

H.R. 2961

Response of Brian Cladoosby, Chairman of the Senate, Swinomish Indian Tribal Community, to  
Additional Questions

Questions from Representative Paul Cook

1. At the hearing, you indicated that as the Chairman of the Swinomish Indian Tribal Community (SITC) you do not support H.R. 375. Could you explain why the SITC does not support H.R. 375?

The premise of this question is factually inaccurate. I testified that the Swinomish Indian Tribal Community neither supports nor opposes H.R. 375 because SITC does not have a *Carciari* problem. This exchange can be viewed at the 54 minute, 56 second mark of the hearing webcast as maintained on the Committee's webpage. As retrieved on June 17, 2019, the URL for this exchange is <https://youtu.be/I9COgMJj86U?t=3236>.

2. Do you agree that Samish is a federally recognized Indian tribe? If not, please explain the basis for your response.

I agree that the Samish Indian Nation is a federally recognized Indian tribe by virtue of the Final Determination to Acknowledge the Samish Tribal Organization as a Tribe made by Assistant Secretary – Indian Affairs Ada Deer on November 8, 1995.<sup>1</sup>

However, it is important to note that the Samish Indian Nation was *not* recognized as a successor to the historic Samish Tribe. To the contrary, its claim to be a successor to the historic Samish Tribe was specifically rejected in the recognition proceedings. *See*:

- *Greene v. Lujan*, Order Granting Federal Defendants' Motion for Partial Summary Judgment at 10 (No. C89-645Z, W.D. Wash. Sept. 19, 1990) (Samish Indian Nation, then known as the Samish Indian Tribe of Washington, is precluded by *United States v. Washington* from "assert[ing] that it is the political successor in interest to the historic Samish Indian Tribe")<sup>2</sup>;
- *Greene v. Lujan*, 1992 U.S. Dist. LEXIS 21737 at \*5, 1992 WL 533059 ("The issue of whether plaintiffs [including the Samish Indian Nation, then known as the Samish Indian Tribe of Washington] are successors in interest to the Treaty of Point Elliot has already been resolved. The Court in *United States v. Washington* affirmed the District Court finding that the Samish lacked the necessary political and cultural cohesion to constitute a successor in interest to the treaty of Point Elliot. 641 F.2d 1368. This Court, in an earlier order, held that *plaintiffs are barred under the doctrine of res judicata from relitigating its status as the political successor to the aboriginal Samish Indian Tribe. ... Plaintiffs' therefore, have no rights under the Treaty of Point Elliott.*")

---

<sup>1</sup> Assistant Secretary Deer's final decision is Administrative Record Document (AR Doc.) 524 in SITC's appeal of the Regional Director's November 9, 2018, decision (IBIA No. 19-030).

<sup>2</sup> A copy of this decision is enclosed as Exhibit A.

and \*9 (“The [*United States v. Washington*] Court ... determined that petitioners were not the successors in interest of the treaty signatories. This holding is binding in this case and treaty issues cannot be relitigated.”) (No. C89-645Z, W.D. Wash. Feb. 25, 1992), *aff’d* 64 F.3d 1266 (9th Cir. 1995).<sup>3</sup>

Even after the Samish Indian Nation secured federal recognition, the courts continued to hold that it was not a successor to the historic Samish Tribe. *See Samish Indian Nation v. United States*, 58 Fed. Cl. 114, 120 (2003) (“Although Plaintiff is correct that a tribe known as the Samish were a party to the Treaty of Point Elliott, the current Samish Tribe is not descended from that tribe; therefore, *the Samish have no rights under the Treaty.*”) (emphasis added).

It should also be noted that Swinomish and other tribes were precluded from participating as parties in the administrative hearing that led to the Samish Indian Nation’s acknowledgement decision. *See In re Federal Acknowledgment of the Snoqualmie Tribal Organization*, 34 IBIA 22, 24 (July 1, 1999). This was an anomaly; the acknowledgement regulations were revised after that hearing so that all interested tribes are now entitled to participate fully in proceedings on petitions for acknowledgement. *Id.* at 24-25.

Moreover, to limit the participation of Swinomish and other tribes in the review of its acknowledgement proceedings, the Samish Indian Nation represented to a federal court that if there was a dispute with another tribe relating to the findings in the acknowledgement proceedings that tribe “*would, of course, have the right of any non-party to relitigate the facts.*” *Greene v. Babbitt*, No. C89-645Z, Transcript of Proceedings Before the Honorable Thomas S. Zilly at 28-29 (July 18, 1996) (emphasis added).<sup>4</sup>

H.R. 2961 would prevent Swinomish from challenging a decision that purports to rely on findings from the Samish Indian Nation’s acknowledgement proceedings despite the Samish Indian Nation’s assurance to the contrary.

3. Is it SITC’s view that the Department of the Interior does not have authority to take land into trust for the Samish Indian Nation under the U.S. Supreme Court’s 2009 *Carcieri v. Salazar* decision?

Yes. As relevant here, *Carcieri* limits the authority of the Secretary of the Interior to take land into trust to tribes that were under federal jurisdiction in 1934. It is Swinomish’s view that the Samish Indian Nation was not under federal jurisdiction in 1934.

The Regional Director’s non-final November 9, 2018, decision found otherwise. It holds that the Samish Indian Nation came under federal jurisdiction in the 1855 Treaty of Point Elliott and that, thereafter, federal officials had dealings with Samish descendants that demonstrated that the Samish Indian Nation remained under federal jurisdiction in 1934.

---

<sup>3</sup> A copy of this decision is enclosed as Exhibit B.

<sup>4</sup> A copy of the transcript is enclosed as Exhibit C.

It is not possible to fully address the multiple legal and factual errors in the Regional Director's decision in the time allowed for my response to these questions. However, I can briefly summarize two of our overriding concerns regarding the decision.

First, the decision finds that the Samish Indian Nation came under federal jurisdiction in the 1855 Treaty of Point Elliott. The historic Samish Tribe participated in that Treaty, but multiple federal courts have held that the Samish Indian Nation is not a successor to the historic Samish Tribe *for any purpose*.<sup>5</sup> The Regional Director's decision is inconsistent with those cases and could allow the Samish Indian Nation to assert rights on or to reservations established under the Treaty (including the Swinomish Reservation); hunting and gathering rights that are held exclusively by treaty successors; and other treaty benefits. The Samish Indian Nation has asserted or threatened to assert such rights in the past.<sup>6</sup> In one memorandum, the Samish Indian Nation's attorney drove home the threat to Swinomish by writing that, "if [counsel for Swinomish] is offended and outraged by the Samish Tribe now, he will only be *more outraged and offended in the years and decades to come*."<sup>7</sup>

Second, members of the historic Samish Tribe formed one of the constituent tribes of the Swinomish Indian Tribal Community. As a result, Swinomish is an adjudicated successor of the historic Samish Tribe and many Swinomish members, including members of its governing body, are Samish descendants.<sup>8</sup> The decision improperly relies on federal dealings with Samish descendants to establish that the Samish Indian Nation was under federal jurisdiction, including individuals who chose to affiliate with Swinomish and were not members of the Samish Indian Nation or any of its predecessors.<sup>9</sup>

Every tribe holds its history and identity as a sacred trust. The Regional Director's reliance on federal dealings with the ancestors of the Swinomish tribe to establish that another tribe was under federal jurisdiction is a form of identity theft that threatens Swinomish's core interests.

---

<sup>5</sup> See my response to Question 2 above and enclosed Exhibits A and B. These and other cases are also cited in my written testimony dated June 5, 2019.

<sup>6</sup> For example, the Samish Indian Nation has argued that the four Indian reservations established in Article 2 of the Treaty "were not established for any particular tribe or tribes; by the terms of the treaty itself, the four reservations were 'reserved for the present use and occupation of the said tribes and bands,' meaning all the reservations were reserved for the use and occupancy of all the signatory tribes and bands to the Treaty of Point Elliott." AR Doc. 509 (12/22/2014 Letter from Thomas Wooten to Stanley Speaks at 2). The Samish Indian Nation has also asserted that it can claim any and all rights under the treaty with the sole exception of fishing rights. See AR Doc. 538 (6/6/2016 Letter from Craig Dorsay to James DeBergh and Jessie Young at 5-7). These documents are enclosed as Exhibits D and E.

<sup>7</sup> Exhibit E, AR Doc. 538 (6/6/2016 Letter from Craig Dorsay to James DeBergh and Jessie Young at 2) (emphasis added).

<sup>8</sup> See AR Doc. 524 (1995 Samish Acknowledgement Decision at 15). A copy of the acknowledgement decision is attached as Exhibit F.

<sup>9</sup> See *id.*

4. Do you agree that federally recognized tribes should be able to have land taken into trust?

Swinomish does not have a position on this question for the same reason that we have not taken a position on H.R. 375. See my response to Question 1 above.

It should be noted, however, that H.R. 2961 is unlike any other *Carciari* fix that has been proposed for any other tribe. Unlike those proposals, H.R. 2961 would ratify and confirm every line and every footnote in a 32-page single-spaced decision that is extremely complicated, both legally and factually. Even a cursory review of the Regional Director's decision will confirm its complexity. Congress is ill-equipped to study (especially without providing an opportunity for full briefing from the parties) and determine the merits of the decision, a task best left to the Interior Board of Indian Appeals and federal judges.

Also, if enacted, H.R. 2961 would be the first time since the Termination Era of federal Indian policy in the 1950s that Congress preempted an Indian tribe's ability to seek legal redress of an active legal claim, a dubious and historically embarrassing distinction for this Congress. If the same approach had been taken in 1987 when the Department issued a *final* decision denying the Samish Indian Nation's petition for federal acknowledgement, the Samish Indian Nation would not be recognized today. The administrative appeal and judicial review processes exist for good reason. It is both fundamentally unfair to Swinomish and wholly improper for the Congress to terminate those processes and ratify a complex interim decision as federal law, especially one that has the potential to create substantial disruption among the Point Elliott Treaty tribes.

#### Questions from Representative Bishop

1. Subcommittee chairman Gallego asked BIA Director Darryl LaCounte whether the BIA considers treaty rights when it takes land into trust. How does the decision in this specific case affect treaty rights?

I recognize that in some fee-to-trust decisions it is not necessary to consider treaty rights. However, in this case, the Regional Director chose to rely on the Treaty of Point Elliott as the centerpiece of his *Carciari* analysis.<sup>10</sup> By treating the Samish Indian Nation as a successor to the historic Samish Tribe that participated in the Treaty, the Regional Director's decision opens the door for the Samish Indian Nation to assert rights on or to reservations established under the Treaty (including the Swinomish Reservation); hunting and gathering rights that are held exclusively by treaty successors; and other treaty benefits.<sup>11</sup> Although the Regional Director's decision states that the Samish Indian Nation cannot re-open decisions holding that it does not have treaty fishing rights, it does not address these other treaty rights. And, it never explains how the Samish Indian Nation can be a successor to the historic Samish Tribe for some purposes but not others.

---

<sup>10</sup> The Regional Director's reliance on the Treaty is detailed in my written testimony dated June 5, 2019.

<sup>11</sup> See my response to Question 3 from Representative Cook.

2. Your testimony focused on the question whether the Samish Indian Nation is a successor to the historic Samish tribe that participated in the 1855 Treaty of Point Elliott. Why is the successorship issue important to the Swinomish Indian Tribal Community?

As discussed in my response to Question 3 from Representative Cook, members of the historic Samish Tribe formed one of the constituent tribes of the Swinomish Indian Tribal Community. As a result, Swinomish is an adjudicated successor of the historic Samish Tribe and many Swinomish members, including members of its governing body, are Samish descendants.<sup>12</sup> The Regional Director's decision improperly relies on federal dealings with Samish descendants to establish that the Samish Indian Nation was under federal jurisdiction, including individuals who chose to affiliate with Swinomish and were not members of the Samish Indian Nation or any of its predecessors.

As I stated in response to Representative Cook, every tribe holds its history and identity as a sacred trust. The Regional Director's reliance on federal dealings with the ancestors of the Swinomish tribe to establish that another tribe was under federal jurisdiction is a form of identity theft that threatens Swinomish's core interests.

To provide one example, the Regional Director cites the federal government's allotment of land to George Barkhousen *on the Swinomish Reservation* in 1884 as evidence of federal obligations, duties or responsibilities for or over a separate and distinct Samish tribe. Regional Director's *Carcieri* Analysis at 22-23. However, the record contained no evidence that the Indian Office considered George Barkhousen to be a member of a separate and distinct Samish tribe and substantial evidence that it considered him to be Swinomish or Clallam. Indeed, there was substantial evidence that Mr. Barkhousen and his family *themselves* considered him to be Clallam, not Samish.<sup>13</sup> The Regional Director's

---

<sup>12</sup> See AR Doc. 524 (1995 Samish Acknowledgement Decision at 15) (enclosed as Exhibit F).

<sup>13</sup> George Barkhousen was enumerated on Swinomish Reservation censuses from 1887 to 1909 and 1911 to 1914, as was his family in 1915, following his death. AR Doc. 596. The 1900 Swinomish Reservation census lists Mr. Barkhousen as *Swinomish*, with a white father and Samish mother. *Id.* He is also listed as Swinomish on the 1901 Swinomish Register of Indian Families. AR Doc. 597. However, when he died in 1915 the Tulalip Agency Report of Deaths listed him as "Clallam tribe." AR Doc. 598.

A May 1918 affidavit by George Barkhousen's son, Otto Henry Barkhousen, states that he is ¼ blood belonging to the Clallam tribe and that his father, George Barkhousen, was ½ blood Clallam, with a white father (Henry Barkhousen) and a full-blood Clallam mother (Julia Barkhousen). AR 549 at pdf page 27. Julia Barkhousen, George Barkhousen, and George Barkhousen's sons, Ernest G. Barkhousen and Otto Henry Barkhousen, are all listed on rolls prepared by Charles Roblin as Clallam. AR Doc. 991 at pdf page 35; *see also* AR Doc. 716 & 717 (affidavits and other documents identifying Julia Barkhousen and her children as Clallam or Lummi).

Historian Alexandra Harmon has explained that Indian people in Western Washington applied many different factors (*including residence*) to determine their "tribal" identity, not just ancestry. AR Doc. 807 at pdf pages 15-16. She illustrated this point by noting (among other examples) that George Barkhousen's mother, Julia Barkhousen, was "listed as an unallotted Klallam" on the Roblin rolls but "had one sister on the Tulalip roll and another on the Lummi roll." *Id.* at pdf page 16.

In relying on the making of an allotment to George Barkhousen on the Swinomish Reservation is evidence of federal jurisdiction over a separate and distinct Samish Tribe, the Regional Director asserts that "he was in fact Samish."

reliance on this and other actions involving individuals that the Indian Office did not identify as Samish threatens the history and identity of those tribes with which they were actually affiliated.

3. Chairman Wooten testified that the historic Samish Tribe controlled the southern San Juan Islands including Fidalgo Island. Do you agree with that?

No. The geographic extent of the aboriginal territories of the treaty Samish, treaty Swinomish, and many other historical tribes and bands has been finally determined in prior litigation. Congress established the Indian Claims Commission (ICC) to determine the areas *exclusively* used and occupied by treaty-time tribes and bands and to determine whether the United States paid unconscionable consideration for the cession of such lands. The ICC separately considered claims brought on behalf of the treaty Samish and the treaty Swinomish and determined that Samish aboriginal territory did not include, and Swinomish aboriginal territory did include, many of the areas that Chairman Wooten testified the “historic Samish Tribe controlled,” including some of the San Juan Islands and the vast majority of Fidalgo Island.

The ICC aboriginal territory claim brought on behalf of the treaty Samish did not include most of Fidalgo Island. *See Samish Indian Tribe v. United States*, 6 Ind. Cl. Comm. at 163, Finding of Fact 4 ICC Dkt. No. 261, Petitioner's Exhibit IA, Defendant's Exhibit 2 (map depicting Samish claim area).<sup>14</sup> And, regardless what was claimed on behalf of the treaty Samish, the ICC found that the treaty Samish did not have *any* aboriginal territory on Fidalgo Island. *See Samish Tribe*, 6 Ind. CL Comm. at 167, Finding of Fact 12 (legally describing area found to be the aboriginal territory of the treaty Samish). Specifically, the ICC found that the historic Samish Tribe exclusively used and occupied two tracts: (1) a tract on the mainland east of Fidalgo Island that included the peninsula known as Samish Island; and (2) Guemes Island. *Id.* Neither tract includes any portion of Fidalgo Island.

In contrast, the ICC found that the southern and eastern portions of Fidalgo Island, where Lake Campbell and the Swinomish Reservation are located, were exclusively occupied by the aboriginal Swinomish. *See Swinomish Tribe of Indians v. United States*, 26 Ind. Cl. Comm. at 384, Finding of Fact 11 (legally describing area found to be the aboriginal territory of the treaty Swinomish).

The ICC factual determinations as to the extent of Samish and Swinomish aboriginal territory were based upon the expert opinions of a number of well-regarded anthropologists or ethnographers, including Dr. Wayne Suttles, Dr. Sally Snyder, and Dr. Barbara Lane, among

---

Regional Director’s *Carciari* Decision at 23 n.166. In making this assertion, the Regional Director relies solely on a 1930 census listing Julia Barkhousen as “full blood Samish.” *Id.* He does not consider how the Indian Office identified George Barkhousen or how Mr. Barkhousen and his family identified him. Given the complexity of Indian identify as described by Professor Harmon, the Regional Director’s reliance on a single census and his failure to consider substantial contrary information was mistaken. There are similar issues with many of the individuals the Regional Director now asserts were “Samish.”

We attach copies of the documents cited in this note as Exhibits G – N.

<sup>14</sup> A copy of this map is enclosed as Exhibit O.

others. Those determinations are inconsistent with Chairman Wooten's claim that the historic Samish Tribe "controlled" Fidalgo Island.

4. Chairman Wooten testified that H.R. 2961 has nothing to do with treaty rights. Would you propose any revisions to the bill to confirm that?

Yes. Swinomish would propose changes to reflect what we understand was Congressman Larsen's intent when introducing H.R. 2961. Although Swinomish would want to confer with the Tulalip, Lummi, and Upper Skagit Tribes before proffering any specific language as has been our custom in addressing these issues, Swinomish envisions that these changes would include: (1) a statement that the Campbell Lake South Property is hereby taken into trust without any reference to the Regional Director's decision; (2) appropriate savings clause language ensuring that the Regional Director's decision shall not have any further force or effect and, if re-issued, shall be subject to appeal as is any other administrative decision; and (3) appropriate savings clause language ensuring that the bill does not affect treaty rights.