United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

CERTIFIED-RETURN RECEIPT REQUESTED

L-1706

Oct. 27, 1976

David H. Getches, Esquire
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Dear Mr. Getches:

This is the Department's decision on the petition dated April 5, 1974, filed by you on behalf of the Stillaguamish Tribe of Indians and constitutes the Department's decision in accordance with the District Court's order of September 24, 1976, in the case of Stillaguamish Tribe v. Kleppe, Civil No. 75-1718, U.S.D.C., District of Columbia. This decision of the Secretary is limited to the Stillaguamish Tribe and to the particular facts of this case.

Specifically, your petition requests that the Department (1) acknowledge that the Stillaguamish Tribe of Indians is an Indian tribe and extend to it federal recognition along with all rights, privileges, protections and services which are attendant upon such federal recognition and which are enjoyed by other federally recognized tribes and their members; (2) approve the tribal constitution and current roll of tribal members or, in the alternative, assist the tribe in updating or revising the tribal constitution and roll; and (3) accept on behalf of the United States in trust for the tribe certain lands willed to the tribe by the late Gus Smith.

As set out herein, the Department has determined that: (1) the Stillaguamish Tribe of Indians is an Indian tribe entitled to exercise treaty fishing rights, and that the Department has a trust responsibility with respect to the protection of those rights; (2) the Stillaguamish Tribe is entitled to continue to function as an organized government outside the Indian Reorganization Act of 1934, and to have its constitution and tribal roll provisionally approved by the Department (subject to a study by the Bureau of Indian Affairs to confirm that members listed on the tribal roll satisfy the membership requirements in the constitution) and (3) the Department has authority

subject to availability of appropriations to provide certain services to members of the tribe as set forth in greater detail herein. My authority to take land in trust under Section 5 of the 1934 act, 25 U.S.C. § 465, is expressly discretionary. The Solicitor has some doubts that Section 465 applies to the Stillaguamish and that there is no other authority for the Department to take the lands willed to the tribe in trust. I am not convinced that I would be justified in taking land in trust for this tribe at this time.

1. Rights of the Stillaguamish Tribe for which the Department has a Trust Responsibility

The Ninth Circuit Court of Appeals has, of course, affirmed the decision by the United States District Court for the Western District of Washington in the case of United States v. Washington, 520 F.2d 676 (9th Cir. 1975); cert. denied 423 U.S. 1086 (1976).

The Court of Appeals specifically held that your client, the Stillaguamish Tribe, possesses treaty fishing rights for which the United States has a trust responsibility. The Department will, of course, conform fully to this decision. I am directing the Commissioner of Indian Affairs and his staff (by a copy of this letter) to meet with your clients and determine what action is necessary on behalf of the Bureau and the Department for purposes of implementing fully the decision in United States v. Washington and for the purposes of protecting and assisting them to protect these treaty fishing rights.

2. The Tribe's Claim that it is Entitled to BIA Services

A. Indian Self-Determination Act and Indian Financing Act

Our authority to extend other services to the petitioners depends on the applicable acts of Congress. Two recent statutes appear to provide justification for the provision of certain services to the Stillaguamish Tribe as an indirect result of the Ninth Circuit decision. These are the Indian Financing Act (25 U.S.C. § 1451 et seq.) and

the Indian Self-Determination Act (25 U.S.C. § 450 et seq.). These acts provide, in brief, for contracting management of most major federal programs to eligible tribes and for the provision of economic development grants and loans to these tribes. The two statutes define "Indian tribe" similarly. The Financing Act defines it to mean "any tribe . . . which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs." 25 U.S.C. §1452(c). The Self-Determination Act refers to "any Indian tribe . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(b). Unlike the Nonintercourse Act, which was at issue in Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and other statutes applying generally to Indians, these laws base their application on some form of federal "recognition."

As we have indicated, the District Court's decisions and the Court of Appeals' ruling in United States v. Washington leads invariably to the conclusion that the Department has a trust responsibility to make services available to the tribe for the purpose of protecting treaty fishing rights. It would, therefore, appear that the tribe "is recognized as eligible" for federal Indian services under these statutes--however limited those services may be. Neither the Self-Determination Act nor the Financing Act suggests how many services or what services a tribe might be recognized as eligible for before it can be considered an "Indian tribe" for purposes of application of those Acts. We determine, accordingly, that the Stillaguamish Tribe is an "Indian tribe" under the acts' definitions--now that it has been determined to be eligible for fishery-related services.

B. Land-Related Services

Many Bureau services or actions (such as approving leases or rights of way) are authorized to be provided where there is land owned by Indians which is held in trust status or subject to restrictions on alienation. For

example, such lands can be leased or permitted with approval of the Department, and the Bureau has certain land management responsibilities with respect to those lands. 25 U.S.C. §§ 323 and 415; 25 C.F.R. Parts 131 and 141. Since the Stillaguamish Tribe owns no land, these services would not be available to it.

C. Other BIA Services

The bulk of BIA services are authorized by two broadly-worded statutes: the Snyder Act (25 U.S.C. § 13) and the Johnson-O'Malley Act (25 U.S.C. § 452 et seq.). The former provides the Secretary with the authority to "direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States" for health, education, welfare, law enforcement, and countless other purposes. The Department has through the years established criteria which would confine the eligibility of Indian people for the benefits available under the act to a class drawn more narrowly than all Indians throughout the United States. In Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court held that entitlement to such benefits extended, at least, to Indians on or near reservations, and this is the Department's current policy. Ruiz invalidated a policy restricting service eligibility to Indians residing on their reservations.

Accordingly, while the Department's authority to make such services available may be broader--extending to all Indians throughout the United States--it has been administratively circumscribed by regulations to a narrower category of Indians--those residing on or near reservations or trust lands. It remains to be seen whether all or any of the members of the Stillaguamish Tribe will meet this eligibility criteria; tribal members who do not satisfy these criteria cannot claim entitlement to Snyder Act services as a matter of right. Nonetheless, the Department clearly has authority under the Snyder Act to request appropriations for the provision of BIA Snyder Act services

to all members of the petitioner Stillaguamish Tribe. */ The Court in Ruiz placed conclusive weight on the appropriations process, and on the requests made by the Department to Congress. We will so request appropriations for the Stillaguamish Tribe and all Snyder Act services will be provided to it to the extent Congress supplies the funds.

The authority for entering into contracts pursuant to the Johnson-O'Malley Act appears to be similarly broad. That Act provides in pertinent part:

> "The Secretary of the Interior is authorized, in his discretion, to enter into a contract or contracts with any State or Territory, or political subdivision thereof, . . .

*/ We premise this authority on the statute itself. There could hardly be a more expansive word than "throughout," and there is no language in the act which would subtract from its broad meaning. Nor does the legislative history of the Snyder Act suggest limited authority. The Supreme Court examined that history in the Ruiz case:

> "The Snyder Act . . . provides the underlying congressional authority for most BIA activities . . . . Prior to the Act, there was no such general authorization. As a result, appropriation requests made by the House Committee on Indian Affairs were frequently stricken on the House floor by point-of-order objections. [citation] The Snyder Act was designed to remedy this situation. It is comprehensively worded for the apparent purpose of avoiding these point-of-order motions to strike." 415 U.S. at 205-06.

> for the education, medical attention, agricultural assistance, and social welfare, including relief of distress of Indians in such State or Territory, through the agencies of the State or Territory . . . and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory." 25 U.S.C. § 452.

While authority under this statute is broader than educational services, Johnson-O'Malley contracts over the years have been restricted to providing education to eligible Indians outside the BIA-operated school system. As for eligibility to benefit from these contracts, the term "Indians" is nowhere defined in the act, nor is there any other language in the act which begins to define those classes of persons to be served. If anything, it appears that the legislation was aimed primarily at assisting the states to provide educational and other assistance to Indians regarded as beyond the reach of BIA services, whether because they reside "in widely scattered communities" or because they "are in definitely a part of the general population." February 26, 1934, letter of John Collier, Commissioner of Indian Affairs, to House Committee on Indian Affairs, H. Rep. 864 (73d Cong., 2d Sess.) at pp. 2-3.

As a matter of administrative practice, "Indian" was first defined in 1974 as "an individual of 1/4 or more degree of Indian blood and a member of a tribe, band, or other organized group of Indians, including Alaska Natives, which is recognized by the Secretary of the Interior as being eligible for Bureau of Indian Affairs services." 39 F.R. 30114 (Aug. 21, 1974); 25 C.F.R. § 33.1(g) (1974). From 1939 until 1974 Departmental regulations provided that payments under the Johnson-O'Malley Act be made to state and local educational agencies for pupils having one-quarter

Indian ancestry without reference to tribal affiliation. 4 F.R. 1631 (April 10, 1939); 25 C.F.R. § 46.11 (1949). Before 1939 reference was made solely to "Indian school children." 25 C.F.R. § 46.11 (1938). Of course, such regulations are persuasive only on questions of eligibility rather than statutory authority. Nonetheless, the paucity of clear administrative standards suggests that the original congressional authorization was regarded as broad. I have concluded that as a matter of discretion the Department will seek appropriations to provide Johnson-O'Malley services to members of this tribe to the extent they have more than one-quarter degree Indian blood.

3. The Tribe's Claim that it is entitled to organize as a Government and have land taken in trust for it.

A. Tribal Constitution

Your request was that I approve the tribal constitution and current roll of tribal members or in the alternative that I assist the tribe in updating or revising the tribal constitution and rolls. A tribal government need not organize under the 1934 act; indeed, most tribal governments function outside the provisions of that statute. Felix S. Cohen, Handbook of Federal Indian Law, p. 122; United States v. Mazurie, 419 U.S. 544 (1975).

As the Court of Appeals determined at least implicitly in United States v. Washington, the Stillaguamish Tribe is clearly an Indian tribe. Its members are Native Americans of common ancestry, "united in a community under one leadership or government", and inhabiting a particular area or territory. See United States v. Candelaria, 271 U.S. 432, 442 (1926); Montoya v. United States, 180 U.S. 261, 266 (1901).

The Stillaguamish Tribe is currently functioning under a constitution adopted in 1953. It appears to be adequate for their needs; it also contains a provision for amending it in the event the tribe finds it lacking in some respect in the future. I see no need for the tribe to adopt a new constitution and I need not decide whether the tribe is entitled to adopt a constitution under the IRA.

We have determined to accept on a provisional basis the constitution approved by the Stillaguamish Council on January 31, 1953. We shall continue to accept that document as the group's governing document so long as we are satisfied that the Department can rely on it, the representatives elected pursuant to it and the actions taken under it. This is essential for purposes of dealing with the tribe and for discharging my obligations to protect the tribe's treaty fishing rights as established by United States v. Washington and dispensing such other services as we are authorized to provide.

In connection with Stillaguamish Tribe v. Kleppe, you have provided the Federal government with a list of members. I herewith direct the Bureau of Indian Affairs to verify that each person listed is a Stillaguamish descendant possessing the degree of Indian blood prescribed in the tribe's constitution. Persons whom the Bureau can verify as being Stillaguamish descendants possessing the degree of Indian blood required by the group's existing constitution shall be considered members of the tribe.

B. Taking Lands in Trust

As to your request that the Department take in trust certain lands willed to the Stillaguamish Tribe by the late Gus Smith, we must deny your request. Based on his analysis of the statutory language and legislative history the Solicitor has some doubts that the Department can take land in trust under 25 U.S.C. § 465 for tribes that were not administratively recognized on the date of that act, (June 18, 1934), and we are uncertain there is any other provision of law which would permit us to take land in trust for the tribe.

In any event my authority under Section 465 is clearly discretionary and I am not convinced that the record before me justifies my exercising that discretion in favor of taking this land in trust for the tribe.

The Solicitor is also of the opinion based on his reading of Section 19 of the act (25 U.S.C. § 479), that the benefits of the IRA are available to individual Indians of one-half or more Indian blood whether or not the tribe was administratively recognized as of the date of the act. Therefore, if those members of the group who do have one-half degree or more Indian blood were to form a separate organization and request that the Department take land in trust for them, we would consider such a request at that time.

Sincerely yours,

Acting Secretary of the Interior