



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

JUN 26 2020

The Honorable Geoffrey Standing Bear  
Principal Chief, the Osage Nation  
627 Grandview  
Pawhuska, Oklahoma 74056

Dear Principal Chief Standing Bear:

In 2014, the Osage Nation (Nation) submitted to the Bureau of Indian Affairs (BIA) an application to transfer into trust approximately 125 acres of land (Site) near the City of Bartlesville, Osage County, Oklahoma, for gaming and other purposes (Proposed Project).<sup>1</sup> The Nation also requested a determination that it is eligible to conduct gaming on the Site.

The Proposed Project would replace the Nation's existing Bartlesville casino, which is located approximately four miles from the Site. The existing Bartlesville casino will continue to operate during construction of the Proposed Project; however, once construction is complete, the existing casino will relocate to the Site. The Nation will use the current Bartlesville casino building and property for another purpose.

We have completed our review of the Nation's request, the Acting Director's Findings of Fact,<sup>2</sup> and the documentation in the record. As discussed below, it is my determination that the Site will be transferred into trust for the benefit of the Nation pursuant to Section 5 of the Indian Reorganization Act (IRA).<sup>3</sup> Once transferred into trust, the Nation may conduct gaming on the Site pursuant to the Indian Gaming Regulatory Act (IGRA).<sup>4</sup>

## Background

In 1870, Congress removed and relocated the Osage people from their lands in Kansas, which were then sold, to lands in the Indian Territory in present-day Oklahoma.<sup>5</sup> There, Congress established the boundaries of the Nation's Reservation in 1872, consisting of approximately 1.47 million acres, which subsequently became part of the Oklahoma Territory in 1890.<sup>6</sup>

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<sup>1</sup> Letter from John D. Red Eagle, Principal Chief, Osage Nation, to Robin Phillips, Acting Superintendent, Osage Agency, Bureau of Indian Affairs (Dec. 30, 2013) [hereinafter Nation's Application].

<sup>2</sup> Memorandum from Acting Regional Director, Eastern Oklahoma Region, to Deputy Director, Office of Indian Gaming at 6 (Dec. 19, 2019) [hereinafter Acting Regional Director's Findings of Fact]. See also Environmental Assessment Osage Nation Fee-to-Trust, Osage Casino Bartlesville Project (May 2019) [hereinafter EA].

<sup>3</sup> 25 U.S.C. § 5108.

<sup>4</sup> 25 U.S.C. §2701 *et seq.*

<sup>5</sup> Act of July 15, 1870, 16 Stat. 335, 362.

<sup>6</sup> Act of June 5, 1872, ch. 310, 17 Stat. 228. Act of May 2, 1890, ch. 182, 26 Stat. 81. See also *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011).

The Osage Allotment Act of 1906 provided for an equal division of the Osage lands among the approximately 2000 tribal members.<sup>7</sup> Each tribal member was permitted to select three allotments of 160 acres each, and would receive an equal share of any land left over after all allotments had been selected.<sup>8</sup> In addition, the 1906 Act severed the surface estate of the reservation from the subsurface mineral estate (commonly referred to as the Osage Mineral Estate), reserving all mineral rights to the Osage Nation in perpetuity.<sup>9</sup>

In 1907, Oklahoma became a state and incorporated the Nation's Reservation as Osage County.<sup>10</sup> The Nation lost more than 90 percent of its land base through this process.<sup>11</sup> Osage County is the largest county in Oklahoma, comprising approximately 1.47 million acres, approximately three percent of the State's total land area.<sup>12</sup>

### **Description of the Property**

The Site consists of approximately 125 acres located on U.S. Highway 60 approximately 2 miles west of the City of Bartlesville, Osage County. The Site is within the Nation's current service area in Osage County, Oklahoma.<sup>13</sup> The Nation acquired the Site in fee in 2012.<sup>14</sup> Maps showing the location of the Site are included as Enclosure 1. The legal description of the Site is included as Enclosure 2.

### **Eligibility for Gaming Pursuant to the Indian Gaming Regulatory Act**

Section 2719 of IGRA prohibits gaming on land acquired in trust after October 17, 1988. Congress expressly provided several exceptions to the general prohibition. Under Section 2719(a)(1), land that is located within reservation boundaries is exempt from the general prohibition. Similarly, land within the former reservation of an Oklahoma tribe that did not have a reservation on October 17, 1988, is also exempt from the general prohibition under Section 2719(a)(2)(A)(i).

The lands at issue are located within the exterior boundaries of the Reservation established by the United States for the Osage Nation, and, thus, are located within the former

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<sup>7</sup> Act of June 28, 1906, ch. 3572, 34 Stat. 539.

<sup>8</sup> *Id.* at § 2, 34 Stat. 540.

<sup>9</sup> *Id.* at § 3, as amended by Act of Mar. 3, 1931, 41 Stat. 1249 (extending the trust status of the mineral estate to 1946); Act of Mar. 2, 1929, 45 Stat. 1478 (extending to 1959), Act of June 24, 1938, 52 Stat. 1034 (extending to 1983), Act of Oct. 21, 1978, 92 Stat. 1660 (extending in perpetuity).

<sup>10</sup> Act of June 16, 1906, ch. 3335, 34 Stat. 267 §§ 2, 21; *Osage Nation v. Irby*, 597 F.3d at 1120.

<sup>11</sup> *Osage Nation v. Irby*, 597 F.3d at 1127.

<sup>12</sup> *Id.* at 1120.

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 2.

reservation of the Osage Nation under IGRA, 25 U.S.C. §§ 2719(a)(1), (a)(2)(A)(i), and the Department's regulations at 25 C.F.R §§ 292.4, 292.2.

We conclude, therefore, that the Site is eligible for gaming.

### **Trust Acquisition Determination Pursuant to 25 C.F.R. Part 151**

The Secretary of the Interior's (Secretary) general authority for acquiring land in trust is found in Section 5 of the IRA (Section 5). The Department's regulations at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5.

#### **25 C.F.R. § 151.3 – Land acquisition policy.**

Section 151.3(a) sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe:

- (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
- (2) When the tribe already owns an interest in the land; or
- (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Although only one factor in Section 151.3(a) must be met, the Nation's application satisfies the requirements of all three. The Nation's application satisfies the criteria of subsections (a)(1) and (a)(2) because the Site is located in Oklahoma within the Nation's former reservation boundaries and the Nation owns the property in fee. The transfer of the Site into trust will facilitate tribal self-determination and economic development because it will generate additional revenue for the Nation's governmental services, thus, satisfying the criteria of Section 151.3(a)(3).

The Regional Director found, and we concur, that acquisition of the Site in trust will facilitate tribal self-determination and economic development.<sup>15</sup>

#### **25 C.F.R. § 151.10 – On-reservation acquisitions.**

Section 151.10 requires the Secretary to evaluate requests for acquisition of land under the on-reservation criteria when the land is located within or contiguous to an Indian reservation.

The Site is located within the Nation's former reservation boundaries. Section 151.2 defines "Indian reservation" as, "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma ... 'Indian

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<sup>15</sup> Acting Regional Director's Findings of Fact at 3.

reservation’ means that area of land constituting the former reservation of the tribe as defined by the Secretary.” The Site meets these criteria.

The Regional Director found, and we concur, that the Nation’s application is properly considered under the on-reservation criteria of Section 151.10.<sup>16</sup>

**25 C.F.R. § 151.10(a) – The existence of statutory authority for the acquisition and any limitations contained in such authority.**

Section 151.10(a) requires the Secretary to consider whether there is statutory authority for the trust acquisition and, if such authority exists, to consider any limitations contained in it.

**Standard of Review**

*A. Four-Step Procedure to Determine Eligibility*

Section 5 of the IRA provides the Secretary with discretionary authority to acquire land in trust for “Indians.”<sup>17</sup> Section 19 of the Act defines “Indian” to include several categories of persons:

[Category 1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [Category 2] 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 [Category 3] all other persons of one-half or more Indian blood.<sup>18</sup>

In 2009, the United States Supreme Court (Supreme Court) in *Carcieri v. Salazar* construed the term “now” in Category 1 to refer to the date of the IRA’s enactment.<sup>19</sup> Thus, the Secretary’s authority to acquire land in trust for Indian tribes under Category 1 extended only to those tribes that were “under federal jurisdiction” when the IRA was enacted on June 18, 1934. The Supreme Court did not consider the meaning of the phrases “under federal jurisdiction” or “recognized Indian tribe.”

The Department finds that all federally recognized tribes in Oklahoma were “under federal jurisdiction” in 1934. This result is consistent with an earlier determination in 2011.<sup>20</sup> For the reasons explained more fully below, we conclude that there is evidence unambiguously demonstrating that the Nation was “under federal jurisdiction” in 1934. As such, the Nation is,

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<sup>16</sup> *Id.* at 17.

<sup>17</sup> 25 U.S.C. § 5108.

<sup>18</sup> 25 U.S.C. § 5129 (bracketed numerals added).

<sup>19</sup> 555 U.S. 379 (2009) (*Carcieri*).

<sup>20</sup> See Decision Letter, Assistant Secretary-Indian Affairs to Principal Chief John D. Red Eagle at 3-4 (Jul. 8, 2011) (acquisition of the 7.5-acre Skiatook Osage Million Dollar Elm Casino parcel).

therefore, eligible under Category 1 and, consequently, the Secretary has authority to acquire land into trust for the Nation.

To guide the implementation of the Secretary's discretionary acquisition authority under Section 5 after *Carcieri*, the Department, in 2010, prepared a two-part procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934.<sup>21</sup> The Solicitor of the Interior (Solicitor) later memorialized the Department's interpretation in Sol. Op. M-37029.<sup>22</sup> Despite this, however, uncertainty persisted over what evidence could be submitted for the inquiry and how the Department would weigh it, prompting some tribes to devote considerable resources to researching and collecting any and all forms of potentially relevant evidence; in some cases, leading to submissions totaling thousands of pages. To address this uncertainty, in 2018 the Solicitor's Office began a review of the Department's eligibility procedures to provide guidance for determining relevant evidence. This prompted questions concerning Sol. Op. M-37029's interpretation of Category 1, on which its eligibility procedures relied. This uncertainty prompted the Solicitor to review Sol. Op. M-37029's two-part procedure for determining eligibility under Category 1, and the interpretation on which it relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029. The Solicitor concluded that its interpretation of Category 1 was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction."<sup>23</sup> In its place, the Solicitor issued a new, four-step procedure for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor (Solicitor's Office).<sup>24</sup>

At Step One, the Solicitor's Office determines whether or not Congress enacted legislation after 1934 making the IRA applicable to a particular tribe. The existence of such authority makes it unnecessary to determine if the tribe was "under federal jurisdiction" in 1934. In the absence of such authority, the Solicitor's Office proceeds to Step Two.

Step Two determines whether the applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such. If so, the

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<sup>21</sup> U.S. Dept. of the Interior, Assistant Secretary, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) (Cowlitz ROD). See also Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Mar. 7, 2014), revised (Jan. 5, 2017).

<sup>22</sup> Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (M-37029).

<sup>23</sup> Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).

<sup>24</sup> *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 10, 2020) (Solicitor's Guidance).

applicant tribe may be deemed eligible under Category 1 without further inquiry. The Solicitor's Guidance describes types of evidence that presumptively demonstrate that a tribe was under federal jurisdiction in 1934. In the absence of dispositive evidence, the inquiry proceeds to Step Three.

Step Three determines whether an applicant tribe's evidence sufficiently demonstrates that the applicant tribe was "recognized" in or before 1934 and remained under jurisdiction in 1934. The Solicitor determined that the phrase "recognized Indian tribe" as used in Category 1 does not have the same meaning as the modern concept of a "federally recognized" (or "federally acknowledged") tribe, a concept that did not evolve until the 1970s, after which it was incorporated in the Department's federal acknowledgment procedures.<sup>25</sup> Based on the Department's historic understanding of the term, the Solicitor interpreted "recognition" to refer to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy. The Solicitor identified forms of evidence that establish a rebuttable presumption that that an applicant tribe was "recognized" in a political-legal sense before 1934 and remained under federal jurisdiction in 1934. In the absence of such evidence, the inquiry finally moves to Step Four.

Step Four assesses the totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934. Given the historical changes in federal Indian policy over time, and the corresponding evolution of the Department's responsibilities, a one-size-fits-all approach for evaluating the totality of a tribal applicant's evidence is not possible or desirable. Attorneys in the Solicitor's Office must evaluate the evidence on a case-by-case basis within the context of a tribe's unique circumstances, and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

To further assist Solicitor's Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor's Guidance includes a memorandum<sup>26</sup> detailing the Department's revised interpretation of the meaning of the phrases "now under federal jurisdiction" and "recognized Indian tribe" and how they work together.

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<sup>25</sup> 25 C.F.R. Part 83.

<sup>26</sup> *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor (Mar. 5, 2020) (Deputy Solicitor's Memorandum).

B. *The Meaning of the Phrase “Now Under Federal Jurisdiction.”*

1. Statutory Context.

The Solicitor first concluded that the phrase “now under federal jurisdiction” should be read as modifying the phrase “recognized Indian tribe.”<sup>27</sup> The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,<sup>28</sup> and the majority opinion focused on the meaning of “now” without addressing whether or how the phrase “now under federal jurisdiction” modifies the meaning of “recognized Indian tribe.”<sup>29</sup>

In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been “under federal jurisdiction” *in* 1934.<sup>30</sup> By “recognized,” Justice Breyer appeared to mean, “*federally* recognized”<sup>31</sup> in the formal, political sense that had evolved by the 1970s, not in the sense in which Congress likely understood the term in 1934. He also considered how “later recognition” might reflect earlier “Federal jurisdiction,”<sup>32</sup> and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.<sup>33</sup>

Justice Breyer’s suggestion that Category 1 does not preclude eligibility for tribes “federally recognized” *after* 1934 is consistent with interpreting Category 1 as requiring evidence of federal actions toward a tribe with whom the United States dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington (Stillaguamish Tribe) shows.<sup>34</sup> It is also consistent with the Department’s policies that in order to apply for trust-land acquisitions under the IRA, a tribe must appear on the official list of entities federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as such.<sup>35</sup>

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<sup>27</sup> Deputy Solicitor’s Memorandum at 19. *See also* *Cty. of Amador v. United States Dep’t of the Interior*, 872 F.3d 1012, 1020, n. 8 (9<sup>th</sup> Cir. 2017) (*Carcieri* leaves open whether “recognition” and “jurisdiction” requirements are distinct requirements or comprise a single requirement).

<sup>28</sup> *Carcieri* at 382-83.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 398 (Breyer, J., concurring).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 399 (Breyer, J., concurring).

<sup>33</sup> *Id.* at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

<sup>34</sup> *Id.*

<sup>35</sup> Federally Recognized Indian Tribe List Act of 1994, tit. I, § 104, Pub. L. 103-454, 108 Stat. 4791, codified at 25 U.S.C. § 5131 (mandating annual publication of list of all Indian tribes recognized by Secretary as eligible for the special programs and services provided by the United States to Indians because of their status as Indians). The Department’s land-into-trust regulations incorporate the Department’s official list of federally recognized tribe by reference. *See* 25 C.F.R. § 151.2.

The Solicitor noted that Category 1’s grammar supports this view. The adverb “now” is part of the prepositional phrase “under federal jurisdiction,”<sup>36</sup> which it temporally qualifies.<sup>37</sup> Prepositional phrases function as modifiers and follow the noun phrase that they modify.<sup>38</sup> Category 1’s grammar therefore supports interpreting the phrase “now under federal jurisdiction” as intended to modify “recognized Indian tribe.” This interpretation finds further support in the IRA’s legislative history, discussed below, and in Commissioner of Indian Affairs John Collier’s statement that the phrase “now under federal jurisdiction” was intended to limit the IRA’s application.<sup>39</sup> This suggests Commissioner Collier understood the phrase “now under federal jurisdiction” to limit and thus modify “recognized Indian tribe.” This is further consistent with the IRA’s purpose and intent, which was to remedy the harmful effects of allotment.<sup>40</sup> These included the loss of Indian lands and the displacement and dispersal of tribal communities.<sup>41</sup> Lacking an official list of “recognized” tribes at the time,<sup>42</sup> it was unclear in 1934, which tribes remained under federal supervision. Because the policies of allotment and assimilation went

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<sup>36</sup> *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016). The *Grand Ronde* court found “the more difficult question” to be which part of the expression “recognized Indian tribe” the prepositional phrase modified. *Id.* The court concluded it modified only the word “tribe” “before its modification by the adjective ‘recognized.’” *Id.* But the court appears to have understood “recognized” as used in the IRA as meaning “federally recognized” in the modern sense, without considering its meaning in historical context.

<sup>37</sup> H. C. House and S.E. Harman, *Descriptive English Grammar* at 163 (New York: Prentice-Hall, Inc. 1934) (hereafter “House and Harman”) (adverbs may modify prepositional phrases).

<sup>38</sup> L. Beason and M. Lester, *A Commonsense Guide to Grammar and Usage* (7th ed.) at 15-16 (2015) (“Adjective prepositional phrases are always locked into position following the nouns they modify.”); *see also* J. E. Wells, *Practical Review Grammar* (1928) at 305. A noun phrase consists of a noun and all of its modifiers. *Id.* at 16.

<sup>39</sup> Sen. Hrgs. at 266 (statement of Commissioner Collier). *See also* *Carcieri*, 555 U.S. at 389 (citing Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936) (“[IRA Section 19] provides, in effect, that the term ‘Indian’ as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act \* \* \*”) (emphasis added by Supreme Court)); *Cty. of Amador*, 872 F.3d at 1026 (“‘under Federal jurisdiction’ should be read to limit the set of ‘recognized Indian tribes’ to those tribes that already had some sort of significant relationship with the federal government as of 1934, even if those tribes were not yet ‘recognized’ (emphasis original)”; *Grand Ronde*, 830 F.3d at 564 (though the IRA’s jurisdictional nexus was intended as “some kind of limiting principle,” precisely how remained unclear).

<sup>40</sup> *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs, House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7902, A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs*, 73d Cong. at 233-34 (1934) (hereafter H. Hrgs.) (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apr. 28, 1934)).

<sup>41</sup> *Id.*

<sup>42</sup> In 1979, the BIA for the first time published in the *Federal Register* a list of federally acknowledged Indian tribes. “Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,” 44 Fed. Reg. 7235 (Feb. 6, 1979); *see also* *Cty. of Amador*, 872 F.3d at 1023 (“In 1934, when Congress enacted the IRA, there was no comprehensive list of recognized tribes, nor was there a ‘formal policy or process for determining tribal status’” (citing William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 429-30 (2016))).



hand-in-hand,<sup>43</sup> left unmodified, the phrase “recognized Indian tribe” could include tribes disestablished or terminated before 1934.

## 2. Statutory Terms.

The Solicitor concurred with the Deputy Solicitor’s conclusion that the expression “now under federal jurisdiction” in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress’s plenary authority, and is instead better interpreted as referring to tribes with whom the United States had clearly dealt on or a more or less sovereign-to-sovereign basis, or as to whom the United States had clearly acknowledged a trust responsibility in or before 1934.<sup>44</sup>

The contemporaneous legal definition of “jurisdiction” defined it as the “power and authority” of the courts “as distinguished from the other departments.”<sup>45</sup> The legal distinction between judicial and administrative jurisdiction is significant. Further, because the statutory phrase at issue here includes more than just the word “jurisdiction,” its use of the preposition “under” sheds additional light on its meaning. In 1934, BLACK’S LAW DICTIONARY defined “under” as most frequently used in “its secondary sense meaning of ‘inferior’ or ‘subordinate.’”<sup>46</sup> It defined “jurisdiction” in terms of “power and authority,” further defining “authority” as used “[i]n government law” as meaning “the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties.”<sup>47</sup>

Congress added the phrase “under federal jurisdiction” to a statute designed to govern the Department’s administration of Indian affairs and certain benefits for Indians. Seen in that light, these contemporaneous definitions support interpreting the phrase as referring to the federal government’s exercise and administration of its responsibilities for Indians. Further support for this interpretation comes from the IRA’s context. Congress enacted the IRA to promote tribal self-government but made the Secretary responsible for its implementation. Interpreting the phrase “now under federal jurisdiction” as modifying “recognized Indian tribe” supports the interpretation of “jurisdiction” to mean the continuing administration of federal authority over Indian tribes already “recognized” as such. The addition of the temporal adverb “now” to the phrase provides further grounds for interpreting “recognized” as referring to a *previous* exercise of that same authority, that is, in or before 1934.<sup>48</sup>

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<sup>43</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

<sup>44</sup> See Deputy Solicitor’s Memorandum at 9.

<sup>45</sup> BLACK’S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter BLACK’S).

<sup>46</sup> BLACK’S at 1774.

<sup>47</sup> BLACK’S at 171. It separately defines “subject to” as meaning “obedient to; governed or affected by.”

<sup>48</sup> Our interpretation of “now under federal jurisdiction” does not require federal officials to have been aware of a tribe’s circumstances or jurisdictional status in 1934. As explained below, prior to M-37029, the Department long understood the term “recognized” to refer to political or administrative acts that brought a tribe under federal authority. We interpret “now under federal jurisdiction” as referring to the issue of whether such a “recognized” tribe maintained its jurisdictional status in 1934, i.e., whether federal trust obligations remained, not whether particular officials were cognizant of those obligations.

### 3. Legislative History.

The IRA's legislative history lends additional support for interpreting "now under federal jurisdiction" as modifying "recognized Indian tribe." A thread that runs throughout the IRA's legislative history is a concern for whether the Act would apply to Indians not then under federal supervision. On April 26, 1934, Commissioner Collier informed members of the Senate Committee on Indian Affairs (Senate Committee) that the original draft bill's definition of "Indian" had been intended to do just that:<sup>49</sup>

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.

Senator THOMAS. Numerous tribes have been lost (...) It is contemplated now to hunt those Indians up and give them a status again and try do to something for them.

Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] 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.*<sup>50</sup>

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.<sup>51</sup> In Commissioner Collier's view, the IRA "does definitely recognize that an Indian [that] has been divested of his property is no reason why Uncle Sam does not owe him something. It owes him more."<sup>52</sup> Commissioner Collier's broad view was consistent with the

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<sup>49</sup> *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs, 73rd Cong. at 80 (Apr. 26, 1934) (hereafter "Sen. Hrgs.")*. See also *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 75 F.Supp.3d at 387, 399 (D.D.C. 2014) *aff'd* 830 F.3d 552 (D.C. Cir. 2016) (noting same).

<sup>50</sup> Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).

<sup>51</sup> See LEWIS MERIAM, THE INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION at 763 (1928) (hereafter MERIAM REPORT) (noting that issuance of patents to individual Indians under Dawes Act or Burke Act had "the effect of removing them in part at least from the jurisdiction of the national government"). See also Sen. Hrgs. at 30 (statement of Commissioner Collier) (discussing the role the Allotment Policy had in making approximately 100,000 Indians landless).

<sup>52</sup> Sen. Hrgs. at 80.

bill's original stated policy to "reassert the obligations of guardianship where such obligations have been improvidently relaxed."<sup>53</sup>

On May 17, 1934, the last day of hearings, the Senate Committee continued to express concerns over the breadth of the bill's definition of "Indian," returning again to the draft definitions of "Indian" as they stood in the committee print. Category 1 now defined "Indian" as persons of Indian descent who were "members of any recognized Indian tribe."<sup>54</sup> As on previous days,<sup>55</sup> Chairman Wheeler and Senator Thomas questioned both the overlap between definitions and whether they would include Indians not then under federal supervision or persons not otherwise "Indian."<sup>56</sup>

The Senate Committee's concerns for these issues touched on other provisions of the IRA as well. The colloquy that precipitated the addition of "now under federal jurisdiction" began with a discussion of Section 18, which authorized votes to reject the IRA by Indians residing on a reservation. Senator Thomas stated that this would exclude "roaming bands" or "remnants of a band" that are "practically lost" like those in his home state of Oklahoma, who at the time were neither "registered," "enrolled," "supervised," or "under the authority of the Indian Office."<sup>57</sup> Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."<sup>58</sup>

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<sup>53</sup> H.R. 7902, tit. III, § 1. *See* Sen. Hrgs. at 20 ("The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. On the contrary, it makes permanent the guardianship services, and reasserts them for those Indians who have been made landless by the Government's own acts.").

<sup>54</sup> Sen. Hrgs. at 234 (citing committee print, § 19). The revised bill was renumbered S. 3645 and introduced in the Senate on May 18, 1934. *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 963 n. 55 (1972) (hereafter *Tribal Self-Government*) (citing 78 CONG. REC. 9071 (1934)). S. 3645, which, as amended, became the IRA, differed significantly from H.R. 7902 and S. 2755, and its changes resulted from discussions between Chairman Wheeler and Commissioner John Collier to resolve and eliminate the main points in controversy. Sen. Hrgs. at 237. The Senate Committee reported S. 3645 out four days after its reintroduction, 78 CONG. REC. 9221, which the Senate debated soon after. The Senate passed the bill on June 12, 1934. *Id.* at 11139. The House began debate on June 15. *Id.* at 11724-44. H.R. 7902 was laid on the table and S. 3645 was passed in its place the same day, with some variations. *Id.* A conference committee was then formed, which submitted a report on June 16. *Id.* at 12001-04. The House and Senate both approved the final version on June 16. *Id.* at 12001-04, 12161-65, which was presented to the President and signed on June 18, 1934. *Id.* at 12340, 12451. *See generally* *Tribal Self-Government* at 961-63.

<sup>55</sup> *See, e.g.*, Sen. Hrgs. at 80 (remarks of Senator Elmer Thomas) (questioning whether bill is intended to extend benefits to tribes not now under federal supervision); *Id.* (remarks of Chairman Wheeler) (questioning degree of Indian descent as drafted); *id.* at 150-151; *id.* at 164 (questioning federal responsibilities to existing wards with minimal Indian descent).

<sup>56</sup> *See, e.g.*, Sen. Hrgs. at 239 (discussing Sec. 3), 254 (discussing Sec. 10), 261-62 (discussing Sec. 18), 263-66 (discussing Sec. 19).

<sup>57</sup> Sen. Hrgs. at 263.

<sup>58</sup> *Id.* By "tribe," Senator Thomas here may have meant the Indians residing on a reservation. A similar usage appears earlier in the Committee's discussion of Section 10 of the committee print (enacted as Section 17 of the IRA), Sen. Hrgs. at 250-55. Section 10 originally required charters to be ratified by a vote of the adult Indians residing within "the territory specified in the charter." *Id.* at 232. Chairman Wheeler suggested using "on the reservation" instead to prevent "any small band or group of Indians" to "come in on the reservation and ask for a charter to take over tribal property." *Id.* at 253. Senator Joseph O'Mahoney recommended the phrase "within the territory over which the tribe has jurisdiction" instead, prompting Senator Peter Norbeck to ask what "tribe"

Chairman Wheeler conceded that such Indians lacked rights at the time, but emphasized that the purpose of the Act was intended “as a matter of fact, to take care of the Indians that are taken care of at the present time,”<sup>59</sup> that is, those Indians then under federal supervision.

Acknowledging that landless Indians ought to be provided for, Chairman Wheeler questioned how the Department could do so if they were not “wards of the Government at the present time.”<sup>60</sup> When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were “just as much Indians as any others,”<sup>61</sup> despite not then being under federal supervision, Commissioner Collier pointed out that such groups might still come within Category 3’s blood-quantum criterion, which was then one-quarter.<sup>62</sup> After a brief digression, Senator Thomas asked whether, if the blood quantum were raised to one-half, Indians with less than one-half blood quantum would be covered by the Act with respect to their trust property.<sup>63</sup> Chairman Wheeler thought not, “unless they are enrolled at the present time.”<sup>64</sup> As the discussion turned to Section 19, Chairman Wheeler returned to the blood quantum issue, stating that Category 3’s blood-quantum criterion should be raised to one-half, which it was in final version of the Act.<sup>65</sup>

Senator Thomas then noted that Category 1 and Category 2, as drafted, were inconsistent with Category 3. Category 1 would include any person of “Indian descent” without regard to blood quantum, so long as they were members of a “recognized Indian tribe,” while Category 2 included their “descendants” residing on a reservation.<sup>66</sup> Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.<sup>67</sup> Commissioner Collier then pointed out that at least with respect to Category 2, the descendants would have to reside within a reservation at the present time.<sup>68</sup>

After asides on the IRA’s effect on Alaska Natives and the Secretary’s authority to issue patents,<sup>69</sup> Chairman Wheeler finally turned to the IRA’s definition of “tribe,”<sup>70</sup> which as then drafted included “any Indian tribe, band, nation, pueblo, or other native political group or

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meant—“Is that the reservation unit?” *Id.* at 254. Commissioner Collier then read from Section 19, which at that time defined “tribe” as “any Indian tribe, band, nation, pueblo, or other native political group or organization,” a definition the Chairman suggested he could not support. *Id.* As ultimately enacted, Section 17 authorizes the Secretary to issue charters of incorporation to “one-third of the adult Indians” if ratified, however, “by a majority vote of the adult Indians living on the reservation.”

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 264.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (statement of Chairman Burton Wheeler) (“You will find here [*i.e.*, Section 19] later on a provision covering just what you have reference to.”).

<sup>66</sup> *Id.* at 264-65.

<sup>67</sup> *Id.* at 264.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 265.

<sup>70</sup> *Id.* at 265.

organization.”<sup>71</sup> Chairman Wheeler and Senator Thomas thought this definition too broad.<sup>72</sup> Senator Thomas asked whether it would include the Catawbas,<sup>73</sup> most of whose members were thought to lack sufficient blood quantum under Category 3, but who descended from Indians and resided on a state reservation.<sup>74</sup> Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.<sup>75</sup> Senator O’Mahoney from Wyoming then suggested that Categories 1 and 3 overlapped, suggesting the Catawbas might still come within the definition of Category 1 since they were of Indian descent and they “certainly are an Indian tribe.”<sup>76</sup>

Chairman Wheeler appeared to concede, admitting there “would have to [be] a limitation after the description of the tribe.”<sup>77</sup> Senator O’Mahoney responded, saying, “If you wanted to exclude any of them [from the Act] you certainly would in my judgment.”<sup>78</sup> Chairman Wheeler proceeded to express concerns for those having little or no Indian descent being “under the supervision of the Government,” persons he had earlier suggested should be excluded from the Act.<sup>79</sup> Apparently in response, Senator O’Mahoney then said, “If I may suggest, that could be handled by some separate provision excluding from the act certain types, but [it] must have a general definition.”<sup>80</sup> It was at this point that Commissioner Collier, who attended the morning’s hearings with Assistant Solicitor Felix S. Cohen,<sup>81</sup> asked:

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 Indian blood would get help.<sup>82</sup>

Without further explanation or discussion, the hearings adjourned.

The IRA’s legislative history does not unambiguously explain what Congress intended “now under federal jurisdiction” to mean or in what way it was intended to limit the phrase “recognized Indian tribe.” However, the same phrase was used in submissions by the Indian Rights Association to the House of Representatives Committee on Indian Affairs (House Committee), where it described “Indians under Federal jurisdiction” as not being subject to State

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<sup>71</sup> Compare Sen. Hrgs. at 6 (S. 2755, § 13(b)), with *id.* at 234 (committee print, § 19). The phrase “native political group or organization” was later removed.

<sup>72</sup> Sen. Hrgs. at 265.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 266. The Catawbas at the time resided on a reservation established for their benefit by the State of South Carolina. See Catawba Indians of South Carolina, Sen. Doc. 92, 71st Cong. (1930).

<sup>75</sup> *Id.* at 264.

<sup>76</sup> *Id.* at 266.

<sup>77</sup> *Id.* at 266.

<sup>78</sup> *Id.* Nevertheless, Senator O’Mahoney did not understand why the Act’s benefits should not be extended “if they are living as Catawba Indians.”

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 231.

<sup>82</sup> *Id.* at 266.

laws.<sup>83</sup> Variations of the phrase appeared elsewhere, as well. In a memorandum describing the draft IRA's purpose and operation, Commissioner Collier stated that under the bill, the affairs of chartered Indian communities would "continue to be, as they are now, *subject to* Federal jurisdiction rather than State jurisdiction."<sup>84</sup> Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."<sup>85</sup> Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,<sup>86</sup> described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."<sup>87</sup> These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.

The IRA's legislative history elsewhere shows that Commissioner Collier distinguished between Congress's plenary authority generally and its application to tribes in particular contexts. He noted that Congress had delegated "most of its plenary authority to the Interior Department or the Bureau of Indian Affairs," which he further described as "clothed with the plenary power."<sup>88</sup> But in turning to the draft bill's aim of allowing tribes to take responsibility for their own affairs, Commissioner Collier referred to the "absolute authority" of the Department by reference to "its rules and regulations," to which the Indians were subjected.<sup>89</sup> Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the Office of Indian Affairs having direct supervision of Indians.<sup>90</sup>

Construing "jurisdiction" as meaning governmental supervision and administration is further consistent with the term's prior use by the federal government. In 1832, for example, the United States by treaty assured the Creek Indians that they would be allowed to govern themselves free of the laws of any State or Territory, "so far as may be compatible with the general jurisdiction"

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<sup>83</sup> H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).

<sup>84</sup> *Id.* at 25 (Memorandum from Commissioner John Collier, *The Purpose and Operation of the Wheeler-Howard Indian Rights Bill* (S. 2755; H.R. 7902) (Feb. 19, 1934) (emphasis added)).

<sup>85</sup> *Id.* at 184 (statement of Commissioner Collier) (Apr. 8, 1934).

<sup>86</sup> Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* <https://www.justice.gov/osg/bio/charles-fahy>.

<sup>87</sup> *Id.* at 319 (statement of Assistant Solicitor Charles Fahy).

<sup>88</sup> *Id.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census (ARCIA), 1919 (May 7, 1919) (directing Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934) (discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.*, field operations); ARCIA for 1900 at 22 (noting lack of "jurisdiction" over New York Indian students); *id.* at 103 (reporting on matters "within" jurisdiction of Special Indian Agent in the Indian Territory); *id.* at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); MERIAM REPORT at 140-41 ("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity... Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs."); Sen. Hrgs. at 282-98 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different Office of Indian Affairs "jurisdictions").

of Congress over the Indians.<sup>91</sup> In *The Cherokee Tobacco* cases, the Supreme Court considered the conflict between subsequent Congressional acts and “[t]reaties with Indian nations within the jurisdiction of the United States.”<sup>92</sup> In considering the 14th Amendment’s application to Indians, the Supreme Court in *Elk v. Wilkins* also construed the Constitutional phrase, “subject to the jurisdiction of the United States,” in the sense of governmental authority:<sup>93</sup>

The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.<sup>94</sup>

The terms of Category 1 suggest that the phrase “under federal jurisdiction” should not be interpreted to refer to the outer limits of Congress’s plenary authority, since it could encompass tribes that existed in an anthropological sense but with whom the federal government had never exercised any relationship. Such a result would be inconsistent with the Department’s understanding of “recognized Indian tribe” at the time, discussed below, as referring to a tribe with whom the United States had clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility.

If “under federal jurisdiction” is understood to refer to the application and administration of the federal government’s plenary authority over Indians, then the complete phrase “now under federal jurisdiction” can further be seen as resolving the tension between Commissioner Collier’s desire that the IRA include Indians “[w]ithout regard to whether or not [they are] now under [federal] supervision” and the Senate Committee’s concern to limit the Act’s coverage to Indian wards “taken care of at the present time.”<sup>95</sup>

### *C. The Meaning of the Phrase “Recognized Indian Tribe.”*

Despite suggesting that the term “recognized” meant something different in 1934 than it did in the 1970s, Sol. Op. M-37029 had appeared to use these historically distinct concepts interchangeably. And while today’s concept of “federal recognition” merges the cognitive sense of “recognition” and the political-legal sense of “jurisdiction,” as *Carcieri* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved.<sup>96</sup> Congress’s authority to

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<sup>91</sup> Treaty of March 24, 1832, art. XIV, 7 Stat. 366, 368. See also Act of May 8, 1906, 34 Stat. 182 (lands allotted to Indians in trust or restricted status to remain “subject to the exclusive jurisdiction of the United States” until issuance of fee-simple patents).

<sup>92</sup> *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870). The Court further held that the consequences of such conflicts give rise to political questions “beyond the sphere of judicial cognizance.” *Id.*

<sup>93</sup> *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). See also *United States v. Ramsay*, 271 U.S. 470 (1926) (the conferring of citizenship does not make Indians subject to laws of the states).

<sup>94</sup> *Id.*

<sup>95</sup> Sen. Hrgs. at 79-80, 263. The district court in *Grand Ronde* noted these contradictory views. *Grande Ronde*, 75 F.Supp.3d at 399-400. Such views were expressed while discussing drafts of the IRA that did not include the phrase “now under federal jurisdiction.”

<sup>96</sup> M-37029 at 8, n. 57 (citing *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (in the absence of a statutory definition of a term, the court’s “task is to construe it in accord

recognize Indian tribes flows from its plenary authority over Indian affairs.<sup>97</sup> Early in this country's history, Congress charged the Secretary and the Commissioner of Indian Affairs with responsibility for managing Indian affairs and implementing general statutes enacted for the benefit of Indians.<sup>98</sup> Because Congress has not generally defined "Indian,"<sup>99</sup> it left it to the Secretary to determine to whom such statutes apply.<sup>100</sup> "Recognition" generally is a political question to which the courts ordinarily defer.<sup>101</sup>

Sol. Op. M-37029 had understood that a tribe could be considered "recognized" for purposes of the IRA so long as it is "federally recognized" when the Act is applied.<sup>102</sup> Arguendo, M-37029 concluded that even if "now" did modify "recognized Indian tribe," the meaning of "recognized" was ambiguous.<sup>103</sup> It described the term as having been used historically in two senses: a "cognitive" or "quasi-anthropological" sense indicating that federal officials "knew" or

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with its ordinary or natural meaning."); *id.* at 275 (the court "presume[s] Congress intended the phrase [containing a legal term] to have the meaning generally accepted in the legal community at the time of enactment.")).

<sup>97</sup> *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.")).

<sup>98</sup> 25 U.S.C. § 2 (charging Commissioner of Indian Affairs with management of all Indian affairs and all matters arising out of Indian relations); 43 U.S.C. § 1457 (charging Secretary with supervision of public business relating to Indians); 25 U.S.C. § 9 (authorizing President to prescribe regulations for carrying into effect the provisions of any act relating to Indian affairs). *See also* H. Hrgs. at 37 (remarks of Commissioner Collier) ("Congress through a long series of acts has delegated most of its plenary authority to the Interior Department or the Bureau of Indian Affairs, which as instrumentalities of Congress are clothed with the plenary power, an absolutist power"); *id.* at 51 (Memorandum of Commissioner John Collier) (providing statutory examples of "the broad discretionary powers conferred by Congress on administrative officers of the Government").

<sup>99</sup> U.S. Dept. of the Interior, Commissioner of Indian Affairs, "Indian Wardship," Circular No. 2958 (Oct. 28, 1933) ("No statutory definition seems to exist of what constitutes an Indian or of what Indians are wards of the Government."); *Eligibility of Non-enrolled Indians for Services and Benefits under the Indian Reorganization Act*, Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Acting Deputy Commissioner of Indian Affairs (Dec. 4, 1978) ("there exists no universal definition of 'Indian'"). *See also* Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esq. on behalf of the Stillaguamish Tribe, at 8-9 (Oct. 27, 1976) (suggesting that "recognized Indian tribe" in IRA § 19 refers to tribes that were "administratively recognized" in 1934).

<sup>100</sup> *Secretary's Authority to Extend Federal Recognition to Indian Tribes*, Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, at 1 (Aug. 20, 1974) (hereafter Chambers Memo) ("the Secretary, in carrying out Congress's plan, must first determine, *i.e.*, recognize, to whom [a statute] applies"); Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate Committee on Interior and Insular Affairs at 5 (Jun. 7, 1974) (hereafter Butler Letter) (same); *Dobbs v. United States*, 33 Ct. Cl. 308, 315-16 (1898) (recognition may be effected "by those officers of the Government whose duty it was to deal with and report the condition of the Indians to the executive branch of the Government").

<sup>101</sup> *Baker v. Carr*, 369 U.S. 186, 216 (1962) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865) (deferring to decisions by the Secretary and Commissioner of Indian Affairs to recognize Indians as a tribe as political questions)). *See also* Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal "Recognition" of Indian Tribes at 2-6 (Jul. 17, 1975) (hereafter Palmer Memorandum).

<sup>102</sup> M-37029 at 25 (interpreting IRA as not requiring determination that a tribal applicant was "a recognized Indian tribe" in 1934).

<sup>103</sup> *Id.* at 24 ("To the extent that the courts (contrary to the views expressed here) deem the term 'recognized Indian tribe' in the IRA to require recognition in 1934").



“realized” that a tribe existed; and a political-legal sense connoting “that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States.”<sup>104</sup> The Solicitor concluded that this interpretation departs from the Department’s prior, long-held understanding of “recognition” as referring to actions taken by appropriate federal officials toward a tribe with whom the United States clearly dealt on a more-or-less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934.

### 1. Ordinary Meaning.

The 1935 edition of WEBSTER’S NEW INTERNATIONAL DICTIONARY first defines the verb “to recognize” as meaning, “to know again (...) to recover or recall knowledge of.”<sup>105</sup> Most of the remaining entries focus on the legal or political meanings of the verb. These include, “To avow knowledge of (...) to admit with a formal acknowledgment; as, to *recognize* an obligation; to *recognize* a consul”; Or, “To acknowledge formally (...); specif: (...) To acknowledge by admitting to an associated or privileged status.” And, “To acknowledge the independence of (...) a community (...) by express declaration or by any overt act sufficiently indicating the intention to recognize.”<sup>106</sup> These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for loans to Indians for tuition and expenses in “recognized vocational and trade schools.”<sup>107</sup> While neither the Act nor its legislative history provide further explanation, the context strongly suggests that the phrase “recognized vocational and trade schools” refers to those formally certified or verified as such by an appropriate official.

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<sup>104</sup> *Id.* M-37029 also notes that the political-legal sense of “recognized Indian tribe” evolved into the modern concept of “federal recognition” or “federal acknowledgment” by the 1970s, when the Department’s administrative acknowledgment procedures were developed. *See* 43 Fed. Reg. 39,361 (Aug. 24, 1978). Originally classified at Part 54 of Title 25 of the Code of Federal Regulations, the Department’s administrative acknowledgment procedures are today classified as Part 83. 47 Fed. Reg. 13326 (Mar. 30, 1982).

<sup>105</sup> WEBSTER’S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for “recognize” (v.t.).

<sup>106</sup> *Id.*, entries 2, 3.c, 5. *See also id.*, entry for “acknowledge” (v.t.) “2. To own or recognize in a particular character or relationship; to admit the claims or authority of; to recognize.”

<sup>107</sup> The phrase “recognized Indian tribe” appeared in what was then section 9 of the committee print considered by the Senate Committee on May 17, 1934. Sen. Hrgs. at 232, 242. Section 9 provided the right to organize under a constitution to “[a]ny recognized Indian tribe.” It was later amended to read “[a]ny Indian tribe, or tribes” before ultimate enactment as Section 16 of the IRA. 25 U.S.C. § 5123. The term “recognized” also appeared several times in the bill originally introduced as H.R. 7902. In three, it was used in legal-political sense. H.R. 7902, 73d Cong. (as introduced Feb. 12, 1934), tit. I, § 4(j) (requiring chartered communities to be “recognized as successor to any existing political powers...”); tit. II, § 1 (training for Indians in institutions “of recognized standing”); tit. IV, § 10 (Constitutional procedural rights to be “recognized and observed” in courts of Indian offenses). H.R. 7902, tit. I, § 13(b) used the expression “recognized Indian tribe” in defining “Indian.”

## 2. Legislative History.

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.<sup>108</sup> Commissioner Collier, himself a "principal author" of the IRA,<sup>109</sup> also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.<sup>110</sup> The IRA's legislative history further suggests that Congress did not intend "recognized Indian tribe" to be understood in a cognitive, quasi-anthropological sense. The concerns expressed by some members of the Senate Committee for the ambiguous and potentially broad *scope* of the phrase arguably prompted Commissioner Collier to suggest inserting "now under federal jurisdiction" in Category 1 as a limiting phrase.<sup>111</sup>

As originally drafted, Category 1 referred only to "recognized" Indian tribes, leaving unclear whether it was used in a cognitive or in a political-legal sense. This ambiguity appears to have created uncertainty over Category 1's scope and its overlap with Section 19's other definitions of "Indian," which appear to have led Congress to insert the limiting phrase "now under federal jurisdiction." As noted above, we interpret "now under federal jurisdiction" as modifying "recognized Indian tribe" and as limiting Category 1's scope. By doing so, "now under federal jurisdiction" may be construed as disambiguating "recognized Indian tribe" by clarifying its use in a political-legal sense.

## 3. Administrative Understandings.

Compelling support for interpreting the term "recognized" in the political-legal sense is found in the views of Department officials expressed around the time of the IRA's enactment and early implementation. Assistant Solicitor Cohen discussed the issue in the Department's HANDBOOK OF FEDERAL INDIAN LAW, which he prepared around the time of the IRA's enactment. The Handbook's relevant passages discuss ambiguities in the meaning of the term "tribe."<sup>112</sup> Assistant Solicitor Cohen explains that the term "tribe" may be understood in both an

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<sup>108</sup> See, e.g., Sen. Hrgs. at 263 (remarks of Senator Thomas of Oklahoma) (discussing prior Administration's policy "not to recognize Indians except those already under [Indian Office] authority"); *id.* at 69 (remarks of Commissioner Collier) (tribal customary marriages and divorces "recognized" by courts nationally). Representative William W. Hastings of Oklahoma criticized an early draft definition of "tribe" on the grounds it would allow chartered communities to be "recognized as a tribe" and to exercise tribal powers under section 16 and section 17 of the IRA. *See id.* at 308.

<sup>109</sup> *Carcieri*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

<sup>110</sup> Sen. Hrgs. at 69 (remarks of Commissioner Collier) (Apr. 26, 1934). On at least one occasion, however, Collier appeared to rely on the cognitive sense in referring to "recognized" tribes or bands *not* under federal supervision. Sen. Hrgs. at 80 (remarks of Commissioner Collier) (Apr. 26, 1934).

<sup>111</sup> Justice Breyer concluded that Congress added, "now under federal jurisdiction" to Category 1 "believing it definitively resolved a specific underlying difficulty." *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>112</sup> United States Department of the Interior, HANDBOOK OF FEDERAL INDIAN LAW (1942 ed.) at 268 (hereafter Cohen 1942).

ethnological and a political-legal sense.<sup>113</sup> The former denotes a unique linguistic or cultural community. By contrast, the political-legal sense refers to ethnological groups “recognized as single tribes for administrative and political purposes” and to single ethnological groups considered as a number of independent tribes “in the political sense.”<sup>114</sup> This suggests that while the term “tribe,” standing alone, could be interpreted in a cognitive sense, as used in the phrase “recognized Indian tribe” it would have been understood in a political-legal sense, which presumes the existence of an ethnological group.<sup>115</sup>

Less than a year after the IRA’s enactment, Commissioner Collier further explained that “recognized tribe” meant a tribe “with which the government at one time or another has had a treaty or agreement or those for whom reservations or lands have been provided and over whom the government exercises supervision through an official representative.”<sup>116</sup> Addressing the Oklahoma Indian Welfare Act of 1936 (OIWA), Solicitor Nathan Margold opined that because tribes may “pass out of existence as such in the course of time, the word “recognized” as used in the [OIWA] should be read as requiring more than “past existence as a tribe and its historical recognition as such,” but “recognition” of a currently existing group’s activities “by specific actions of the Indian Office, the Department, or by Congress.”<sup>117</sup>

The Department maintained similar understandings of the term “recognized” in the decades that followed. In a 1980 memorandum assessing the eligibility of the Stillaguamish Tribe for IRA trust-land acquisitions,<sup>118</sup> Hans Walker, Jr., Associate Solicitor for Indian Affairs, distinguished the modern concept of formal “federal recognition” (or “federal acknowledgment”) from the political-legal sense of “recognized” as used in Category 1 in concluding that “formal acknowledgment in 1934” is not a prerequisite for trust-land acquisitions under the IRA, “*so long as the group meets the [IRA’s] other definitional requirements.*”<sup>119</sup> These included that the tribe had been “recognized” in 1934. Associate Solicitor Walker construed “recognized” as referring to tribes with whom the United States had had “a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time.*”<sup>120</sup>

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<sup>113</sup> Cohen separately discussed how the term “Indian” itself could be used in an “ethnological or in a legal sense,” noting that a person’s legal status as an “Indian” depended on genealogical and social factors. Cohen 1942 at 2.

<sup>114</sup> *Id.* at 268 (emphases added).

<sup>115</sup> *Id.* at 268 (validity of congressional and administrative actions depend upon the [historical, ethnological] existence of tribes); *United States v. Sandoval*, 231 U.S. 28 (1913) (Congress may not arbitrarily bring a community or group of people within the range of its plenary authority over Indian affairs). *See also* 25 C.F.R. Part 83 (establishing mandatory criteria for determining whether a group is an Indian tribe eligible for special programs and services provided by the United States to Indians because of their status as Indians).

<sup>116</sup> Letter, Commissioner John Collier to Ben C. Shawanesee (Apr. 24, 1935).

<sup>117</sup> I OP. SOL. INT. 864 (Memorandum from Solicitor Nathan M. Margold to the Commissioner of Indian Affairs, Oklahoma – Recognized Tribes (Dec. 13, 1938)); Cohen 1942 at 271.

<sup>118</sup> Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980) at 1 (hereafter Stillaguamish Memo).

<sup>119</sup> *Id.* at 1 (emphasis added). Justice Breyer’s concurring opinion in *Carcieri* draws on Associate Solicitor Walker’s analysis in the Stillaguamish Memo. *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>120</sup> *Id.* at 2 (emphasis added).

Associate Solicitor Walker then noted the Senate Committee’s concerns for the potential breadth of “recognized Indian tribe.” He concluded that Congress intended to exclude some groups that might be considered Indians in a cultural or governmental sense, but not “any Indians to whom the Federal Government had *already* assumed obligations.”<sup>121</sup> Implicitly construing the phrase “now under federal jurisdiction” to modify “recognized Indian tribe,” Associate Solicitor Walker found it “clear” that Category 1 “requires that some type of obligation or extension of services to a tribe must have existed in 1934.”<sup>122</sup> As already noted, in the case of the Stillaguamish Tribe, such obligations were established by the 1855 Treaty of Point Elliott and remained in effect in 1934.<sup>123</sup>

Associate Solicitor Walker’s views in 1980 were consistent with the conclusions reached by the Solicitor’s Office in the mid-1970s following its assessment of how the federal government had historically understood the term “recognition.” This assessment was begun under Reid Peyton Chambers, Associate Solicitor for Indian Affairs, and offers insight into how Congress and the Department understood “recognition” at the time the Act was passed. In fact, it was this historical review of “recognition” that contributed to the development of the Department’s federal acknowledgment procedures.<sup>124</sup>

Throughout the United States’ early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.<sup>125</sup> In 1871, Congress enacted legislation providing that no tribe within the territory of the United States could thereafter be “acknowledged or recognized” as an “independent nation, tribe, or power” with whom the United States could contract by treaty.<sup>126</sup> Behind the act lay the view that though Indian tribes were still “recognized as distinct political communities,” they were “wards” in a condition of dependency who were “subject to the paramount authority of the United States.”<sup>127</sup> While the question of “recognition” remained one for the political branches,<sup>128</sup> the contexts within which it arose expanded with the United States’ obligations as guardian.<sup>129</sup>

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<sup>121</sup> *Id.* at 4 (emphasis added). This is consistent with Justice Breyer’s concurring view in *Carcieri*.

<sup>122</sup> *Id.* at 6. In the case of the Stillaguamish Tribe, such obligations arose in 1855 through the Treaty of Point Elliott, and they remained in effect in 1934.

<sup>123</sup> Justice Breyer’s concurring opinion in *Carcieri* draws on the analysis in the Stillaguamish Memo. *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>124</sup> 25 C.F.R. Part 83.

<sup>125</sup> U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.

<sup>126</sup> Act of March 3, 1871, c. 120, § 1, 16 Stat. 544, 566. Section 3 of the same Act prohibited further contracts or agreements with any tribe of Indians or individual Indian not a citizen of the United States related to their lands unless in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Id.*, § 3, 16 Stat. 570-71.

<sup>127</sup> *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).

<sup>128</sup> *United States v. Holliday*, 70 U.S. 407, 419 (1865).

<sup>129</sup> *See* Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship). *Compare, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832) with *United States v. Kagama*, 118 U. S. 375 (1886).

After the close of the termination era in the early 1960s, during which the federal government had “endeavored to terminate its supervisory responsibilities for Indian tribes,”<sup>130</sup> Indian groups that the Department did not otherwise consider “recognized” began to seek services and benefits from the federal government. The most notable of these claims were aboriginal land claims under the Nonintercourse Act;<sup>131</sup> treaty fishing-rights claims by descendants of treaty signatories;<sup>132</sup> and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,<sup>133</sup> which included tribes previously recognized and seeking restoration or reaffirmation of their status.<sup>134</sup> At around this same time, Congress began a critical historical review of the federal government’s conduct of its special legal relationship with American Indians.<sup>135</sup> In January 1975, it found that federal Indian policies had “shifted and changed” across administrations “without apparent rational design,”<sup>136</sup> and that there had been no “general comprehensive review of conduct of Indian affairs” or its “many problems and issues” since 1928, before the IRA’s enactment.<sup>137</sup> Finding it imperative to do so,<sup>138</sup> Congress established the American Indian Policy Review Commission<sup>139</sup> to prepare an investigation and study of Indian affairs, including “an examination of the statutes and

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<sup>130</sup> *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). See also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at § 1.06 (Nell Jessup Newton ed., 2012) (hereafter Cohen 2012) (describing history and implementation of termination policy). During the termination era, roughly beginning in 1953 and ending in the mid-1960s, Congress enacted legislation ending federal recognition of more than 100 tribes and bands in eight states. Michael C. Walsh, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983). Congress has since restored federal recognition to some terminated tribes. See Cohen 2012 at § 3.02[8][c], n. 246 (listing examples).

<sup>131</sup> See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 655 (D. Me.), *aff'd sub nom. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (Nonintercourse Act claim by unrecognized tribe in Maine); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 944 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (Nonintercourse Act claim by unrecognized tribe in Massachusetts).

<sup>132</sup> *United States v. State of Wash.*, 384 F. Supp. 312, 348 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (treaty fishing rights of unrecognized tribes in Washington State).

<sup>133</sup> AMERICAN INDIAN POLICY REVIEW COMMISSION, *Final Report, Vol. I* [Committee Print] at 462 (GPO 1977) (hereafter AIRPC Final Report) (“A number of [unrecognized] Indian tribes are seeking to formalize relationships with the United States today but there is no available process for such actions.”). See also TASK FORCE NO. 10 ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, *Final Report to the American Indian Policy Review Commission* (GPO 1976) (hereafter *Report of Task Force Ten*).

<sup>134</sup> Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 LAW & SOC'Y REV. 930 (2017).

<sup>135</sup> Pub. L. No. 93-580, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, (hereafter AIRPC Act), *codified at* 25 U.S.C. § 174 note.

<sup>136</sup> *Id.* Commissioner John Collier raised this same issue in hearings on the draft IRA. See H. Hrgs. at 37. Noting that Congress had delegated most of its plenary authority to the Department or BIA, which Collier described as “instrumentalities of Congress...clothed with the plenary power.” Being subject to the Department’s authority and its rules and regulations meant that while one administration might take a course “to bestow rights upon the Indians and to allow them to organize and allow them to take over their legal affairs in some self-governing scheme,” a successor administration “would be completely empowered to revoke the entire grant.”

<sup>137</sup> *Id.* (citing MERIAM REPORT).

<sup>138</sup> *Id.*

<sup>139</sup> AIRPC Act, § 1(a).

procedures for granting Federal recognition and extending services to Indian communities.”<sup>140</sup> It was against this backdrop that the Department undertook its own review of the history and meaning of “recognition.”<sup>141</sup>

### The Palmer Memorandum

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on “Federal ‘Recognition’ of Indian Tribes” (Palmer Memorandum).<sup>142</sup> Among other things, it examined the historical meaning of “recognition” in federal law, and of the Secretary’s authority to “recognize” unrecognized groups. After surveying statutes and case law before and after the IRA’s enactment, as well as its early implementation by the Department, the memorandum notes that “the entire concept is in fact quite murky.”<sup>143</sup> The Palmer Memorandum finds that the case law lacked a coherent distinction between “tribal existence and tribal recognition,” and that clear standards or procedures for recognition had never been established by statute.<sup>144</sup> It further finds there to be a “consistent ambiguity” over whether formal recognition consisted of an assessment “of *past* governmental action” – the approach “articulated in the cases and [Departmental] memoranda” – or whether it “included authority to take such actions *in the first instance*.”<sup>145</sup> Despite these ambiguities, the Palmer Memorandum concludes that the concept of “recognition” could not be dispensed with, as it had become an accepted part of Indian law.<sup>146</sup>

Indirectly addressing the two senses of the term “tribe” described above, the Palmer Memorandum found that before the IRA, the concept of “recognition” was often indistinguishable from the question of tribal existence,<sup>147</sup> and was linked with the treaty-making powers of the Executive and Legislative branches, for which reason it was likened to diplomatic recognition of foreign governments.<sup>148</sup> Though treaties remained a “prime indicia” of political “recognition,”<sup>149</sup> the memorandum noted that other evidence could include congressional

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<sup>140</sup> *Id.*, § 2(3).

<sup>141</sup> *See, e.g.*, Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate Committee on Interior and Insular Affairs (Jun. 7, 1974) (hereafter Butler Letter) (describing authority for recognizing tribes since 1954); Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, Secretary’s Authority to Extend Federal Recognition to Indian Tribes (Aug. 20, 1974) (hereafter Chambers Memo) (discussing Secretary’s authority to recognize the Stillaguamish Tribe); Palmer Memorandum.

<sup>142</sup> Associate Solicitor Reid P. Chambers approved the Palmer Memorandum in draft form. *Id.* The Palmer Memorandum came on the heels of earlier consideration by the Department of the Secretary’s authority to acknowledge tribes.

<sup>143</sup> Palmer Memorandum at 23.

<sup>144</sup> *Id.* at 23-24.

<sup>145</sup> *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.

<sup>146</sup> *Id.* at 24.

<sup>147</sup> The Palmer Memorandum noted that based on the political question doctrine, the courts rarely looked behind a “recognition” decision to determine questions of tribal existence *per se*. *Id.* at 14.

<sup>148</sup> *Id.* at 13. *See also* Cohen 1942 at 12 (describing origin of Indian Service as “diplomatic service handling negotiations between the United States and Indian nations and tribes”).

<sup>149</sup> *Id.* at 3.

recognition by non-treaty means and administrative actions fulfilling statutory responsibilities toward Indians as “domestic dependent nations,”<sup>150</sup> including the provision of trust services.<sup>151</sup>

Having noted the term’s ambiguity and its political and administrative uses, the Palmer Memorandum then surveyed the case law to identify “indicia of congressional and executive recognition.”<sup>152</sup> It describes these indicia as including both federal actions taken toward a tribe with whom the United States dealt on a “more or less sovereign-to-sovereign basis,” as well as actions that “clearly acknowledged a trust responsibility”<sup>153</sup> toward a tribe, consistent with the evolution of federal Indian policy.<sup>154</sup>

The indicia identified by the Solicitor’s Office in 1975 as evidencing “recognition” in a political-legal sense included the following: treaties;<sup>155</sup> the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a “tribe.”<sup>156</sup> Specific indicia of Congressional “recognition” included enactments specifically referring to a tribe as an existing entity; authorizing appropriations to be expended for the benefit of a tribe;<sup>157</sup>

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<sup>150</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). See also AIPRC Final Report at 462 (“Administrative actions by Federal officials and occasionally by military officers have sometimes laid a foundation for federal acknowledgment of a tribe’s rights.”); *Report of Task Force Ten* at 1660 (during the Nixon Administration, “federally recognized” included tribes recognized by treaty or statute and tribes treated as recognized “through a historical pattern of administrative action.”).

<sup>151</sup> Palmer Memorandum at 2; AIPRC Final Report at 111 (treaties but one method of dealing with tribes and treaty law generally applies to agreements, statutes, and Executive orders dealing with Indians, noting the trust relationship has been applied in numerous nontreaty situations). Many non-treaty tribes receive BIA services, just as some treaty-tribes receive no BIA services. AIPRC Final Report at 462; Terry Anderson & Kirke Kickingbird, An Historical Perspective on the Issue of Federal Recognition and Non-Recognition, Institute for the Development of Indian Law at 1 (1978). See also *Legal Status of the Indians-Validity of Indian Marriages*, 13 YALE L.J. 250, 251 (1904) (“The United States, however, continued to regard the Indians as nations and made treaties with them as such until 1871, when after an hundred years of the treaty making system of government a new departure was taken in governing them by acts of Congress.”).

<sup>152</sup> *Id.* at 2-14.

<sup>153</sup> *Id.* at 14.

<sup>154</sup> Having ratified no new treaties since 1868, ARCI 1872 at 83 (1872), Congress ended the practice of treaty making in 1871, more than 60 years before the IRA’s enactment. See Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. § 71. This caused the Commissioner of Indian Affairs at the time to ask what would become of the rights of tribes with which the United States had not yet treated. ARCI 1872 at 83. As a practical matter, the end of treaty making tipped the policy scales toward expanding the treatment of Indians as wards under federal guardianship, expanding the role of administrative officials in the management and implementation of Indian Affairs. Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship); *Brown v. United States*, 32 Ct. Cl. 432, 439 (1897) (“But since the Act 3d March, 1871 (16 Stat. L. 566, § 1), the Indian tribes have ceased to be treaty-making powers and have become simply the wards of the nation.”); *United States v. Kagama*, 118 U.S. 375, 382 (1886) (“But, after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,-to govern them by acts of congress. This is seen in the act of March 3, 1871...”).

<sup>155</sup> Butler Letter at 6; Palmer Memorandum at 3 (executed treaties a “prime indicia” of “federal recognition” of tribe as distinct political body).

<sup>156</sup> Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memorandum at 19.

<sup>157</sup> Butler Letter at 5; Palmer Memorandum at 6-8 (citing *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913), *United States v. Nice*, 241 U.S. 591, 601 (1916), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920)); *id.* at 8-10

authorizing tribal funds to be held in the federal treasury; directing officials of the Government to exercise supervisory authority over a tribe; and prohibiting state taxation of a tribe. Specific indicia of Executive or administrative “recognition” before 1934 included the setting aside or acquisition of lands for Indians by Executive order;<sup>158</sup> the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;<sup>159</sup> the establishment of schools and other service institutions for the benefit of a tribe; the supervision of tribal contracts; the establishment by the Department of an agency office or Superintendent for a tribe; the institution of suits on behalf of a tribe;<sup>160</sup> and the expenditure of funds appropriated for the use of particular Indian groups.

The Palmer Memorandum also considered the Department’s early implementation of the IRA, when the Solicitor’s Office was called upon to determine tribal eligibility for the Act. While this did not provide a “coherent body of clear legal principles,” it showed that Department officials closely associated with the IRA’s enactment believed that whether a tribe was “recognized” was “an administrative question” that the Department could determine.<sup>161</sup> In making such determinations, the Department looked to indicia established by federal courts.<sup>162</sup> There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.<sup>163</sup> Early on, the factors the Department considered were “principally retrospective,” reflecting a concern for “whether a particular tribe or band *had* been recognized, not whether it *should* be.”<sup>164</sup> Because the Department had the authority to “recognize” a tribe for purposes of implementing the IRA, the absence of “formal” recognition in the past was “not deemed controlling” *if there were sufficient indicia* of governmental dealings with a tribe “on a sovereign or quasi-sovereign basis.”<sup>165</sup> The manner in which the Department understood “recognition” before, in, and long-after 1934<sup>166</sup> supports the view that Congress and the Department understood “recognized” to refer to actions taken by federal officials with respect to a tribe for political or administrative purposes in or before 1934.

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(citing *United States v. Nice*, 241 U.S. 591, 601 (1916); *Tully v. United States*, 32 Ct. Cl. 1 (1896) (recognition for purposes of Depredations Act by federal officers charged with responsibility for reporting thereon).

<sup>158</sup> Palmer Memorandum at 19 (citing Cohen 1942 at 271)); Butler Letter at 4.

<sup>159</sup> Palmer Memorandum at 19 (citing Cohen 1942 at 271).

<sup>160</sup> *Id.* at 6, 8 (citing *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920) (suit brought on behalf of Oneida Indians)).

<sup>161</sup> *Id.* at 18.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (emphasis in original). *See also* Stillaguamish Memo at 2 (Category 1 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.”).

<sup>165</sup> Palmer Memorandum at 18.

<sup>166</sup> *See, e.g.*, Stillaguamish Memo. *See also* 25 C.F.R. § 83.12 (describing evidence to show “previous Federal acknowledgment” as including: treaty relations; denomination as a tribe in Congressional act or Executive Order; treatment by Federal government as having collective rights in lands or funds; and federally held lands for collective ancestors).



C. *Construing the Expression “Recognized Indian Tribe Now Under Federal Jurisdiction” as a Whole.*

Based on the interpretation above, the phrase “any recognized Indian tribe now under federal jurisdiction” as a whole should be interpreted as intended to limit the IRA’s coverage to tribes who were brought under federal jurisdiction in or before 1934 by the actions of federal officials clearly dealing with the tribe on a more or less sovereign-to-sovereign basis, or clearly acknowledging a trust responsibility, and who remained under federal authority in 1934.

Each phrase referred to a different aspect of a tribe’s trust relationship with the United States. Before and after 1934, the Department and the courts regularly used the term “recognized” to refer to *exercises* of federal authority over a tribe that initiated or continued a course of dealings with the tribe pursuant to Congress’ plenary authority. By contrast, the phrase “under federal jurisdiction” referred to the supervisory and administrative responsibilities of federal authorities toward a tribe thereby established. The entire phrase “any recognized Indian tribe now under federal jurisdiction” should therefore be interpreted to refer to recognized tribes for whom the United States maintained trust responsibilities in 1934.

Based on this understanding, the phrase “now under federal jurisdiction” can be seen to exclude two categories of tribe from Category 1. The first category consists of tribes never “recognized” by the United States in or before 1934. The second category consists of tribes who *were* “recognized” before 1934 but no longer remained under federal jurisdiction in 1934. This would include tribes who had absented themselves from the jurisdiction of the United States or had otherwise lost their jurisdictional status, for example, because of policies predicated on “the dissolution and elimination of tribal relations,” such as allotment and assimilation.<sup>167</sup> Though outside Category 1’s definition of “Indian,” Congress may later enact legislation recognizing and extending the IRA’s benefits to such tribes, as *Carciari* instructs.<sup>168</sup> For purposes of the eligibility analysis, however, it is important to bear in mind that neither of these categories would

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<sup>167</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994) (“The “ultimate purpose of the [Indian General Allotment Act was] to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country.”); *see also Montana v. United States*, 450 U.S. 544, 559 (1981) (citing 11 CONG. REC. 779 (Sen. Vest), 782 (Sen. Coke), 783–784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881); SECRETARY OF THE INTERIOR ANN. REP. 1885 at 25–28; SECRETARY OF THE INTERIOR ANN. REP. 1886 at 4; ARCIA 1887 at IV–X; SECRETARY OF THE INTERIOR ANN. REP. 1888 at XXIX–XXXII; ARCIA 1889 at 3–4; ARCIA 1890 at VI, XXXIX; ARCIA 1891 at 3–9, 26; ARCIA 1892 at 5; SECRETARY OF THE INTERIOR ANN. REP. 1894 at IV). *See also* Cohen 1942 at 272 (“Given adequate evidence of the existence of a tribe during some period in the remote or recent past, the question may always be raised: Has the existence of this tribe been terminated in some way?”).

<sup>168</sup> *Carciari*, 555 U.S. at 392, n. 6 (listing statutes by which Congress expanded the Secretary’s authority to acquire land in trust to tribes not necessarily encompassed by Section 19).

include tribes who were “recognized” and for whom the United States maintained trust responsibilities in 1934, despite the federal government’s neglect of those responsibilities.<sup>169</sup>

## Analysis

### A. Procedure for Determining Eligibility.

As noted, the Solicitor’s Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.<sup>170</sup> It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.<sup>171</sup> The Solicitor’s Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.<sup>172</sup> Only in the absence of presumptive evidence should the inquiry proceed to Step Four, which requires the Department to weigh the totality of an applicant tribe’s evidence.<sup>173</sup>

Having identified no separate statutory authority making the IRA applicable to the Nation under Step One, our analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the Nation was under federal jurisdiction in 1934.<sup>174</sup> This criterion derives from understanding the meaning of the phrase “under federal jurisdiction” as referring to the federal government’s administration of its Indian affairs authority with respect to particular groups of Indians. Certain federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934. These are: elections conducted by the Department pursuant to Section 18 of the IRA; approval by the Secretary of a constitution following an election held pursuant to Section 16 of the IRA; issuance of a charter of incorporation following a petition submitted pursuant to Section 17 of the IRA; adjudicated treaty rights; inclusion in 1934 on the Department’s Indian Population Report; and land acquisitions by the United States for groups of Indians in the years leading up to 1934.<sup>175</sup> It also includes the continuing existence of treaty rights and federal legislation addressing a particular tribe.<sup>176</sup> Where any of these forms of evidence exist, then the Solicitor’s Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.<sup>177</sup> The Nation, as explained below, provided unambiguous evidence under Step Two that it was “under federal jurisdiction” in 1934 and therefore eligible for the benefits of Section 5 of the IRA.

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<sup>169</sup> See, e.g., *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004) (improper termination of treaty-tribe’s status before 1934).

<sup>170</sup> Solicitor’s Guidance at 1.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 2.

<sup>175</sup> *Id.* at 2-4.

<sup>176</sup> *Id.* at 6.

<sup>177</sup> *Id.* at 2.

## B. *Dispositive Evidence of Federal Jurisdiction in 1934.*

### 1. Osage Allotment Act

The United States acquired the lands occupied by the Osage in 1803 through the Louisiana Purchase, first bringing the Nation within federal authority.<sup>178</sup> Soon after, in 1808, the United States entered the first of several treaties with the Nation, by which the Osage made a major cession of land in present-day Missouri.<sup>179</sup>

In 1870, Congress removed and relocated the Osage from their lands in Kansas to lands in the Indian Territory.<sup>180</sup> In 1872, Congress established a reservation for the Osage (Reservation) consisting of approximately 1.47 million acres, which subsequently became part of the Oklahoma Territory in 1890.<sup>181</sup> In 1906, Congress enacted the Oklahoma Enabling Act, which authorized the admission of the Indian Territory and Oklahoma Territory to the Union as the State of Oklahoma.<sup>182</sup> That same year, Congress enacted legislation allotting the Nation's reservation to individual tribal members.<sup>183</sup> The Osage Allotment Act severed the surface estate of the Reservation from the subsurface mineral estate (Osage Mineral Estate), reserving all mineral rights in trust for the benefit of the Nation.<sup>184</sup> The United States has continuously held the Osage Mineral Estate in trust for the Nation, and continues to do so today.<sup>185</sup> Approximately ten percent of the surface estate in Osage County is held in trust or restricted status, with all other lands held in fee. Under the Osage Allotment Act, the Nation is further authorized to lease the Osage Mineral Estate for oil and gas mining "subject to the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe."<sup>186</sup> The Department has since established a regulatory regime, which has evolved and continues in force to this day.<sup>187</sup> The

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<sup>178</sup> *Brunt v. Commissioner*, 5 U.S.B.T.A. 134, 149 (1926).

<sup>179</sup> Treaty with the Great and Little Osage (Nov. 10, 1808), 7 Stat. 107. *See also* Treaty with the Great and Little Osage (Sep. 12, 1815), 7 Stat. 133; Treaty with the Great and Little Osage (Sep. 25, 1818), 7 Stat. 183; Treaty with the Great and Little Osage (Aug. 21, 1822), 7 Stat. 222; Treaty with the Osage (Jun. 2, 1825), 7 Stat. 240; Treaty with the Great and Little Osage (Aug. 10, 1825), 7 Stat. 268; Treaty with the Great and Little Osage (Jan. 11, 1839), 7 Stat. 576; Treaty with the Great and Little Osage (Sep. 29, 1865), 14 Stat. 687.

<sup>180</sup> Act of July 15, 1870, 16 Stat. 335, 362.

<sup>181</sup> Act of June 5, 1872, ch. 310, 17 Stat. 228. Act of May 2, 1890, ch. 182, 26 Stat. 81. *See also Osage Nation v. Irby*, 597 F.3d at 1120.

<sup>182</sup> *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267. *See also* OKLA. CONST. art. XVII, § 8 ("[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County.").

<sup>183</sup> Act of June 28, 1906, ch. 3572, 34 Stat. 539 ("Osage Allotment Act").

<sup>184</sup> Osage Allotment Act at § 3.

<sup>185</sup> Though the Osage Allotment Act originally provided that the mineral estate would become the property of individual landowners within 25 years, Congress ultimately extended the restrictions indefinitely. *See* Act of March 3, 1921, ch. 120, 41 Stat. 1249 (extending trust status of mineral estate to 1946); Act of March 2, 1929, ch. 493, § 1, 45 Stat. 1478 (extending same to 1958); Act of June 24, 1938, ch. 645, § 3, 52 Stat. 1034 (extending same to 1983); Pub. L. No. 95-496, § 2(a), 92 Stat. 1660 (extending same in perpetuity).

<sup>186</sup> *Id.*

<sup>187</sup> Regulations to implement the Osage Allotment Act were first issued in 1912. *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 636 (2006), and were amended prior to and after the passage of the IRA. *See* Secretary of the Interior, *Regulations to govern the leasing of lands in the Osage Reservation, Oklahoma, for oil and*

Osage Allotment Act has been held to have established a trust relationship between the Nation and the United States establishing a specific duty on the part of the federal government “to hold in trust all moneys due [under the Osage Allotment Act], now and in future to the Osage Tribe,”<sup>188</sup> a duty that remains in effect today.<sup>189</sup>

The federal duties and responsibilities established by the Osage Allotment Act in 1906, which remain in effect today, demonstrate that the Nation was under federal jurisdiction in 1934.

## 2. IRA Section 13.

By expressly referencing Osage, Section 13 of the IRA provides dispositive evidence that the Nation was under federal jurisdiction in 1934. Though the IRA is a statute of general applicability, it includes provisions that are applicable to specific Indian groups.<sup>190</sup> These include Section 13 of the IRA, which exempts specific tribes in the State of Oklahoma, including the Osage, from the application of certain IRA provisions.<sup>191</sup> Section 13 provides in relevant part:

[...] That sections 2, 4, 7, 16, 17 and 18<sup>192</sup> of this title shall not apply to the following named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomie, Cherokee, Chickasaw, Choctaw, Creek and Seminole.<sup>193</sup>

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*gas mining purposes* (July 12, 1932), first promulgated at 25 C.F.R. part 180 (1938). These regulations are now found at 25 C.F.R. part 226 (governing leases of Osage Reservation lands for oil and gas mining).

<sup>188</sup> *Osage Tribe of Indians v. United States*, 85 Fed. Cl. 162, 171 (2008) (citing *Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (2003)).

<sup>189</sup> The first act extending the trust status period of the Osage mineral estate declared all members of the Nation to be United States citizens without prejudice to “their interest in tribal property or the control of the United States over such property”). Act of March 3, 1921, ch. 120, § 3, 41 Stat. 1250.

<sup>190</sup> See, e.g., IRA, § 3 (addressing Papago Tribe); *id.*, § 14 (addressing Sioux Indians); *id.*, § 13 (addressing Indians in the Territory of Alaska).

<sup>191</sup> By 1934, specific statutes applied to the Five Civilized Tribes and Osage Nation and to the land base of Oklahoma tribes. Similarly, specific provisions in the IRA addressed Alaska where there were few reservations.

<sup>192</sup> Section 2 (25 U.S.C. § 5102) extended the existing periods of trust and any restriction on alienation placed upon Indian lands. Section 4 (25 U.S.C. § 5107) limited sales, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of the tribe or corporation organized under the Act. Section 7 (25 U.S.C. § 5110) authorized the Secretary to proclaim new reservations or add lands to existing reservations. Section 16 (25 U.S.C. § 5123) provided that any Indian tribe, or tribes, residing on the same reservation, the right to organize and adopt a constitution. Section 17 (25 U.S.C. § 5124) provides that the Secretary, upon a petition by at least one-third of the adult Indians, may issue a charter of incorporation to such tribe. Section 18 (25 U.S.C. § 5125) provided that the adult Indians on any reservation could vote in a special election to opt out of the IRA.

<sup>193</sup> 25 U.S.C. § 5118.

Thus, the Nation’s inclusion in the list of tribes in Section 13 provides unambiguous evidence that Congress understood the Nation to be under federal jurisdiction at the time of the IRA’s enactment in 1934.<sup>194</sup> It is further worth noting that Section 13 did not exempt the named Oklahoma tribes from application of Section 5. As its legislative history shows, Congress understood that Section 5 would remain a source of authority for the Secretary to accept land in trust even for those Oklahoma tribes, including the Nation.<sup>195</sup>

### **Conclusion**

Consistent with Step Two of the Solicitor’s Guidance, the continuing applicability of the Osage Allotment Act, as amended, and the inclusion of Osage in Section 13 of the IRA unambiguously establish that the United States considered the Nation to be under federal jurisdiction in 1934. As such, the Nation satisfies the definition of “Indian” contained in Category 1. We, therefore, conclude that the Secretary has the authority to acquire land in trust for the Nation under Section 5 of the IRA.

#### **25 C.F.R. § 151.10(b) – The need of the individual Indian or the tribe for additional land.**

Section 151.10(b) requires the Secretary to consider the tribe’s need for additional land.

The Nation seeks to restore part of its land base in a region that it has occupied since 1870. Following the enactment of the Osage Allotment Act in 1906, the Nation lost the majority of its trust and restricted allotted lands.<sup>196</sup> By 1957, 1.1 million acres of the 1.47 million acres in Osage County lost their trust and restricted status.<sup>197</sup> As of 2008, the United States held only approximately 0.04 percent of the total land in Osage County in trust for the Osage Nation.

The Nation needs additional land to construct an improved gaming facility. The Nation’s existing Bartlesville casino is located on a 24-acre parcel in a remote area on a two-lane rural

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<sup>194</sup> See also 78 Cong. Rec. 11125 (June 12, 1934) (remarks of Senator Thomas of Oklahoma) (describing the Osage Reservation as the only “great Indian reservation[.]” remaining in Oklahoma).

<sup>195</sup> Members of the Oklahoma Congressional delegation held a similar understanding at the time. See 78 Cong. Rec. 11125-26 (June 12, 1934) (remarks of Senator Thomas of Oklahoma) (offering amendment, adopted by Congress, so as to make Section 5 available to individual Indians “not only in my State for individual Indians but in other States where Indian lands have been allotted.” See also, 78 Cong. Rec. 11739 (June 15, 1934) (remarks of Representative Hastings of Oklahoma) (noting exemption of Oklahoma tribes from certain sections of the IRA and not objecting “to assistance by the Government in the form of and to the extent of the purchase of land for landless and indigent Indians”).

<sup>196</sup> Allotted lands are lands owned by the United States in trust for an Indian (trust allotment) or owned by an Indian subject to a restriction on alienation (restricted allotment). During the trust or restricted period, typically 25 years, federal law protects allotments against encumbrance, alienation, and taxation without federal consent. Often, when the restricted period was complete, the lands were lost from Indian ownership through tax foreclosure or other means. See Cohen’s Handbook of Federal Indian Law § 16.03 (2019).

<sup>197</sup> *Osage Nation v. Irby*, 597 F.3d at 1127.

road.<sup>198</sup> The Nation built its existing casino on an individual tribal member's allotted land that is leased to the Nation by the member's family. The lease agreement will expire in 2029. The Proposed Project will replace the existing facility and be located on land held in trust for the Nation, in a bigger facility with a hotel and easy access to State Highway 60. These improvements will increase patronage and revenue for the Nation.

The Nation depends heavily on its own economic activities to fund its governmental programs and services. The majority of the Nation's operating expenses are funded by revenue from its existing gaming operations. The Nation will use the additional revenue generated from the Proposed Project to improve tribal services including its social, health, and housing programs, and to facilitate self-determination and economic development.<sup>199</sup>

In recent years, the Nation has experienced a 20 percent increase in enrollment.<sup>200</sup> In 2019, the Nation had approximately 21,567 members who rely on the tribal government to provide benefits and services. With the steady increase in tribal enrollment, the Nation has greater needs for funding. Transfer of the Site into trust will allow the Nation to support governmental functions including its health benefit card, scholarships, general assistance, and language and cultural schools, and will decrease dependence on limited federal and state funds.<sup>201</sup> With the expected increase in revenue from transferring the Site into trust, the Nation will address the needs of its members and prepare for future membership growth. Transfer of the Site into trust will also create additional jobs for tribal members.

The Regional Director found, and we concur, that the Tribe has a need for additional land for an improved gaming facility that will generate increased funding for governmental programs.<sup>202</sup>

### **25 C.F.R. § 151.10(c) – The purposes for which the land will be used.**

Section 151.10(c) requires the Secretary to consider the purposes for which land will be used.

The Nation will relocate its existing Bartlesville casino to the Site, and develop approximately 10 acres of the Site with the Proposed Project. The gaming facility will consist of approximately 57,400 square feet (sf), which includes the gaming floor with approximately 450 class III gaming machines and 6 table games, food and beverage facilities, and back-of-house facilities. The hotel will consist of approximately 150 rooms and 11,800 sf of meeting space. The Proposed Project will also have approximately 685 surface level parking spaces to accommodate both patrons and employees. The remaining approximately 115 acres of the Site will remain undeveloped.

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<sup>198</sup> *Id.* at 6.

<sup>199</sup> Acting Regional Director's Findings of Fact at 5.

<sup>200</sup> *Id.* at 2.

<sup>201</sup> *Id.* at 6.

<sup>202</sup> *Id.*

The Regional Director found, and we concur, that the Nation has adequately defined the purpose for which the land will be used.<sup>203</sup>

**25 C.F.R. § 151.10(e) – If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.**

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

By correspondence dated and January 25, 2018, the BIA requested comments from the following state and local governments on the potential impact of the proposed acquisition on regulatory jurisdiction, real property taxes, and special assessments:

- Governor of Oklahoma
- Oklahoma Tax Commission
- Osage County Commissioners
- Osage County Treasurer
- Osage County Assessor

Property taxes for the Site in 2018 were \$68.00.<sup>204</sup> No officials identified negative impacts from removal of the Site from the tax rolls.<sup>205</sup> The loss of taxes on the Site is minimal and will be more than offset by the benefits to the regional economy, including increased employment, economic output, and tax revenue.

*Employment and Economic Output*

Construction of the Proposed Project will create approximately 186 new jobs throughout Washington and Osage counties.<sup>206</sup> The available labor force in the City of Bartlesville, Washington County and Osage County will primarily fill these jobs. Construction will also generate substantial economic output, creating economic benefits for a variety of area businesses that support construction activities. Area businesses will in turn increase their spending and labor demand, thereby stimulating the local economy.

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<sup>203</sup> Acting Regional Director's Findings of Fact at 6.

<sup>204</sup> See 2018 tax receipt for the Site in Acting Regional Director's Findings of Fact, Exhibits 124-136. On February 26, 2014, the BIA sent a similar request to the same parties. *Id.* The Osage County Treasurer responded stating that the taxes on the Site were \$69.00 in 2013. See letter from Sally Hulse, Osage County Treasurer, to the Department of the Interior (March 6, 2014), in Acting Regional Director's Findings of Fact, Exhibit 135.

<sup>205</sup> Acting Regional Director's Findings of Fact at 7.

<sup>206</sup> EA § 4.6.1.

Operation of the Proposed Project will generate approximately 147 jobs, with an anticipated annual payroll of approximately \$6.8 million.<sup>207</sup> Currently, 132 people are employed at the Nation's existing casino in Bartlesville, with an annual payroll of \$5.4 million. These employees are likely to fill the same number of jobs at the Proposed Project. The newly created jobs will be filled through the local labor market. Additional new jobs are expected for regional businesses that support operations or are near the Proposed Project, such as gas stations.

### *Tax Impacts*

The construction and operation of the Proposed Project will result in a variety of tax benefits for state and local governments that will more than offset the loss of \$68.00 in annual property taxes.<sup>208</sup> The construction budget for the Proposed Project is approximately \$30 million. This economic output will directly benefit the construction industry. Operation of the Proposed Project will generate indirect and induced output that will be dispersed and distributed among a variety of different industries and businesses in the County. Output from construction and operation will generate tax revenue for state and local governments.

The Regional Director found, and we concur, that the removal of the Site from the tax rolls will be offset by the contributions and economic development provided by the Proposed Project.<sup>209</sup>

### **25 C.F.R. § 151.10(f) - Jurisdictional problems and potential conflicts of land use which may arise.**

Section 151.10(f) requires the Secretary to consider whether any jurisdictional problems and potential conflicts of land use may arise. In response to its request of January 25, 2018, the BIA received no comments from the State or local jurisdictions regarding jurisdictional problems or potential conflicts of land use.<sup>210</sup>

### *Jurisdiction and Land Use*

The County zoned the Site as agricultural land.<sup>211</sup> The Site is largely undeveloped and currently used for cattle grazing. Surrounding land uses include agriculture and rural residences. The Nation will construct the Proposed Project on approximately 10 acres on the northern end of the Site along U.S. Highway 60. The remaining approximately 115 acres of the Site will stay undeveloped, providing a buffer between the Proposed Project and neighboring land uses.

As noted above, the BIA, by correspondence dated January 25, 2018, requested comments on the proposed acquisition from applicable State, Osage County, and City of Bartlesville officials. The

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Acting Regional Director's Findings of Fact at 7.

<sup>210</sup> *Id.*

<sup>211</sup> EA § 3.8.1.



BIA received no comments.<sup>212</sup> The Nation has good working relationships with these local governments and can continue to work with them to resolve any issues that may arise.

*Law Enforcement, Fire Protection, and Emergency Services*

The Osage Nation Police Department (ONPD) will provide law enforcement for the Proposed Project.<sup>213</sup> The ONPD maintains a cross-deputation agreement with the Osage County Sheriff and the Bartlesville Police Department. The Bartlesville Fire Department is the primary first responder to the Nation's existing Bartlesville casino and provides fire protection and emergency medical services. It will maintain this service for the Proposed Project.<sup>214</sup>

The Regional Director found, and we concur, that the transfer of the Site into trust will not cause conflicts of land use or other jurisdictional problems.<sup>215</sup>

**25 C.F.R. § 151.10(g) - If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.**

Section 151.10(g) requires the Secretary to determine whether the BIA has the resources to assume additional responsibilities if the land is acquired in trust.

The Site is located within the jurisdictional boundaries of the BIA Osage Agency. The Nation is responsible for the administration of real estate services and natural resources programs associated with the management of trust lands through a Self-Governance Multi-Year Funding Agreement. The BIA Osage Agency provides technical assistance, review, and approval of real estate transactions.

The Regional Director found, and we concur, that the BIA has adequate resources to assume the additional responsibilities resulting from the transfer of the Site into trust.<sup>216</sup>

**25 C.F.R. § 151.10(h) - The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4,**

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<sup>212</sup> Acting Regional Director's Findings of Fact at 7-8.

<sup>213</sup> *Id.* at 8.

<sup>214</sup> E.A. § 4.9.6.

<sup>215</sup> Acting Regional Director's Findings of Fact at 8.

<sup>216</sup> *Id.*

**National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.**

Section 151.10(h) requires the Secretary to consider the availability of information necessary for compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and a determination on the presence of hazardous substances.

*602 DM 2, Land Acquisitions: Hazardous Substances Determinations*

A Phase I Environmental Site Assessment (ESA) was prepared in September 2017 for the Site, which complied with ASTM Standard E 1427-13.<sup>217</sup> The ESA found no Controlled Recognized Environmental Conditions and no Historical Environmental Recognized Conditions. There were no hazardous materials or underground storage tanks. The ESA recommended no additional subsurface hazardous materials investigations.<sup>218</sup> An updated ESA will be conducted prior to transferring the Site into trust.

*National Environmental Policy Act*

The BIA prepared an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C § 4321 *et seq.* The EA evaluated the transfer of the Site into trust and the subsequent development of the Proposed Project. The BIA made the EA available for public comment from June 21, 2019, through July 22, 2019. The BIA published notices of availability of the EA in the *Tulsa World of Tulsa Oklahoma* and the *Bartlesville Examiner*. The BIA received no comments from the public. The EA is available at [www.bartlesvilleea.com](http://www.bartlesvilleea.com).

As discussed below, I conclude that the development of the Proposed Project on the Site will not result in significant impacts to the human environment, and, therefore, an environmental impact statement is not required. The Finding of No Significant Impact is included as Enclosure 3.

The BIA considered four alternatives:

*Alternative A, Proposed Action - Casino and Hotel Alternative*

Under Alternative A, the United States would transfer the approximately 125-acre Site into trust for the benefit of the Nation. The Nation would relocate its existing Bartlesville casino and develop approximately 10 acres of the Site with a casino and hotel. The Proposed Project would replace the Nation's existing Bartlesville casino.

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<sup>217</sup> *Id.* at 9.

<sup>218</sup> EA Appendix I.

### *Alternative B, Different Layout Alternative*

Under Alternative B, the United States will transfer the Site into trust. The components of Alternative B are the same as Alternative A, except that the development would be in a north/south orientation on the eastern boundary of the property.

### *Alternative C, Reduced Intensity Alternative*

Under Alternative B, the United States will transfer the Site into trust. The components of Alternative C would be the same as Alternative A, except no conference center or hotel would be developed.

### *Alternative D, No Action Alternative/No New Casino Alternative*

Under Alternative D, the Site would not be transferred into trust for the benefit of the Nation. The 125 acres would remain undeveloped and the Nation's existing casino would continue to operate.

### *Preferred Alternative Selection*

We have determined that the Department will implement Alternative A as the Preferred Alternative. This decision is based on the environmental analysis in the EA, a consideration of economic and technical factors, and the purpose and need for action. Of the alternatives evaluated in the EA, Alternative A will best meet the purpose and need for action because it best promotes the long-term economic vitality and self-sufficiency, self-determination, and self-governance of the Nation.

### *Findings*

The EA evaluated the potential impacts to land resources, water resources, air quality, biological resources, cultural resources, socioeconomic conditions, transportation networks, land use, public services, visual resources, noise, and hazardous materials. The EA describes the Best Management Practices (BMPs) in Section 2.1.3 that are incorporated into the project design to eliminate or substantially reduce any environmental consequences to less-than-significant levels.

*Land Resources* (EA § 4.1) – Alternative A will not result in adverse impacts on land resources. No adverse effects to topography will occur; one pond will be infilled, and a grading plan will be prepared in compliance with standard engineering practices and adhered to, resulting in no adverse effect on topography. The Bartlesville Property is located near optimal and moderately optimal faults; however, the proposed facilities will conform to the requirements of the International Building Code Seismic Zone 1. Some soils on the Bartlesville Property a moderate risk of corrosion of concrete and a high risk of corrosion of steel, however the engineering and design plans will address these limitations. With implementation of BMPs, and mitigation measures, impacts to land resources will be less than significant.

*Water Resources* (EA § 4.2; 4.9.1) – Alternative A will not result in adverse impacts on water resources. Potable water supply will be provided by the City of Bartlesville and the City’s existing water plant has sufficient capacity to accommodate the increase from the proposed casino hotel. Additionally, the existing casino will be shut down and no longer require any water supply, thus increasing the amount of available City water. During construction, BMPs and the Storm Water Prevention Plan will minimize potential adverse effects. Stormwater detention basins will be designed to accommodate runoff from impervious surfaces that will then be released at a controlled rate. The Bartlesville Property is not within a 100- or 500- year FEMA designated flood zone. The on-site pond that will be filled will be in compliance with the Clean Water Act and necessary permits will be obtained. Impacts to water resources will be less than significant.

*Air Quality and Climate* (EA § 4.3) – Alternative A will have no direct impacts on air quality. Short-term impacts to air quality will occur during construction, but application of standard BMPs will reduce emissions to a less-than-significant level. The State of Oklahoma is currently in attainment status. Impacts during operation will be below air quality threshold levels and will not contribute to a change in the designation status. Impacts to air quality and climate will be less than significant.

*Biological Resources* (EA § 4.4; Appendix E) – Alternative A will have no direct impacts on biological resources. There are no federally listed plants within the Bartlesville Property. Five federally listed species may occur with the Bartlesville Property; however, there is no suitable habitat for four of the species. The American burying beetle (ABB) may occur within the project Site. Prior to construction, presence or absence surveys will be conducted per the U.S. Fish & Wildlife Service (USFWS) Survey Guidance. If no ABBs are found, concurrence from USFWS should be sought. If ABBs are found, continue with formal Section 7 consultation with the USFWS. The ABB is currently under consideration for delisting. Migrating birds may occur within the Bartlesville Property; however, implementation of mitigation measures as identified in Section 5.4 will ensure no significant adverse impacts. 441.18 linear feet of ephemeral drainage and one 0.39 acre pond will be affected, however with implementation of mitigation measures in compliance with any permits as identified in Section 5.4 will reduce impacts to less than significant.

*Cultural Resources* (EA §§ 3.5, 4.5) – Alternative A will have no direct impacts on cultural resources. An archaeological survey was conducted in March 2013, which identified one historic road. The THPO recommended that the road is not eligible for listing on the National Register of Historic Places and the Proposed Project will not affect the road, the SHPO concurred with that recommendation. Scoping letters were sent to the Cherokee Nation, Delaware Tribe of Indians, and the United Keetoowah Band of Cherokee Indians in Oklahoma, but not responses were received. Inadvertent discovery may occur during construction, but with implementation of BMPs, impacts to cultural resources will be less than significant.

*Socioeconomic Conditions* (EA § 4.6) – Alternative A will not adversely impact socioeconomic conditions. The Nation is operating the existing Bartlesville casino that will be relocated to the Bartlesville Property. Construction of the Proposed Casino/Hotel is expected to generate

approximately 186 jobs. Operation of the Proposed Casino/Hotel is expected to have 147 employment positions, of which 132 will be filled by existing casino employees. The new employment opportunities will be absorbed by the local labor market resulting in employment for previously unemployed people. This increase in employment is considered a beneficial impact. The only identified environmental justice community identified is the Osage Nation. The Proposed Project will be beneficial in providing funding for the Osage Nation for education, health care, and housing programs. Alternative A would provide several financial benefits to the Nation, including education, health care, and housing. Impacts to socioeconomic conditions will be less than significant.

*Transportation Networks* (EA § 4.7; Appendix G) – Alternative A will have no direct impacts on transportation. Trip generation, trip distribution, intersection capacity and safety were analyzed for the Proposed Casino/Hotel in a traffic impact study. During operation, the applicable intersections will operate at an acceptable level service. Alternative A would have less than significant impacts on transportation. Section 5.7 includes an optional mitigation measure to widen U.S. Highway 60 to three lanes across the Bartlesville Property allowing for a left turn lane to improve access to the property. Impacts to transportation networks will be less than significant.

*Land Use* (EA § 4.8) – Alternative A will have no significant impacts on land use. Current zoning of the Bartlesville Property is agricultural. Approximately 10 acres will change from agricultural to commercial use. The development will differ from adjacent agricultural land uses, but would not disrupt, prohibit access to, or conflict with neighboring land uses. The remaining approximately 115 acres will remain undeveloped. The project design includes design features and BMPs that will minimize impacts to neighboring land use including nearby residences. Under the Federal Protection Policy Act, prime and unique farmlands must be assigned a conversion impact score. A score of less than 160 does not require further evaluation or protection. The conversion impact score for the Bartlesville Property is 52. Impacts to land use will be less than significant.

*Public Services* (EA § 4.9) – Alternative A will have no direct impacts on utilities or public services. Impacts to public services will be less than significant.

#### *Utilities*

The City of Bartlesville has sufficient capacity to supply potable water and to treat wastewater from the Proposed Casino/Hotel. Solid waste generated from the construction of the Proposed Casino/Hotel will be hauled to Osage Landfill. Osage Landfill has excess capacity and currently receives solid waste generated by the operation of the existing Bartlesville casino, which will be relocated to the Proposed Casino/Hotel. The Proposed Casino/Hotel represents a small net increase in electrical demand but the effect is negligible. Natural gas will be provided by

Oklahoma Natural Gas and area natural gas utilities are adequate to supply the Proposed Casino/Hotel. Impacts to utilities will be less than significant.

*Law Enforcement, Fire Protection, and Emergency Services*

Law enforcement for the Proposed Casino/Hotel will be provided by the Osage Nation Police Department. The Osage Nation Police Department maintains a cross-deputization agreement with the Osage County Sheriff and the Bartlesville Police Department. The Bartlesville Fire Department is the primary first responder to the existing Bartlesville casino and provides fire protection and Emergency Medical Services. The Bartlesville Fire Department will serve the Proposed Casino/Hotel during construction and operation. Relocating the existing Bartlesville casino to the Proposed Casino/Hotel is not expected to increase demand for fire protection or Emergency Medical Services. There will be no adverse impacts to law enforcement, fire protection, or emergency services. Impacts to law enforcement, fire protection, and emergency services will be less than significant.

*Visual Resources* (EA § 4.10) – Alternative A will have no significant impacts on visual resources. Alternative A would result in currently vacant land along U.S. Highway 60 being developed with the Proposed Casino/Hotel, which would be visible to neighboring residences. However, existing mature trees and the rolling topography of the area limit potential impacts to visual resources. Additionally, the project design for the Proposed Casino/Hotel includes design features and BMPs that will minimize impacts to neighboring residences visual resources and lighting. Impacts to visual resources will be less than significant.

*Noise* (EA § 4.11) – Alternative A will have no direct impacts from noise. Noise from construction activities will be temporary and the noise level at the nearest sensitive receptor will be less than the Federal Noise Abatement Criteria threshold. Additionally, the project design for the Proposed Casino/Hotel includes design features and BMPs that will reduce the level of impact to sensitive receptors. Operation of the facilities will slightly increase existing noise levels; however, the increase is marginal and will be below the Federal Noise Abatement Criteria threshold. Impacts from noise will be less than significant.

*Hazardous Materials* (EA § 4.12; Appendix I) – Alternative A will have no direct impacts on public safety from hazardous materials. A Phase I Environmental Site Assessment was conducted on September 2017 at the Bartlesville Property. The Environmental Site Assessments found no historic or current recognized environmental conditions (RECs). During construction the Proposed Casino/Hotel incidental releases of hazardous materials could occur, however typical construction management practices limit potential incidental releases. During operation of the Proposed Casino/Hotel small quantities hazardous materials common to most commercial operations would be stored and used throughout the facilities. These materials do not pose any unusual or substantial impact to public health and safety. Impacts from hazardous materials will be less than significant.

*Cumulative Impacts* (EA § 4.13) – Alternative A will not result in cumulatively adverse impacts to land resources; water resources; air quality; biological resources; cultural resources;

socioeconomic conditions; transportation networks; land use; public services; visual resources; noise; and hazardous materials. The proposed relocation of the existing Bartlesville casino to the Proposed Casino/Hotel is expected to have a positive indirect effect on the local economy. The development of Alternative A will result in less-than-significant cumulative or indirect impacts to the resources identified above.

Based on the findings in the EA, I determine that transferring the Bartlesville Property into trust and the subsequent relocation of the existing Bartlesville casino to the Proposed Casino/Hotel by the Nation will have no significant impact on the quality of the human environment. In accordance with Section 102(2)(c) of NEPA, an environmental impact statement is not required. This fulfills the requirements of NEPA as set out in the Council on Environmental Quality Regulations for Implementing NEPA, 40 C.F.R. §§ 1500-1508, and the BIA NEPA Guidebook, 59 IAM 3-H (August 2012).

**Decision to approve the Nation's fee-to-trust application**

Pursuant to Section 5 of the IRA, 25 U.S.C. § 5108, the Department will acquire the Site in trust for the Osage Nation. Further, pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(a)(2)(A)(i), the Site will be eligible for gaming upon its acquisition in trust. Consistent with applicable law, upon completion of the requirements of 25 C.F.R. § 151.13 and any other Departmental requirements, the Regional Director shall immediately acquire the Bartlesville Site in trust. This decision constitutes a final agency action under 5 U.S.C. § 704.

Sincerely,



Tara Sweeney  
Assistant Secretary - Indian Affairs

Enclosures