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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

May 11, 2022

The Honorable Teresa Leger Fernandez, Chair
Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, DC 20515

The Honorable Jay Obernolte, Acting Ranking Member
Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources
U.S. House of Representatives
1329 Longworth House Office Building
Washington, D.C. 20515

RE: H.R. 6181, the *Samish Indian Land Reaffirmation Act*

Dear Chair Fernandez and Acting Ranking Member Obernolte:

On behalf of the Swinomish Indian Tribal Community ("Swinomish"), I write to reiterate our opposition to the H.R. 6181, the *Samish Indian Land Reaffirmation Act*, as introduced by Rep. Gallego, and express Swinomish's support for the testimony of the Tulalip Tribes at the April 27, 2022, hearing of the Subcommittee for Indigenous Peoples of the United States on the bill. Swinomish requests that this letter be included in the Committee's hearing record for that hearing.

As introduced, the legislation would "ratif[y] and confirm[]" a November 9, 2018, decision by Bureau of Indian Affairs ("BIA") Northwest Regional Director Bryan Mercier to take approximately 6.70 acres of land into trust for the benefit of the Samish Indian Nation. Regional Director Mercier's decision is premised on the erroneous notion that the Samish Indian Nation is a successor to the historic Samish and Nuwhaha tribes, which were parties to the 1855 Treaty of Point Elliott.

As explained below, this ratification and confirmation would reverse 40 years of precedent holding that the Samish Indian Nation is ***not*** a successor to the historic Samish or Nuwhaha tribes or any other treaty signatory. It would also reverse the extensive litigating position of the United States as confirmed less than five years ago in the Administration's written testimony before the House Subcommittee on Indian, Insular and Alaska Native Affairs on a prior iteration of the bill. And it threatens to undermine the very identity, treaty rights and settled expectations of Swinomish and other tribes, undoubtedly leading to renewed assertions of tribal successorship and treaty rights by the Samish Indian Nation.

Enactment into law of H.R. 6181, as introduced, would also terminate Swinomish's administrative appeal challenging Regional Director Mercier's decision that is currently awaiting decision by the Interior Board of Indian Appeals ("IBIA") and would foreclose the Tribe's right to judicial review thereafter.

I. H.R. 6181 Would Upend 40 Years of Federal Court Precedent and the Extensive Litigating Position of the United States, Threatens to Undermine the Identity and Treaty Rights of Swinomish and Other Tribes, and Would Lead to Renewed Assertions of Treaty Rights by the Samish Indian Nation

In written testimony to the House Subcommittee on Indian, Insular and Alaska Native Affairs on a prior iteration of the legislation (H.R. 2320 in the 115th Congress), the Department of the Interior stated in written testimony that "the Department has historically indicated **the Samish Indian Nation is not a successor and does not have treaty rights under the 1855 Treaty of Point Elliot**" (emphasis added). The Administration's testimony added that, to the extent H.R. 2320 provided otherwise, it "would significantly alter the **extensive litigating position of the United States** on this matter" (emphasis added). If enacted into law as introduced, H.R. 6181 would do the very things that the Department has previously cautioned Congress against.

Regional Director Mercier's November 9, 2018, decision repeatedly cites the Treaty of Point Elliott, 12 Stat. 927 (1855), as evidence that the Samish Indian Nation was under federal jurisdiction in 1934. Indeed, apart from the Treaty of Point Elliott, the Regional Director's determination cites no other legal basis under which any federal official could have brought the Samish Indian Nation under federal jurisdiction.

Regional Director Mercier's heavy reliance on the Treaty of Point Elliott is contrary to settled law and historical fact. Over the past 40 years, *at the urging of the United States*, the federal courts have repeatedly and consistently held that the Samish Indian Nation is not a successor to any tribe that participated in the Treaty of Point Elliott, rejecting its claims of successorship to the Samish and Nuwhaha that were parties to the treaty. Just last year this holding was again reaffirmed by the Ninth Circuit Court of Appeals. *See*, *e.g.*:

United States v. Washington, 476 F. Supp. 1101, 1104 (Samish Indian Nation, then known as the Samish Tribe, is **not a "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") (emphasis added) and 1106 (Samish Indian Nation was "**not an entity that descended from any of the tribal entities that were signatory to the Treaty of Point Elliott**) (W.D. Wash. 1979), *aff'd*, 641 F.2d 1369 (9th Cir. 1981);

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**") (emphasis added);

Greene v. Lujan, 1992 U.S. Dist. LEXIS 21727 at *5, 1992 WL 533059 ("The issue of whether plaintiffs [including the Samish Indian Nation] 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**.") (emphasis added) 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.") (emphasis added) (No. C89-645Z, W.D. Wash. Feb. 25, 1992), aff'd 64 F.3d 1266 (9th Cir. 1995);

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);

United States v. Washington, 593 F.3d 790, 799-800 (9th Cir. 2009) (en banc) (rejecting Samish Indian Nation's request to re-open the issue of its successorship to a treaty tribe in treaty fishing rights litigation and holding that it previously had a full and fair opportunity to litigate that issue in *United States v. Washington*); and

Snoqualmie Indian Tribe v. Washington, 8 F.4th 853, 864-65 (9th Cir. 2021), *cert. denied,* 596 U.S. __ (April 25, 2022) (Samish Indian Nation's claim to "treaty-tribe status" was denied in *United States v. Washington* and cannot be relitigated).

In contrast to these repeated holdings that the Samish Indian Nation is not a successor to a treaty tribe, the courts in *United States v. Washington* have held that Swinomish, the Lummi Indian Nation, and the Upper Skagit Indian Tribe ***are*** the legal successors to the Samish and Nuwhaha tribes that participated in the Treaty. By "ratif[ying] and confirm[ing]" the Regional Director's decision, H.R. 6181 would reverse 40 years of precedent and the extensive litigating position of the United States, re-write history and legislatively alter the tribal identity of the tribes that federal courts have held are the true successors to the signatories to the 1855 Treaty, and embroil the Department in additional treaty rights litigation.

II. As introduced, H.R. 6181 Would Prematurely End the Tribe's Pending Appeal Before the IBIA and Preclude the Tribe from Obtaining Judicial Review of Regional Director Mercier's Decision

Regional Director Mercier's decision is not a final decision of the Department and, as provided in the Department's regulations, 25 C.F.R. § 2.4, the Tribe filed an administrative appeal of the decision with the IBIA on December 10, 2019. Extensive briefing has been completed and the parties are awaiting a decision from the IBIA.

If enacted into law as introduced, H.R. 6181 would bring a premature end to the Tribe's ongoing administrative appeal, divest the IBIA of its jurisdiction to make a final decision for the Department, and preclude the Tribe from seeking judicial review if it receives an adverse decision from the Board. The Tribe is unaware of any other instance in recent memory where Congress effectively extinguished an Indian tribe's right to utilize the Department's administrative appeal procedures and obtain *any* judicial review—especially when the appeal at issue implicates treaty rights considerations. In fact, not since the Termination Era in federal Indian policy can Swinomish recall such an example.

H.R. 6181 has been described by its promoters as necessary to prevent "frivolous" litigation and "delay tactics." We cannot imagine issues that are more critical and in need of access to the federal courts than the ability of treaty tribes to defend their status as successors in interest to signers of a treaty. H.R. 6181 would set a precedent of Congress preempting the ability of tribes to obtain judicial review on issues as sacred as tribal identity and treaty rights.

III. Rep. Gallego's Draft Amendment in the Nature of a Substitute could also be Interpreted to Affect Treaty Rights and Does Not Resolve Concerns with H.R. 6181

Swinomish shares the concerns of the Tulalip regarding Rep. Gallego's amendment in the nature of a substitute. Specifically, the draft amendment would "reaffirm" the applicability of the Indian Reorganization Act to the SIN without altering the "now under federal jurisdiction" requirement in Section 19 of the Act. Except for the Northwest Regional Director's November 9, 2018, decision, the applicability of the Indian Reorganization Act to the SIN has not previously

been "affirmed." Accordingly, it could be argued that what is being "reaffirmed" by the amendment is the Regional Director's determination, which incorporates the decision that the SIN was under federal jurisdiction in 1934 as a successor to the treaty Samish and Nuwhaha. At a minimum, the amendment could lead to the dismissal of Swinomish's appeal of the Regional Director's decision on mootness grounds, leaving the decision's erroneous premise of treaty successorship intact.

Swinomish notes that it and the Tulalip, Upper Skagit, and Lummi Tribes have good reason to be skeptical of the SIN's motives regarding its ongoing legislative efforts. For example, at the June 5, 2019, hearing on the substantively identical version of the bill introduced in the 116th Congress (H.R. 2961), SIN Chairman Tom Wooten testified that the bill was not intended to affect treaty rights. In an October 20, 2021, letter to the state of Washington's Governor's Office of Indian Affairs, however, the SIN's legal counsel represented that "the Samish Indian Nation in its federal acknowledgment proceeding and its more recent *Carcieri* determination has been confirmed as a successor to the Samish Indian Tribe that is a signatory to the 1855 Treaty of Point Elliott .. ." (emphasis added). This written acknowledgment on the SIN's behalf that the November 9, 2018, BIA decision that is subject to Swinomish's appeal "confirmed" that the present day SIN is a treaty successor reinforces what the four tribes have objected to all along: that the SIN has been and continues to use the legislative process in an attempt to affect long-settled treaty right issues.

It should also be noted that Rep. Gallego's amendment differs from the *Carcieri* fix that has been proposed for other tribes, which would explicitly amend the IRA by deleting the "now under federal jurisdiction" requirement in Section 19. SIN's past statements and actions strongly indicate that it is taking a different approach here to preserve the Regional Director's decision and bolster its repeatedly rejected claim of treaty successorship.

Sincerely,

Steve Edwards

Steve Edwards, Chairman
Swinomish Indian Tribal Community