

(10) Reconsidered Final Determination Documents

- May 07, 1987

MAY 5 1987

Memorandum

To: The Secretary

From: Assistant Secretary - Indian Affairs

Subject Summary: Letter to Kenneth Hansen concerning Samish petitioner's request for reconsideration of final determination against acknowledgment as an Indian tribe - Request for Secretarial Signature

DISCUSSION:

Situation: The Samish petitioner asked that you request me to reconsider my final determination of February 5, 1987, to decline to acknowledge the Samish as an Indian tribe. The Samish request was received shortly before the effective date of the final determination. Consequently, the Office of the Secretary extended the period for consideration of the Samish request for 30 days.

The Samish request, with its accompanying reports, was referred to me for review. Comments from the Tulalip Tribes opposing the request were also considered. Comments from the Swinomish Tribe opposing reconsideration were not received in a timely fashion and, consequently, were not considered.

Background: The proposed finding against acknowledgment of the Samish was published November 4, 1982. The final determination was published February 5, 1987.

The factual record is an extensive one researched over a period of years by the Bureau, the petitioner and others concerning the genealogy, history, culture, and social organization of the petitioner. The documentation comprises in excess of 10,000 pages.

The petitioner had approximately four years after the proposed finding to develop new evidence. This is far longer than the normal 120-day comment period under the regulations for response to a proposed finding. The acknowledgment staff consulted with the Samish on several occasions concerning the proposed finding. During final portion of the comment period, the Samish declined to provide additional material suggested by the Acknowledgment staff at a meeting they requested through their Congressman.

Basis under the regulations for Secretarial request for reconsideration: The acknowledgment regulations at 25 CFR 83.10 provide that the Secretary may at his discretion request a reconsideration and shall request a reconsideration

if, in his opinion, there is new evidence that would change the decision; a substantial portion of the evidence was unreliable; or the petitioner's or Bureau's research was materially inadequate or incomplete.

Conclusions: The Samish comments are primarily a critique of the research and analysis presented in the proposed finding and final determination. The comments present essentially no new evidence and only a few arguments or interpretations not presented previously. Many comments are restatements of arguments previously made and some incorrectly characterize the statements and arguments made in the final determination.

Most of the comments are without merit. They do not meet the requirements of the criteria in 25 CFR 83.10 for reconsideration. While some factual conclusions and some interpretations might be changed or refined on the basis of the submitted comments, these are not substantial enough to merit reconsideration of the final determination. There are some factual areas that despite the extensive record may not have been fully researched by any party. The 60 days within which I must issue my reconsidered decision will not permit significant original research. There appears to be some merit in The Tulalip Tribes' argument that the proposed finding that the Samish met criterion (a) of the regulations may have been incorrect, and should be reconsidered. Criterion (a) was not reevaluated in making the final determination in February. If you were to order reconsideration, we would be obligated to reevaluate criterion (a).

The Samish argue that they have been continuously recognized from treaty times until illegally terminated administratively in 1974 and therefore should not have to go through the acknowledgment process. The current comments provide no basis for changing the previous conclusion that the Samish had not been recognized separately since shortly after 1900, when they merged into the recognized Lummi and Swinomish Tribes.

The Tulalip Tribes assert that court determinations in U.S. v. Washington in 1979 and 1981 that the Samish had not continued to exist as a tribe preclude an administrative decision under the acknowledgment regulations. Consideration of this question was deferred by the Assistant Secretary in 1982 until the case was evaluated under the regulations. Because of the negative findings, it has not been considered. You may wish to request a Solicitor's opinion on this question if you consider it appropriate.

Attached is a summary review of comments on the final determination and a briefing book with copies of the Samish decisions and the Samish and other comments.

RECOMMENDATION: I recommend that you sign the attached letter denying the Samish request for reconsideration.

Prepared by: George Roth ext: 343-3568

 Ross O. Swimmer

Attachment

cc: Secy Surname:(2) Secy RF:Surname:Chron:400:440RF:440B:101-A:
Holdup:GROTH:msb:5/3/87:ASMEMSAM

SUMMARY REVIEW OF COMMENTS ON THE SAMISH FINAL DETERMINATION

The major arguments advanced by the Samish and by the Tulalip Tribes are summarized below, together with a brief staff analysis of each. Many details, minor comments and criticisms and variations on basic arguments have been omitted here for reasons of space, although all have been reviewed. The review is organized by the mandatory criteria for acknowledgment found in 25 CFR 83.7. Two issues outside of the criteria which have been raised are also reviewed.

I. The Factual Record:

The factual record considered in evaluating this petition is an extensive one researched over a period of years by the Bureau, the petitioner and other parties concerning the genealogy, history, culture, and social organization of the petitioner. The documented petition, including all its supplements, comprises over 5000 pages. Bureau researchers developed in excess of 5000 additional pages including documentary research and field interviews. All but a small portion of this material was provided to the Samish under the Freedom of Information Act. Prior to consideration of the acknowledgment petition, an extensive record of documents and testimony had been developed for the U.S. v. Washington (Boldt) decision concerning the Samish.

The petitioner had approximately four years after the proposed finding to develop new evidence. This period was far longer than the 120-day comment period normally afforded under the regulations for response to a proposed finding. The acknowledgment staff consulted with the Samish on several occasions concerning the proposed finding. During the final portion of the comment period, the petitioner declined to provide additional material suggested by the Acknowledgment staff at a review meeting granted in response to a Samish request through their congressman.

II. Criterion A: Identification Throughout History as an Indian Entity:

Tulalip Comment: Tulalip questions the proposed finding's evaluation that the Samish meet this criterion on the grounds that the criterion requires the continued existence of a tribal community which is also identified as Indian and the Samish did not meet that requirement.

Staff Analysis: There may be some merit to this comment. The Samish were determined to meet criterion a because various entities with some links to each other and some consistency in membership had been identified as Samish throughout history, not on the continued existence of a tribal community. A reevaluation of this criterion was not made in the final determination.

III. Criterion B: Maintenance of a Distinct Community:

A. Samish Comment: The Bureau's analysis of the social survey which forms the primary basis of the Samish claim for a cohesive community erroneously characterized the sample as biased and erroneously interpreted the results.

Staff Analysis: No new evidence was provided. Reexamination of the sample continues to indicate it is strongly biased toward individuals likely to give positive responses. Most of the Bureau critique that the questions were not designed to develop the appropriate data was not challenged. The questions used evidently resulted from an erroneous analysis of fieldnotes of Bureau interviews.

Most of the questions were not relevant to determining social cohesion. One possibly relevant question showed no contact at all among half the sample. The final determination concluded that a small portion of the survey data may reflect social cohesion, but given the limitations of the data and problems of the sample, this did not outweigh the large body of current and historical data against social cohesion.

B. Samish Comment: The final determination concluded that the reservation Samish are presently integrated into the Lummi and Swinomish Reservation communities, disregarding the evidence that social distinctions were made between the Samish and other reservation members. The final determination's characterization of Samish participation in these reservation communities in the past erroneously treated limited, formal participation as social integration.

Staff Analysis: No new evidence was provided and no new arguments were made. The question was evaluated in the final determination, which concluded that while social distinctions were made, the evidence concerning this, together with extensive evidence of social integration, did not demonstrate that the reservation-derived individuals enrolled with the Samish were a separate community from the rest of the reservation.

The proposed finding and final determination presented data indicating more than token participation in formal institutions. They also considered the process of integration to have been a gradual one after 1900, noting the existence of some continuation of a somewhat distinct Samish body within Swinomish Reservation as late as the 1930's.

C. Samish Comment: The reason so few reservation Samish or Indian descendants are enrolled on reservations is because they refused to do so, and this indicates they are socially distinct. The final determination could not explain why only about 30 percent from reservation-derived family lines were actually enrolled.

Staff Analysis: No evidence of refusal has been presented. Most Samish members could not meet the requirements of enrollment on a reservation. New data indicates that a minimum of 70 percent of the reservation-derived families are enrolled with a recognized tribe.

D. Samish Comment: The Samish challenge the final determination's characterization of the almost universal intermarriage with whites for multiple generations among three-fourths of the Samish families as indicative of a lack of social cohesion and of integration into non-Indian society. The Samish also question the findings' interpretation of traditional intermarriage practices among Puget Sound Indians.

Staff Analysis: There was no new nor any previous evidence to support the Samish assertion that the extensive intermarriage with whites was a means to gain access to white resources by members of a distinct, tribal body. The Samish characterization of present intertribal marriage patterns as governed by reservation membership requirements and not derived from aboriginal cultural patterns contradicts previous assertions by the Samish and documents previously cited by them.

E. Samish comment: The final determination has no basis for saying the 1926 Samish organization enrollment was not an enrollment of a tribe except invalid inferences from intermarriage data.

Staff Analysis: The comment does not address the factual evidence discussed in the proposed finding and technical reports concerning the nature of this enrollment. Reexamination of the field and documentary data confirms the original conclusion.

F. Samish comment: The Samish question the existence of a social distinction between reservation Samish and Indian descendants. The comment cites a statement in a draft technical report which is characterized as asserting no distinction was made.

Staff Analysis: The proposed finding and technical reports are based on both interview and documentary data indicating a distinction is made. The cited statement, based on only a portion of the data, indicated only that no challenge to the legitimacy of membership in the organization of any individuals was found. The proposed finding was based on a conclusion that the weight of evidence supported the existence of a distinction.

G. Samish comment: The final determination ignores evidence from the Samish social survey that there is a social core, as large as other, successful cases have had, and makes conflicting identification of the reservation Samish as being a core and not being a core.

Staff Analysis: The survey does not provide evidence to establish that the reservation Samish are a distinct social group, although it confirms that they maintain social contact among themselves and with other reservation Indians, or that the Indian descendants maintain the extent and kind of contact with them that characterized other cases. The final determination does not characterize or regard the reservation Samish as a social core.

IV. Criterion C: Maintenance of Tribal Political Authority:

A. Samish Comment: The final determination's conclusion that traditional political leadership existed until the 1940's contradicts the proposed finding. The finding claims Samish political authority only lapsed after 1951, when the present organization was formed.

Staff Analysis: This was an explicit change, in response to new evidence submitted by the Samish. The conclusion was only that traditional political leadership had continued over the reservation Samish, not for the Indian descendants families who form most of the current membership.

B. Samish Comment: The final determination invalidly requires that the post-1951 organization have exercised political authority by dispute resolution, development of consensus and control of behavior. Recognized tribes cannot meet these requirements.

Staff Analysis: No new evidence. These factors were cited as examples of tribal political authority, not the only manifestations. No evidence was cited concerning the exercise of political authority by recognized tribes.

C. Samish Comment: The final determination invalidly requires post-1951 organization to have been "representative." The comment asserts that the council is characterized by a continuation of the aboriginal practice of "family heads" representing their families, rather than direct contact.

Staff Analysis: This misstates the finding, which was that there was no evidence that most members participated in decision-making, i.e., had no contact with or input to the "council" and those speaking in the name of the organization. No evidence or analysis was presented to support the assertion of a family-head based system in the modern era. It was not possible to evaluate the record de novo to determine if this had any merit.

D. Samish Comment: The Samish exercise and have exercised many functions besides claims pursuit, i.e., administering social programs, seeking fishing rights, etc. and these constitute evidence of exercise of political authority.

Staff analysis: No evidence was provided that in conducting these functions the organization was exercising political authority over its membership as called for by the regulations.

E. Samish Comment: The findings ignore ample evidence of political functioning and meetings between 1935 and 1950.

Staff Analysis: The limited evidence presented was reviewed but did not provided grounds for concluding that the meetings represented tribal political processes.

V. Criterion E: Descent from an Historic Tribe or Tribes which have Combined:

A. Samish Comment: Seventy-four percent of the membership was conceded by the final determination to trace descent to the historic tribe. Why was this not a sufficient percentage, since in another context, 75 percent of something was considered the vast majority? In Jamestown, 75 percent proving ancestry was considered sufficient.

Staff Analysis: Criterion e of the regulations does not qualify the requirement that the petitioner's membership be descended from the historic tribe. In evaluating cases, allowance is made for less than 100 percent of a petitioner meeting this requirement, but given the positive demonstration of other, non-Samish ancestry and absent significant mitigating factors, 74 percent is considered too low to meet the criterion. Eighty-six percent of Jamestown is considered to be able to demonstrate the requisite ancestry. The quoted figure of 75 percent reflects a higher level of documentation than that used for Samish or other cases subsequent to Jamestown.

B. Samish Comment: All Noowhaha descendants should be counted, since the Noowhaha and Samish tribes had a patron-client relationship, which is a political relationship. The final determination unfairly requires proof that each individual Noowhaha family had combined politically with the Samish.

Staff analysis: Criterion e calls for an historic combination of tribes into a single autonomous political unit. The final determination concluded the traditional Noowhaha-Samish relationship did not have this character. The examination of the incorporation of individual families was made in the absence of indication of an historical combination of the two tribes into a single autonomous political unit. Previous cases cited had clear evidence that a portion of the relevant tribe had merged.

C. Samish Comment: The final determination has relied on information gathered by Charles Roblin in his creation of a list of unenrolled Western Washington Indians. This evidence is unreliable because it was gathered for potential enrollment at Quinault and because Roblin's categorization of tribal backgrounds is confused and inconsistent.

Staff Analysis: The Samish comments tend to confirm the reliability of tribal identification in Roblin's materials by noting that the affiants had nothing to gain by identifying their ancestry as one tribe over another. The applications were not taken solely for enrollment at Quinault. It is not clear that the "inconsistent" tribal identifications reflect Roblin's categorizations or those of the affiants.

VI. Other Issues:

A. Previous Recognition by the Federal Government:

Samish Comment: The final determination ignores or misinterprets evidence that the Samish have been continuously recognized up until the present and misinterprets evidence of local agency recognition since the 1950's.

Staff Analysis: No new evidence was presented. The arguments are largely a reassertion of previous arguments. The comments do not examine the analysis presented in the final determination or proposed finding reports. A reexamination of existing record as well as additional evidence strengthens conclusion presented in previous reports.

B. Effect of U.S. v. Washington Decision:

Tulalip comment: The Tulalip Tribes assert that the 1979 and 1981 District and Circuit Court determinations in U.S. v. Washington that the Samish had not continued to exist since treaty times as a tribal political community precludes an administrative decision under the acknowledgment regulations on essentially the same question. The Samish provided no new comment on this question.

Staff Analysis: This question has been raised frequently during consideration of the petition, most recently by the Samish in their comments on the proposed finding. In 1982, at the request of the Samish, the Assistant Secretary deferred consideration of this question until completion of evaluation of the petition. Because the proposed finding and the final determination were against acknowledgment, this question was not considered. The Secretary if he considers it appropriate may wish to request an opinion from the Solicitor on this question.

VII. Conclusions:

The primary focus of the Samish comments is a critique of the research and analysis presented in the Assistant Secretary's proposed finding and final determination. The comments present essentially no new evidence and only a limited number of new arguments or interpretations not presented previously. Many are essentially restatements of arguments previously made and some incorrectly characterize the statements and arguments made in the final determination.

Most of the comments are without merit. They do not meet the requirements of the criteria in 25 CFR 83.10. While some factual conclusions and some interpretations might be changed or refined on the basis of the submitted comments together with a reexamination of the record and limited additional research if the case was reconsidered, these are not of enough substance to merit reconsideration of the final determination. There are some factual areas that despite the extensive record have not as far as is known been completely researched or analyzed by any party. The results of such research are, of course, unpredictable. Moreover, this potential additional evidence would not be available in the 60-day time frame for reevaluation if a reconsideration is granted. The Tulalip Tribes questioned whether the Samish validly met criterion a, as the proposed finding concluded. This criterion was not reevaluated in making the final determination. There may be some merit in the arguments made by the Tulalip's regarding this.

The Samish argue that they were continuously recognized from treaty times until 1974, when they claim to have been illegally terminated by administrative action and that therefore they should not have to go through the acknowledgment process. The current comments provide no basis for changing the previous conclusion that the Samish had not been recognized separately since shortly after 1900, when they merged into the recognized Lummi and Swinomish Tribes.

The Tulalip Tribes assert that court determinations in U.S. v. Washington in 1979 and 1981 that the Samish had not continued to exist as a tribe preclude an administrative decision under the acknowledgment regulations.

Consideration of this question was deferred by the Assistant Secretary in 1982 until the case was evaluated under the regulations. Because of the negative findings, it has not been considered. The Secretary may request a Solicitor's opinion on this question if he considers it appropriate.

MAY 7 1987

Mr. Kenneth C. Hansen
P.O. Box 217
Anacortes, Washington 98221

Dear Mr. Hansen:

I have reviewed your request for a reconsideration of the Assistant Secretary - Indian Affairs' determination of February 5, 1987, to decline to acknowledge the Samish as a tribe under 25 CFR 83. I have also considered a comment from the Tulalip Tribes objecting to any reconsideration. I also received comments from the Swinomish Tribe objecting to reconsideration. These comments were not timely filed, however, and there is no evidence that they were provided to you as directed by the Assistant Secretary's letter of April 6 to you. Therefore, I have not considered them.

In reviewing this matter, I find no basis for concluding that your request meets the criteria found in 25 CFR 83.10 which would require me to ask the Assistant Secretary to reconsider his decision. While some factual conclusions and some interpretations might be refined or changed in some respects on the basis of the submitted comments, these are not substantial enough to merit reconsideration of the final determination. Therefore, the Assistant Secretary's determination of February 5, 1987, is now final and effective.

I'm enclosing a copy of the Summary Review of Comments on the Samish Final Determination, and a memorandum from Solicitor Ralph Tarr which gives the conclusions of his independent review.

The record in the Samish case is an extensive one, consisting of many thousands of pages of documents, resulting from research over a period of years. This record was thoroughly considered and the initial decision based on it was subsequently reviewed. The Samish have had several opportunities to comment on these decisions and a lengthy period in which to develop and provide additional data and analyses. I therefore believe the Samish petition has been given a fair and thorough review.

The acknowledgment regulations call for a determination of what alternative options, if any, are available under which a petitioning group which is refused acknowledgment could make application for services and other benefits as Indians. Some of those listed on your membership roll may be eligible for

enrollment with the Lummi or Swinomish Tribes. I am directing the Assistant Secretary to provide whatever assistance is possible to these individuals in seeking enrollment, if they so desire.

Sincerely,

Donald Paul Hodel

DONALD PAUL HODEL

Enclosures

cc: Tulalip Tribes
Bell and Ingram
Forrest Gerard
Swinomish Tribe
Alan Olson
Lummi Tribe
Kerry Radcliffe
Governor of Washington State
Attorney General of Washington State
Senate Select Committee
House Interior Committee
Congressman Al Swift
Congressman Mike Lowery
Senator Daniel Evans
Senator Brock Adams
Portland Area Office
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K. Lynn (IBIA)
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cc: ES:AS-IA:SOL-IA:

Secy Surname:(2) Secy RF:Surname:Chron:400:440RF:(440B)101A:
Holdup:Groth:msb:5/2/87:SECSAM