Prepared Statement of M. Brian Cladoosby, Chairman, Swinomish Indian Senate

Legislative Hearing on H.R. 2961, the "Samish Indian Nation Land Reaffirmation Act"

Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources
U.S. House of Representatives

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The Swinomish Indian Tribal Community ("Swinomish" or the "Tribe") strongly opposes H.R. 2916, the "Samish Indian Land Reaffirmation Act."

As introduced, Section 2(a) of the legislation would "ratif[y] and confirm[]" a non-final decision by Bureau of Indian Affairs ("BIA") Northwest Regional Director Bryan Mercier, a subordinate agency official, to take approximately 6.70 acres of land into trust for the benefit of the Samish Indian Nation. Regional Director Mercier's November 9, 2018, decision is premised on the 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.

This ratification and confirmation would reverse 40 years of federal court precedent and the extensive litigating position of the United States as confirmed less than two years ago in the Administration's testimony before this Subcommittee. It would also lead to renewed assertions of treaty rights by the Samish Indian Nation to the detriment of Swinomish and other area tribes.

Enactment into law of H.R. 2961 as introduced would also terminate the Tribe's administrative appeal challenging Director Mercier's decision that is currently pending before the Interior Board of Indian Appeals ("IBIA") and foreclose the Tribe's right to judicial review thereafter.

The Swinomish Indian Tribal Community opposes H.R. 2916 for the following reasons.

1.

H.R. 2961 would terminate 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. 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, 2018. Assistant Secretary Sweeney did not exercise her prerogative to take jurisdiction over the appeal, *see* 25 C.F.R. § 2.20, and the IBIA docketed the appeal on February 12, 2019. The appeal is otherwise proceeding in the ordinary course before the IBIA.

If enacted into law as introduced, H.R. 2961 would ratify and confirm Regional Director Mercier's decision for purposes of all claims pending on the date of enactment or filed on or

after that date (as provided in Section 2(b) of H.R. 2961). This result would bring a premature end to the Tribe's on-going 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 this Committee advanced legislation that would effectively extinguish an Indian tribe's (or any other litigant's) right to utilize the Department's administrative appeal procedures of a subordinate agency official and obtain judicial review of that decision—especially when the appeal at issue implicates treaty rights considerations. The overarching trust responsibility to Indian tribes that the federal government and, indeed, this Committee, must adhere to forecloses such a result.

2.

There is no practical need for H.R. 2916 because the Samish Indian Nation already owns the land at issue and is using it for its intended purpose.

There is no need for Congress to intervene in this inter-tribal dispute, terminate an on-going administrative appeal, and deprive one tribe of the benefit of administrative and judicial procedures available to all other litigants. The Samish Indian Nation currently owns the land at issue and has stated that it does not intend to change the current use of the land if it is acquired in trust. Thus, any delay that results from allowing the administrative process to proceed in the ordinary course will not prevent the Samish Indian Nation from continuing its preferred use the land.

Under these circumstances, there can be no principled justification for prematurely terminating the administrative process and the Swinomish Indian Tribal Community's rights to an administrative appeal and judicial review. As noted above, doing so would be a gross violation of the United States' trust responsibility to the Tribe. It would set a dangerous and far-reaching precedent for Congress to intervene in virtually any inter-tribal dispute before there has been a final agency decision and to favor one tribe at the expense of another. Congress should not open this door.

3.

H.R. 2916 opens the door to the Samish Indian Nation's applications to acquire lands in trust on March Point, triggering an inter-tribal conflict over the boundaries of the Swinomish Indian Reservation and threatening the core interests of the Swinomish Indian Tribal Community.

Two of the Samish Indian Nation's pending fee-to-trust applications are in an area known as March Point, on lands that the Swinomish Indian Tribal Community contends are within the original boundaries of the Swinomish Indian Reservation. The Swinomish Indian Reservation was described in the Treaty of Point Elliott as "the peninsula at the southeastern end of Perry's [now Fidalgo] Island, called Shais-quihl." 12 Stat. 927 (1855). March Point is a geographically

minor but culturally and economically significant promontory on the southeasterly portion of Fidalgo Island in northern Washington state.

In multiple submissions to the Department, the Samish Indian Nation readily and repeatedly acknowledged that March Point is within the boundaries of the Swinomish Indian Reservation as described in the Treaty.[1] In those submissions, the Samish Indian Nation's attorney discussed both the language of the Treaty and the geography of Fidalgo Island in asserting that the treaty language included March Point.[2] And the Samish Indian Nation's Chairman stated unequivocally that the Samish Indian Nation "agrees with the [Swinomish Indian Tribal Community] that March's Point **was and is** part of the reservation established by Governor Isaac I. Stevens in Article 2 of the 1855 Treaty of Point Elliott, the tract of land identified as 'the peninsula at the southeastern end of Perry's Island'" (emphasis added).[3]

However, the Samish Indian Nation has since completely reversed its position on this issue and now asserts that March Point is not within the boundaries of the Reservation. By ratifying and confirming Regional Director Mercier's November 9, 2018, decision, the Bill will allow the Samish Indian Nation's March Point applications to proceed, setting up a conflict between the Tribes over the boundaries of the Swinomish Indian Reservation and threatening the core interests of the Swinomish Indian Tribal Community.

4.

H.R. 2916 would upend 40 years of precedent and the extensive litigating position of the United States and would lead to renewed assertions of treaty rights by the Samish Indian Nation, to the detriment of the Swinomish Indian Tribal Community and other tribes.

Regional Director Mercier's November 9, 2018, decision relies heavily on the proposition that the Samish Indian Nation is a successor to the historic Samish and Nuwhaha tribes, which were parties to the Treaty of Point Elliott. However, in four decades of litigation, the United States has asserted repeatedly, and the federal courts have held, that the Samish Indian Nation is not a successor to the historic Samish and Nuwhaha or any other tribe that participated in the Treaty. In contrast, the courts have held that the Swinomish Indian Tribal Community, Lummi Indian Nation and Upper Skagit Indian Tribe are successors to such tribes. By "ratif[ying] and confirm[ing]" Regional Director Mercier's decision, the Bill upends decades of settled law and the extensive litigating position of the United States, as confirmed less than two years ago by the Principal Deputy Assistant Secretary – Indian Affairs in testimony to the House Subcommittee on Indian, Insular and Alaska Native Affairs. It will provide new

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[1] *See Swinomish Indian Tribal Community v. Northwest Regional Director, Bureau of Indian Affairs,* Docket No. IBIA 19-030, Administrative Record Document (AR Doc.) 775 at 2; AR Doc. 687 at 3; AR Doc. 693 at 10-11 n.24; AR Doc. 509 at 1.

[2] *E.g. Swinomish Indian Tribal Community v. Northwest Regional Director, Bureau of Indian Affairs,* Docket No. IBIA 19-030, AR Doc. 775 at 2; AR Doc. 687 at 3; AR Doc. 693 at 10-11 n.24.

[3] *Swinomish Indian Tribal Community v. Northwest Regional Director, Bureau of Indian Affairs,* Docket No. IBIA 19-030, AR Doc. 509 at 1.

arguments to the Samish Indian Nation as it seeks to exercise treaty hunting and gathering rights to the detriment of Swinomish and other tribes and to undermine the adjudicated successorship status of those tribes.

a.

Attachment 1 to Regional Director Mercier's November 9, 2018, decision addresses the question whether the Samish Indian Nation was under federal jurisdiction in 1934. It asserts that a treaty is a federal action that, in and of itself, demonstrates that a tribe was under federal jurisdiction at some identifiable period in its history. November 9, 2018, Decision, Attachment 1 at 11 (discussing Sol. Op. M-37029). It also asserts that "[t]he Department [of the Interior] has long considered treaty relations a significant factor in establishing whether a tribe was under federal jurisdiction, 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." *Id*. at 18 (footnotes omitted).

The decision then repeatedly cites the Treaty of Point Elliott, 12 Stat. 927 (1855), as evidence that the Samish Indian Nation was under federal jurisdiction in 1934. *See*, *e.g.*, id. at 16 ("The Samish Indian Nation came under federal jurisdiction by 1855 when the United States negotiated and entered into the Treaty of Point Elliott. As Federal officials considered the Samish a separately recognized tribe through the early 1900s, 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.") (footnotes omitted), 16-19 (discussing the participation of the Samish Tribe in the Treaty of Point Elliott), 19-21 (discussing federal efforts to relocate the Samish Tribe to a reservation under the Treaty of Point Elliott), 22-23 (discussing issuance of allotments to Samish Indians under the Treaty of Point Elliott), 23-24 (discussing assertion of federal jurisdiction over members of Point Elliott treaty tribes that lived off-reservation); 31 (concluding 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" and that, "[f]rom 1855 through 1934, there is no evidence demonstrating that the United States ever terminated the Samish's recognized status").

Indeed, apart from the Treaty of Point Elliott, Regional Director Mercier's decision cites no other legal basis under which any federal official could have brought the Samish Indian Nation under federal jurisdiction. The Regional Director acknowledges that administrative action cannot revoke federal jurisdiction once established by a treaty and cites no authority for the proposition that administrative action can create federal jurisdiction absent a treaty or other statutory authority. *See* November 9, 2018, Decision, Attachment 1 at 30-31.

b.

Regional Director Mercier's heavy reliance on the Treaty of Point Elliott is inconsistent with the fact that, over the past 40 years, *at the urging of the United States*, the federal courts have held repeatedly and consistently 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. These cases include the following:

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) & 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)[4];

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)[5];

Greene v. Lujan, 1992 U.S. Dist. LEXIS 21727 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**.") (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)[6]; and

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*).[7]

c.

[4] These findings were proposed by the United States.

[5] This ruling was sought by the United States.

[6] This ruling was also sought by the United States.

[7] The United States sought these rulings as well.

Regional Director Mercier's November 9, 2018, decision seeks to sidestep these decisions by drawing a distinction between treaty rights and statutory benefits such as acquiring lands in trust. However, the basis for the distinction between treaty rights and statutory benefits is that, in order to possess treaty rights, a modern-day tribe must be the successor to a treaty tribe. In contrast, in order to obtain most statutory benefits accorded to federally recognized tribes, a modern-day tribe need only be federally recognized; it need not be the successor to a treaty tribe. It is for this reason that, despite the ruling in *United States v. Washington* that it was not a successor to a treaty tribe, the Samish Indian Tribe was able to seek and ultimately obtain federal recognition.

However, while the fact that the Samish Indian Nation is not a successor to a treaty tribe did not *preclude* it from obtaining federal recognition as a tribe, it did preclude it from obtaining recognition or any other benefits *based on a claim of treaty successor status*. Thus, in *Greene*, the court held repeatedly that the Samish Indian Nation could not obtain recognition based on the Treaty of Point Elliott – because the *United States v. Washington* court had already determined that it was not a successor to any party to that treaty. And in *Samish Indian Nation v. United States*, the court held that the Samish Indian Nation could not sue for damages arising from the United States' failure to provide certain benefits under the Treaty for the same reason: the *United States v. Washington* court had already determined that it was not a successor to a treaty tribe. These decisions adopted the consistent position of the United States that the Samish Indian Nation is not a successor to a treaty tribe for any purpose.

So here: the fact that the Samish Indian Nation is not a successor to a treaty tribe does not (by itself) preclude the Samish Indian Nation from establishing that it was under federal jurisdiction in 1934, but it does preclude it from establishing that it was under federal jurisdiction *on the basis of the Treaty of Point Elliott.* Regional Director Mercier's November 9, 2018, decision disregards this basic point. In finding that the Samish Indian Nation was under federal jurisdiction in 1934 *based on the Treaty of Point Elliott*, the Regional Director's determination upends 40 years of caselaw and the extensive litigating position of the United States. It accepts the Samish Indian Nation's assertion that it is the successor to a treaty tribe despite the repeated rejection of that very claim by the United States and the courts.

The Department confirmed the United States' litigating position less than two years ago. On November 15, 2017, in written testimony to the House Subcommittee on Indian, Insular and Alaska Native Affairs on H.R. 2320 at pp. 102, the Principal Deputy Assistant Secretary – Indian Affairs, John Tahsuda III, stated 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). Mr. Tahsuda 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." *Id*. at 2 (emphasis added).

By "ratif[ying] and confirm[ing]" the Regional Director's decision, H.R. 2916 would threaten 40 years of precedent and the extensive litigating position of the United States. It would inevitably open the door for the Samish Indian Nation to seek treaty hunting and gathering rights to the detriment of the Swinomish Indian Tribal Community and other tribes.

H.R. 2916 is distinguishable from H.R. 312, the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act," because the latter ratified and confirmed the "taking into trust" by the United States of certain land for the Mashpee Tribe, not a specific agency decision and its underlying analysis. H.R. 312 also confirmed the applicability of an intergovernmental agreement between the Mashpee Tribe and the town of Mashpee. In contrast, as introduced, H.R. 2916 contains no such mitigating language to address its treaty rights and other implications.

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There is no need for any of this. The Swinomish Indian Tribal Community has filed a routine administrative appeal from a non-final decision by a subordinate BIA official. The Samish Indian Nation's continuing use of the land at issue is not affected in any way by the appeal. The appeal and any subsequent proceedings for judicial review should be allowed to proceed in the ordinary course.