Samish Indian Nation
OF WASHINGTON

June 19, 2019

The Honorable Ruben Gallego
Chairman
Indigenous Peoples of the United States Subcommittee
House Natural Resources Committee
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Gallego,

Thank you for your letter of June 12, 2019 following up on the Legislative Hearing held on June 5, 2019 before the Committee on Natural Resources' Indigenous Peoples of the United States Subcommittee regarding H.R. 2961, the Samish Indian Nation Land Reaffirmation Act. I appreciated the opportunity to testify before the Subcommittee on behalf of the Samish Indian Nation.

In your letter, you asked me to respond to four questions from Ranking Member Paul Cook. I am grateful for the opportunity to answer these questions to further clarify these issues. Please find attached the answers to these questions:

1. **At the hearing, you mentioned local support for your trust land efforts in your testimony. Could you please elaborate on this support?**

The Samish Indian Nation (Tribe) has enjoyed continuous local support throughout its ten year legislative effort to obtain land in trust, including support from Skagit County, the City of Anacortes, and our local state legislators. The Tribe has service agreements in place with both the City of Anacortes and Skagit County to compensate those governments for any impacts that putting land in trust for Samish may have on those governments.

The 6.7 acre Campbell Lake South parcel that Bureau of Indian Affairs (BIA) decided to take into trust for Samish is located solely in Skagit County. With the introduction of H.R. 2961, Skagit County has provided a letter of support for the legislation to Congressman Larsen (attached). Although the Campbell Lake South parcel is outside of the city limits, the City of Anacortes still supports the Tribe and is currently working on a letter of support to submit. In addition, Representative Jeff Morris of the 40th State House District has submitted a letter of support for HR 2961 to Congressman Larsen (attached) and State Senator Liz Lovelett has stated that she is also drafting a letter of support.

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2. **Does H.R. 2961 affect the treaty rights of neighboring tribes or the treaty rights of the Samish Indian Nation?**

H.R. 2961 does not affect the treaty rights of the Samish Indian Nation or any other tribe. H.R. 2961 simply reaffirms the BIA's decision to take 6.7 acres of land into trust for Samish. As part of that decision, a *Carcieri* analysis needed to be completed in order to determine that Samish was under federal jurisdiction as of 1934 and thus eligible to have land taken into trust. The 32 page *Carcieri* analysis for Samish is a comprehensive review that determined that Samish was under federal jurisdiction in 1934 and is eligible for land to be taken into trust. Further, Samish's *Carcieri* analysis makes two things clear: (1) there is a fundamental distinction between treaty rights and the benefits of federal recognition, including land into trust; and (2) Samish has acknowledged that the issue of off-reservation treaty fishing rights is closed.

The Swinomish Indian Tribal Community and other tribes have made this same argument regarding treaty rights against the Samish Tribe for the last 27 years, when the Samish Tribe sought federal re-recognition and more recently when the Samish Tribe sought to obtain the benefits and services of federal recognition by obtaining land in trust under the Indian Reorganization Act. Swinomish and the Tulalip Tribe lost this argument every time in federal court, including four Ninth Circuit Court of Appeals decisions.

It was only in the early 1970s that the Samish Tribe discovered that the federal government had started treating the Tribe as an unrecognized tribe. No formal federal decision had ever determined that the Samish Tribe was unrecognized. It was only in 1994, during trial on the Samish Tribe's petition for re-recognition, that the Tribe found out that it had been dropped from an internal Department of Interior list of federally-recognized tribes by a BIA clerk, who could not cite any reason for her action. The Department of Interior then used this list to determine that Samish was unrecognized, even though the list was never intended for this purpose. *Greene v. Babbitt*, 943 F.Supp. 1278, 1288 (W.D.Wash. 1996) ("*Greene III*"). The Federal Circuit Court of Appeals later ruled that this action by the BIA was "arbitrary and capricious" and "wrongful," and that the Samish Tribe should have been federally-recognized for this entire time. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1373-74 (Fed. Cir. 2005).

When the Samish Tribe sought federal re-recognition through the federal acknowledgment regulatory process at 25 C.F.R. Part 83 starting in 1979, Swinomish and Tulalip argued that Samish was prohibited from being federally-recognized because the federal acknowledgment regulations required a showing of continuous tribal existence and successorship, and the *U.S. v. Washington*, 641 F.2d 1368 (9th Cir. 1981) ruling that the Samish Tribe was not a successor to the historical Samish Tribe for purposes of off-reservation treaty fishing rights meant that the Samish Tribe could not be a successor to the historical Samish Tribe for any purpose, including federal recognition. The 9th Circuit Court of Appeals twice rejected Swinomish and Tulalip's argument, holding that federal recognition and the benefits that flow from such recognition and treaty rights are two completely separate subjects: "We recognize that the two inquiries are similar. Yet each determination serves a different legal purpose and has an independent legal

effect." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) ("*Greene I*"); *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995) ("*Greene II*"):

> [T]he Tulalip Tribe appears amicus curiae to argue that the Samish are collaterally estopped from litigating any issue of tribal recognition. They contend estoppel results from the litigation that culminated in *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981)(*Washington II*). That case finally determined the Samish were not entitled to tribal treaty fishing rights. We denied the Tulalip's application for intervention on the ground that the issues of tribal recognition and treaty tribe status were fundamentally different. *See Greene v. United States*, 996 F.2d 973 (9th Cir. 1993). We reach the same conclusion here and hold that the *Washington II* litigation does not preclude the Samish's pursuit of recognition as a tribe for purposes of securing benefits for its members under federal entitlement programs available to Indians.

This holding was confirmed yet again a third time by an en banc panel of the Ninth Circuit in an opinion written by Judge William Canby, a noted authority in Indian law, in *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) (cited as "*Samish*"), where he stated: "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." (Emphasis added). The en banc Ninth Circuit went on to say that federal recognition and the benefits that flow from such recognition, including taking land into trust can have no impact on treaty rights. The *Samish* 9th Circuit opinion says: "recognition has no effect on treaty rights," 593 F.3d at 801, and concluded: "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." This ruling cannot be stated more clearly. Swinomish, Tulalip, Lummi and Upper Skagit were parties in this case.

The Samish Tribe had to prove it was a successor to the historical Samish Tribe that signed the Point Elliott Treaty when it petitioned for federal re-recognition, and it had to prove it was a successor to the historical Samish Tribe to obtain a positive *Carcieri* determination. These determinations, to obtain the services and benefits of federal recognition, are fundamentally different than successorship for purposes of treaty status, and do not affect Swinomish's or the other tribe's judicial decisions that they are the successor to certain tribes and bands for purposes of off-reservation treaty fishing rights. The Ninth Circuit in *Samish* held that the Samish Tribe cannot claim such treaty rights. Swinomish and Tulalip tried to prevent Samish federal re-recognition on the ground that their successorship determinations in *U.S. v. Washington* prohibited Samish from being federally- re-recognized. The federal courts soundly rejected that argument several times. Swinomish and Tulalip make the same argument again now, in opposition to the Samish Tribe's successful *Carcieri* analysis, which determined that Samish is a successor to the historical Samish Tribe for purposes of taking land into trust under the IRA. The same analysis and result applies – taking land into trust for the benefit of the Samish Indian Nation does not affect and cannot affect the treaty rights of the Swinomish Indian Tribal Community.

3. Please explain the purpose of Section 2(b) of H.R. 2961?

Section 2(b) of H.R. 2961 states that the Act, which reaffirms the BIA's decision and actions to take 6.7 acres of land into trust for Samish, applies to all existing and future claims against the BIA's decision. Section 2(b) is patterned after other similar trust land reaffirmation legislation, including Section 2(b) of P.L. 113-179, the Gun Lake Trust Land Reaffirmation Act and Section 2(b) of H.R. 312, the Mashpee Tribe Reservation Reaffirmation Act which was recently passed by the House. Section 2(b) would help to bring finality to Samish's decade long effort to take land into trust since the *Carcieri* decision.

The Samish Indian Nation has been trying to put modest amounts of land in trust for governmental services and tribal member needs since the tribe was re-recognized in 1996. In 1969, due to a clerical error, the BIA began to treat Samish as an unrecognized tribe forcing Samish to undertake a 27 year administrative and legal battle to restore its recognition. After re-recognition, the Tribe was finally able to have a 79 acre parcel taken into trust by the BIA in 2009, but has been unable to effectively use this land. After the Supreme Court's 2009 *Carcieri* decision, the Tribe requested that a *Carcieri* analysis be completed to determine that the Tribe was under federal jurisdiction as of 1934 and thus eligible to have lands taken into trust. Because of Samish's 27 year battle to be re-recognized which created hundreds of thousands of pages and the efforts of Swinomish to oppose Samish in this process, it took the Samish Tribe over nine years to have its *Carcieri* analysis completed. This was an exhaustive process that is reflected in the 32 page *Carcieri* analysis attached the BIA's decision.

Unfortunately, Swinomish has opposed the Samish Tribe every step of the way, including opposing Samish federal re-recognition and now opposing any attempts by our tribe to acquire land in trust for our people. Swinomish has stated that its objective is to delay the Samish Tribe as long as possible. Throughout the *Carcieri* analysis process, Swinomish has tried to delay the determination through multiple submissions to the Department of Interior claiming the Samish Tribe could not meet the *Carcieri* standard, multiple requests for consultations both at the Regional Office and on Swinomish territory, and multiple requests to the Department to delay Samish's *Carcieri* analysis to allow Swinomish to try to find additional information and develop additional arguments against Samish. **Now, Swinomish has appealed to the Interior Board of Indian Appeals (IBIA) based solely on arguing that the BIA does not have the authority to take land into trust for Samish because of the *Carcieri* decision.** Appealing to the IBIA on the basis of *Carcieri* has been soundly rejected by the House of Representatives when it voted to pass H.R. 375 which would clarify the Secretary of Interior's authority to take land into trust for all federally recognized tribes.

It is likely that it will take 6 or more years for Swinomish's appeal to work its way through the IBIA, federal district court, and a federal court of appeals. Meanwhile, all of Samish's other land into trust applications, including applications for our Administrative Complex and Longhouse,

which houses the Tribe's Head Start and elder services programs, are on hold while the appeal is considered.

Section 2(b) would provide finality to the IBIA appeals process and allow the BIA to finalize the trust status of the Campbell Lake South parcel and to move forward to consider other Samish land in trust applications without having to face future challenges based on *Carcieri*. This finality would further ensure that federal taxpayer funds are not wasted on protracted frivolous litigation given it is the United States that is tasked with defending its decision.

To be clear, future Samish fee-to-trust applications may be appealed, but those challenges would have to be based on the criteria set out in the BIA's fee-to-trust regulations at 25 CFR Part 151, not on the *Carcieri* determination, just as for every other federally-recognized tribe.

4. **If H.R. 375 were to be signed into law, could you explain how this would assist the Samish Indian Nation in its efforts to take land into trust?**

The signing into law of H.R. 375 would greatly facilitate the Samish Indian Nation's efforts to put land into trust. For Samish, the Supreme Court's *Carcieri* decision resulted in an undue nine year delay before the BIA completed a Carcieri analysis for the Tribe. H.R. 375 would clarify that the Secretary of Interior has the authority to take land into trust for all federally recognized tribes. Specifically for Samish, it would moot out all legal challenges to whether the Samish Tribe is eligible to take land into trust under the Indian Reorganization Act, 25 U.S.C. §5108, including the current appeal to the IBIA filed by Swinomish which is challenging the Secretary's authority to take land into trust for the Samish based on the *Carcieri* decision. Simply put, the Samish Indian Nation would be able to move forward with all pending fee to trust applications with the BIA. Other tribes, local governments and affected persons could still challenge Samish fee-to-trust applications, but those challenges would be limited to the criteria set out in the fee-to-trust regulations at 25 C.F.R. Part 151.

While Samish strongly supports H.R. 375, because of the uncertainty surrounding it's final passage by Congress, Samish is also pursuing H.R. 2961 to reaffirm the BIA's decision to take 6.7 acres of land into trust for the Tribe in order to provide finality for Samish and allow the Tribe to finally move forward after over 9 years to take land into trust.

Thank you for the opportunity to answer these questions from the Subcommittee. I would be glad to answer any further questions should they arise.

Sincerely,

Thomas D. Wooten
Chairman, Samish Indian Nation