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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

October 5, 2016
Via First Class Mail and Electronic Mail

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RE: Swinomish Response to September 13, 2016 Letter from Regional Director Speaks on Proposed Constitutional Amendments

Dear Christina and Greg:

On behalf of the Swinomish Indian Tribal Community, I am replying to the comment letter dated September 13, 2016 from Northwest Regional Director Speaks, Bureau of Indian Affairs ("BIA" or Bureau"). In my response, I set forth some suggested alternative language and/or explanations for the previous proposals to amend the Tribe's Constitution and By-Laws. Upon reading the BIA's comment letter, I identified several items of concern to the BIA. I first address the two specific mandatory changes set forth in your letter; I then address three other issues raised by the BIA in Enclosure 1 attached to that letter.

Mandatory changes:
1) Item 2: **Amendment B**.

Tribe's original proposal:

ARTICLE I-NAME, TERRITORY, AND JURISDICTION

SECTION 1. The name of this organized body shall be the Swinomish Indian Tribal Community, hereinafter called the community or Tribe.

[History] IRA (11/16/35).

SEC. 2. Territory. The territory of the Swinomish Indian Tribal Community shall include, to the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, all lands, water, property, airspace, surface rights, subsurface rights, and other natural resources

(a) in which the Tribe now or in the future has any interest, or

(b) which are owned now or in the future by the United States for the exclusive or non-exclusive benefit of the Tribe or for individual tribal members, or

(c) which are located within the original boundaries of the Swinomish Reservation in pursuance of Article II of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928), notwithstanding the issuance of any existing or future patent or right-of-way.

SEC. 3. Jurisdiction. To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Swinomish Indian Tribal Community shall have jurisdiction over all persons, subjects, property and activities occurring within

a) its territory as defined by this Article; and

b) the Tribe's usual and accustomed fishing grounds and stations and all open and unclaimed lands, as guaranteed by treaty for fishing, hunting and gathering, and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas.

Further, jurisdiction shall extend to all persons, subjects, property and activities that may hereafter be included within the jurisdiction of the Tribe.

BIA Comments: The BIA's comments were contained in both the letter and in Enclosure 1. For your convenience, I set them out below.

1. **Body of the Letter**: "This proposed amendment expands the Swinomish territory and jurisdiction by eliminating any reference to the Executive Order of September 9, 1873. Issued in accordance with Article III of the Treaty of Point Elliott, January 22, 1855 (Treaty), the Executive Order defines the northern boundary of the Swinomish Reservation. Elimination of the northern boundary would create ambiguities in the Tribe's territory and invite conflict as the Community exercised its expanded jurisdiction. The proposed amendment runs contradictory to an existing Executive Order and, ultimately, the Treaty. This proposed amendment needs to be revised to comply with the Executive Order or withdrawn."

2. **Enclosure 1:** "The proposal to modify Article I presents significant changes to this section with expansive language to the jurisdiction and territory of the Tribe. The changes do present contradictions to applicable law. Additionally, potential conflicts may arise if this amendment is enacted. The proposed amendment first defines the Tribe's territory and then secondly defines the Tribe's jurisdiction.

In the section defining territory, the proposed changes delete all the reference to the Executive Order of September 9, 1873 (Executive Order), in pursuance of Article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928). The Executive Order (Attachment 3) defines the northern boundary of the Swinomish Indian Reservation. Removal of this language is in contradiction to the Executive Order.

Next, the section on jurisdiction includes "all persons, subjects, property and activities occurring within its territory as defined by this Article." A potential expansion in territory as defined in the first section allows for a potential expansion of jurisdiction and regulatory authority as defined in the second section. If the proposed amendment is enacted, this expansion of tribal jurisdiction may lead to conflicts as the Tribe flexes its regulatory authority within an expanded tribal territory.

We suggest inserting "Name." following "SECTION 1." for consistency."

Swinomish Response:

The Tribe is surprised by and disappointed with the BIA's response to our proposal. Our proposed language does not "expand the Swinomish territory and jurisdiction," but instead accurately reflects our territory and jurisdiction in accordance with applicable Federal law. The statement that the Executive Order was authorized by Article III of the Treaty of Point Elliott and defines the northern boundary of the Swinomish Reservation ignores the historical record, is inconsistent with well-settled Federal law regarding Indian reservation boundaries, and depends upon an interpretation of Article III of the Treaty that is indefensible.

The Swinomish Reservation was established by Article II of the Treaty of Point Elliott in 1855, not by the Executive Order in 1873, as Article 1, Section 2 of our current Constitution erroneously states. Among other reservations, Article II of the Treaty reserved "the peninsula at the southeastern end of Perry's [Fidalgo] Island, called Shais-quihl." The Swinomish Reservation as established by Treaty in 1855 had a defined boundary and the location of a portion of that boundary is a north-south line running across the isthmus of land separating Fidalgo and Similk Bays, such that the area of land commonly known as March Point was included within the Reservation. The 1873 Executive Order did not define the Swinomish Reservation boundary in the first instance and was not issued to clarify the boundary because of any confusion over its location, but instead attempted to change the boundary to exclude March Point[1] from the Reservation because non-Indian squatters had been trespassing on that portion of the Reservation for some time. We have explained these facts to the BIA, the Regional Solicitor's Office,[2] and the Office of the Solicitor on a number of occasions, we have never before understood the United States to contest them, and we do not believe that they can be contested given the compelling historical record with respect to them. *See, e.g,* E. Richard Hart, *March Point and the Swinomish Reservation* (2012); Letter from Emily Haley to Stanley Speaks at 1-

[1] We use the term "March Point" as a catch-all for all those lands that were purportedly removed from the Swinomish Reservation pursuant to the 1873 Executive Order.
[2] Lynn Peterson, Mary Anne Kenworthy and Jessie Young are familiar with our position and supporting documents as, of course, is their client, Regional Area Director Stanley Speaks.

2 (April 13, 2016); Letter from Marc Slonim to Stanley Speaks at 2-4 (April 24, 2012) (attached hereto as Enclosures A, B and C respectively).[3]

An Indian reservation established by treaty remains intact unless and until Congress acts to disestablish or diminish the reservation or alter its boundaries. *See, e.g., Nebraska et al. v. Parker et al.,* 577 U.S. _ , 136 S. Ct. 1072 (March 22, 2016), slip op. at *5* ("[o]nly Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear") (quotation omitted), 12 ("[o]nly Congress has the power to diminish a reservation"); *Solem v. Bartlett,* 465 U.S. 463, 470 (1984) ("*once a block of land is set aside for an Indian Reservation* and no matter what happens to the title of individual plots within the area, *the entire block retains its reservation status until Congress explicitly indicates otherwise*") (emphasis added). Here, Congress took no action whatsoever to disestablish or diminish the Swinomish Reservation or alter its boundaries. As a result, the Reservation and its boundaries continue to exist as they were originally established by the Treaty in 1855. There is simply no authority for the proposition that the President can unilaterally disestablish or diminish a reservation or alter its boundaries, and any such suggestion is foreclosed by well-settled Federal law. *See* Haley Letter at 2-5 (Enclosure B). Therefore, it is the BIA's statement, and not the Tribe's proposed Constitutional amendment, that is contrary to Federal law.

In your response, you indicate that the Executive Order was valid and effective to set the northern boundary of the Reservation because it was issued in accordance with Article III of the Treaty. This statement may be a recitation of similar, but erroneous, language in Article I, Section 2 of our current Constitution. Article III of the Treaty does not purport to authorize the President to set or modify the boundaries of the reservations established under Article II of the Treaty, including the Swinomish Reservation, or speak in any way to the President's power with respect to the Article II reservations or their boundaries. Instead, it reserves one township of land near the Tulalip Reservation for the purpose of carrying out Governor Stevens' desired, but never realized, vision of establishing a "central agency and general reservation" there, with "a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory." Treaty of Point Elliott, Article III. However, the Article III general reservation was never established, the Article II reservations established in the five treaties ceding lands west of the Cascades were never disestablished, and the 20 tribes which were signatories to those treaties and the beneficiaries of the Article II reservations to which they removed were never required to remove to or settle upon a general reservation. Moreover, we are not aware of any presidential action purporting to accomplish any of those results or to change the location of the general reservation, which is the only presidential power Article III arguably speaks to.

Nor did any other provision of the Treaty authorize the Executive Order. Article II of the Treaty indicates that the Article II reservations should be surveyed and marked out for the tribes' exclusive use, but the Executive Order said nothing about surveying the Reservation and the Reservation was not in fact surveyed until after the Executive Order was issued. Article VII of the Treaty purports to authorize the president to "remove [the tribes and bands] from either or all of the special reservations hereinbefore made [in Article II of the Treaty] to the said general reservation [in Article III of the Treaty], or such other suitable place within said Territory as he may deem fit … or [to] consolidate

[3] For your convenience, we have separated out the Hart report and its accompanying exhibits from both the Haley and the Slonim letters.

them with other friendly tribes and bands," but the Executive Order said nothing about removing the tribes and bands present on the Swinomish Reservation to the general reservation at Tulalip or anywhere else, and said nothing about consolidating them with tribes or bands located on other reservations. Article VII of the Treaty also purports to provide the president with authority to allot the Article II reservations, but the Executive Order said nothing about allotting the Swinomish Reservation and allotment on the Reservation did not in fact start until 1883. Any argument that the Executive Order was authorized by the Treaty is belied by the plain language of the Treaty and the historical record.

For all of these reasons, lands on March Point are within the Swinomish Reservation and our proposed Constitutional amendment complies with Federal law because the Executive Order could not and did not diminish the boundaries of the Reservation. Even if patterns of non-Indian settlement and governance subsequent to the Executive Order could affect the Tribe's ability to exercise jurisdiction on lands on March Point in certain circumstances today, that has no bearing on the Reservation's boundaries or the conclusion that March Point remains within the Swinomish Reservation.[4]

Revised Proposal:

While the Tribe continues to believe that the original proposal is lawful[5] and not only consistent with, but compelled by, Federal law for the reasons expressed above and in our prior submissions to the BIA on these issues, the BIA does not need to make a final determination with respect to these issues in order to approve an alternative proposal that we believe accurately reflects the Tribe's territory and jurisdiction and is consistent with Federal law. Stated another way, we offer the following alternative proposal in a desire to move forward expeditiously. The new language would define the Tribe's territory and on-Reservation jurisdiction to the limits of the "Swinomish Reservation" and no farther, even if there continue to be outstanding issues for another day about the precise boundaries of the "Swinomish Reservation." The new language is set forth in blue and ~~red strikeout~~ for easy identification.

ARTICLE I-NAME, TERRITORY, AND JURISDICTION

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[4] Your response indicates you are concerned that (1) amending erroneous statements in our current Constitution regarding the territory of the Tribe or (2) the Tribe attempting to exercise jurisdiction over such territory in the future (no matter how speculative those attempts may be), will "create ambiguities" or "invite conflict." We note that the BIA lacks statutory authority to disapprove a duly-adopted Constitutional amendment for either of those reasons, as discussed in greater detail below. *See* 25 U.S.C. § 5123 (d)(1) (formerly codified at 25 U.S.C. § 476(d)(1))). Moreover, to the extent any "ambiguities in the Tribe's territory" may exist, they do so because President Grant issued Executive Order in 1873 purporting to diminish or alter the boundaries of a treaty reservation without any authorization to do so.

[5] Subsection 2(c) of our original proposal was approved by the Regional Solicitor's Office during a telephone conference on August 26, 2015 with Assistant Regional Solicitors Mary Anne Kenworthy and Christina Parker. While concerns were raised by them during the call, they did not relate to any portion of Article I. *See* E-mail dated August 27, 2015 from Assistant Regional Solicitor Christina Parker to Alix Foster with a copy to Mary Anne Kenworthy regarding Swinomish changes after call (attached hereto as Enclosure D). The change in position by the Bureau is therefore puzzling.

SECTION 1. *Name.* The name of this organized body shall be the Swinomish Indian Tribal Community, hereinafter called the community or Tribe.

SEC. 2. Territory. The territory of the Swinomish Indian Tribal Community shall include, to the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, all lands, water, property, airspace, surface rights, subsurface rights, and other natural resources

(a) in which the Tribe now or in the future has any interest, or

(b) which are owned now or in the future by the United States for the exclusive or non-exclusive benefit of the Tribe or for individual tribal members, or

(c) which are located within ~~the original boundaries of~~ the Swinomish Reservation, ~~in pursuance of Article II of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928),~~ notwithstanding the issuance of any existing or future patent or right-of-way.

SEC. 3. Jurisdiction. To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Swinomish Indian Tribal Community shall have jurisdiction over all persons, subjects, property and activities occurring within

(a) its territory as defined by this Article; and

(b) the Tribe's usual and accustomed fishing grounds and stations and all open and unclaimed lands, as guaranteed by treaty for fishing, hunting and gathering, and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas.

Further, jurisdiction shall extend to all persons, subjects, property and activities that may hereafter be included within the jurisdiction of the Tribe.

Rationale for proposal:

a) The **Sample BIA Constitution** on your website provides support for this alternative language. For your convenience, I set forth that language below:

ARTICLE I - TERRITORY AND JURISDICTION

Section 1. Territory. The territory of the EXAMPLE Tribe shall include, to the fullest extent possible consistent with federal law, all lands, water, property, airspace, surface rights, subsurface rights and other natural resources in which the Tribe now or in the future has any interest, which are owned now or in the future by the United States for the exclusive or non-exclusive benefit of the Tribe or for individual tribal members, or which are **located within the boundaries of a reservation** which may be established for the Tribe, notwithstanding the issuance of any right-of-way.

> Section 2. Jurisdiction. Except as prohibited by federal law, the EXAMPLE Tribe shall have jurisdiction over all tribal members and **over all persons, subjects, property and all activities occurring within its territory as defined by this Article**. Nothing in this Article shall be construed to limit the ability of the Tribe to exercise its jurisdiction, based upon its inherent sovereignty as an Indian tribe.

(Emphasis added.) *See,* Sample Constitution of the Example Tribe found at *http://www.bia.gov/cs/groups/public/documents/text/idc-001884.pdf.* Comparing the alternative proposal with the model language, you can see that the language of our proposal essentially mimics the model language, with two exceptions:

1) the Tribe added language referencing the sovereign powers of the Tribe; and
2) the Tribe inserted language specific to the Swinomish Reservation.

Following the BIA sample language, I have removed references to both the Treaty and the Executive Order; they are not necessary given the introductory language. By tying the territory to the introductory language, we avoid having to cite all references, existing now or that may exist in the future, that may relate to the boundaries of the reservation, thereby making the document a "living" document, *i.e.*, one not tied to a particular point in time.

Additionally, as with the model language, the introductory language in Section 2 (as well as Section 3, *see* below) – namely, "to the fullest extent possible **consistent with applicable federal law and the sovereign powers of the Tribe**" – ought to alleviate any concerns you may have (emphasis added). That language specifically references the constraints upon both the Tribe's claims of territory and its exercise of jurisdiction. The Tribe carefully considered the addition of this language so as to ensure that any claims would be within the parameters of applicable federal law and the Tribe's inherent sovereignty. As such, this proposal cannot be found to be "contrary to applicable laws," the only grounds set forth in the IRA and implementing regulations for not approving proposed amendments. *See* 25 U.S.C. § 5123(d)(1) (formerly codified at 25 U.S.C. § 476(d)(1)) and 25 C.F.R. § 81.5(b), § 81.7(b)(2), § 81.7(b)(3)(iii), and § 81.45(b)(3). Concerns about possible confusion is <u>not</u> a ground supporting disapproval.

Finally, we remind you that under 25 C.F.R. § 81.9:

> The Secretary **will give deference** to the tribe's reasonable interpretation of the amendment and adoption articles of the tribe's governing documents. The Secretary retains authority, however, to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe or when a provision, result, or interpretation may be **contrary to Federal law**.

(Emphasis added.)

We understand your complaint about the original proposed amendment lay with the description of Swinomish territory and its consequent impacts on jurisdiction. Having proposed alternative language to Section 2 (territory), we believe that we have met your concerns and thus have not

changed the language in Section 3 (jurisdiction). Nevertheless, we provide a brief summary supporting the language in Section 3.

First, the Tribe mimicked the language in the model BIA constitution. The bolded text of the model BIA constitution, namely **over all persons, subjects, property and all activities occurring within its territory as defined by this Article,** is precisely the language set forth in Section 3(a) in our alternative proposal (and I might add, our original proposal). Given that our language is no different, the BIA must approve our jurisdictional language.

Second, the Tribe added the off-reservation language to reflect Federal law pertinent to the Swinomish Indian Tribal Community as a Treaty tribe with off-reservation usufructuary rights, including off-reservation fishing rights. The Tribe was following the rules set forth by Judge Boldt in stating that the Tribe had concurrent authority to regulate off-reservation treaty fishing. *U.S. v. Washington,* 384 F.Supp. 312, 403 (W.D. Wash. 1974). Furthermore, as a result of the decision in *Colville v. Anderson*, 903 F. Supp. 2d 1187, 1198 (E.D. Wash. 2011),[6] settlement was reached between the Confederated Tribes of the Colville Reservation and the State of Washington with regard not just to the regulations of time, manner and place of hunters, but also to public safety violations, which settlement was thereafter extended to other Washington tribes. As a result, Swinomish has a written agreement acknowledging its authority to prosecute its members on off-reservation open and unclaimed lands for public safety violations (a copy can be provided to you upon request).

Third, as you are aware, the issues surrounding tribal jurisdiction and the exercise of that jurisdiction both on and off the reservation are complex and dependent upon a variety of factors and laws, including, but not limited to, land status, tribal membership, relations between the tribe and its members on the one hand and those to be regulated or adjudged on the other, congressional statute and judicial interpretation. With the exception of the Indian Civil Rights Act, tribal civil jurisdiction over non-Indians has never been expressly curtailed by Congress. Further, should an issue over the Tribe's jurisdiction arise in the future, it would be a question for the federal courts, not the BIA, to determine—and only in a case where there is a specific set of circumstances and a concrete, particularized injury to the person(s) or entity(ies) to be regulated or adjudged. Courts are loath to issue advisory opinions, and the BIA should be too. To our knowledge Congress has not authorized the BIA to curtail or limit in any way inherent tribal authority to exercise civil jurisdiction over non-members.

As you know, the federal courts have <u>not</u> found that tribes were implicitly divested of all civil jurisdiction over non-Indians. Under *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court confirmed that tribes retain inherent sovereignty to exercise civil jurisdiction over non-members (1) for activities that take place on Indian owned land within the reservation; and (2) for activities that take place on non-Indian owned lands within the reservation when one of two circumstances apply,

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[6] The *Colville* Court adopted similar standards to those applicable to treaty fishing when it held that "a state may enact and enforce laws regulating a tribal member's exercise of an ''in common'' hunting right for public-safety purposes if the law(s): 1) reasonably prevents a public-safety threat; 2) is necessary to prevent the identified public-safety threat; 3) does not discriminate against Indians; and 4) application to the Tribe is necessary in the interest of public safety."

often referred to as the "Montana exceptions": consensual relationship or political/economic integrity. In a more recent case, *Water Wheel Camp Recreational Area v. LaRance*, 642 F. 3d 802 (9th Cir. 2011), the Ninth Circuit confirmed that tribes still retain the ability to exercise civil jurisdiction over non-Indians for activities that take place on Indian owned land within the reservation.

Furthermore, membership-based, criminal jurisdiction over tribal members is a feature of inherent tribal sovereignty that has neither been expressly eliminated by Congress nor implicitly divested. The Department of the Interior has always asserted that membership-based criminal jurisdiction is a feature of inherent sovereignty. *See, e.g.,* 1 Op. Sol. On Indian Affairs 891, 896 (U.S.D.I. 19[3]9) stating

> "That the original sovereignty of an Indian tribe extended to punishment of a member by the proper tribal officers for the depredations or other forms of misconduct committed outside of the territory of the tribe cannot be challenged. Certainly we cannot read into the laws and customs of the Indian tribes a principle of territoriality of jurisdiction with which they were totally unfamiliar, and to which no country has adopted as an absolute rule. That Indian tribes friendly to the United States acted to punish their members for depredations committed against whites outside of the Indian Country is a matter of historical record."

Importantly, Congress has never expressly eliminated tribal criminal jurisdiction over tribal members for extra-territorial conduct. Recently, the Sixth Circuit, the first Circuit to squarely face this issue, decided that tribes retain inherent authority to prosecute their members for off-reservation conduct. *Kelsey v. Pope,* 809 F. 3d 216 (6th Cir. 2016), *cert. denied sub nom. Kelsey v. Bailey*, 580 U.S. ___ (October 3, 2016) (No. 16-5120). *Kelsey* involved the criminal prosecution of a tribal member for a sexual assault that took place on tribally-owned land off-reservation.

For all of these reasons, the BIA should approve our alternative proposed language.

2) **Item 3: Amendment P.**

Tribe's Original proposal:

> Article VI, Section 1. *Enumerated powers*. - The senate of the Swinomish Indian Tribal Community shall exercise the following powers, **subject to any limitations imposed by the statutes or the Constitution of the United States**, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws:
> ...
>
> (n) To regulate the inheritance of property, real and personal, within the territory of the Swinomish Indian Tribal Community.

(Emphasis added.)

BIA Comments: The BIA's comments were contained in both the letter and in Enclosure 1. For your convenience, I include them below.

1) **Letter:** "Item 16 (Proposed Amendment P): Inheritance codes require approval of the Secretary. See 25 U.S.C. § 2205. This proposed amendment is contrary to existing federal law and

needs to either be revised to comply or withdrawn.

2) **Enclosure 1:** "The proposed amendment to Article VI, Section 1 (n) removes the requirement for Secretarial review for regulatory actions by the Tribe's governing body regarding the inheritance of real and personal property. The proposed amendments does present a contradiction to applicable law; because the Tribe lacks a probate code authorized under the AIPRA to govern descent and distribution of trust property within the jurisdiction of the Tribe. See 25 U.S.C. § 2205."

Swinomish Response:
We agree with your comment that the Secretary must approve tribal probate codes. It was never our intention to avoid such approval. The introductory language, which provides that all of the enumerated powers are "**subject to any limitations imposed by the statutes or the Constitution of the United States"**, applies to this subsection. Since Secretarial approval of tribal probate codes is currently required by Federal statute, it would be required by virtue of the introductory language. *See reasoning set forth below in the* January 3, 1985 memorandum from Arthur Biggs, Assistant Regional Solicitor, to Wilford Bowker, Assistant Area Director (Program Services), Bureau of Indian Affairs, Again, the Tribe was attempting to be forward looking when it made its proposal. In the event that Secretarial review and approval is later removed by Congress, the Tribe will not have to amend this Section to delete the specific reference to Secretarial approval. As you are aware, there are several examples of changes in Federal law that have affected the authority of tribes. *See, e.g.,* Pub. L. 101-511, Title VIII § 8077 (b)-(c), 104 Stat. 1894 (Nov. 5, 1990) (the so-called *Duro*-fix, reinstating tribal authority to prosecute non-member Indians following *Duro v. Reina,* 495 U.S. 676 (1990)); 25 U.S.C. § 1304 (recent amendments to the Violence Against Women Act, which authorizes tribes to prosecute non-members for certain domestic violence crimes, dating violence, and violations of protection orders).

As a result, the Tribe continues to believe that the original proposal is lawful and not contrary to federal law and requests that the BIA reverse its opinion to the contrary in light of the explanation above. However, in the event that the BIA maintains its position that the original proposal violates applicable federal law and in a desire to move forward expeditiously, we offer the following alternative proposal:

Alternative Proposal:

> Article VI, Section 1. *Enumerated powers*. - The senate of the Swinomish Indian Tribal Community shall exercise the following powers, **subject to any limitations imposed by the statutes or the Constitution of the United States**, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws:
> …
>
> (n) To regulate the inheritance of property, real and personal, within the territory of the Swinomish Indian Tribal Community, subject to any approval of the Secretary of the Interior as may be required by applicable federal law.

Other Suggested Changes.
Additionally, the BIA included a suggested, but not mandatory, change in the letter and two changes that appear to be mandatory in Enclosure 1. I address each of them below.

3. **Item 1 - Amendment A**

BIA Comments: "While we do not find any contradiction of existing law in Proposed Amendment A, we do note it makes 25 modifications to the Constitution and Bylaws. These 25 modifications, when combined with the other 29 individually proposed amendments, create an extensive amount of change that could potentially cause voter confusion."
Swinomish Response: The Tribe agrees that it could be confusing to have so many minor changes to wording. As a result, it has chosen to delete many of the modifications originally proposed, with the result that there are three (3) left. Given the need to consistently refer to the Tribe throughout the Constitution by reference to its legal name, the minor significance of this amendment, and the ease with which the Tribe can explain the amendment to its membership, we intend to move forward with the amendment.

Revised Proposal:

AMENDMENT (Number/Letter to be filled in)__ - Updates appropriate wording in Titles of and Preamble to the Constitution and By-Laws

Current wording with Proposed wording:

Wording to be changed	**Proposed changes**
"Swinomish Indians"	"Swinomish Indian Tribal Community"
"Swinomish Indians of the Swinomish Reservation of Washington"	"Swinomish Indian Tribal Community"
"Indians of the Swinomish Reservation"	"members of the Swinomish Indian Tribal Community"

Explanation of what voting for this amendment will do:

This amendment would change

1. the term "Swinomish Indians" to "Swinomish Indian Tribal Community" in the Preamble to the Constitution;
2. the term "Swinomish Indians of the Swinomish Reservation of Washington" or "Indians of the Swinomish Reservation" to "Swinomish Indian Tribal Community" in the Titles of the Constitution and the By-Laws; and
3. the term "Indians of the Swinomish Reservation" to "members of the Swinomish Indian Tribal Community" in the Preamble.

Wording of Proposed Amendment:

CONSTITUTION AND BY-LAWS FOR THE SWINOMISH INDIAN TRIBAL COMMUNITY

PREAMBLE

We, the members of the Swinomish Indian Tribal Community, in order to establish a more perfect tribal organization, promote the general welfare, encourage educational progress, conserve and develop our lands and resources, and secure to ourselves and our posterity the

power to exercise certain rights of home rule, in accordance with and by the authority of the act of Congress of June 18, 1934, do ordain and establish this constitution for the Swinomish Indian Tribal Community.

...

BY-LAWS FOR THE
SWINOMISH INDIAN TRIBAL COMMUNITY

Rationale for proposal:
As Article I, Section 1 of the Tribe's current Constitution states that "[t]he name of this organized body shall be the Swinomish Indian Tribal Community." Despite this statement, there are various instances throughout our current Constitution and Bylaws which refer to the Tribe by something other than its legal name. Our proposal would correct these inconsistencies so that all references to the Tribe or its members use the Tribe's legal name. The Department itself recognized that "Swinomish Indians of the Swinomish Indian Reservation" is not the correct name for the Tribe and corrected it in its official list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." 79 Fed. Reg. 4748, 4752 (Jan. 29, 2014).

We believe that these are administrative changes to correct the Tribe's name throughout the Constitution and Bylaws which can be made with one amendment.

4. **Amendment M.**

Tribe's Original Proposal:

Enumerated powers. - The senate of the Swinomish Indian Tribal Community shall exercise the following powers, **subject to any limitations imposed by the statutes or the Constitution of the United States**, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws:

(k) To promulgate and enforce ordinances:

a. governing the conduct of all persons within the territory of the Swinomish Indian Tribal Community,

b. governing tribal members beyond the limits of the Swinomish Reservation, including with respect to exercising tribal fishing, hunting, and gathering rights on all usual and accustomed fishing grounds and stations and all open and unclaimed lands as guaranteed by treaty for fishing, hunting and gathering and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas, and;

c. providing for the maintenance of law and order and the administration of justice.

(Emphasis added.)

BIA Comments: The BIA's comments were included only in Enclosure 1. They state:

> The proposed amendment to Article VI, Section 1 (k) newly includes the requirement for Secretarial review for ordinances that govern persons conduct within the "territory" of the Swinomish Indian Reservation; tribal member conduct beyond the limits of the reservation; and the administration of the Tribal court. While the majority of the prior proposed amendments remove Secretarial review, in this instance Secretarial review would be necessary. The development of the tribal ordinances must adhere to federal and state laws that govern persons that fall outside of Tribal enforcement, and on land outside of Tribal jurisdiction. With the inclusion of Secretarial review, these proposed amendments to the Law and Order Section do not present any contradictions to applicable law.

Swinomish Response:

1) **Rationale for original proposal**:

a) With the exception of the deletion of the requirement of Secretarial approval, which, we note, is the very language that the BIA is *encouraging* tribes to delete, the language proposed by the Tribe is **nearly identical** to that proposed by the Tribe and approved by Area Director Stanley Speaks as Amendment 14 in October 1985. *See* Letter dated October 22, 1985 from Director Speaks to Chairman Robert Joe, Sr. (attached hereto in relevant part as Enclosure E). The 1985 language, was also approved by Assistant Regional Solicitor Arthur Biggs[7] and reads:

> Article VI, Section 1(k). To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior:
>
> (a) governing the conduct of all persons within the territory of the Swinomish Indian Reservation;
>
> (b) governing tribal members beyond the limits of the Swinomish Indian Reservation with respect to exercising tribal fishing, hunting, and gathering rights on all usual and accustomed fishing grounds and stations of the Swinomish Indian Tribal Community, on all open and unclaimed lands reserved by treaty for hunting or gathering and on such other lands and waters as is necessary for access to such fishing, hunting and gathering sites, and;
>
> (c) providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers.

This language was incorporated into the Tribe's Constitution until it was corrected as a result of an administrative action by the BIA. The BIA took this action in response to a resolution from the Tribe asking for the correction after advising the BIA that despite the Tribe's request to include this language in the 1985 voter's pamphlet, the BIA inadvertently included only the introductory language, namely, "to promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior." Swinomish Resolution No. 2016-03-048 (attached hereto as Enclosure G).

While there are two major differences (in addition to the deletion of the requirement for Secretarial approval), these differences should be insufficient to disapprove our proposed amendment:

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[7] *See,* January 3, 1985 memorandum from Arthur Biggs, Assistant Regional Solicitor, to Wilford Bowker, Assistant Area Director (Program Services), Bureau of Indian Affairs, analyzing the proposed amendments and in particular approving the proposed amendment at issue (attached hereto as Enclosure F).

(1) the territory of the Tribe; and
(2) the addition of the word "including" in subsection b, which recognizes the recent decision in *Kelsey v. Pope, supra* and allows the Constitution to be a "living document", i.e., one that can follow the changes in the law.

Notably, the reasoning set forth by Assistant Solicitor Arthur Biggs in 1985 remains applicable. Specifically, he found that the inclusion of limiting language in the introductory paragraph was sufficient to save the proposal. For your convenience, I set out his reasoning in full below:

> Article VI, Section 1 is amended to eliminate the restriction on the powers of the Senate which limited its authority to enacting ordinances governing the conduct of "members of the Swinomish Reservation." The proposed amendment authorizes the Senate to enact ordinances governing the conduct of (1) all persons within the territory of the Swinomish Reservation and (2) tribal members beyond the limits of the reservation with respect to fishing, hunting and gathering rights. **We see no reason to disapprove this amendment**.
>
> In the case of United States v. Montana, 450 U.S. 544, 67 L.Ed.2d 493 (1981), the United States Supreme Court stated "Indian tribes have lost any right of governing every person within their limits except themselves." Id. at 67 L.Ed.2d 510. The court went on to indicate, however, that Indian tribes do retain inherent power to exercise civil authority over the conduct of nonIndians on fee lands within their reservation "when that conduct threatens and has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 67 L.Ed.2d 511. The court also recognized that tribes may regulate the activities of non-members who enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements. Id. at 67 L.Ed.2d 510. While Indian tribes may exercise civil jurisdiction over non-Indians within their reservation, the extent to which they may do so is not easily defined. Nevertheless, it is clear that such jurisdiction is much more limited than that which they may exercise over their own tribal members. The broad assertion that the tribe may enact ordinances governing the conduct of "all persons within the territory of the Swinomish Indian Reservation" could run afoul of the principles of federal law limiting the extent to which Indian tribes may exercise civil jurisdiction over non-Indians as set forth by the United States Supreme Court in the Montana case. However, Section 1, Article VI of the Tribe's constitution states that the enumerated powers conferred upon the Senate are subject to any limitations imposed by the statutes or Constitution of the United States." **In view of this limiting language upon the jurisdiction asserted in Section l (k) of the proposed amendment, we believe the amendment is consistent with the federal law and see no reason to disapprove this assertion of jurisdiction.**
>
> Tribes do enjoy extra-territorial jurisdiction over their members. Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). **In view of such authority we see no basis for objecting to the tribe's assertion of jurisdiction to govern its tribal members beyond the limits of the reservation.**

(Emphasis added.)

Like our predecessor proposal, our current proposal contains this very same limiting language and ought to alleviate your concerns as it did in 1985. *See* the introductory language in Section 1 (namely, "**subject to any limitations imposed by the statutes or the Constitution of the United States**"). This language specifically references the constraints upon the Tribe's actions. Under Asst. Regional Solicitor Biggs' reasoning, this limiting language ensures that our proposal is consistent with federal law. As such, it is difficult for us to comprehend out how language similar to that approved by the Department and its solicitor in 1985 would now be "contrary to applicable laws".

b) The Tribe looked to the **Sample BIA Constitution** on its website for guidance in its original proposal. *See, Sample Constitution for the Example Tribe, supra.* For your convenience, I set forth that language below:

> Article V, Section (h): The Tribal Council shall have all powers vested in the Tribe through its inherent sovereignty or federal law. It shall execute these powers in accordance with established customs of the Tribe and subject to the express limitations contained in this constitution or other applicable laws. These powers include but are not limited to the following:
>
> ...
>
> (h) To enact a law and order code governing the **conduct of persons within the jurisdiction of the Tribe** in accordance with applicable laws;

(Emphasis added.) While our language is somewhat different, we believe that the breadth of the sample BIA language is the equivalent to the scope of our original proposal.

c) We incorporate by reference the reasoning set forth above for Item 2 – Amendment B (Territory and Jurisdiction) above. Additionally, there is no federal law that the Tribe is aware of that requires Secretarial approval of ordinance under this section.

d) Further, whether or not a future ordinance goes beyond the Tribe's powers is at this time completely speculative. Additionally, should the issue arise, it would be a question for the federal courts, not the BIA, to determine. As you are aware, the issues surrounding tribal jurisdiction and the exercise of that jurisdiction beyond reservation boundaries are complex and dependent upon congressional statute and judicial interpretation.

e) Finally, the BIA's comments appear to be contrary to its own policy of removing Secretarial approval from tribal constitutions. *See,* 80 Fed. Reg. 63094 ("For many tribes, the requirement for Secretarial elections or Secretarial approval is anachronistic and inconsistent with modern policies favoring tribal self-governance. The rule includes language clarifying that a tribe reorganized under the IRA may amend its governing document to remove the requirement for Secretarial approval of future amendments. The Department encourages amendments to governing documents to remove vestiges of a more paternalistic approach toward tribes.") As a result, the Tribe continues to believe that its original proposal is lawful and not contrary to federal law. However, in the event that the BIA maintains its position that the original proposal violates applicable federal law and in a desire to move forward expeditiously, we offer the following alternative proposal (again, please note that the language "**subject to any limitations imposed by the statutes or the**

Constitution of the United States" remains). The Tribe's preference, to avoid creating confusion through the amending language, is to proceed with the original proposal and asks that you revisit your comments and approve the original language.

Alternative Proposal:
The new language is set forth in blue and ~~red strikeout~~ for easy identification.

> *Article VI, Section 1. Enumerated powers.* - The senate of the Swinomish Indian Tribal Community shall exercise the following powers, **subject to any limitations imposed by the statutes or the Constitution of the United States**, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws:
>
> (k) Except as otherwise provided by this Constitution and applicable law, to promulgate and enforce ordinances:
>
> a. governing the conduct of all persons within the territory of the Swinomish Indian Tribal Community, as defined in Article I, Section 2 of this Constitution;
>
> b. governing tribal members beyond the limits of the Swinomish Reservation, including with respect to exercising tribal fishing, hunting, and gathering rights on all usual and accustomed fishing grounds and stations and all open and unclaimed lands as guaranteed by treaty for fishing, hunting and gathering and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas, and;
>
> c. providing for the maintenance of law and order and the administration of justice.

5. **Amendment X**

The Tribe will be deleting this amendment. It was inadvertently included when the Tribe was considering amending Article IX.

Finally, I would like to discuss with you the numbering/lettering of the proposed amendments as I see that you have renumbered/lettered them. As this is something that is more amenable to a verbal discussion, I merely note the issue for further discussion.

Thank you for your prompt attention to this matter.

Sincerely,

Alix Foster

cc: Stanley M. Speaks, Area Director, BIA
Brian Cladoosby, Chair, Swinomish Indian Tribal Community
Brian Porter, Chair, Constitutional Reform Committee