various parties. Treaty hunting and gathering rights have not been adjudicated, and newly recognized tribes like the Samish and Snoqualmie Tribes therefore can claim such treaty rights but must follow the specific process laid out by the en banc Court to successfully establish eligibility and authority to exercise such treaty rights. In particular, the Tribe claiming such unadjudicated treaty rights must introduce the factual evidence substantiating its treaty status anew, and it will almost certainly be opposed by other parties. The Samish Tribe plans to take advantage of the Court's ruling in *Samish* in the future. The Samish Tribe believes the en banc Court's ruling is clear beyond any dispute, but the district court's ruling reflects that it and some parties do not understand it correctly. This Court needs to clarify and

reaffirm the en banc Court's rulings on this critical issue.

The Snoqualmie Tribe initiated its own treaty hunting and gathering case in district court against the State of Washington. The State of Washington filed a motion for summary judgment to dismiss the Snoqualmie Tribe's complaint based on sovereign immunity from suit and on other grounds. Despite the presence of several jurisdictional defenses which are normally decided before the court addresses the merits of a tribal dispute, the district court dismissed Snoqualmie's case on the merits, with prejudice. The district court ruled that the Snoqualmie Tribe is precluded by the decision in *Washington II* from raising or litigating any treaty rights claim, not just the treaty fishing rights claim decided in *Washington II*.

The district court's ruling ignores the issue preclusion exception decision made by the en banc Court in *Samish* to reconcile the conflicting factual findings in *Washington II* and the Samish Tribe's Federal Acknowledgment proceeding. The district court's decision adversely affects the Samish Indian Nation because the Samish Tribe is in the same factual and legal situation as the Snoqualmie Tribe, the party in the case before the district court.

Based on the discussion in this Brief, the Samish Tribe requests that the Court reverse the decision of the district court for the reason that it conflicts with the en banc Court's ruling in *Samish* that tribes like Samish and Snoqualmie are not precluded by *Washington II* from litigating unadjudicated treaty claims,

including hunting and gathering rights, so long as they follow the specific procedure set out in *Samish*, and remand this case to the district court for further proceedings consistent with the Court's decision and the en banc decision in *Samish*. Rulings on any other subject would be premature at this time.

Dated: July 31, 2020.

Respectfully submitted,

s/ Craig J. Dorsay
Craig J. Dorsay

s/ Lea Ann Easton
Lea Ann Easton

s/ Kathleen M. Gargan
Kathleen M. Gargan

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Attorneys for Samish Indian Nation, Intervenor-Appellant

STATEMENT OF RELATED CASES

There are no related cases pending before the Court. The Snoqualmie Tribe filed a separate appeal from the district court's decision, No. 20-35346, but the two appeals have now been consolidated.

Dated this 31st day of July, 2020.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay, WSBA 9245

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 11,537 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

I certify that 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 Times New Roman 14 Point Font.

DORSAY & EASTON LLP

By: s/ Craig J. Dorsay Date: July 31, 2020.
Craig J. Dorsay, WSBA 9245
Attorneys for Samish Indian Nation, Intervenor-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 31, 2020.

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.

Dated: July 31, 2020.

DORSAY & EASTON LLP

s/ Craig J. Dorsay
Craig J. Dorsay, WSBA 9245
Attorneys for Samish Indian Nation, Intervenor- Appellant

EXHIBITS TO

BRIEF OF INTERVENOR-APPELLANT

SAMISH INDIAN NATION

Exhibit 1 - November 1, 1996 – Greene v. Babbitt Judgment

Exhibit 2 - November 9, 2018 – Final Fee-to-Trust Decision with Attachment – Campbell Lake South Property

UNITED STATES DISTRICT COURT
Western District of Washington

JUDGMENT IN A CIVIL CASE

MARGARET GREENE, et al.

v. CASE NUMBER: **C89-645Z**

BRUCE BABBITT, et al.

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

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

IT IS ORDERED AND ADJUDGED THAT

(1) The Court enters judgment in favor of the plaintiff, and holds that the Department of Interior violated the Fifth Amendment due process clause and § 553 of the Administrative Procedure Act [5 U.S.C. § 553], in connection with the acknowledgement process of the Samish Tribal Organization as an Indian tribe pursuant to 25 C.F.R. Part 83.

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

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

1. Part of the Noowhaha tribe merged with the Samish (see ALJ Recommended Decision at 22; Final

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(Rev 8/82)

Determination dated November 8, 1995, at 12-13, 32).

2. Many of the Samish families that settled on the Swinomish Indian Reservation did not relinquish their Samish affiliation (see Final Determination at 35, and references to record contained therein).

3. The Department of Interior could not adequately explain why the Samish had been omitted from a list of federally recognized tribes prepared during the 1970s (see ALJ Findings 1-3; Final Determination at 16, 38-39).

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

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

BRUCE RIFKIN, Clerk

November 1, 1996
Date

By Casey Condon
Casey Condon
Deputy Clerk

AO 72
(Rev 8/82)

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Northwest Regional Office
911 NE 11th Avenue
Portland, Oregon 97232-4169

NOV 0 9 2019

In Reply Refer To:
Realty Department

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

The Honorable Tom Wooten
Chairman
Samish Indian Nation
Post Office Box 217
Anacortes, Washington 98221

Dear Chairman Wooten:

This is the decision of the Bureau of Indian Affairs ("BIA"), Northwest Regional Director, on the Samish Indian Nation's ("Samish Nation" or "Samish" or "Nation") land into trust application for the property more fully identified below, known as the "**Campbell Lake South Property**" consisting of 6.70 acres, more or less, and located in Skagit County, Washington. The property is currently used for both a buffer and another point of ingress and egress to the Nation's existing 79 acres and will continue in its current use as the Nation does not plan to change the use of the property.

1. Application Information

The Samish Nation requested by Resolution No. 2011-11-012 (dated January 27, 2016) and by an updated Fee-to-Trust application (dated March 18, 2016) that the United States acquire a 6.70-acre tract in trust for the use and benefit of the Nation and its membership.

The Nation acquired the land from John L. and Karolyn M. Sullivan, by Deed dated May 7, 2010 and recorded the purchase on May 27, 2010 in Skagit County, Washington, under document number 2010005270044 and Elden G. and Mary J. Awes, by Deed dated December 27, 2002 and recorded the purchase on January 3, 2003 in Skagit County, Washington, under document number 200301030107.

2. Land Description of the Property

The subject property is contiguous as it shares a common boundary with Tribal Trust Tract 130-T1216. As such, the subject property is considered an on-reservation acquisition.

The land is described as follows:

PARCEL "A":
That portion of Government Lot 2 of Section 18, Township 34 North, Range 2 East, W.M., described as follows:

Commencing on the centerline of vacated Lincoln Avenue in vacated "Carlyle's Addition to Fidalgo City, Washington", recorded in Volume 2 of Plats, page 3, records of Skagit County, 200 feet North of the South line of said Carlyle's Addition; thence West 200 feet to the true point of beginning of this description; thence West to the Southeasterly line of State Highway 20 as it existed on June 16, 1932 (being the same shown as "Permanent Highway No. 18" on a Washington State Department of Transportation right-of-way plan dated June 1932 on Sheet 1 of 3); thence Northeasterly along the Southeasterly line of said Highway 20 to a point 200 feet West of the centerline of Lincoln Avenue; thence South to the true point of beginning; EXCEPT therefrom any portion lying within the right-of-way for Permanent Highway No. 18 as conveyed to Skagit County by Auditor's File No. 251879.

EXCEPT portion conveyed to the State of Washington under Auditor's File No. 200701290009.

All of the above being vacated portions of Lake Avenue, Thirteenth Street, Blocks 9 and 11 of vacated "Carlyle's Addition to Fidalgo City, Washington", as per plat recorded in Volume 2 of Plats, page 3.

PARCEL "B":

That portion of vacated "CARLYLE'S ADDITION TO FIDALGO CITY, WN.", as recorded in Volume 2 of Plats, page 3, records of Skagit County, TOGETHER WITH that portion of vacated Lake Avenue, if any, that has reverted thereto by operation of law, described as follows:

Beginning on the Southeasterly line of State Highway 20, (shown as "Permanent Highway No. 18" on a Washington State Department of Transportation right-of-way plan dated June 1932 on Sheet 1 of 3) 200 feet West of the centerline of Lincoln Avenue; thence South to a point of intersection with the South line of 13th Street as platted in said Addition produced West; thence East to the centerline of Lincoln Avenue; thence North to the Southeasterly line of State Highway 20; thence Southwesterly along the Southeasterly line of Highway 20 to the point of beginning; ALSO, vacated Lots 21 to 30 inclusive and Lot 31 in Block 8, vacated, of "CARLYLE'S ADDITION TO FIDALGO CITY, WN.", as per plat recorded in Volume 2 of Plats, page 3, of the records of Skagit County; TOGETHER WITH the East ½ of vacated Lincoln Avenue adjoining; TOGETHER WITH a non-exclusive easement for ingress, egress, vehicular and pedestrian travel and for utilities, over, along, under and across an existing access road, the same being 20 feet in width and the center line of which is described as beginning at

the intersection of the South line of Highway 20 and the East line of vacated Lot 24, Block 9, all vacated of "CARLYLE'S ADDITION TO FIDALGO CITY, WN.", thence running Easterly 300 feet, more or less, to the centerline of vacated Lincoln Avenue in said addition, the same being the West line of property hereinabove described; EXCEPT that portion of said Easement conveyed to the State of Washington by Auditor's File No. 200705090083.

PARCEL "C":

That portion of Government Lot 2, Section 18, Township 34 North, Range 2 East, W.M., lying within the following described tract:

Vacated Blocks 9 and 10 of "CARLYLE'S ADDITION TO FIDALGO CITY", as per plat recorded in Volume 2 of Plats, page 3, records of Skagit County, Washington; TOGETHER WITH those portions of the following named vacated streets, which have reverted thereto by operation of law: 12th Street, Lincoln Avenue, 13th Street, Washington Avenue and Lake Avenue;

EXCEPT FROM SAID TRACT the four following described parcels:

1. That portion thereof conveyed to John L. Sullivan by Deed recorded under Auditor's File No. 8206180069 and re-recorded under Auditor's File No. 9101100012.

2. That portion thereof conveyed to Mary Jane Awes, et ux, by Deed recorded under Auditor's File No. 8206100003.

3. That portion thereof lying within the right-of-way for Permanent Highway No. 18 as conveyed to Skagit County by Auditor's File No. 251879.

4. That portion thereof, if any, lying Northwesterly of the Southeasterly line of the right-of-way for State Highway No. 20 (shown as "Permanent Highway No. 18" on a Washington State Department of Transportation right-of-way plan dated June 1932 on Sheet 1 of 3).

All situate in the County of Skagit, State of Washington. Containing 6.70 acres, more or less.

The Land Description Review was approved by the Bureau of Land Management's Chief Cadastral Surveyor on November 28, 2011. The Land Description Review states that the land description is acceptable.

I find that the Nation has fulfilled the requirements of 25 C.F.R. § 151.9 governing requests for approval of acquisitions because Resolution No. 2011-11-012 sets out the identity of the parties, a description of the land, and other information showing that the acquisition comes within 25 C.F.R. Part 151.

3. Regulatory requirements: 25 C.F.R. Part 151

This decision of the Northwest Regional Director, Bureau of Indian Affairs is discretionary. In evaluating the Nation's request to have land taken into trust, the BIA must consider the criteria set out in 25 C.F.R § 151.10 (a) through (c) and (e) through (h). Proof that the Northwest Regional Director considered the factors set forth in 25 C.F.R. § 151.10, must appear in the administrative record; however, there is no requirement that the BIA reach a particular conclusion concerning each factor. Nor must the factors be weighed or balanced or exhaustedly analyzed in a particular way.[1]

3.1 151.3(a) – Department's land acquisition policy

I find that this acquisition is consistent with the Department's land acquisition policy because:

1. The Nation already owns the land as evidenced by the Statutory Warranty Deeds. The Office of Solicitor, Pacific Northwest Region, U.S. Department of the Interior, reviewed the title commitment and provided Preliminary Opinion of Title BIA.PN.16424, dated September 26, 2018 finding title vested in the Nation.

2. The Nation stated that the land is used for both a buffer and another point of ingress and egress to the Nation's existing 79 acres. The Nation will be increasing its land base, which provides greater options and flexibility for future actions to facilitate its self-determination goals. I find that this land is necessary for facilitating tribal self-determination.

3.2 151.3(a)(2) and (3)

I have determined that the regulatory requirements of 25 C.F.R. § 151.10 applies to this trust acquisition. 25 C.F.R. § 151.11 does not apply because the subject property is contiguous, as it has a common boundary with Tribal Trust Tract 130-T1216. As such, this subject property will be processed as an on-reservation acquisition.

3.3 151.10(a) – Statutory Authority

The primary authority to acquire land in trust for a federally recognized Indian tribe is Section 5 of the Indian Reorganization Act ("IRA"). Section 5 provides in relevant part:

> The Secretary of the Interior is authorized in his discretion, to acquire through purchase, relinquishment, gift exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations,

[1] *Thurston County, Nebraska v. Great Plains Regional Director, Bureau of Indian Affairs*, 56 IBIA 296; 300-01 (04/03/2013).

> including trust or otherwise restricted allotments, whether the allottee is living or deceased, for the purpose of providing land for Indians.[2]

Section 19 of the IRA defines those "Indians" eligible for its benefits as:

> "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood."[3]

For the reasons set forth in *Attachment 1: NW Regional Director's Analysis of Whether Samish were under federal jurisdiction in 1934* (attached), I find that the Nation satisfies the first definition of "Indian,"[4] which the United States Supreme Court has construed as meaning recognized tribes "under federal jurisdiction" in 1934, and therefore, the Secretary has the authority to take the subject land into trust for the Samish Indian Nation using the authority of Section 5 of the IRA.

3.4 151.10 (b) – Need for Additional Land

The United States holds 79 acres of land in trust for the Nation. The Nation requests the property to be acquired in trust by the United States in order to govern effectively and exercise self-determination. Trust status of the property will enable the Nation to exercise its inherent governmental authority for the benefit of its members and facilitate tribal self-determination. The property is located within the Nation's historical and aboriginal territory as set forth in anthropologist reports. The property will establish a land base for the Nation in an area that is central to the Nation's cultural and governmental activities.

Based on the above facts, and after having given scrutiny to the Nation's justification of anticipated benefits from the acquisition, I find that the Nation needs this additional land for self-government, self-sufficiency, self-determination purposes, and to increase its land base to better sustain the Nation and its members.

3.5 151.10 (c) – Purpose for which the land will be used

The Nation stated the purpose for the property is for both a buffer and another point of ingress and egress and will continue in its current use. The Nation does not plan to change the use of the land at this time. Therefore, there is no change in land use for the BIA to consider.

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[2] 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465).

[3] 25 U.S.C. § 5129 (bracketed numbers added).

[4] I did not determine whether or not Samish satisfies any other definition of Indian.

3.6 151.10 (e) – Impact on State and local governments' tax base

A Notice of Application was sent to the Governor of Washington, Skagit County Board of Commissioners ("Board of Commissioners"), and Swinomish Indian Tribal Community ("SITC") on September 25, 2018. The notice provides 30 days for a written response. The Governor of Washington and the Board of Commissioners received their notices on September 27, 2018 and SITC received their notice on September 28, 2018. The Governor of Washington, Skagit County, and SITC did not respond to the Notice of Application.

The impact on the State of Washington from the removal of the land from the property tax rolls will be minimal because the land has already been declared exempt from taxation for two of the parcels and the third parcel had a tax burden of $110.72. Therefore, there should be no measurable impact on the County or State based on the removal of the property from the tax rolls. SITC does not tax this parcel, so there will be no impact to their tax base.

3.7 151.10 (f) – Jurisdictional problems and land use conflicts

The State of Washington, the Board of Commissioners, and SITC did not respond to the Notice of Application, and thus, they did not raise any jurisdictional problems.

Currently, all parcels included within this application are zoned Rural Reserve by the Board of Commissioners. The Nation's use of the property will not conflict with the current zoning of the parcels. The Nation has obtained a Memorandum of Understanding ("MOU") between it and the Board of Commissioners regarding limits on development of the trust land adjacent to these parcels. The purpose of the MOU is to address specific jurisdictional issues between the two governments and maintain a cooperative working relationship.

Based on current information, BIA has no basis to conclude that jurisdictional problems or land use conflicts will arise as a result of this land acquisition. I find that there will not be any jurisdictional problems or potential land use conflicts if this land is acquired into trust status. Based on the preceding discussion, I find that my consideration of the criterion in 25 C.F.R. § 151.10(f) weighs in favor of the acquisition of the subject property.

3.8 151.10 (g) – Whether the BIA is equipped to discharge additional responsibilities

The Nation does not anticipate that the BIA will incur additional responsibilities as a result from the acquisition of the land in trust status. The Nation intends to be responsible for all expenses and maintenance with regard to said property and to handle any legal matters that may arise with regard to said property. There will only be duties associated with converting this land into trust and it will only affect Realty, Environmental Services, and Land, Titles and Records at the Northwest Regional Office.

I find that the BIA is equipped to discharge any minimal additional responsibilities resulting from the acquisition of this 6.70 acre parcel in trust status.

3.9 151.10 (h) – Environmental compliance

A Categorical Exclusion dated October 29, 2018, indicates that an environmental assessment is not required because the Nation indicated that no change in land use after acquisition is planned or known. Therefore, I find that approval of this acquisition falls under 516 DM 10.5(1) and is categorically excluded. Should future development occur, compliance with the National Environmental Policy Act may be required.

3.9.1 Historic/Endangered Species Compliance

Since there are no approved plans for further development of this property, I anticipate no impact to any historic or archaeological resources or to any threatened or endangered species that may exist on the property. Should future development occur, compliance with laws governing historic properties and endangered species, if applicable, will be required.

3.9.2 Phase I Environmental Site Assessment

Prior to deed acceptance, a Phase I Environmental Site Assessment will need to be conducted by a qualified Environmental Professional for the property. Additionally, the Phase I Environmental Site Assessment will need to be conducted according to the current ASTM Standards and 40 C.F.R. Part 312. The Phase I Environmental Site Assessment will need to be reviewed and approved by the Northwest Regional Environmental Scientist.

4. Conclusion

Based on the review of all of the documents identified in this decision and Attachment 1, I find that acquisition of the Campbell Lake South Property complies with all of the requirements of 25 C.F.R. 151 and Department and Regional Directives. Therefore, the application is hereby approved. The documents relied on or provided in support of the proposed acquisition are held at the NW Regional Office.

5. Appeal Rights

Any party who wishes to seek judicial review of this decision must first exhaust administrative remedies. The Northwest Regional Director's decision may be appealed to the Interior Board of Indian Appeals ("IBIA") in accordance with the regulations in 43 C.F.R. 4.310–4.340.

If you choose to appeal this decision, your notice of appeal to the IBIA must be signed by you or your attorney and must be either postmarked and mailed (if you use mail) or delivered (if you use another means of physical delivery, such as Federal Express or UPS to the IBIA within 30 days from the date of publication of this notice. The regulations do not authorize filings by facsimile or by electronic means. Your notice of appeal should clearly identify the decision being appealed. You must send your original notice of appeal to the IBIA at the following address: Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Suite 300, Arlington, Virginia 22203.

You must send copies of your notice of appeal to (1) the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, MS-4141-MIB, 1849 C Street NW, Washington, D.C. 20240; (2) each interested party known to you; and (3) the Northwest Regional Director. Your notice of appeal sent to the IBIA must include a statement certifying that you have sent copies to these officials and interested parties and should identify them by names or titles and addresses.
If you file a notice of appeal, the IBIA will notify you of further procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,

Northwest Regional Director

Enclosure

ATTACHMENT 1: NW REGIONAL DIRECTOR'S ANALYSIS OF WHETHER SAMISH WERE UNDER FEDERAL JURISDICTION IN 1934

In assessing whether the Samish Indian Nation ("Samish Nation" or "Samish" or "Nation") were under federal jurisdiction in 1934, I considered the voluminous submissions of the Samish Nation in favor of its application[1] and those of the Swinomish Indian Tribal Community ("SITC") opposing it.[2] I also considered the record of evidence compiled by the Office of Federal Acknowledgment ("OFA") in considering the Nation's petition for federal acknowledgment under 25 C.F.R. Part 83 ("Part 83");[3] the findings of fact and conclusions of law issued in litigation and administrative proceedings related thereto;[4] the various court

[1] Samish submitted a number of submissions in regards to whether the Samish where under federal jurisdiction in 1934. The major submissions include, but are not limited to the following: Memorandum, Dorsay & Easton, LLP to Mary Anne Kenworthy, Office of the Regional Solicitor, Department of the Interior (Dec. 7, 2011); Memorandum, Dorsay & Easton, LLP to Douglas W. Wolf, Office of the Solicitor, Department of the Interior (Jun. 8, 2012); Memorandum, Dorsay & Easton, LLP to Mary Anne Kenworthy, Office of the Regional Solicitor, Department of the Interior (Jun. 26, 2012); Memorandum, Dorsay & Easton, LLP to Mary Anne Kenworthy, Office of the Regional Solicitor, Department of the Interior (Feb. 28, 2013); Memorandum, Dorsay & Easton, LLP to Mariel Combs, Office of the Solicitor, Department of the Interior (Mar. 11, 2013); Chris Friday, Ph.D., "Samish Indian Nation History in Light of the Carcieri Decision: Expert Historian's Report" (Jun. 30, 2013) ("Friday Report"); Memorandum, Dorsay & Easton, LLP to James V. DeBergh, Office of the Solicitor, Department of the Interior (Jun. 6, 2016) (letter in response to SITC letter dated April 13, 2016 from Emily Haley); Memorandum, Dorsay & Easton, LLP to James V. DeBergh, Office of the Solicitor, Department of the Interior (Jun. 6, 2016) (letter in response to SITC letter dated April 13, 2016 from James Janetta); Memorandum, Dorsay & Easton, LLP to Jessie D. Young, Office of the Regional Solicitor, Department of the Interior (Aug. 10, 2017); Memorandum, Dorsay & Easton, LLP to Jessie D. Young, Office of the Regional Solicitor, Department of the Interior (Oct. 31, 2017).

[2] SITC submitted a number of submissions in regards to whether the Samish where under federal jurisdiction in 1934. The major submissions include, but are not limited to the following: Letter, Ziontz, Chestnut, Varnell, Berley & Slonim to Bureau of Indian Affairs ("BIA") Northwest Regional Director Stanley M. Speaks (Apr. 24, 2012); Letter, Swinomish Indian Tribal Community to BIA Northwest Regional Director Stanley M. Speaks (Oct. 20, 2014); Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks (Nov. 2, 2015); Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks (Nov. 24, 2015); Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks (Mar. 9, 2016); Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks (Jun. 21, 2016); E. Richard Hart, "Analysis of the Methodology of a Report of Dr. Chris Friday" (Nov. 21, 2016); Response to Friday Report, Memorandum from Marc Slonim, Ziontz Chestnut to James DeBergh, Office of the Solicitor, Department of the Interior (Nov. 28, 2016); Memorandum from Theresa Trebon, SITC Records Manager and Archivist (Nov. 28, 2016).

[3] *See* Memorandum, Recommendation and Summary of Evidence for Proposed Finding Against Federal Acknowledgment of the Samish Indian Tribe, Pursuant to 25 C.F.R. 83 (formerly Part 54), from Dep. Asst. Sec'y – Indian Affairs (Operations) to Assistant Secretary – Indian Affairs (Oct. 27, 1982) ("1982 Proposed Finding"); Memorandum, Recommendation and Notice of Final Determination Against Federal Acknowledgment of the Samish Indian Tribe Pursuant to 25 C.F.R. 83, from Dep. Asst. Sec'y – Indian Affairs (Tribal Services) to Assistant Secretary – Indian Affairs (Jan. 30, 1987) ("1987 Final Determination"); U.S. Dep't of the Interior, Bureau of Indian Affairs, Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe, 52 Fed. Reg. 3709 (Feb. 5, 1987); U.S. Dep't of the Interior, Assistant Secretary – Indian Affairs, Final Determination To Acknowledge the Samish Tribal Organization as a Tribe (Nov. 8, 1995) ("1995 Final Determination"); U.S. Dep't of the Interior, Bureau of Indian Affairs, Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe, 61 Fed. Reg. 15,825 (Apr. 19, 1996). This also includes material compiled and maintained by the Office of Federal Acknowledgment in its review of Samish's federal acknowledgment petition. In addition, I reviewed records related to *Greene v. Babbitt*, Dkt. No. Indian 93-1 (Aug. 31, 1995) (Torbett, ALJ) ("*Greene Administrative Proceedings*").

[4] *Greene Administrative Proceedings*, App. B, ¶¶ 1-3. This includes documents in boxes identified as *Greene v. Babbitt* in the Office of Federal Acknowledgement, 1951 Constitution Avenue, NW, Washington, D.C. 20240; and

decisions addressing the Nation's off-reservation treaty fishing rights under the 1855 Treaty of Point Elliott;[5] the Nation's eligibility for federal acknowledgment under Part 83;[6] and the Nation's eligibility for statutory and treaty benefits based on its federally acknowledged status.[7] Additionally, I reviewed a submission by the Upper Skagit Indian Tribe addressing Samish treaty rights but found that this submission did not directly address the Nation's jurisdictional status in 1934 directly.[8] For the reasons explained below, I conclude that the evidence demonstrates that the Nation was "under federal jurisdiction" in 1934 and that the Department has the authority to acquire the Campbell Lake Parcel in trust for the Nation under Section 5 of the Indian Reorganization Act ("IRA").[9]

I. BACKGROUND

The Samish Indian Nation is located in northern Puget Sound in Washington State. The aboriginal Samish were one of the Coast Salish tribes of Puget Sound, with territory centered on Guemes and Samish Island but including neighboring islands and portions of the mainland shore to the east.[10] By the 1840s, most Samish occupied a single large village on Samish Island. In the early 1850's, extensive white settlement of the Puget Sound area began.

Treaty of Point Elliott

The history of federal interactions with the Samish Nation is long and complex. It begins in 1855, when the Samish and other tribes entered the Treaty of Point Elliot with the United States. The Treaty of Point Elliott was one of several treaties negotiated by Washington Territorial Governor Isaac Stevens by which with Pacific Northwest tribes ceded land to the United States

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exhibits submitted by the Samish Nation and the Department's expert reports by Dr. Barbara Lane submitted in the *Washington* litigation. *See infra* n. 4.

[5] *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Washington I*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert denied sub nom Washington Reef Net Owners Association v. United States*, 423 U.S. 1086 (1976); *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979) ("*Washington II*"), *aff'd*, 641 F.2d 1368 (9th Cir. 1981) *cert. denied*, 454 U.S. 1143 (1982); *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Washington III*"); *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Washington IV*").

[6] *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059 (W.D. Wash. Feb. 25, 1992), *aff'd sub nom. Greene v. United States*, *aff'd sub nom. Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) ("*Greene I*"); *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene II*"); *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996) ("*Greene III*").

[7] *Samish Indian Nation v. United States*, 58 Fed. Cl. 114 (2003), rev'd in part, den. in part, 419 F.3d 1355 (Fed. Cir. 2005) ("*Samish II*").

[8] Letter, Upper Skagit Indian Tribe to BIA Northwest Regional Director Stanley Speaks (Mar. 9, 2017).

[9] 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465). The compilers of the U.S. Code have editorially reclassified section 5 of the IRA, along with other sections of the IRA. This analysis will use the new designations or the section of the original statute.

[10] The following information reflects the general conclusions of the Department in the 1982 Proposed Finding, the 1987 Final Determination, and the 1995 Final Determination. While the district court vacated the 1987 Final Determination as a whole, these findings in particular were never challenged. The 1995 Final Determination set out additional findings of fact.

but retained various rights.[11] Though not expressly mentioned in the Treaty, the United States District Court for the Western District of Washington in 1979 confirmed that the Samish were parties thereto and were included under the signature of Chow-its-hoot, a Lummi leader who signed on behalf of the Samish and other northern bands.[12]

Prior to treaty negotiations, Samish villages were located on Samish Island, Guemes Island, Fidalgo Island, and Lopez Island, in the Puget Sound area of Washington State. The first two locations were exclusively Samish.[13] In 1875, the Samish village at Samish Island was replaced by a village established at New Guemes, which was maintained until around 1905. Some Samish from, or associated with, this village moved to the Swinomish and Lummi Reservations beginning before 1900 and continuing into the 1920's. The reservation families continued to be somewhat distinct as a Samish community even after moving to the reservations, notwithstanding their social and political participation in the communities which emerged on those reservations. After 1905, other Samish from the village at New Guemes became part of a small Indian settlement at Ship Harbor, which was already largely Samish. This settlement persisted until approximately 1930. Still other Samish families did not move to the reservations. From the late 19th-century to the present, these non-reservation families continued in significant contact with the reservation families, even though they had married non-Indians and lived elsewhere.[14] A portion of these reservation and non-reservation Samish have continued to exist as a tribe under a distinct political leadership, including the off-reservation families, from the early 1900s to the present.[15] As further explained below, federal officials provided services to and exercised jurisdiction over the Samish on- and off-reservation populations into the twentieth-century.

As late as the 1960s, the Samish appeared on an unofficial list prepared by the BIA of tribes with which the agency "had dealings."[16] Although "not intended 'to be a list of federally recognized

[11] 1995 Final Determination at 5; *United States v. Washington*, 384 F.Supp. 312, 331-32 (W.D. Wash. 1974); *Samish II*, 419 F.3d at 1359, citing *United States v. Washington*, 641 F.3d 1368, 1373–74 (9th Cir. 1981).

[12] *Washington II*, 476 F.Supp. at 1106.

[13] *Samish v. U.S.*, 6 Ind. Cl. Comm. Docket 261, 174 (March 11, 1958); Barbara Lane, *Identity, Treaty Status and Fisheries of the Samish Nation of Indians*, 6–7 ("Lane Samish Report"). Dr. Barbara Lane was one of the Department's expert witnesses who drafted numerous reports in the *Washington I* and *Washington II* litigation. The federal district court in *Washington II* found the Lane Samish Report "highly credible." *Washington II*, 459 F. Supp. at 1059.

[14] 1995 Final Determination at 5, 8.

[15] *Id*. at 8.

[16] *Greene Administrative Proceedings*, App. B, ¶ 1.

tribes as such,'"[17] a 1966 draft version of the list included the Samish Tribe.[18] That same year, the BIA listed the Samish Tribe as a tribe not organized under Section 16 of the IRA in a memorandum on "Tribal Organizations: Indian Reorganization Act; Oklahoma Indian Welfare Act; Other Organizations; Unrecognized."[19] Also in 1966, the Acting Superintendent of the Western Washington Agency wrote to Harold C. Hatch, Chairman of the Samish Tribe, regarding the names and positions of the Samish Tribe's tribal officers, requesting that the Samish Tribe inform the BIA of any changes to their tribal leadership.[20] For reasons that remain unclear, however, a 1969 version of the BIA's list omitted the Samish Nation,[21] and in the early 1970s federal officials began referring to the Samish Tribe as not being federally recognized.[22] Cognizant of this, in 1972, the Samish Tribe filed its first petition for federal acknowledgment, but the government did not respond to its request.[23]

Washington I & *II*

The United States filed suit against the State of Washington in 1970 seeking a declaratory judgment concerning off-reservation treaty fishing rights of Washington State tribes under the 1855 Treaty of Point Elliott.[24] In 1974, Judge Hugo Boldt issued his landmark decision in *Washington I*, which determined the off-reservation fishing rights of tribes' party to the Treaty of Point Elliott. The Samish Indian Nation was not a party to *Washington I*, but thereafter intervened to assert off-reservation treaty fishing rights. In *Washington II*, Judge Boldt concluded that while the Samish was a party to the Treaty of Point Elliott, because they were not federally recognized as an Indian governmental or political entity, they were not successors in interest to the off-reservation treaty fishing rights of the Treaty Samish.[25] On appeal, the Ninth Circuit

[17] *Samish II*, 419 F.3d at 1359 (Fed. Cir. 2005), citing *Samish Tribe of Indians v. United States of America*, 6 Ind. Cl. Comm. 169 (1958); *see also Greene Administrative Proceedings*, App. B, ¶ 1 (BIA official who testified at the Samish recognition proceeding stated that the list was not intended to be to be a list of federally recognized tribes, but "it may have evolved into that…under Congressional pressure to make clearer distinctions between recognized and non-recognized tribes").

[18] *Greene Administrative Proceedings*, App. B, ¶ 1.

[19] Memorandum from BIA, Tribal Operation Assistant Patricia Simmons to BIA, Chief Tribal Governmental Section of BIA (Jul., 21 1966), and accompanying list.

[20] Letter from John B. Benedetto, Acting Superintendent Western Washington Agency to Harold C. Hatch, Chairman Samish Tribe (January 5, 1966).

[21] The Court in *Greene III*, 943 F. Supp. at 1288 n.13, reinstated the three contested findings of the Administrative Law Judge, including the finding that the omission of the Samish Tribe from the unofficial 1969 list was "neither based on actual research, nor was it intended to be used as the basis for determining which Indian groups are to be recognized by the United States."

[22] *See, e.g.*, Letter from Superintendent of the Western Washington Agency to Samish Chairman Margaret Greene (Jan. 21, 1972).

[23] *Samish II*, 419 F.3d at 1360.

[24] *Washington I*, 384 F. Supp. at 327. The original lawsuit included seven tribes, and later seven more tribes joined.

[25] *Washington II*, 476 F. Supp. at 1106.

reversed Judge Boldt's holding that only recognized tribes may exercise treaty rights, [26] but the divided panel found that Judge Boldt's other factual findings surrounding Samish supported the denial of relief.[27]

Petition for Federal Acknowledgment under 25 C.F.R. Part 83

While the Nation's motion to intervene in *Washington II* was pending, the Department issued regulations governing the procedures by which tribes can obtain federal acknowledgment.[28] Following its appeal of Judge Boldt's decision in *Washington II*, the Nation submitted a new petition for federal acknowledgment pursuant to the Department's Part 83 regulations.[29] The Nation submitted 190 exhibits as part of its petition – 146 more than it had proffered in *Washington II* and about half of which dated from between 1850 and 1940.[30] In 1987, however, the Assistant Secretary – Indian Affairs ("Assistant Secretary") denied the Nation's petition for federal acknowledgment after determining that the Nation had failed to meet three of Part 83's seven mandatory acknowledgment criteria.[31]

Greene Litigation

The Nation challenged the Assistant Secretary's determination, alleging violations of due process.[32] In 1992, a federal district court agreed and found that the hearing afforded to the Nation on its petition for federal acknowledgement did not comport with constitutional principles of due process.[33] The district court ordered the BIA to vacate its denial determination and hold a new hearing that conformed to the requirements for a formal adjudication under the Administrative Procedures Act.[34] The Nation and the United States agreed that an administrative

[26] *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981).

[27] *Id*. at 1373; *see also id.* (Canby, J.) (dissent) (agreeing federal recognition not essential to exercise of treaty rights but rejecting that district court had resolved the determinative question of the Nation's continuity or provided means for doing so).

[28] 43 Fed. Reg. 39,361 (Aug. 24, 1978). The Part 83 regulations were originally classified at 25 C.F.R. Part 54. The Department amended the mandatory acknowledgment criteria in 1994, 59 Fed. Reg. 9,280 (Feb. 25, 1994), and again in 2015. 80 Fed. Reg. 37,862 (Jul. 1, 2015).

[29] *Samish II*, 419 F.3d at 1360.

[30] *See* Appendix A Quantitative Comparison found in Samish's federal acknowledgment records. *See infra* n. 4. This document also states that there were an additional 100 exhibits to be submitted as an addendum in April 1981. The Nation submitted a further 173 sets of tribal minutes; 590 family ancestry charts; and BIA family trees from 20 principal families.

[31] 1987 Final Determination. The Assistant Secretary had issued a proposed finding against federal acknowledgement in 1982. *See Samish Indian Tribe; Proposed Findings Against Federal Acknowledgment*, 47 Fed. Reg. 50,110 (Nov. 4 1982).

[32] *Greene I*, 64 F.3d 1266.

[33] *Id*. Because the District Court vacated the Department's decision denying Samish's recognition, I reject any reliance on the findings in the 1982 Proposed Findings or the 1987 Final Determination to the extent inconsistent with either ALJ Torbett's decision, the 1995 Final Determination, or the decision in *Greene III*.

[34] *Id.*

law judge ("ALJ") would conduct an administrative hearing to prepare findings of fact and a recommendation for the Assistant Secretary on whether the Nation met the mandatory acknowledgment requirements of Part 83 based on the existing administrative record and testimony produced at the hearing.[35]

The district court denied a motion by the Tulalip Tribes to intervene in the administrative proceedings on the grounds that federal acknowledgment of the Nation would not dilute the Tulalip Tribe's adjudicated treaty fishing rights, a determination upheld by the Ninth Circuit.[36] Recognizing that the inquiries into treaty rights and federal acknowledgment are similar, the court held that each determination "serves a different legal purpose and has an independent legal effect."[37] While nonrecognition can result in the loss of statutory benefits, it can have "no impact on vested treaty rights," and by the same token a tribe "need not assert treaty fishing rights to gain federal recognition."[38]

In extensive hearings lasting nine days before ALJ David L. Torbett in 1994, the Nation and the United States argued whether the Nation met the Part 83 mandatory acknowledgment criteria. In an exhaustive opinion issued the following year,[39] ALJ Torbett concluded "there is no question" that a preponderance of evidence supported the Nation "as to each and every element contained in the recognition regulations," and that it is "reasonable and believable that the Samish have continually existed as an Indian tribe up until this very day."[40] In 1995, the Assistant Secretary

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[35] *Greene Administrative Proceedings* at 1–2.

[36] *Greene II*, 996 F.2d at 978.

[37] *Id*.

[38] *Id*. at 977.

[39] ALJ Torbett's decision in the *Greene Administrative Proceedings* consisted of: (1) a summary of the evidence; (2) a discussion and recommendation; (3) an appendix discussing the burden of proof; and (4) an appendix enumerating 205 proposed findings. The Ninth Circuit concluded that ALJ Torbett "conducted a thorough and proper hearing on the question of the Samish's tribal status, and made exhaustive proposed findings of fact after considering all the evidence and the credibility of the witnesses." *Greene III*, 943 F. Supp. at 1288. The Ninth Circuit agreed, finding that ALJ Torbett had "carefully considered and weighed all the evidence, including the testimony of the parties' witnesses, and made findings consistent with the evidence. *Id*. at 1289.

[40] *Greene Administrative Proceedings* at 19. The criteria that was used at the time to determine if Samish should be recognized under the provisions of 25 C.F.R. Part 83 are as follows: (a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal"…; (b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area; (c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present; (d) A copy of the group's present governing document, or in the absence of a written document,. a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members; (e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity…; (f) The membership of the petitioning group is composed principally of persons who

ultimately issued a final determination that the Nation met the mandatory acknowledgment criteria in Part 83.[41]

Washington III

Following federal acknowledgment, the Nation in 2002 moved to reopen the previous denial of its off-reservation treaty fishing rights.[42] Pursuant to Fed. R. Civ. P. 60(b), the Nation argued that federal acknowledgment constituted an "extraordinary circumstance" that justified re-examining *Washington II*. The district court denied the Nation's motion, concluding that "a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights."[43] The Nation appealed and the Ninth Circuit reversed and remanded in *Washington III*, holding that while federal recognition is not necessary for an exercise of treaty rights, it is sufficient because federal acknowledgment is "determinative" of tribal organization, the issue on which the Nation was denied treaty fishing rights in *Washington II*.[44]

On remand the district court again denied the Nation's motion,[45] finding that to do otherwise would conflict with the Ninth Circuit's decisions in *Greene* holding that federal recognition had no effect on treaty rights.[46] If recognition did not determine treaty status, then the Nation's acknowledgment could "not of itself justify" granting the Nation's motion.

Washington IV

The Nation again appealed. The Nation's appeal brought into focus "[t]he nature and severity" of a conflict between the Ninth Circuit's *Greene* and *Washington* lines of authority.[47] This prompted the Court to take up the matter *en banc* even before a panel decision could issue.[48]

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are not members of any other North American Indian tribe; (g) the petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship."

[41] *Supplemental Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe*, 61 Fed. Reg. 26,922 (May 29, 1996). The Assistant Secretary issued the 1995 Final Determination as a result of the *Greene Administrative Proceedings*. The Nation challenged the 1995 Final Determination for omitting certain findings of fact by ALJ Torbett, arguing that the findings were "necessary to the tribal recognition process." *Greene III*, 943 F. Supp. at 1287. Because of ex parte communications between the government's attorneys and the Assistant Secretary "ma[de] a remand inappropriate," the district court reinstated the findings itself. *Id*. at 1288-89.

[42] *Greene II*, 996 F.2d at 977.

[43] *Washington III*, 394 F.3d at 1156, citing *United States v. Washington*, No. CV 70–09213, Subproceeding No. 01–2, slip op. at 13, 16 (W.D. Wash. Dec. 19, 2002). The district court also noted that the Nation had not alleged that the *Washington II* proceeding was fundamentally unfair or that the Nation had been prevented from adducing evidence in support of its claim. *Id*.

[44] *Id*. at 1161.

[45] *United States v. Washington*, 2008 WL 6742751 (W.D. Wash. Sept. 2, 2008), *aff'd,* 593 F.3d 790 (9th Cir. 2010) (en banc).

[46] *Id.*

[47] *Washington IV*, 593 F.3d at 798.

[48] *Id*. at 798 n. 9.

Overruling its decision in *Washington III*, the Ninth Circuit this time upheld the district court's denial of the Nation's motion. The *en banc* opinion in *Washington IV* overruled *Washington III*, which held that federal acknowledgment could warrant reopening a prior denial of treaty rights, and upheld the denial of the Tribe's 60(b) motion.

Washington IV held that any inconsistency between the Assistant Secretary's decision to acknowledge the Nation and the factual findings adjudicated in *Washington II* did not in itself provide sufficient grounds to re-open *Washington II*.[49] The Ninth Circuit relied on the fact that the Nation had had both an incentive and an opportunity to present to Judge Boldt the evidence it later provided to the Department under Part 83.[50] Re-opening *Washington II* based on evidence that could have been presented earlier could have "a particularly severe impact" on tribes whose treaty fishing rights had already been adjudicated.[51] The Ninth Circuit agreed with the district court that concerns for finality "loom[ed] especially large" because of the detailed regime for regulating fishing rights established by *Washington* over the years.[52]

Washington IV also reaffirmed that treaty litigation and recognition proceedings were "fundamentally different" and had no effect on one another.[53] Federal acknowledgment establishes a 'government-to-government relationship' between a recognized tribe and the United States and is "a 'prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.'" [54] Acknowledgment "brings its own obvious rewards," not least of which is "'the eligibility of federal money for tribal programs, social services and economic development.'"[55] Given this fundamental distinction, the Ninth Circuit concluded that "the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation."[56] The Nation did not seek a writ certiorari from the Ninth Circuit's decision in *Washington IV*, and today concedes that the issues litigated there are closed.[57]

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[49] *Washington IV*, 593 F.3d at 799.

[50] *Id.*, citing *Washington v. United States*, 2008 WL 6742751 at *22.

[51] *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) (en banc).

[52] *Id*. The district court had expressed concerns for finality and for disrupting the court's on-going management of the *Washington* adjudication, whose docket included over 19,000 entries. *See United States v. Washington*, 2008 WL 6742751 at *21 (W.D. Wash. Sept. 2, 2008) (unreported).

[53] *United States v. Washington*, 593 F.3d at 800.

[54] *Id*. at 801, citing 25 C.F.R. § 83.2.

[55] *Id.*, citing *Greene v. Babbitt*, 996 F.2d 973, 978 (9th Cir. 1993).

[56] *Id*.

[57] Memorandum Response, Craig J. Dorsay, Esq., to James V. DeBergh, Attorney-Advisor, Dep't. of the Interior, Office of the Solicitor at 10 (Jun. 3, 2016) (Nation precluded from relitigating off-reservation treaty fishing rights).

Prior Fee-to-Trust Determinations

Since its federal acknowledgment in 1996, the Nation has purchased land and buildings in Skagit County, Washington, for various administrative purposes. In 2006, the Department acquired property known as the Campbell Lake Homeland in trust for the Nation pursuant to Section 5 of the IRA.[58] At the time, the Department interpreted the IRA's first definition of "Indian" as only requiring a tribal applicant to be federally recognized at the time trust land was acquired.[59] In 2009, however, the United States Supreme Court ("Supreme Court") construed the IRA's first definition of "Indian" as requiring tribal applicants also to have been "under federal jurisdiction" at the time of the IRA's passage in 1934.[60] Since the Supreme Court's decision in *Carcieri* the Department has not placed any other lands into trust for the Nation.

II. STANDARD OF REVIEW

A. Carcieri

The first definition of "Indian" applies to "all persons of Indian descent who are members of ay recognized Indian tribe now under Federal jurisdiction."[61] In *Carcieri v. Salazar,* the Supreme Court considered the ordinary meaning of the term "now," its sense within the context of the IRA, as well as contemporaneous Departmental correspondence,[62] and concluded that the phrase "now under the federal jurisdiction" unambiguously referred to tribes "that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."[63] The majority did not, however, address the meaning of the phrase "under federal jurisdiction," however, concluding that the parties had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934.[64]

B. Sol. Op. M-37029

In 2014, the Department's Solicitor issued a signed M-Opinion interpreting the statutory phrase "under federal jurisdiction" for purposes of determining whether an Indian tribe can demonstrate that it was under such jurisdiction in 1934 for purposes of Section 5 of the IRA.[65] Because a signed M-Opinion is binding on Department offices and officials until modified by the Secretary,

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[58] *See* Letter, Acting Superintendent, Puget Sound Agency, BIA to Ken Hansen, Chairman, Samish Indian Nation (July 20, 2001); Letter, Northwest Regional Director BIA to Rick Landers, General Manager, Samish Indian Nation (September 2004).

[59] *See Carcieri v. Salazar*, 555 U.S. 379, 381 (2009) ("*Carcieri*"). *Carcieri* did not address the Secretary's authority to acquire land in trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

[60] *Id. at* 379.

[61] 25 U.S.C. § 5129.

[62] *Carcieri*, 555 U.S. at 388–90.

[63] *Id*. at 395.

[64] *Id*. at 382, 395.

[65] The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, Op. Sol. Interior M-37029 (Mar. 12, 2014) ("Sol. Op. M-37029").

the Deputy Secretary, or the Solicitor, I must rely on Sol. Op. M-37029 to guide our analysis here.[66]

"Recognized Indian Tribe"

Sol. Op. M-37029 concluded that the phrase "recognized Indian tribe" in the IRA's first definition of "Indian" is ambiguous because "recognition" has historically been understood in two senses, one a cognitive or quasi-anthropological sense, the other a more formal legal sense connoting a political relationship with the United States.[67] The latter evolved into the notion of "federal acknowledgment" in the 1970s.[68] Having identified this statutory ambiguity, the Solicitor interpreted Section 19 as requiring that a tribe be "recognized" at the time the IRA is applied, for example, when the Secretary decides to take land into trust for its benefit.[69] The courts have upheld the Solicitor's interpretation.[70]

"Under Federal Jurisdiction"

Sol. Op. M-37029 concluded that neither the text of the IRA nor its legislative history defined or otherwise clearly established the meaning of "under federal jurisdiction," which required the Department to interpret the phrase in order to continue to exercise the authority delegated to it under Section 5 of the IRA.[71] Federal acknowledgment in today's political sense is not synonymous with being 'under federal jurisdiction' for purposes of *Carcieri*, and the absence of

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[66] U.S. Dep't of the Interior, 209 Departmental Manual 3.2(A)(11). The D.C. Circuit and the Ninth Circuit have both recently upheld the framework embodied in Sol. Op. M-37029 as reasonable. *See Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016) ("*Cowlitz*"); *Cty. of Amador v. United States Dep't of the Interior*, 872 F.3d 1012, 1025 (9th Cir. 2017), reh'g en banc den. (Jan. 11, 2018), petition for cert pending, No. 17-1432 (U.S. 2018).

[67] Sol. Op. M-37029 at 23; *see also* Felix Cohen, Handbook of Federal Indian Law at 268 (1942 ed.); *Carcieri*, 555 U.S. at 400 (Souter, J.) (dissent) (noting majority opinion does not foreclose giving recognition and jurisdiction separate content, and pointing out that whether the United States was ignorant of a tribe in 1934 would not preclude the tribe from having been under federal jurisdiction). The historical record produced during the Nation's federal acknowledgment proceedings demonstrates that the Nation has been "cognitively" recognized on a substantially continuous basis from treaty times through the present.

[68] *Id.*

[69] Sol. Op. M-37029 at 25.

[70] *Confederated Tribes of the Grande Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016), *cert. den. sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S.Ct. 1433 (2017); *County of Amador v. Jewell*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015); *aff'd*, 872 F.3d 1012, 1021 (9th Cir. 2017) (concluding de novo that the expression "recognized Indian tribe" as used in Section 19, "when read most naturally, includes all tribes that are currently – that is, at the moment of the relevant decision – 'recognized' and that were 'under Federal jurisdiction' at the time the IRA was passed"); *cert. filed*, No. 17-1432 (U.S. Apr. 11, 2018); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015) (not reported), *aff'd*, 673 Fed. Appx. 63 (2d Cir. 2016), *cert den.*, 137 S.Ct. 2134 (2017).

[71] The Secretary receives deference to interpret statutes that are consigned to his administration. *See Chevron v. NRDC*, 461 U.S. 837, 842–45 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001); *see also Skidmore v. Swift*, 323 U.S. 134, 139 (1944) (holding that agencies merit deference based on "specialized experience and broader investigations and information" available to them).

a formal government-to-government relationship with the United States in 1934 would not preclude the possibility that a tribe was under federal jurisdiction in 1934.[72] To address the ambiguity for purposes of implementing Section 5 of the IRA, the Solicitor established a two-part inquiry for determining whether a tribe was "under federal jurisdiction" in 1934.

The first part examines whether evidence from the tribe's history, at or before 1934 demonstrates that it was under federal jurisdiction. This step looks to whether the United States had, in 1934 or earlier, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe—that establish or generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.[73] Some federal actions in and of themselves demonstrate that a tribe was under federal jurisdiction at some identifiable period in its history, such as the treaties or the implementation of specific legislation (e.g, votes conducted under Section 18 of the IRA). In other cases a variety of federal actions viewed in totality may demonstrate that a tribe was under federal jurisdiction.[74] Such evidence may include guardian-like actions undertaken on behalf of a tribe or a continuous course of dealings with a tribe. It could also include, but is not limited to, the negotiation of treaties; federal approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe. It may also include actions by Office of Indian Affairs officials administering the affairs of Indian reservations or implementing federal legislation. Evidence submitted as part of federal acknowledgment process of Part 83 may also be highly relevant,[75] As might other types of evidence not referenced in Sol. Op. M-37029 that also demonstrate federal obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe.

Where a tribe establishes that it was under federal jurisdiction before 1934, the second part of the inquiry determines whether that jurisdictional status remained intact in 1934. The Federal government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status.[76] Evidence of executive officials disavowing legal responsibility in certain instances cannot, in

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[72] U.S. Dep't of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 104 (Apr. 2013) ("Cowlitz ROD") (Tribe's admission that it lacked formal political relationship with United States in 1934 does not necessarily also mean it was not under federal jurisdiction in 1934). As the Ninth Circuit has also noted, neither does the lack of federal acknowledgment prevent the exercise of treaty rights. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981).

[73] Evidence unambiguously demonstrating that a tribe was under federal jurisdiction in 1934 will eliminate the need to examine the tribe's history before 1934.

[74] *See, e.g.*, Cowlitz ROD.

[75] Sol. Op. M-37029 at 25.

[76] *See* Memorandum, Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, *Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe* ("Stillaguamish Memorandum").

itself, revoke jurisdiction absent express congressional action,[77]and there may be periods where federal jurisdiction exists but is dormant.[78] The absence of probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.[79]

The Solicitor concluded, and courts have affirmed,[80] that the two-part inquiry for determining whether a tribe was "under federal jurisdiction" in 1934 is consistent with the IRA's remedial purpose and with the Department's post-enactment practices in implementing the statute.[81]

C. Effect of Washington II

Before assessing the Samish Indian Nation's jurisdictional status in 1934, I must address the relevance of the 1979 decision in *Washington II* to this inquiry.

Swinomish Indian Tribal Community argues that *Washington II* precludes the Department from determining that the Nation was "under federal jurisdiction" in 1934 for purposes of the IRA.[82] As noted above, *Washington II*, inter alia, adjudicated the off-reservation treaty fishing rights of certain Washington tribes that were party to the Treaty of Point Elliott. At the time the Nation intervened in that litigation, it had not yet received federal acknowledgment. Based on its lack of acknowledgment at that time, Judge Boldt in *Washington II* concluded that the Nation was not a treaty tribe "in the political sense" holding off-reservation treaty fishing rights for itself or its members.[83]

SITC argues that because *Washington II* concluded that the Nation is not a successor to the Treaty of Point Elliott, it cannot be a successor entity to the treaty Samish. SITC further contends that the Department cannot rely on evidence of federal interactions with descendants of the treaty

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[77] It is a basic principle of federal Indian law that tribal governing authority arises from a sovereignty that predates establishment of the United States, and that "[o]nce recognized as a political body by the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty." Cohen's Handbook Of Federal Indian Law § 4.01[1] (2012 ed.) (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142–43 (D.D.C. 1976)).

[78] *See* Stillaguamish Memorandum at 2 (noting that enduring treaty obligations maintained federal jurisdiction, even if the federal government did not realize this at the time); *United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost 100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

[79] Sol. Op. M-37029 at 20.

[80] *See supra* n. 73. *See also Citizens for a Better Way v. United States DOI*, 2015 WL 5648925 (E.D. Cal. Sep. 23, 2015) (not reported), *aff'd sub. nom. Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584 (9th Cir. 2018); *Stand Up for Cal.! v. United States DOI*, 204 F. Supp. 3d 212 (D.D.C. 2016), 879 F.3d 1177 (D.C. Cir. 2018), *reh'g en banc den.* (Apr. 10, 2018); *Shawano County, Wisconsin v. Acting Midwest Reg'l Dir.*, 53 IBIA 62 (2011); *Village of Hobart, Wisc. v. Acting Midwest Reg'l Dir., Bureau of Indian Affairs*, 57 IBIA 4 (2013).

[81] Sol. Op. M-37029 at 20.

[82] Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks (Mar. 9, 2016).

[83] *Washington II*, 476 F. Supp. at 1111.

Samish for purposes of the "under federal jurisdiction" inquiry.[84] Though SITC concedes that Samish participated in the Treaty of Point Elliott,[85] it claims "there is simply no evidence of Federal actions that establish, or that generally reflect, Federal obligations or duties to, responsibility for, or authority over" the Nation at any time, up to and including 1934.[86]

SITC's arguments neglect the fundamental distinction between treaty rights and statutory benefits derived from acknowledgment, a distinction the Ninth Circuit discussed and elaborated upon in both the *Washington* and *Greene* lines of authority.[87] Those authorities distinguish between inquiries into succession for purposes of treaty rights and inquiries into continuous tribal existence for purposes of federal acknowledgment under the mandatory criteria of Part 83.[88] While each inquiry may look to the same historical record, each must evaluate it according to fundamentally distinct legal purposes. In order to establish treaty fishing rights, a tribe must show that (1) it comprises a group of Indians descended from a treaty signatory and (2) that it has maintained an organized tribal structure.[89] By contrast, a group of Indians seeking formal acknowledgment must satisfy the seven mandatory requirements set forth in the Part 83 regulations.

Neither the Federal acknowledgment nor the "under federal jurisdiction" inquiry requires a tribe to show that it descended from a treaty tribe.[90] In fact, the Department has determined that a tribe was under federal jurisdiction in 1934 even though they were not a party to any ratified treaty. In issuing a determination relating to the Cowlitz Indian Tribe's ("Cowlitz") application for in trust, the Secretary found that the government's course of dealings with the tribe dated from failed treaty negotiations in 1855.[91] On appeal to the U.S. Court of Appeals for the District of Columbia Circuit, the court found that "[i]t makes sense to take treaty negotiations into account,

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[84] *See, e.g.*, Letter, Ziontz Chestnut to BIA Regional Director Stanley M. Speaks at 49–54 (Mar. 9, 2016).

[85] Letter, Ziontz Chestnut to BIA Northwest Reg. Dir. Stanley M. Speaks at 5 (Mar. 9, 2016) ("we agree that Samish Indians participated in the treaty"). *See also* Letter, Ziontz Chestnut to BIA Northwest Reg. Dir. Stanley M. Speaks (Nov. 24, 2015).

[86] Letter, Ziontz Chestnut to BIA Northwest Reg. Dir. Stanley M. Speaks at 4 (Mar. 9, 2016).

[87] The *Washington* line of cases addressed the Nation's off-reservation treaty fishing rights under the Treaty of Point Elliott. The *Greene* line of cases addressed the effects of federal acknowledgment on statutory benefits and treaty rights available to the Nation. To resolve a conflict between these lines of authority, the Ninth Circuit in *Washington IV* held that the Nation's 1996 federal acknowledgment did not warrant re-visiting the 1979 decision in *Washington II*, which had denied the Nation off-reservation fishing rights under the Treaty of Point Elliott. *See also Samish Indian Nation v. United States*, 58 Fed. Cl. 114, (2003), *rev'd in part and denied in part*, 419 F.3d 1355 (Fed. Cir. 2005).

[88] *United States v. Washington*, 19 F. Supp. 3d 1317, 1374 (W.D. Wash. 2000) ("The standard for treaty rights and for tribal recognition, while similar, are not identical, with each determination serving a different legal purpose and having an independent legal effect") (internal quotes and brackets omitted), citing *Greene II*, 996 F.2d at 976.

[89] *See Washington I*, 520 F.2d at 693; *Washington II*, 641 F.2d at 1372.

[90] *See* 25 C.F.R. § 83.11 (criteria for acknowledgment as a federally recognized Indian tribe); 25 C.F.R. § 83.12 (criteria for previously federally acknowledged petitioner).

[91] *See Cowlitz*, 830 F.3d at 562.

as one of several factors reflecting authority over a tribe, even if they did not ultimately produce agreement."[92] The Court ultimately found that the Cowlitz—even though they were not a party or successor in interest to any treaty tribe—were under the jurisdiction of the federal government beginning at the time of treaty negotiations.[93]

Although the Ninth Circuit affirmed the decision in *Washington II,* it rejected Judge Boldt's holding that only federally recognized tribes may exercise treaty rights, finding it "clearly contrary to…and…foreclosed by well-settled precedent."[94] The Ninth Circuit explained that non-recognition had no impact on vested treaty rights, though it might result in the loss of statutory benefits.[95]

The Ninth Circuit revisited the difference between treaty rights and statutory benefits flowing from recognition several years later when reviewing the district court decision in *Greene* denying the Tulalip Tribe's motion to intervene in the Nation's administrative acknowledgment proceedings.[96] Though it conceded that the issue was the Nation's claims to federal acknowledgment and off-reservation treaty fishing rights, the Tulalip Tribe argued that both inquiries raised nearly identical issues and were largely based on the same factual record.[97] And although the Ninth Circuit agreed that the historical inquiries were similar,[98] it added that each "serves a different legal purpose" and has an "independent legal effect."[99] Affirming the analysis of *Washington II,* the Ninth Circuit again held that while non-recognition might result in the loss of statutory benefits, it could have no effect on vested treaty rights.[100] By the same token, "the Samish need not assert treaty fishing rights" to gain federal acknowledgment, and "might document repeated identification by federal and state authorities … sometime after or independent of the 1855 Treaty [of Point Elliott]."[101] Critically, the court found that if the Samish Indian Nation obtained federal acknowledgment, it would "still have to confront the decisions in *Washington I* and *II*" before it could claim off-reservation treaty fishing rights.[102]

An *en banc* panel of the Ninth Circuit revisited the distinction once more when resolving the conflict of authority arising out of the *Greene* and *Washington* line of cases. As described earlier,

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[92] *Id.* at 564.

[93] *Id.*

[94] *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981).

[95] *Id.*

[96] *Greene II,* 996 F.2d at 978.

[97] *Id.* at 976.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 977, citing *United States v. Washington*, 641 F.2d at 1371.

[101] *Greene II,* 996 F.2d at 977.

[102] *Id.*

Washington IV reaffirmed that treaty rights litigation and recognition proceedings were "fundamentally different" and had no effect on one another.[103] In a unanimous decision, the *en banc* panel held that Federal acknowledgment establishes a 'government-to-government relationship' between a recognized tribe and the United States; is "a 'prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes'";[104] and "brings its own obvious rewards," not least of which is "'the eligibility of federal money for tribal programs, social services and economic development.'"[105] Precisely because of this fundamental distinction, the Ninth Circuit concluded that "the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation."[106] As noted, the Nation has conceded that the issues it litigated in *Washington II* were closed by the Ninth Circuit's decision in *Washington IV*.[107]

Pursuant to *Carcieri*, the Department must undertake the "under federal jurisdiction" inquiry to determine eligibility for statutory benefits made available to recognized tribes by Section 5 of the IRA. Because determining the Nation's jurisdictional status as of 1934 is necessarily a historical inquiry, it is an analysis not dissimilar to those for determining federal acknowledgment and treaty rights and may rely on the same historical record. However, the inquiry required by *Carcieri* serves a different legal purpose having an independent legal effect.[108]

Sol. Op. M-37029 determined that the historical record prepared for a tribe pursuant to the federal acknowledgment process may be relied on and "highly relevant" in demonstrating that a tribe was under federal jurisdiction in 1934.[109] Part 83's mandatory acknowledgment criteria require petitioners to demonstrate, among other things, that they have been identified as an American Indian entity since 1900 and that they have comprised a distinct community maintaining political authority over their members "from historic times to the present" on a substantially continuous basis.

As described above, the Ninth Circuit rejected the claim that the Department's review of the Nation's petition for federal acknowledgment was precluded by *Washington II*.[110] And although the court acknowledged the historical roots of each inquiry were "probably the same,"[111] it

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[103] *Washington IV*, 593 F.3d at 800.

[104] *Id.* at 801, citing 25 C.F.R. § 83.2.

[105] *Id.*, citing *Greene II*, 996 F.2d at 978.

[106] *Washington IV*, 593 F.3d at 801.

[107] Memorandum Response, Craig J. Dorsay, Esq., to James V. DeBergh, Attorney-Advisor, U.S. Dep't of the Interior, Office of the Solicitor at 10 (Jun. 3, 2016) (Nation precluded from relitigating off-reservation treaty fishing rights).

[108] *Greene II*, 996 F. 2d at 976.

[109] Sol. Op. M-37029 at 25.

[110] *Greene I*, 64 F. 3d at 1270.

[111] *Id.*; *U.S. v. Washington*, 641 F.2d 1368 (9th Cir. 1981).

concluded that "the legal issue and the factual issue, as well as the stakes, are very different."[112] The historical scope of the "under federal jurisdiction" inquiry necessarily overlaps with the federal acknowledgment inquiry. Both focus on events taking place in or before 1934, and Part 83 requires petitioners to document a substantially continuous existence from historical times to the present. As a result, the federal acknowledgment record generally will include evidence for the same period. And while satisfying Part 83's mandatory criteria cannot in and of itself mean that a tribe was "under federal jurisdiction" in 1934 for purposes of *Carcieri*, the Part 83 record may nonetheless include evidence relevant to the *Carcieri* inquiry.[113]

For these reasons I conclude that *Washington II* is not determinative of the question whether the Nation was under federal jurisdiction in 1934, and does not preclude the Department from relying on the record submitted by the Nation under Part 83.

III. ANALYSIS

A. Federal Jurisdiction before 1934

The Samish Indian Nation came under federal jurisdiction by 1855 when the United States negotiated and entered into the Treaty of Point Elliott.[114] As Federal officials considered the Samish a separately recognized tribe through the early 1900s,[115] and as there is no evidence in the record to establish that its recognition was ever extinguished, I conclude that the Nation and its members remained under federal jurisdiction in 1934.

1. Treaty of Point Elliott

Between 1854 and 1855, federal treaty negotiators asked many Indian tribes and bands in the territories occupied by the "Lummis and other northern bands"[116] in western Washington—including the Samish—to enter a treaty council with the United States.[117] Leading up to treaty

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[112] *Greene I*, 64 F. 3d at 1270.

[113] *See, e.g.*, 25 C.F.R. § 83.7(a)(1) (identification as Indian entity by federal authorities); § 83.7(e) (federal records as evidence of descent from historical tribe); § 83.8 (acceptable evidence of previous federal acknowledgment).

[114] *Washington II*, 476 F. Supp. at 1106–07; *Greene Administrative Proceedings*, App. B, ¶ 67; 1995 Final Determination at 6. As discussed in more detail below, I rely on the Treaty of Point Elliott and surrounding negotiations solely as evidence reflecting the establishment of *federal* jurisdictional authority over Samish for the limited purposes of the "under federal jurisdiction" inquiry, which assesses eligibility for statutory benefits available to recognized tribes.

[115] 1995 Final Determination at 16; *see also* 1987 Final Determination at 29.

[116] *Greene Administrative Proceedings*, App. B, ¶ 60 (finding that the Samish Nation is a Coast Salish tribe of Indians whose aboriginal territory was bounded by the southeast tip of San Juan Island, Deception Pass, Padilla Bay, Samish Bay, Chuckanut Bay, and the northern end of Lopez Island); Barbara Lane, *Identity, Treaty Status and Fisheries of the Samish Tribe of Indians* (January 15, 1975) ("Lane Samish Report").

[117] Friday Report at 12. Though some portions of the Friday Report are not relevant to the "under federal jurisdiction" inquiry, those that are relevant are well-reasoned and supported by the historical record. The Swinomish Tribe argued that the Friday Report "provides no evidence to support the claim that Samish were under federal jurisdiction in 1934" and separately challenged its methodology. *See* Marc Slonim, Esq., "Response to Friday Report" (Nov. 28, 2016); "Analysis of the Methodology of a Report of Dr. Chris Friday" by E. Richard Hart (Nov. 21, 2016). However the Swinomish Tribe's submissions do not discredit the evidence on which our

negotiations with the tribes in Western Washington, in March 1854, George Gibbs, the federal treaty commission's secretary, wrote specifically about the Samish as a separate and distinct group of Indians.[118]

Six months before the signing of the Point Elliott Treaty, the Acting Commissioner of Indian Affairs instructed Territorial Governor Isaac Stevens to send a map identifying the location of the tribes, bands, and treaty reservations once treaty negotiations concluded.[119] Governor Stevens forwarded this map in 1857, which identified "Samish" as a party to the Point Elliott Treaty and showed the location of the Samish Indians around the Fidalgo Island Reservation (also referred to as the Perry's Island Reservation and which is now the present day Swinomish Reservation).[120] Stevens' map included a table stating that Stevens planned to set aside the Lummi Reservation for the Lummi, Samish, and Nooksack.[121] In his letter of transmittal, Governor Stevens himself vouched for the general accuracy of the map and the Indian statistics stated within it.[122] In further demonstrating that the treaty commission considered Samish a party to the Treaty of Point Elliott, Governor Stevens' treaty map also reflects federal obligations, duties, responsibility for or authority over the Samish Nation.

On December 10, 1854, the treaty commission met to discuss tribal "probable reserves," which included "one on Samish."[123] When the treaty commission arrived at *Muckl-te-oh*, or Point Elliott, on January 16, 1855, Gibbs recorded the presence of 113 Samish at the treaty council grounds.[124] In the draft of the Treaty of Point Elliott made on January 22, 1855, Gibbs included the "Samish" in the listing of tribes for which the duly authorized "Chiefs headmen and

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determination relies, but instead draw different inferences and conclusions from that same evidence. In addition, they take issue with evidence that is not relevant to our inquiry and on which our determination does not rely, for which reason we do not consider it.

[118] *See* Lane Samish Report at 4–5.

[119] Barbara Lane, *Identity and Treaty Status of the Nooksack Indians* (November 28, 1974) ("Lane Nooksack Report"), App. A.

[120] Lane Samish Report at 10.

[121] *See* 1856 Map of the Indian Nations and Tribes of the Territory of Washington by Isaac Stevens. A copy of this map can be found at Exhibit 2842 of the Friday Report.

[122] Lane Nooksack Report at 11; *see also* Letter, William McCluskey to W.F. Dickens (Jan. 23 1923) (over sixty years later, the Farmer in Charge on the Swinomish reservation wrote to the Tulalip Superintendent W.F. Dickens that two Samish Indians, Mrs. Blackinton and Mrs. Julia Barkhousen, were among the last surviving individuals present at the Point Elliot Treaty signing.

[123] Lane Nooksack Report at 12. We note here that the phrase "one of Samish" is not clear on its face, yet it probably meant either one on Samish Island, a location with a Samish village (*see* Lane Samish Report at 7), or one on Samish River, a location associated with Samish Indians (*see* Lane Samish Report at 5).

[124] Lane Samish Report at 13; *see also Washington II*, 476 F. Supp. at 1106 ("Official estimates of the number of Samish at treaty times varied from about 98 to about 150 persons.").

delegates"[125] would sign the treaty. Although not a separately named signatory, the United States grouped the Samish with one or more signatories for purposes of executing the treaty.[126] A common practice at the time, Governor Stevens and other treaty commissioners grouped different tribes and bands together under certain head "chiefs" or treaty signers for practical purposes of negotiating and finalizing a treaty.[127] Many members of the Samish Nation today trace their lineages to the Samish who were alive or present at the signing of the Treaty of Point Elliott.[128]

SITC asserts that participation in a ratified treaty cannot establish that a tribe was recognized and under federal jurisdiction in 1934.[129] This assertion is incorrect. The Department has long considered treaty relations a significant factor in establishing whether a tribe was under federal jurisdiction,[130] and the Solicitor has determined that a tribe may be "under federal jurisdiction" in 1934 as a result of a treaty with the United States that was still in effect.[131] Treaties "implicitly established federal jurisdiction over tribes," and could do so even where treaty negotiations were unsuccessful.[132] Sol. Op. M-37029 explains that treaties negotiated by the President and ratified

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[125] *See* Lane Samish Report at 12. The draft treaty also demonstrates that the United States government believed that the Samish and Lummi were not the same tribe, because Gibbs put "Samish" on the same line as the "Lummi" but separated the two by a comma.

[126] *Washington II*, 476 F. Supp. at 1106 ("The 1855 Samish were not named in the treaty but were assigned, for the purpose of including them in the treaty, to the Lummi signer, Chow-its-hoot, who signed the treaty for the Lummi and the other northern bands."). The record indicates that other treaty signers may have also signed for the Samish. *See, e.g., Duwamish*, 79 Ct. Cl. at 530 ("Noo-wha-ha" chief signed for Samish); *Greene Administrative Proceedings*, App. B, ¶ 65 (Noowhaha chief Pateus signed for Samish). It is clear from the record that one, if not more than one, treaty signatories signed for the Samish.

[127] *U.S. v. Washington*, 520 F.2d 676, 682, 688 (9th Cir. 1975) (western Washington " 'tribes' " somewhat arbitrarily constructed by Governor Stevens for convenience in negotiating treaties, noting that in many cases each tribe was an aggregate of smaller communities or villages).

[128] *See, e.g.*, Letter from William McCluskey, Farmer of the Swinomish Indian Reservation, to Mr. W.F. Dickens, Tulalip Superintendent (Jan. 29, 1923) (stating that John Davis and wife, Mrs. Blackinton, and Mrs. Julia Barkhousen were present at the Point Elliott Treaty signing); *see also Washington II*, 476 F. Supp. at 1105–06 (Samish Indian Nation "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott.").

[129] Letter, Ziontz Chestnut to BIA Northwest Reg. Dir. Stanley M. Speaks at 2, n.1 (Nov. 24, 2015).

[130] Sol. Op. M-37029 at 14, n. 90 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 271 (1942 ed.) (listing treaty relations as one factor relied upon by the Department in establishing tribal status). *See also* U.S. Dep't of the Interior, Bureau of Indian Affairs, Record of Decision: Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 79 (Dec. 2013) ("Cowlitz ROD") (treaty negotiations "demonstrate that the Federal Government clearly regarded the [Tribe] as a sovereign entity capable of engaging in a formal treaty relationship with the United States") (available at https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc2-056427.pdf); *Cowlitz*, 830 F.3d at 564.

[131] Sol. Op. M-37029 at 4, citing *Carcieri*, 555 U.S. at 399 (Breyer, J.); i*d*. at 20.

[132] Sol. Op. M-37029 at 14. *See also* Sol. Op. M-36759 (Nov. 16, 1967) (discussing treaty relations between the Federal Government and the Burns Paiute Tribe as evidence of tribal status even though such relations did not result in a ratified treaty).

by the Senate under the Treaty Clause establish on-going legal obligations of the United States to treaty tribes. Once a government-to-government relationship is established between a tribe and the United States, the absence of probative evidence of termination or loss of a tribe's jurisdictional status suggests that such status is retained.[133] This is consistent with Justice Breyer's view in *Carcieri* that a tribe could be "under federal jurisdiction" in 1934 because of a treaty "in effect in 1934."[134] The Treaty of Point Elliott, executed in 1855, remains in effect today.

2. 1855 to 1900

Between 1855 and 1900, federal officials continued to treat Samish as under federal jurisdiction. Article 7 of the Treaty of Point Elliott gave Federal officials authority to relocate the Samish to the Treaty reservations,[135] and federal officials took actions to do the same, repeatedly reporting that the Samish were under their "charge" and "supervision." In 1856, Governor Stevens appointed Edmund Claire Fitzhugh to oversee Indians in the general vicinity of Bellingham Bay and in his September 1856 report to the Agent for Indians of Puget Sound District, he estimated that there were 98 Samish "under [his] supervision":

> From our position, being far removed from the seat of war, I have never had these Indians on any reserve, and consequently have not been obliged to feed them—as all their former opportunities for procuring sustenance were still open to them. The Lummas have been principally residing at a fishery called Sky-lak-sen and also at the mouth of the Lumma River—the Samish at the river whence they derive their name, and the fisheries adjacent . . .[136]

In the winter of 1856–57, the federal government began relocating the Lummi and Samish to the Bellingham Bay reservation (present day Lummi reservation).[137] Fitzhugh reported to Governor Stevens in December 1856 that "I have them now nearly all at the encampment—all of the Samish having moved up & joined the Lummas, very near my place. I can now give them more

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[133] *See* Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe at 2 (Oct. 1, 1980) (enduring treaty obligations maintain federal jurisdiction even where federal government remains unaware at the time).

[134] Sol. Op. M-37029 at 4, citing *Carcieri*, 555 U.S. at 399.

[135] 12 Stat. 927. Article 7 of the Treaty states in part that "The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, *remove them from either or all of the special reservations hereinbefore make to the said general reservation, or such other suitable place within said Territory as he may deem fit*, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home…" (emphasis added).

[136] Lane Samish Report at 13.

[137] Lane Samish Report at 13–14 ("By December [1856] the situation had changed. Evidently during the winter of 1856–57 all of the Lummi and Samish were on the reservation at Bellingham Bay.").

attention, than I could, when they were scattered over such an extent of country."[138] In 1857, Fitzhugh again reported that he was in charge of the "Neuk-sack, Samish, and Lummi" along with "a portion of the Neukwers and Sia-man-nas, who live in the back country on the lakes and streams adjacent."[139] A year later, Fitzhugh reported the "Lummi, Neukfsack, and Samish Nations" under his "superintendency" numbering "some fifteen hundred, men, women, and children included."[140]

In 1859, agent B.F. Shaw reported to the Commissioner of Indian Affairs that the Lummi, Nooksack, "Samish, and Stick"[141] Indians were "part of his charge" and that Governor Stevens had assigned the "Neukfsacks and Samish…[that] live on the Neukfsak and Samish Rivers" to the newly opening Lummi reservation. However, he further reported that such tribes were "much attached to their homes, and do not wish to leave them" and "until such time as the reservation can present such superior advantages over their present homes that it cannot fail to convince them of the advantage to be gained by the change in homes."[142]

Despite federal efforts to relocate the Samish to one of the Treaty reservations, the majority of Samish soon left[143] to continue to live in Samish villages on land surrounding the Samish River and the Padilla, Samish, and Bellingham Bays, which the Samish had traditionally occupied prior to the Treaty of Point Elliott.[144] The Samish had little incentive to move to or stay on any of the four established Treaty reservations because their traditional villages provided ample land to support them, and white settlement of Samish territory was comparatively slow.[145] Additionally, Samish believed that they would eventually obtain their own, separate Treaty reservation,[146] though some Samish continued to return to the Bellingham Bay reservation to collect their treaty annuities.[147]

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[138] *Id*. at 13–14.

[139] Friday Report at 19.

[140] *Id*.

[141] Stick (or Stick Samish), Noowhaha (or Noo-wha-ha), and Upper Samish are names used to identify the same group of Indians. *See Greene Administrative Proceedings*, App. B, ¶ 63 ("According to Dr. [Wayne] Suttles, the Noowhaha were called "Stick" Samish, from the Chinook Jargon term for 'forests', or sometimes Upper Samish, since they lived inland from the salt water Samish."). While the Noowhaha and the Samish were at one time different tribes, they merged before the treaty and have been one tribe since that time. This finding by ALJ Torbett was originally rejected by the Department but reinstated by the court. *See Greene III*, 943 F. Supp. at 1288–89.

[142] Friday Report at 20.

[143] *Greene Administrative Proceedings*, App. B, ¶ 68.

[144] *Id*.; *see also* 1995 Final Determination.

[145] *See Greene Administrative Proceedings*, App. B, ¶¶ 69, 70, 72–73.

[146] *Greene Administrative Proceedings*, App. B, ¶ 68; *see also* 1995 Final Decision at 28.

[147] *Id*.

A limited number of federal agents available to oversee the Samish's affairs also contributed to the Nation's movements to and from the Treaty reservations. In 1863, for example, Indian Agent Henry C. Hale reported that for the "Fidalgo Island" reservation (the present day Swinomish Reservation), "there is no one in charge of these Indians at present" because of the dismissal of the Assistant Farmer in Charge.[148]

In 1866, Christian C. Finkbonner, Indian Sub-Agent at the Lummi reservation, reported 47 Samish living on the reservation,[149] a fraction of the Samish Indian population reported by Fitzhugh ten years prior.[150] In 1870, Finkbonner reported that the Samish "persistently refuse to come and live on the Lummi reservation."[151] Nonetheless a small population of Samish lived there during 1869 and 1870, and U.S. Army Lieutenant George D. Hill, the agent at Neah Bay, Washington Territory, reported to the Commissioner of Indian Affairs that the Lummi reservation was for the Lummi, Nooksack, Samish, and Squinamish tribes.[152]

Many Samish Indians instead continued to occupy a village on Samish Island until 1875. After a local storekeeper shot a Samish Indian on Samish Island, however, many Samish resettled on Guemes Island in a community referred to as the "New Guemes village."[153] This village consisted of numerous Samish families and homes, as well as a longhouse built on adjoining homestead allotments[154] issued to Bob Kithnolatch and Sam Watchoat, two Samish Indians who had obtained them pursuant to a provision in an 1875 appropriations act extending the benefits of the 1862 Homestead Act to Indians.[155] And although the act on its face required allottees to prove they had abandoned tribal relationships, the longhouse built by Kithnolatch and Watchoat on their allotments became the center of family and social life for the Samish and other Indians.[156] Many Samish families resided on the allotments up to and after 1905, when the allotments were eventually sold to satisfy tax liabilities.

SITC argues that the Samish allotment applications provide no evidence of federal jurisdiction over Samish if, by filling out these applications, Kithnolatch and Watchoat averred that they had severed their tribal relations.[157] However it is the acceptance of their applications pursuant to the

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[148] Friday Report at 37.

[149] Lane Samish Report at 14.

[150] *Id*. at 13–14.

[151] *Id*. at 15.

[152] Friday Report at 38.

[153] Lane Samish Report at 7; *Greene Administrative Proceedings*, App. B, ¶¶ 60, 69.

[154] *Id*. at 7; *see also Schedules of Special Census of Indians*, 1880.

[155] *See* 18 Stat. 402, 420 (1875); *see also* Lane Samish Report at 7.

[156] *Greene Administrative Proceedings*, App. B, ¶¶ 73, 74, 76, 81–83. *See also* I Sol. Op. 732 (U.S.D.I. 1979), "Status of Wisconsin Winnebago," citing Solicitor's Opinion (Mar. 6, 1937) (concluding that Indians with homestead allotments on the public domain are eligible to organize under the IRA).

[157] Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks at 11 (Mar. 9, 2016).

1875 appropriations act that demonstrates that the federal government recognized the Samish and its members as being Indians under the federal government's jurisdiction at this time.

Federal officials further exercised authority over the Samish in New Guemes Village. Though not within any reservation boundary, federal officials sought to assert control over the Indians living there. For example, in November 1880, Tulalip Indian Agent John O'Keane reported that the Samish had invited Indians from all the tribes of the North West" to a "Great Potlatch or Give Feast" on Guemes Island.[158] O'Keane denied a request by "the chiefs and headmen" of the Tulalip Reservation to attend the feast.[159] Despite O'Keane's denial, many left the Tulalip Reservation to attend anyway, causing O'Keane to send a "detachment of Police to the Samish" to arrest a Skagit Indian and to disrupt the celebration. The Indians "defied the Police force and refused to give up the [Skagit] man," forcing the police to return without accomplishing their purpose.[160] Such incidents demonstrate that whether the Samish were residing on one of the Treaty reservations or in the off-reservation New Guemes Village built on Indian homestead allotments, federal officials treated the Samish Indians as within their police power and under federal jurisdiction.

Census records show that as of May 1881, at least fourteen families "of the Samish Nation" lived on Guemes Island.[161] The Table of Contents to the 1880 census, under the Tulalip Indian Agency heading, identifies the Samish and Stick Samish[162] as "Indians not on a reservation," while "Samish" are not identified on any of the reservations created by the Treaty of Point Elliott.[163]

In 1884-85, federal authorities began carrying out the allotment provisions of the Treaty of Point Elliott for Indians on the Bellingham Bay and Perry's Island reservations, today known as the Lummi Reservation and Swinomish Reservation, respectively. On the Lummi reservation, federal officials assigned allotments to approximately eighty-five Indians. On the Swinomish reservation, the federal government allotted lands to approximately sixty-three Indians. Some Samish Indians received allotments on these reservations, including George Barkhousen, who received an 80-acre allotment on the Swinomish Reservation in 1884.[164] And although the 1900

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[158] Friday Report at 39.

[159] *Id*.

[160] *Id*.

[161] *Schedules of Special Census of Indians*, 1880. Microfilm publication M-1791, 5 rolls. Records of the Bureau of the Census, 1790–2007, Records Group 29. National Archives at Washington D.C.

[162] Stick Samish (also referred to as Upper Samish or Noowhaha) (*supra* note 144) are considered to have merged with the Samish Nation. *See also Greene III*, 943 F. Supp. at 1288, n. 13 (reinstating finding that "a substantial part of the Noowhaha tribe merged historically with the Samish.").

[163] *Schedules of Special Census of Indians*, 1880. Microfilm publication M-1791, 5 rolls. Records of the Bureau of the Census, 1790-2007, Records Group 29. National Archives at Washington D.C.

[164] *See* Friday Report at 154–55 ("…[w]hen he died in 1915, federal officials divided the allotment into three equal portions among his heirs Audry Alice Barkhousen (or Barkhausen), Ernest George Barkhausen, and Henry Otto.").

U.S. Census listed Barkhousen as Swinomish,[165] he was in fact Samish.[166] Tribal misidentification was common during these years, and the fact that George Barkhousen was identified as a Swinomish Indian could be simply because he owned an allotment on the Swinomish reservation.[167] I find that misidentification of George, and other Samish Indians, should be taken for what they are: simple mistakes made by federal officials during a time when tribal affiliation was not determinative, or necessarily important for exercising their federal responsibilities over individual Indians or tribes.

Summary

The Department in 1982 concluded that Samish was "clearly considered in subsequent agency reports and similar documents to have been covered by the [Treaty of Point Elliott] and to be under the jurisdiction of the Office of Indian Affairs" through the first decade of the twentieth century.[168] During the period 1855 to 1900, federal officials reported Samish in traditional villages in the special census of Indians; federal officials granted homestead allotments to Samish Indians under statutes that applied only to Indians; federal officials granted to Samish Indians allotments on the Treaty reservations; and federal officials attempted to exercise federal jurisdiction over Samish Indians living at a traditional off-reservation village. Such evidence demonstrates that the Federal government continued a course of dealings with the Tribe and its members that evidenced federal obligations, duties, responsibility for, and authority over the Samish.

B. Federal Jurisdiction through 1934

1. 1900 to 1934

The Department concluded that the village at New Guemes dissolved in the first decade of the twentieth century as Samish residents began moving to the Lummi and Swinomish reservations.[169] Subsequent to administrative proceedings that followed a 1987 determination that the Nation did not meet the mandatory acknowledgment criterion at 25 C.F.R. § 83.7(c), the Department found that the Nation had maintained a distinct Samish community even after moving to the Lummi and Swinomish reservations, and that the Samish had always maintained a

[165] *See* 1900 U.S. Census, Skagit, Swinomish Reservation.

[166] George Barkhousen was the son of Henry C. Barkhousen (white) and Julia Barkhousen (née Sehome) a Samish Indian. *See* 1930 Skagit, Fidalgo Precinct (Julia Barkhousen listed as "full blood Samish"). Julia was present at the Point Elliott Treaty grounds. *See* Letter, William McCluskey, Farmer of the Swinomish Indian Reservation, to Mr. W.F. Dickens, Tulalip Superintendent (Jan. 29, 1923).

[167] Misidentification could also be attributed to the fact that coastal Salish Indians (like the Samish) "reckoned descent from important ancestors on both their mother's side and father's side, with the result that all kinship groups overlapped." *See* 1995 Final Decision at 27. Said another way, an individual with grandparents from four different distinct tribes could be identified by the federal government—or self-identify—as belonging to and the right to identify with any one of those tribes. *See, e.g. Greene Administrative Proceedings*, App. B, ¶ 48.

[168] 1982 Proposed Finding at 7 (summary evaluation of evidence showing that Nation satisfied the mandatory acknowledgement criteria of 25 C.F.R. § 83.7(a)). 1995 Final Determination at 4 (same); 61 Fed. Reg. 15,826 (Apr. 9, 1996) (same).

[169] 1995 Final Determination at 5.

distinct tribal political leadership since the early 1900s.[170] This decision was made following a determination that Federal officials continued to take actions evidencing the exercise of federal authority over the Samish and its members in this period.

In 1905 numerous Samish Indians, including George Cagey and Charley (or Charlie) Edwards applied for and received allotments on the Swinomish reservation.[171] In 1916, Tulalip Superintendent Charles Buchanan intervened on behalf of Dick Edwards, who wished to pass ten acres of his Swinomish allotment to his daughter Katherine Scott by signing and executing a deed.[172] A November 1905 list of allottees on the Swinomish reservation created by the Tulalip Indian Agency also shows Samish Indians receiving allotments on the reservation.[173] Issuance of allotments to Samish Indians living on the Swinomish reservation, which was established not for the specific use of one tribe but for all the Indians of the Treaty of Point Elliott, supports a conclusion that the Samish Nation was under federal jurisdiction at this time. Most Samish did not, however, take allotments on the Treaty reservations. In a 1906 report concerning Washington Indians, the Farmer in Charge at the Tulalip Reservation reported that the Samish were among that "large portion of the Indian population of the treaty tribes, who made the treaty with the Government at Point Elliott" who "live on no reservations, but cluster chiefly along the valleys of the great rivers of the Sound."[174] He further reported that the river valley population of the certain tribes, including the Samish, had been promised school facilities at that place.[175]

Because so many Indians who were members of tribes that had negotiated the Treaty of Point Elliott lived off-reservation, Commissioner of Indian Affairs Cato Sells in 1913 informed Tulalip Superintendent Charles M. Buchanan that "the jurisdiction of the Tulalip Agency" was "extended so as to include all non-reservation Indians in Whatcom, Skagit, and Snohomish

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[170] *Id*. at 5, 9; 61 Fed. Reg. 15,825 (Apr. 9, 1996). 1987 Final Determination at 4. Though the Department initially found "little indication of a consistently functioning Samish tribal political unit after about 1920," it conceded that "there was some degree of identified Samish leadership until at least 1935." *Id*. at 19.

[171] *See* Department of Commerce, Fifteenth Census of the United States: 1930 Population Schedule, Swinomish Indian Reservation, in North La Conner District (April 2, 1930) (George Cagey is listed on the 1930 Census as Mixed Blood Samish); Department of Commerce, Fifteenth Census of the United States: 1930 Population Schedule, Swinomish Indian Reservation, in North La Conner District (April 8, 1930) (Charley Edwards is listed on the 1930 U.S. Census as "Full Blood Samish"). We are aware that these individuals are identified in other documents with different tribal affiliation but we do not find that identification of Samish Indians with other tribal affiliations necessarily determinative because identification of Indians during this time period was not always accurately portrayed in federal documents. The 1930 Census records seems to reflect a change in federal official protocol for census records from identifying an Indian by the reservation they resided on to actually identifying them according to their own tribal affiliations.

[172] Letter, Charles Buchanan to Commissioner of Indian Affairs (May 25, 1916).

[173] Letter, Edward Bristow, Farmer in Charge to Dr. Charles Muchana, U.S. Indian Agent (Nov. 6, 1905).

[174] Charles M. Buchanan, *Report of Superintendent on Tulalip Reservation* at 383 (Aug. 6, 1906).

[175] *Id*.

Counties,"[176] where many off-reservation Samish Indians lived.[177] While Samish families that had moved to the Swinomish or Lummi reservations were already under the jurisdiction of the Tulalip Agency, the Commissioner's formal acknowledgement of jurisdiction over Indians like the off-reservation Samish demonstrates that these non-reservation Samish were also under federal jurisdiction.[178]

Further, the Northwestern Federation of American Indians ("Federation"), established in 1913 by northwestern tribes including the Samish Nation, petitioned the Department's Office of Indian Affairs on behalf of Indians in western Washington who had not received benefits under the Stevens treaties.[179] The Office of Indian Affairs agreed to carry out an enrollment of these Indians, and assigned the work to special allotting agent Charles E. Roblin.[180] From 1916 to 1919, Roblin set out to create a list of more than 4,000 "unattached" or off-reservation Indians in western Washington and the Puget Sound region who were representative of "approximately 40 bands or tribes."[181] Roblin's research materials listed sixteen individuals as "Samish," "Part Samish," "Stick," or "Nuwhaha,"[182] but identified these individuals in his final report with a different tribal affiliation.[183] The Department has relied on similar lists of "unattached Indians"

[176] Letter, Cato Sells, Commissioner of Indian Affairs to Dr. Chas. Buchanan and Mr. H. H. Johnson (Sept. 5, 1913).

[177] *See, e.g.*, Survey of Friday (Apr. 21, 1922) (Samish Indian living in Skagit County) (document found in Samish's OFA records); Survey of Jimmie Sampson (April 21, 1922) (Samish Indian living on public domain in Skagit County) (document found in Samish's OFA records); *Greene Administrative Proceedings*, App. B, ¶¶ 84–85 (some people from the New Guemes House went back to Samish Island and others went to live in Anacortes, located in Skagit County).

[178] *See also* Cowlitz ROD 100 (describing extension of jurisdiction of Taholah Agency to Indians residing off-reservation).

[179] In 1929, the Tulalip Agency Farmer wrote to the Superintendent of the Tulalip Indian Agency that the Samish were a part of the Northwest Federation of American Indians. Letter, Agency Farmer to Duclos (Apr. 6, 1929).

[180] *See* Letter, E.B. Merrit to Otis O. Benson, Supt. Taholah Indian School (Nov. 17, 1919); Letter, Charles E. Roblin, Special Allotting Agent to W.F. Dickens, Superintendent Tulalip (May 10, 1926).

[181] Letter, E.B. Merrit to Otis O. Benson, Supt. Taholah Indian School (Nov. 17, 1919); *see also* letter from Charles E. Roblin, Special Allotting Agent to W.F. Dickens, Superintendent Tulalip (May 10, 1926). ("In making these schedules I tried to exclude ALL Indians who…[were] at that time listed on the census reports of ANY tribe in Western Washington, and to include only unattached Indians who were on no census.") (capitalization in original).

[182] *See supra*, n.138.

[183] While SITC asserts that Samish did not provide the Department with adequate information in the 1970s and 80s to explain why Roblin had not used Samish or Stick Samish as separate categories, *see* Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks at 17 (Mar. 9, 2016), I find that SITC did not provide the Department with adequate information of why Roblin would have changed the tribal affiliation of those Samish Indians who identified as such in their affidavits. Because there is not clear evidence to why he made these changes, it is reasonable for us to rely on the affidavits as evidence of Samish members interacting with federal officials during this time period.

in previously establishing that tribes lacking federal acknowledgment were nevertheless under federal jurisdiction at the time.[184]

In the 1920s, Tulalip Agency officials repeatedly took actions demonstrating that they considered the Samish to be under federal authority. In the early 1920s, for example, federal officials inquired on behalf of the Samish Nation about obtaining an Indian burial ground on Samish Island that was important to the Nation not only because it had been given to Harry Ite, a chief of the Samish Indians on Samish Island, as a burial ground for the Indians in that district, but also because there were about "two hundred of their members" buried there.[185] In 1922, federal officials visited the homes of Samish Indians living on the public domain as well as on the Swinomish reservation to conduct a survey and documented information including their living situation and occupation.[186]

In a letter to the Executive Secretary of the American Indian League in March 1927, the Tulalip Agency Superintendent described the Indian tribes under his jurisdiction as the "Lummi, Nooksack, Skagit, Suiattle, Sauk, Sammish, Swinomish, Snohomish, Snoqualmie, Muckleshoot, Suquamish, D'Wamish, Clallam," who are located "on the Lummi, Swinomish, Tulalip, Muckleshoot and Port Madison Reservations, as well as on the public domain."[187]

In 1929, the Superintendent of the Tulalip Agency provided Washington State officials with a list of Indians by county who "should have special fishing privileges," a list that included many Samish Indians.[188] In a separate communication to the Commissioner of Indian Affairs in the same year, the Superintendent reported that the Samish were part of the "Swinomish Subagency," which itself was part of the Tulalip Agency.[189] In 1929, Superintendent Duclos informed the Commissioner of Indian Affairs that he had provided Samish Indians living off-reservation in Anacortes "for a number of years" with groceries totaling $8.00 per month during the winter and that he had assigned the "field nurse" to help them that winter to make sure "that

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[184] *See* Cowlitz ROD at 100–01.

[185] Letter, Tulalip Indian Agency Superintendent to Commissioner of Indian Affairs (Oct. 11, 1920).

[186] Superintendent Field Survey Notes from visits to allotted and non-allotted Indians (Friday, Jimmie Sampson, John Lyons, and John Edge) from April 21–22, 1922. *See also* Cowlitz ROD at 102 (referencing 1937 Solicitor's Opinion concluding that Indians with homestead allotments on public domain eligible for IRA benefits).

[187] Letter from Superintendent Tulalip Indian Agency to Rev. Wm. Brewster Humphrey (March 1, 1927). SITC assert that this reference to the Samish "likely refers to the Samish located on the Swinomish Reservation" (emphasis omitted). *See* Letter, Ziontz Chestnut to BIA Northwest Regional Director Stanley M. Speaks at 28 (Mar. 9, 2016). To support its argument, Swinomish points to other federal records in which the Samish are not specifically enumerated as on the public domain. However sufficient evidence in the record demonstrates that a number of Samish lived on the public domain.

[188] Letter, Duclos to William Dunston, State of Washington (Jan. 29, 1929).

[189] Letter, Aug. F. Duclos, Superintendent Tulalip Indian Agency to Commissioner of Indian Affairs (May 13, 1929). However, on November 21, 1929 Duclos wrote to Mr. W. David Owl, Missionary, Cattaraugus Reservation that the Tulalip Agency had the following tribes under its jurisdiction: "Snohomish, Lummi, Swinomish, Muckleshoot, Suquamish, Nooksack and Skagit Indians." Nothing in the record explains why the Superintendent omitted Samish from the list of tribes under his jurisdiction. Standing alone, the letter, which contradicts a letter sent six months earlier, does not provide conclusive evidence that Samish were not under the agency's jurisdiction.

they are properly cared for and will receive their rations regularly."[190] In 1931, Superintendent Duclos informed the Commissioner about the will of Jim Charles, a "living un-allotted Sammish Indian" of the Tulalip Indian Agency.[191]

Another further significant course of action by the federal government demonstrating that the Nation was under federal jurisdiction from 1900 to 1934 are the Department's approvals of the Nation's attorney contracts in 1925 and 1933. In 1925, federal agents assisted northwest Washington tribes, including the Samish, to enter attorney contracts[192] in order to bring claims against the United States in the United States Court of Claims. The Act of May 21, 1872 required all such contracts be approved by the Commissioner of Indian Affairs and the Secretary of the Interior to be valid. Five "properly authorized [Samish] Indian delegates" who were "acting for and on behalf" of the Samish Nation signed their attorney contract on December 17, 1925.[193] On May 31, 1933, Commissioner of Indian Affairs John Collier wrote to the Secretary of the Interior confirming that attorney Arthur E. Griffin had a contract to represent "tribes of Indians in Washington" including "Samish" to "pursue the litigation known as F-275 in the United States Court of Claims."[194] The Secretary approved this second contract with the Samish in June 1933.[195] The Department's actions in approving the Samish's attorney contracts in 1925 and 1933 support a finding that the Department considered the Nation a tribe subject to the statutory requirement for Departmental supervision of attorney contracts, and thus "under federal jurisdiction." [196]

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[190] Letter, Aug. F. Duclos to Commissioner of Indian Affairs (Mar. 16, 1929) ("During the summertime they are usually over on the San Juan Islands where they pick berries and fish. During this time they are beyond our reach and they really do not need any assistance. They spend their summers on the Islands regularly, in fact it is sort of a summer home for them.") When William McCluskey retired, the grocery deliveries ceased. Duclos told the Commissioner, "I have visited these old people and talked to them and they appear to be very grateful for the assistance given to them by the government." *Id*.

[191] Letter, Duclos to Commissioner of Indian Affairs (Nov. 4, 1931).

[192] Attorney's Contract approved by the United States between certain Indian tribes in the State of Washington and Arthur E. Griffin, of Seattle Washington (December 17, 1925).

[193] *Id*.

[194] Letter, Commissioner of Indian Affairs John Collier to Secretary of the Interior Harold L. Ickes (May 31, 1933).

[195] Attorney's Contract approved by the United States between certain Indian tribes in the State of Washington and Arthur E. Griffin, of Seattle Washington (June 9, 1933). Letter, Asst. Commissioner of Indian Affairs William Zimmerman, Jr. to Secretary of the Interior Harold L. Ickes (Sept. 6, 1933) (describing contracts with "tribes of Indians in Washington" including the "Samish"). The Court of Claims issued its decision on the Nation's claims two weeks before passage of the IRA. *Duwamish*, 79 Ct. Cl. 530. *Duwamish* held that the Samish Nation was a signatory to the Treaty of Point Elliott and had existed as a separate, independent tribe. *Duwamish*, 79 Ct. Cl. at 580–81. The court reaffirmed the federal government's obligations to the Samish Nation under the Treaty of Point Elliott, noting that the treaty included "numerous tribes and bands, some residing on treaty reservations and *others on nontreaty lands*." *Duwamish*, 79 Ct. Cl. at 612 (emphasis added). Though the court determined the Samish were owed compensation totaling $3,500.00, it ultimately found the award offset by federal expenditures, and thus dismissed the case. *Duwamish*, 79 Ct. Cl. at 538, 613.

[196] *See* Cowlitz ROD at 103 (Departmental supervision of tribal attorney contracts as evidence that non-treaty tribe was under federal jurisdiction in 1934). SITC argues that federal approval of a tribal attorney contract is not

ATTACHMENT 1: NW REGIONAL DIRECTOR'S ANALYSIS OF WHETHER SAMISH WERE UNDER FEDERAL JURISDICTION IN 1934

The Department's view that the Samish were under federal jurisdiction continued beyond 1933 and is reflected in its implementation of the IRA. In 1934, O.H. Lipps, Superintendent of the Sacramento California Indian Agency, wrote a letter of recommendation to the Commissioner of Indian Affairs on behalf of Don McDowell, acting secretary of the Samish Nation and president of the Northwest Federation of American Indians, who worked on behalf of federal officials to educate Northwest tribes about the IRA.[197] Lipps recommended McDowell for appointment to a supervisory position in the Indian Service, reporting that McDowell "[is] a member of the Samish Indian tribe enrolled at the Tulalip agency."[198] McDowell worked with federal officials to educate tribes about the IRA's benefits and believed it would provide a means for the "Samish Nation and Upper Skagit Band" to form an independent tribal government. Soon before passage of the IRA, McDowell signed a resolution endorsing the Act in his capacity as "Acting Secretary" of the Samish Nation.[199] In acknowledging that resolution Commissioner Collier stated "[w]e appreciate the favorable attitude as taken by your people on this important legislation."[200] In December 1934, in anticipation of a visit to the Swinomish reservation by Commissioner Collier, McDowell wrote to the Tulalip Superintendent of his further efforts to organize IRA elections on the Swinomish and Lummi reservations as well as among the Nooksack.[201]

2. After 1934

Although not directly relevant to the "under federal jurisdiction" inquiry, federal actions occurring after 1934 demonstrate that federal officials continued to take actions in accordance with the Department's prior treatment of the Samish as being under federal authority. In 1938, Tulalip Superintendent Upchurch wrote a general letter of recommendation for Mary McDowell, daughter of Don McDowell, describing her as "an Indian of one-fourth blood of *the Samish Nation*, Washington," and that "although resident in the Tulalip Jurisdiction, none of the family

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unequivocal evidence of jurisdiction status. *See* Letter, Ziontz Chestnut to BIA Northwest Reg. Dir. Stanley M. Speaks at 56 (Mar. 9, 2016). However we rely on the attorney contracts in context of other evidence spanning decades demonstrating continuing federal interactions with Samish tribal members.

[197] Friday Report at 54–55. Superintendent O.C. Upchurch wrote in April 1934 that McDowell "has an intense desire to do a social and economic missionary job among his people. He is a man of tact with industrial, supervisory, and political experience, a good organizer and I am sure he will be able to make a real contribution to our service." *Id.* Furthermore, Upchurch added, McDowell had been "my most able assistant in selling the Wheeler-Howard plans to the Northwest which is acceptable to most of the tribes." *Id.*

[198] Letter, O.H. Lipps, Superintendent, Sacramento Indian Agency to Commissioner of Indian Affairs John Collier (Apr. 30, 1934). Lipps explained that he had come to know McDowell when the latter was a student at the Carlisle Indian School. There, according to Lipps, McDowell showed "his more than ordinary desire to acquire an education and training, and by the qualities of leadership he displayed in the various student activities in which he participated…He is one of the outstanding, progressive Indians of the Pacific Northwest." *Id.*

[199] *See* Letter, Commissioner of Indian Affairs John Collier to Don McDowell (n.d., c. 1934) (regarding resolution endorsing the Wheeler-Howard Indian Self-Government Plan).

[200] *Id.*

[201] Letter, Don McDowell to O.C. Upchurch (Dec. 7, 1934).

has been allotted on any of our Reservations."[202] Over the next several years, other Samish would write to Upchurch about such issues as home loans and inheritance. Upchurch continued to recognize his responsibility to, and jurisdiction over, these individuals.[203]

In the 1950s, the Samish Nation again sought to bring claims against the United States and again had the Nation's attorney contract approved by the Department, as it had in 1926 and 1933.[204] In 1958, the Indian Claims Commission held that the Samish Nation was an Indian entity that had continuously existed as a recognized group by the federal government, and affirmed that the Samish Nation was party to the Point Elliott Treaty.[205] The court concluded that the Samish Nation "has shown itself to be the descendants and successors in interest of the Samish Indians of aboriginal times."[206]

During the 1950s, federal officials continued to report the Samish Nation under their jurisdiction. In 1951, in response to a Congressional request for the "names of tribes serviced through your agency" forwarded to him by the Information Officer for the Commissioner of Indian Affairs, the Western Washington Agency Superintendent included Samish on a list of "Indian Tribes (members not enrolled) to whom this office extends services," noting that the Samish had some 700 members and was the largest such group.[207] In 1953, the Superintendent invited Samish Tribal Council Secretary Mary McDowell to meet the Commissioner of Indian Affairs during his visit to Seattle on the basis that the Samish Nation was one of "the tribes under the jurisdiction of the Western Washington Indian Agency."[208] The Commissioner of Indian Affairs later wrote to McDowell, thanking the "Samish Indian Tribe" for meeting with him.[209] In 1955, the Western Washington Agency again listed Samish as a "landless" tribe under its jurisdiction.[210] In 1963

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[202] Letter, O.C. Upchurch to Whom Concerned (Jun. 8, 1938) (emphasis added).

[203] *See* Letter. Margaret Cagey Brown to O.C. Upchurch (Sep. 19, 1940); Letter, O.C. Upchurch to Margaret Cagey Brown [Marietta] (Sep. 23, 1940); Summary of Report on Heirs, Estate of Joseph Cagey (Feb. 29, 1940).

[204] *See* Letter, Superintendent, Western Washington Indian Agency, to Alfred Edwards (Oct. 12, 1956); Letter, Acting Superintendent Schmartz, Western Washington Indian Agency, to Don Foster, Area Director, Portland, Oregon (November 30, 1956).

[205] *Samish Nation of Indians*, 6 Ind. Cl. Comm. at 170–71.

[206] *Id*. at 172.

[207] Letter, M.M. Tozier to Raymond H. Bitney (Oct. 11, 1951); Letter, Raymond H. Bitney to M.M. Tozier, Information Officer, Commissioner of Indian Affairs, Washington D.C. (Oct. 12, 1951). *See, e.g*., Report of Raymond H. Bitney, Superintendent of Western Washington Indian Agency to Commissioner of Indian Affairs (Oct. 12, 1951) (identifying numerous Indian tribes, including Samish, as having members not enrolled and which are extended services by the agency).

[208] Letter, Raymond H. Bitney to Mary McDowell, Secretary, Samish Tribal Council (Sep. 30, 1953) (Bitney also told McDowell that the Commissioner would meet all the tribes as a whole and then hold "individual meetings with the representatives of each group").

[209] Letter, Glenn Emmons, Commissioner of Indian Affairs to Mary McDowell Hansen, Secretary/Treasurer, Samish Indian Tribe (Jan. 12, 1954).

[210] Letter, Melvin L. Robertson to R.J. Wilson [New York] (Mar. 24, 1955).

and 1964, Western Washington Agency officials met repeatedly with the Samish Nation and welcomed tribal representatives while conducting research on tribal enrollment issues.[211]

Also, in the 1950s, the Department implemented the decision in *Tulee v. Washington*, 315 U.S. 681 (1942), which upheld the right of Washington treaty tribes to fish without the need for their members to apply for state licenses, by issuing so-called "blue cards" to eligible Indians, which included Samish Indians as "enrolled member[s] of the Samish Nation" on records of the Western Washington Indian Agency.[212]

I note that the record contains some evidence demonstrating that officials occasionally omitted the Samish from lists of Indian tribes within federal jurisdiction, or misidentified individual Samish as members of other tribes. For example, in 1938, the Tulalip Agency Superintendent wrote that there were nine distinct tribes under his jurisdiction, but did not include Samish.[213] There is no explanation of the Superintendent's position, which is inconsistent with his earlier statements that there were "16 tribes under jurisdiction of Tulalip"[214] and with his provision of assistance to individual Samish Indians. Such inconsistencies are not uncommon, and do not in themselves demonstrate that the Samish Nation was not under federal jurisdiction.[215] I am aware of no evidence demonstrating that federal officials affirmatively disclaimed federal jurisdiction over the Samish before about 1971.[216] Even if there were, however, evidence of executive officials disavowing legal responsibility in certain instances that cannot, by itself, revoke jurisdiction absent express congressional action.[217] As the Solicitor has explained, the absence of probative evidence that a tribe's jurisdictional status was terminated or lost before 1934 strongly suggests that such status was retained in 1934.[218] The administrative actions or inactions of the

[211] Samish Tribal Council Minutes, September 29, 1963 (At the meeting, Jess Town, Tribal Operations Office for the Western Washing Indian Agency, BIA told the Samish Nation that its "by-laws have been accepted by the Secretary of the Interior as an operating document, but not approved because we are not a reservation tribe." He also pledged that if the tribe "will let the agency know when meetings are to be held, an agency representative will attend…to discuss hunting and fishing problems.").

[212] *See, e.g.*, Letter, Raymond Bitney, Superintendent of Western Washington Indian Agency to Frank Wilson (Sep. 2, 1953) ("In accordance with your request, we are enclosing card which certifies that you are an enrolled member of the Samish Nation, according to the records of this agency").

[213] Letter, O.C. Upchurch to Mr. George L. Harris (Mar. 7, 1938).

[214] Letter, O.C. Upchurch to Department of Labor (Feb. 27, 1934).

[215] SITC suggests that documents that do not mention Samish provide evidence that Samish were not under federal jurisdiction in 1934. *See* Letter, Ziontz Chestnut to BIA Northwest Reg. Dir. Stanley M. Speaks (Mar. 9, 2016). However the absence of evidence does not necessarily indicate evidence of absence.

[216] *See Greene Administrative Proceedings*, App. B, ¶ 110 (describing first official disclaimers of recognized status).

[217] Sol. Op. M-37029 at 20, n.123, citing *United States v. John*, 437 U.S. 634, 653 (1978).

[218] *Id*.

Department could not legally terminate the federal relationship with the Samish.[219] The Department has stated before that neither federal denials of requests for assistance, nor occasional misstatements from government officials results in the repudiation of federal jurisdiction.[220] In addition, misstatements by Department officials do not by themselves terminate federal jurisdiction over a tribe.[221]

IV. CONCLUSION

Based on the record as a whole, I conclude that the Samish Nation satisfies both steps of the "under federal jurisdiction" inquiry established by Sol. Op. M-37029. The record demonstrates that the Nation's ancestors were first recognized and brought under federal jurisdiction when the United States negotiated and entered the Treaty of Point Elliott with the Samish. From 1855 through 1934, there is no evidence demonstrating that the United States ever terminated the Samish's recognized status. In the years following the Treaty, the federal government treated the Samish as a federally recognized tribe, during which time federal officials continued a course of dealings with the Nation and its members on and off the reservations established by the Treaty. These included efforts at relocating the Samish to Treaty reservations; issuing homestead allotments to Samish Indians; exercising authority over Samish activities; and recording Samish Indians on lists of Indians under the authority of federal Indian agencies in Washington State.

The United States Court of Appeals for the District of Columbia Circuit addressed the degree of a relationship between an Indian tribe and the United States government that is required to be considered "under federal jurisdiction" for purposes of the IRA. In *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, the federal appeals court found that given "a large and complex record of Interior interactions with the Cowlitz for almost a century" the Secretary reasonably determined that the tribe in that case satisfied the two-part test, discussed above.[222] Significantly, the court opined that:

> Whether the government acknowledged federal responsibilities toward a tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed. And as the Secretary explained, we can understand the existence of such responsibilities sometimes from one federal action that in and of itself will be sufficient, and at other times from a "variety of actions when viewed in concert." Such contextual analysis takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian

[219] *See* Sol. Op. M-37029 at 20 n.122 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1]). *See also United States v. Long*, 324 F.3d 475, 479–80 (7th Cir. 2003); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

[220] *See* Cowlitz ROD at 95.

[221] *See generally Carcieri*, 555 U.S. at 397–98 (Breyer, J., concurring) (recognizing that a tribe may have been under federal jurisdiction in 1934 even though the Federal Government did not believe so at the time).

[222] *Cowlitz*, 830 F.3d at 566.

> affairs and implementing the statute. It is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction.[223]

As in *Grand Ronde*, the Samish maintained a relationship with the United States through a wide variety of actions. This government-to-government relationship persisted from the late nineteenth-century to 1934, and beyond. Contrary to SITC's assertions, even if the Department did not consistently view the Samish as being under its supervision, other historical facts and interactions with the United States demonstrate that such federal jurisdiction over the Samish remained intact.

Irrespective of whether a formal government-to-government relationship existed in 1934, the evidence plainly shows that federal officials considered the Samish and its members under federal authority. From 1900 through 1934, officials at the local and national level continued to take actions that reflect a course of dealings demonstrating that Federal officials considered the Samish Indians as under federal authority. These actions include federal officials managing and issuing reservation allotments to Samish; expanding federal jurisdiction to Samish Indians living off-reservations; taking surveys and notes of off-reservation Samish; inquiring on behalf of Samish to obtain a Samish burial ground; expressly describing the Samish as being "under federal "jurisdiction"; approving attorney contracts for the Samish Nation pursuant to federal statutes requiring the same; using federal funds to buy groceries for elderly Samish Indians; and providing medical services to Samish Indians living off-reservation. These actions reflect a course of dealings for or on behalf of the Samish Nation and its members that establish federal obligations, duties, responsibility for, and authority over the Samish Nation by the federal government. Viewed in context, these actions plainly reflect a course of dealings for or on behalf of the Samish Nation and its members that establish federal obligations, duties, responsibility for, and authority over the Samish Nation by the federal government. For these reasons I conclude that Samish was under federal jurisdiction in 1934.

[223] *Id*. at 565 (record citations omitted).