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September 1, 2016

Stanley M. Speaks, Regional Director
Attn: Greg Norton, Tribal Government Specialist
United States Department of the Interior
Bureau of Indian Affairs, Northwest Region
911 NE 11th Ave.
Portland, OR 97232-4169

Mary Anne Kenworthy, Attorney
Christina Parker, Attorney
United States Department of the Interior
Office of the Regional Solicitor
Pacific Northwest Region
805 SW Broadway, Suite 600
Portland, OR 97205

Re: Objection of Samish Indian Nation to Proposed Changes to Swinomish Indian Tribal Community (SITC) IRA Constitution & Request for Consultation.

Dear Regional Director Speaks, Tribal Government Specialist Norton, Regional Solicitor's Office Attorneys Kenworthy and Parker:

I am the tribal attorney for the Samish Indian Nation ("Samish Tribe"), a federally-recognized Indian tribe headquartered in Anacortes, Washington, and located near the Swinomish Indian Tribal Community. I have been directed by the Samish Tribal Council to communicate with you on the following issue.

The Samish Tribe recently submitted a FOIA request to the BIA and the Solicitor's Office requesting documentation regarding proposed amendments to the Swinomish Constitution. The proposed changes were referenced in the Swinomish tribal newsletter but not detailed or explained. The Samish Tribe received the response to its FOIA request on August 25, 2016. I have now briefly reviewed the documentation provided in the FOIA response. Because it is clear from that review that relevant provisions of the proposed Swinomish Indian Tribal Community constitutional amendments are contrary to federal law, illegal, and would adversely

affect the legal interests of the Samish Tribe – and are therefore contrary to the federal government’s trust responsibility to the Samish Tribe – the Samish Tribe requests that the Department of Interior decline to approve the proposed constitutional amendments detailed below, decline to conduct the federal constitutional amendment election requested by the SITC so long as the detailed amendments are left in, or decline to approve the detailed constitutional amendments if SITC requests that the Department of Interior proceed with conducting an IRA constitutional amendment election with the detailed proposed amendments included. The Samish Tribe formally requests consultation with the Northwest Regional Director and appropriate staff to discuss this matter in greater detail.

The Samish Tribe believes SITC is proposing the changes referenced below, and trying to move them forward expeditiously, as a strategy in pending disputes and threatened litigation the SITC has with the Samish Tribe. The federal government should not and cannot take a position in this inter-tribal dispute that benefits one tribe over the other..

There are three areas of critical concern for the Samish Tribe with regard to SITC’s proposed constitutional changes:

1. The SITC proposes to change the name of its Constitution from the “Indians of the Swinomish Reservation” to the Swinomish Tribe or Tribal Community. This proposed change must be linked with another change to the Swinomish Constitution made in 1985, Amendment XV, 9/7/85, which, as discussed below, the Samish Tribe believes is invalid. Throughout the Constitution, the SITC seeks to change references to the residents or Indians of the Swinomish Reservation to Tribe. The Samish Tribe does not believe the SITC can validly make these changes without complying with the relevant provisions of Section 16 of the Indian Reorganization Act on organization of tribes.
2. The SITC seeks to amend Article I, Section 2 of the SITC Constitution. That Section currently states that the territory of the SITC is the Reservation established by the September 9, 1873 Executive Order, in pursuance of Article 3 of the Treaty of Point Elliott, and any other lands later added to that Reservation. The proposed amendment changes this language to “the original boundaries of the Swinomish Reservation in pursuance of Article 2 of the Treaty of Point Elliott.” This proposed amendment is an attempt to expand the territory of the SITC in a manner that will interfere with the rights and property of the Samish Tribe. It is also a violation of the provisions of Section 16 of the IRA under which the SITC organized as a tribal organization.
3. The SITC seeks to add a new Section 3 to Article I of the SITC Constitution entitled “Jurisdiction,” in which it intends to assert SITC jurisdiction and authority over all the territory described in the proposed amended Article I, Section 2, including the area known as March’s Point, and over all persons and property within that area. Samish members and property are located in that area. SITC’s proposed assertion of jurisdiction has not been affirmed or upheld by any court, and is contrary to the provisions of Section 16 under which the SITC organized.

Section 16 of the IRA as enacted “contemplates two distinct and alternative types of a tribal organization. In the first place, it authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of organization under section 19) to organize without regard to past tribal affiliation.” 55 ID 355, 356 (Oct. 18, 1935). *See* 25 U.S.C. §476 (Section 16 of IRA).

The procedure to adopt an IRA Section 16 Constitution is completely different depending on which of these two tribal organizations is being formed. For the first category – a tribe or tribes – “When the members of an Indian tribe or tribes residing on the same reservation . . . vote in an election on a proposed constitution and by-laws, the following rules shall determine the eligibility of voters in such election: (a) Any member of the tribe or tribes shall be entitled to vote, regardless of whether or not he is a resident of the reservation at the time of such election.” *Id.*

In contrast, if the individual residents of a reservation desire to form a tribal organization under the IRA, the Interior Department states: “When the adult Indians residing on a reservation shall vote in an election on a proposed constitution and by-laws, the following rules shall determine the eligibility of voters in such election: (a) Any Indian residing on the reservation shall be entitled to vote, regardless of his membership in any tribe.” *Id.* at 357. *See* 1 Op. Sol. 484, 487 (Dec. 13, 1934) (“Wheeler-Howard Act – Interpretation”) (“It is clear that the act contemplates two distinct and alternative types of tribal organization. In the first place, it authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of this act, under section 19) to organize without regard to past tribal affiliations. In the former situation, tribal affiliation is essential, and residence is immaterial in the determination of voting rights. In the latter situation, residence is a necessary condition of the right to vote, and tribal affiliation is not necessary.”).

There is no dispute that for the Swinomish Indian Tribal Community, it was the individual adult residents who in 1935 voted to form a tribal organization under Section 16 of the IRA. The approved 1936 IRA Constitution reflects this fact in its heading and in its language. It was the individual Indian residents of the Swinomish Reservation who voted earlier under Section 18 of the IRA to accept the Act. Only residents of the Swinomish Reservation were eligible to vote in both elections. Non-residents of the reservation were not included in the eligible voters. If the SITC had been organizing as a sovereign tribe or tribes residing on a reservation, all members of those tribes would have been eligible to vote whether they were located on or off reservation. This did not occur. As the Samish Tribe has demonstrated in submissions on other disputes to the Department, there were approximately 300 off-reservation Samish members at the time the residents of the Swinomish Reservation, including fewer than 20 individual Samish Indians who resided on allotments on that reservation (obtained as Samish Indians), voted to accept the IRA and subsequently to adopt the SITC Constitution. None of the off-reservation members of the Samish Tribe were ever notified or considered eligible to vote in these IRA votes.

As the Interior Decision and Solicitor Opinion quotes above reflect, when the individual adult Indian residents of a reservation vote to accept the IRA, they are “considered a tribe for purposes of the [IRA].” This does not mean that they are an inherent sovereign aggregation of tribes or have any powers other than those conferred by the IRA, unless and until rights are established in an appropriate judicial forum or the proper provisions of Section 16 are followed. *See, e.g.*, F. Cohen’s Handbook of Federal Indian Law 130 n. 67 (1942 ed.) (“The powers of self-government vested in these various tribes (organized under the IRA) likewise vary in accordance with the circumstances, experience, and resources of the tribe. – fn. – It has been administratively determined that constitutions of groups not previously recognized as tribes, in the political sense, cannot include powers derived from sovereignty, such as the power to tax, condemn land of members, and regulate inheritance.”).¹ *See* 1 Op. Sol. 618 (April 9, 1936), 813 (April 15, 1938) (Lower Sioux Indian Community; Prairie Island Indian Community). Like Lower Sioux and Prairie Island, SITC organized under Section 16 of the IRA as a tribal community, an association of individual Indians residing on the same reservation. Samish knows that the IRA has been amended to prohibit discrimination in status among tribes (including discrimination against Samish), but the fact remains that legal status as a tribe established under one process afforded by the IRA cannot be unilaterally altered without following the law and relevant legal procedures of Section 16 to organize under a different provision of that Section.

SITC in its proposed constitutional amendments now seeks to transform itself from a Section 16 tribal organization of individual Indian residents (and their descendants) of the Swinomish Reservation into a “tribe or tribes residing on the same reservation.” To do so without following the specific organizational process required by Section 16 would be a violation of the IRA.

The Department lacks the legal authority to bypass the statutory requirements of the IRA. If SITC wants to convert its present tribal organizational structure from the Indian residents of the Swinomish Reservation into a different organization comprised of a tribe or tribes of Indians, it must follow the organizational requirements of 25 U.S.C. §476(a), which still require a specific process to achieve that result. Since we know that the SITC desires to claim the Samish Tribe as one of its tribes (for purposes other than off-reservation treaty fishing rights), this federal statutory provision requires the consent and participation of the Samish Tribe, which is not given. The relevant proposed amendments by SITC and its request for a constitutional amendment election under Secretarial regulations cannot alter this statutory requirement, are contrary to applicable law, and must be disapproved by the Secretary.

The harm to the Samish Tribe from SITC’s proposed constitutional amendments is that Swinomish is attempting to leverage federal approval of its proposed changes into an advantage in litigation against the Samish Tribe. Since internal communications within the Department and Solicitor’s Office were redacted in the FOIA response received by the Samish Tribe, the Samish Tribe does not know whether the legal issues discussed above were discussed, approved or even

¹ The IRA has since been amended to provide specific enumerated powers to Indian tribes organized under Section 16 “in addition to all powers vested in any Indian tribe or tribal council by existing law.” 25 U.S.C. §476(e).

considered by the Department or Solicitor's Office. They certainly were not raised in correspondence from the SITC and its legal counsel. It is fact that the SITC still refuses to accept the existence of the Samish Tribe as a federally-recognized Indian tribe, that SITC refuses to accept that the Samish Tribe possesses inherent sovereignty and has existed – as established in its Federal Acknowledgment proceeding – since time immemorial, and that SITC has stated its intent to litigate the Samish Tribe's legal status and existence if possible. Swinomish's proposed changes are designed to try to give SITC an advantage in potential future litigation with the Samish Tribe that the Department of Interior "approves" of SITC's position. In addition, SITC seeks these changes to gain advantage in future potential disputes with Samish, for example, trying to claim that off-reservation fee-to-trust applications are really on-reservation applications.

The SITC claims that it is the only historical Samish Tribe because of the decision regarding its off-reservation treaty fishing status in *U.S. v. Washington*. The SITC attempts to leverage that narrow treaty rights decision into a claim that the SITC is the legal and political successor to the historical Samish Tribe for all purposes, and it seeks to amend its current constitution to create an advantage in that claim. By approving SITC's proposed amendments, the United States would be taking sides in this dispute. The United States cannot take a side in that dispute because SITC's claim is wrong and it would be a conflict for it to prefer one tribe over the other in an unadjudicated legal dispute. The Samish Tribe established against the United States in its Federal Acknowledgment proceeding, as required by mandatory federal regulations, that it has continuously existed as a distinct Indian tribe from the time of first European contact to the present. An *en banc* panel of the Ninth Circuit held that a decision in *U.S. v. Washington* on treaty rights has no preclusive effect on any aspect of federal recognition or legal status, or even on treaty status for treaty rights that have not specifically been adjudicated. *U.S. v. Washington*, 593 F.3d 790, 800-01 (9th Cir. 2010).² So, for SITC to try to leverage its off-reservation treaty status as a successor to the Samish Tribe for any other purpose, it must first establish that status in a proper judicial forum. It has not done so, and so federal approval of SITC's constitution asserting such status as a general matter would be contrary to law.

The Samish Tribe is prepared to litigate its status as the historical Samish Tribe relative to the SITC in any appropriate forum. But the Samish Tribe has a right to due process, as does the SITC, and the federal government cannot make any decision that will decide that issue, including "approval" of the proposed SITC constitutional amendments, without providing the Samish Tribe with due process.

In contrast to the Samish Tribe's eight day contested hearing (in which the SITC closely cooperated and coordinated with federal legal counsel and presented SITC tribal witnesses) in which it successfully proved its continuous legal existence, the SITC presented no evidence, and the federal court made no factual findings regarding the SITC's continuous existence as a tribe in *U.S. v. Washington*. The sole factual finding made with regard to SITC continuous tribal

² The *en banc* Court reaffirmed its previous acknowledgment of the "host of purposes" and benefits that accrue from federal recognition, including but not limited to jurisdiction over territory, economic development, and protection, services and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." *Id.* at 801 (quoting *U.S. v. Greene*, 996 F.2d 973, 978 (9th Cir. 1993))

existence was that SITC is a “currently functioning Indian tribe maintaining a tribal government on the Swinomish Indian Reservation” *U.S. v. Washington*, 459 F.Supp. 1020, 1039 (W.D.Wash. 1974, 1975) (FF. 254). The only reference to SITC being a successor to the Samish Tribe³ is a short reference in the Treaty Status Report prepared by Dr. Barbara Lane that “some” Samish Indians settled on the Swinomish Reservation. Another report prepared shortly thereafter by Dr. Lane for the Samish Tribe stated that other Samish Indians did not move to a reservation and had maintained their separate sovereign status as the Samish Indian Tribe.⁴ There are no findings of fact, and no evidence about continuous SITC existence as a tribe or any conscious, voluntary, or any other merger or assimilation of the Samish Tribe into the SITC.

The SITC has argued that the federal court must have made such findings because they are the standard for treaty exercise and successorship, as stated by the 9th Circuit a year later in *U.S. v. Washington*, 520 F.2d 676, 692-93 (9th Cir. 1975), and later applied to the Samish Tribe in *U.S. v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1981)⁵, but the fact remains that no such findings of fact were made for SITC, and SITC cannot show that any such evidence was even presented in the case. SITC’s own expert, Dr. Natalie Roberts, who prepared a history of the SITC that SITC has relied on in other disputes with the Samish Tribe, demonstrates conclusively that the SITC had no functioning tribal government from treaty time until 1930 at the earliest, and even then it was only a primitive, informal mostly social structure, not an “organized” tribal government. Not until 1936 did SITC organize as a tribe. Before that off-reservation treaty rights decision for SITC can be applied in any other setting, including but not limited to attempted amendment and federal approval of its constitution, the SITC must be required to obtain a determination of its asserted legal status in an appropriate forum in which the Samish Tribe has the right to participate. As just one example of issues that need to be resolved, while there is no question that the SITC as a tribal organization of reservation residents formed in 1936 under the IRA has the authority to take land into trust pursuant to the statute under which it was established, it has never been established in any court that an asserted pre-existing tribal entity existed or was under federal jurisdiction sufficient to justify taking land into trust under the IRA under a different legal justification. Such justification must be tested and decided before unilaterally approving such authority in the form of a proposed constitutional amendment, and the Samish Tribe will vigorously contest any attempt by such an asserted tribal entity to subsume the Samish Tribe under its sovereign umbrella.

The law of the Ninth Circuit is very clear on the exclusive standard by which one tribe can claim to be the legal and political successor to another tribe. In *United States v. Oregon*, 29 F.3d 481, 484 (9th Cir. 1994), citing *United States v. Suquamish Tribe*, 901 F.2d 772 (9th Cir. 1990), the Ninth Circuit held that to prove that one tribe is the legal and political successor to another tribe, the first tribe must demonstrate a “cohesive communal decision” by the first tribe to “unite” with the second tribe, and that “actual merger or combination of tribal or political

³ And not an exclusive one, since the Lummi Tribe was also held to be a successor to the Samish Tribe for off-reservation treaty fishing rights.

⁴ The Samish Tribe will bring and present these and other relevant documents at the formal consultation requested at the end of this letter.

⁵ The 2010 *en banc* decision in *U.S. v. Washington* held that this adverse decision only applied as a matter of res judicata to off-reservation treaty fishing rights. 790 F.3d at 800-01.

structure was required.” *Id.* at 776. Without such a showing, the second tribe “could not successfully claim that it was a ‘political successor’” to the first tribe. *Id.* at 777. *See Conf. Tribes of the Chehalis Indian Reservation v. Washington*, 96 F. 3d 334, 341 (9th Cir. 1996) (one tribe can claim the rights of another tribe “only if the tribes merge or consolidate in a manner sufficient to combine their tribal or political structures;” “affiliation” of one tribe because it is allowed to obtain allotments on the reservation of another tribe involves only individual rights and cannot be equated with consolidation of tribal structures).

As the Samish Tribe has shown in documents and material submitted to the Department on other issues, and which the Tribe will provide again in its requested consultation with the Department, no such merger or cohesive communal decision by the Samish Tribe to merge with the SITC has ever occurred. The historical record is clear that the Samish Tribe has maintained its separate existence throughout history. The SITC has never presented any evidence in any forum to the contrary. The fact that a few Samish Indians who as individuals obtained allotments on the Swinomish Reservation (since Samish did not have its own reservation and the reservations established by the Treaty of Point Elliott were established for all the tribes and bands who signed the treaty) while continuing separately to participate in Samish tribal affairs and activities does not constitute merger or consolidation of tribes. The Samish Tribe has continuously exercised its authority as an independent tribal sovereign. The fact that a federal attorney held in contempt of federal court for his fundamental violation of the due process rights of the Samish Tribe unilaterally altered the findings of fact reached by an administrative judge in an impartial eight day contested hearing, not based on facts but as a political matter to protect the SITC, also does not change this indisputable fact. Until and unless SITC can establish the contrary in a court of competent jurisdiction, the Department cannot approve a proposed constitutional amendment that unilaterally asserts a contrary conclusion with no factual basis.

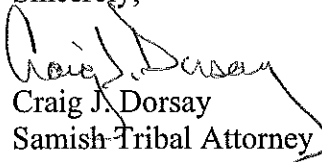
It should be noted that the 1974-75 federal court decision affirming SITC treaty status for purposes of off-reservation treaty fishing rights also found that the current Swinomish Reservation established by Executive Order in 1873 was “the reservation . . . established pursuant to [the Treaty of Point Elliott].” 459 F.Supp. at 1039. SITC and the United States are bound by this decision. SITC’s attempt to amend its constitution to claim a larger treaty reservation is foreclosed by *res judicata*, and the Department must disapprove this proposed amendment to the SITC Constitution. As a group of individual adult Indians residing on a reservation who elected to organize as a tribe under the IRA, the territorial authority of those Indians was necessarily limited to the reservation that served as the basis for their tribal organization pursuant to federal statute. For the SITC, as is reflected in their 1936 Constitution, that reservation was the reservation established by Executive Order on September 9, 1873. No greater territorial authority is authorized by this provision of Section 16 of the IRA.⁶ Any additional territorial authority must be established by law. No such authority has been

⁶ See, for example, a Solicitor’s Opinion previously cited with approval by the SITC, 1 Op. Sol 1709, M-36181, Feb. 21, 1956 (Ownership of Unallotted Lands on the Tulalip Reservation)(“The question here . . . is whether the beneficiaries of [the Indian title to the Tulalip Reservation] today are all of the tribes or bands who were parties to the treaty, or the Indians who actually settled on the reservation, took allotments thereon as provided for in the treaty, and subsequently organized and incorporated as the Tulalip Tribes.”).

established in any forum against the Samish Tribe, which aboriginally resided on the land that SITC now seeks unilaterally to expand to, and seeks federal approval of, to try to gain an advantage over the Samish Tribe in pending litigation. The United States cannot take a position that disfavors the Samish Tribe on this issue.

The Samish Tribe has more to offer on the issues discussed in this letter. Because the SITC has proposed constitutional amendments that have been before the BIA Regional Office and the Office of the Regional Solicitor for some time, and because e-mail communications and mail correspondence provided to the Samish Tribe in response to its recent FOIA request discloses that the SITC is trying to move the constitutional election process forward with all possible speed, the Samish Tribe wants its position on the issues discussed in this letter to be presented to the respective agencies as quickly as possible. The Samish Tribe would be glad to expound on any point raised in this letter at the Department's request. The Samish Tribe also formally requests consultation with the BIA Regional Office on this matter. Please contact Chairman Tom Wooten at the Samish Indian Nation to arrange dates and times for such consultation. There may be a need for more than one consultation to fully address all the complex and difficult issues raised by SITC's proposed constitutional amendments. Any final action on the proposed constitutional amendments which adversely affect the Samish Tribe must await the outcome of such consultation, and any final decision will of course be subject to appeal by the Samish Tribe.

Thank you in advance for your review of this letter and your consideration of the serious issues raised by SITC's proposed actions. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Craig J. Dorsay
Samish Tribal Attorney

Cc: Samish Tribal Council

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