UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

OCT 1 1980

Memorandum

To: Assistant Secretary, Indian Affairs

Through: Commissioner, Bureau of Indian Affairs

From: Associate Solicitor, Indian Affairs

Subject: Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe

By letter dated June 6, 1978, the Stillaguamish Tribe of Indians requested Secretary Andrus to reconsider the October 27, 1976, decision of then Acting Secretary Kent Frizzell declining to take land in trust for the Stillaguamish. The Acting Secretary declined to take the lands in trust in part because he had doubts whether the Stillaguamish fell under the definitions of "Indian" and "tribe" in Section 19 of the Indian Reorganization Act (IRA) (25 U.S.C. §479). More specifically, the Acting Secretary apparently believed that a tribe must have had a reservation or other trust land and have been formally acknowledged as a tribe in 1934 in order to organize under or otherwise benefit from the IRA. Our research leads us to the conclusion that neither landownership nor formal acknowledgment in 1934 is a prerequisite to IRA land benefits so long as the group meets the other definitional requirements of a "tribe" within the meaning of Section 19 of the IRA. More specifically, it is our opinion that the Stillaguamish are indeed an Indian tribe within the meaning of Section 19.

Section 19 of the IRA provides in relevant part:

> "The term 'Indian' as used [in this Act] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation and shall further include all other persons of one-half or more Indian blood . . . The term 'tribe' whenever used [in this Act] shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. §479.

The first issue which must be resolved is whether the definitions of "tribe" and "Indian" should be read independently or whether the requirements for Indian status must be read into the definition of "tribe." We believe that the definitions must be read together. The definition of "tribe" itself contains the term "Indian." In addition, the IRA often uses the term "Indian" in contexts where it is clear that both tribes and individuals are being referred to. For example, Section 5 (25 U.S.C. §465) allows the Secretary to acquire lands in trust "for the purpose of providing land for Indians." Similar use of "Indian" to designate both tribes and individuals is found in 25 U.S.C. §461, and in the exchange authority enacted in 1939 (25 U.S.C. §463e-g). It is a well established principle that a section of a statute must not be read in isolation, but with a look to the provisions of the whole law, and to its object and policy. Richards v. United States, 369 U.S. 1, 11 (1962). A construction should be chosen which gives effect to all parts of the statute while avoiding a result contrary to the apparent intent of the Congress. Certified Color Manufacturers Association v. Mathews, 543 F.2d 284, 296 (D.C. Cir. 1976). Reading "Indian" and "tribe" separately in 25 U.S.C. §§ 465, 461, and 463 e-g would lead to results clearly not intended by Congress.

Having determined that the definitions of "Indian" and "tribe" must be read together, we must determine whether the Stillaguamish Tribe is a "recognized tribe now under Federal jurisdiction" for the purposes of Section 19.

We believe that that phrase includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time. Although the United States was apparently unaware in 1934 that it had a continuing obligation to protect Stillaguamish treaty fishing rights, those rights put the Stillaguamish "under Federal jurisdiction" for purposes of the IRA.

Originally the definition of "Indian" in Section 19 included members of "any recognized tribe." The phrase "now under federal jurisdiction" was added during the Senate Hearings at the suggestion of Commissioner Collier in response to certain concerns of Senator Wheeler. At one point in the Senate Hearings, Senators Thomas and Frazier expressed concern for Indians who were not members of tribes, and not being supervised. The following exchange occurred:

> "The CHAIRMAN [Wheeler]: They do not have any rights at the present time, do they?

> Senator THOMAS of Oklahoma: No rights at all.
>
> The CHAIRMAN: Of course this bill is being passed, as a matter of fact to take care of the Indians that are being taken care of at the present time.
>
> Senator FRAZIER: Those other Indians have got to be taken care of, though.
>
> The CHAIRMAN: Yes; but how are you going to take care of them unless they are wards of the Government at the present time?"

To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess. 263 (1934) (hereafter Senate Hearings).

Senator Thomas then brought up the issue of the Catawbas. Wheeler stated that they should not be covered unless they were half-bloods. Thomas objected that many enrolled Indians had almost no Indian blood at all. Wheeler agreed that the situation was anomalous and that his preference would be to sever federal responsibility to all Indians of less than one-half blood. However, the bill would not attempt to change the status quo of Indians to whom the United States already had obligations. It is unclear which Indians Wheeler considered to be "wards." He speaks of Indians whose property is managed by the United States (Id. at 264), enrolled Indians (Id. at 264), wards (Id. at 263), and Indians under the supervision of the United States (Id. at 266).

Senator O'Mahoney noted that in his opinion the phrase "member of any recognized Indian tribe" would include the Catawbas who he described as a group living together as Indians although they were not half-bloods and were apparently being ignored by the Federal Government. Wheeler felt that the definition of "Indian" should be amended to exclude such groups. Collier suggested:

> "Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the Act to the Indians now under federal jurisdiction, except that other Indians of more than one-half blood would get help." Id. at 266.

From the above it is clear that the drafters of the IRA intended to exclude at least some groups which could be considered Indians in a cultural or governmental sense, but they did not intend to use the Act to cut off any Indians to whom the Federal Government had already assumed obligations.

Collier's use of the phrase "federal jurisdiction" is puzzling because it is used nowhere else in the legislative history. Instead there are references to "federal supervision," "federal guardianship," and "federal tutelage." There is evidence that the term "federal supervision" was tied to management of property rights.

> "Senator THOMAS of Oklahoma: . . . In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money, in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.
>
> Commissioner COLLIER: Yes."
>
> Id. 79-80.

However, Collier emphasized that membership in recognized tribes was an alternate basis for benefits.

> "Commissioner COLLIER: This bill provides for any Indian who is a member of a recognized tribe or band shall be eligible to government aid.
>
> Senator THOMAS: Without regard to whether or not he is now under your supervision?
>
> Commissioner COLLIER: Without regard, yes. It definitely throws open government aid to those rejected Indians."
>
> Id. 80.

To Wheeler's objection that the government should not be supervising persons of minimal Indian blood Collier replied:

> "Commissioner COLLIER: I may say, Senator, that we have tried in this bill, we have desired to avoid running into that particular horner's nest of defining an Indian, of settling contentious enrollment problems. We have tried

> to avoid that in order to keep the issues comparatively simple.
>
> But the bill does definitely recognize that the fact that an Indian has been divested of his property is no reason why Uncle Sam does not owe him something. It owes him more."
>
> Id. 80.

Note that even as to "Federal supervision" Thomas stated that money as opposed to a land base was a sufficient basis for federal supervision. Id. at 79-80.

Elsewhere the legislative history speaks of "federal guardianship" and "federal tutelage." The declaration of Congressional policy in H.R. 7902 stated that "it is hereby declared to be the policy of Congress to grant to those Indians living under Federal tutelage and control the right to organize for the purpose of local self-government." (Emphasis added.)

During the House Hearings Collier and Delegate Dimond of Alaska were unsure whether Alaska Natives (who in general had no reservations) were under federal tutelage. Readjustment of Indian Affairs: Hearing on H.R. 7902 before House Committee on Indian Affairs, 73rd Cong., 2d Sess. 79 (1934) (hereafter House Hearings). However, during the exchange in the Senate Hearings that produced the phrase "now under Federal jurisdiction" Collier stated that Alaska Natives were under federal guardianship for some purposes but not others. He went on to say that the land acquisition provisions should be extended to Alaska. Senate Hearings 265.

Elsewhere in the House Hearings, Collier assured Congressman Cartwright of Oklahoma that Indians in states with little or no reservations could participate in Section 5 acquisitions. House Hearings 137; see also Collier's statement on landless Indians in Oklahoma and other states, House Hearings 69.

As the IRA moved closer towards passage, Congressman Howard explained the definition of "Indian:"

> "In essence, it recognizes the status quo of the present reservation Indians and further includes all persons of one-fourth or more Indian blood. The latter provision is intended to prevent persons of less than one-fourth Indian blood who

> are not already members of a tribe or descendants of such members living on a reservation from claiming the financial and other benefits of the act." Cong. Rec. H. 12056 (June 15, 1934).

The Interior Department had reported that the definition in Section 19 was designed to clarify "that residence upon a reservation is deemed an essential qualification of charter membership in a community only with respect to persons who are not members of any recognized tribe and are not possessed of one fourth degree of Indian blood." House Hearings 196.

Although it is clear that the definition of Indian requires that some type of obligation or extension of services to a tribe must have existed in 1934, we conclude that neither a reservation nor other trust land is required by Section 19. Even Senator Thomas' definition of "federal supervision" included the management of trust moneys. Furthermore, Solicitor's Opinions have repeatedly treated reservations and trust land as a basis for eligibility for IRA benefits but not as a sine qua non for those benefits. 1/ Associate Solicitor's Opinion of April 8, 1935, on the North Carolina Siouan Indians; Solicitor's Opinion of August 31, 1936, on the Mississippi Choctaw; Associate Solicitor's Opinion of February 8, 1937, on the Mole Lake Chippewa; Solicitor's Opinion of May 1, 1937, on the Nahma and Beaver Island Indians; Solicitor's Opinion of March 20, 1944, on the Catawbas; Solicitor's Opinion of December 13, 1938, on the Miamis and Peorias; Solicitor's Opinion of February 6, 1937, on the St. Croix Chippewa; Acting Associate Solicitor's Opinion of August 13, 1971, on the Nooksacks.

We believe that the treaty fishing rights of the Stillaguamish render them a "recognized tribe now under Federal jurisdiction." In 1855, the Stillaguamish Tribe entered into the Treaty of Point Elliott (12 Stat. 927). The Ninth Circuit has held that:

> "[T]he members of the [Stillaguamish Tribe] are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district

1/ The Solicitor's Opinions arise both out of requests to organize and petitions to have land taken in trust for a tribe. Since status as a "recognized tribe now under Federal jurisdiction" is a prerequisite to either action, the opinions relating to organizational rights are applicable to the issue under consideration here.

> court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott." 520 F.2d 676, 693 (9th Cir. 1975).

It should be noted that the Ninth Circuit held that the Stillaguamish have a tribal right rather than a right as individuals. Further, that right was premised upon a finding of continuous tribal existence since 1855. The Stillaguamish Treaty right is "vested" and may be lost only by "unequivocal action by Congress." Id. Since the United States had a treaty obligation to the Stillaguamish in 1934, they were "under Federal jurisdiction." Because we believe that the treaty rights bring the Stillaguamish within the IRA definition, we need not consider the other dealings between the United States and the Stillaguamish which the tribe has submitted in support of its petition.

It is irrelevant that the United States was ignorant in 1934 of the rights of the Stillaguamish and that no clear determination or redetermination of the status of the tribe was made at that time. It is very clear from the early administration of the Act that there was no established list of "recognized tribes now under Federal jurisdiction" in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups. The Solicitor's Office was called upon repeatedly in the 1930's to determine the status of groups seeking to organize. Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion of August 31, 1936, on the Mississippi Choctaw; Solicitor's Opinion of May 1, 1937, on the Nahma and Beaver Island Indians; Solicitor's Opinions of February 6, 1937, and March 15, 1937, on the St. Croix Chippewa; Associate Solicitor's Opinion of Feb, 8, 1937, on the Mole Lake Chippewa; Solicitor's Opinion of January 4, 1937, on the Landless Shoshone Indians of Nevada; Solicitor's Opinion of December 13, 1938, on the Miami and Peoria Tribes of Oklahoma.

None of these opinions expresses surprise that the status of an Indian group should be unclear, nor do they contain any suggestion that it is improper to determine the status of a tribe after 1934. Further, the Department has on at least two occasions reassessed the status of groups initially determined not to be tribes for purposes of section 19. By Opinion dated May 31, 1946, the Acting Solicitor found that there was insufficient evidence before him to show that the Burns Paiutes constituted a band capable of organizing under the IRA. On November 16, 1967, the Acting Associate Solicitor, Indian Affairs determined that the Burns Paiutes could organize as a band. Based on new evidence, the Acting Associate Solicitor, Indian Affairs held on August 13, 1971, that the Rocksanks did constitute a tribe, despite a finding to the contrary in the Solicitor's Opinion of December 9, 1947.

Thus it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a "recognized tribe now under Federal jurisdiction" and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability.

We therefore conclude that the Stillaguamish do constitute a tribe for purposes of the IRA. The Stillaguamish, however, must also demonstrate a need for the land before it may be taken in trust for them pursuant to Section 5. City of Tacoma v. Andrus, 457 F. Supp. 342 (D.D.C. 1978). According to BIA estimates the unemployment level of the Stillaguamish Tribe is three times the national average. Average income is at or below the poverty level. In 1977, the State of Washington Office of Community Development, Indian Economic Employment Assistance Program made a grant of $16,500 to the Stillaguamish to be used exclusively for the acquisition of land to be taken in trust. The tribe currently has no land base and proposes to use the acquired lands for a tribal government center, fish hatchery, low income housing and potential tribal businesses. Under these circumstances, we believe that the Stillaguamish have adequately established their need for trust land and that the Secretary has the authority and discretion to take land in trust for the tribe.

(Sgd.) Hans Walker, Jr.

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