United States Department of the Interior

OFFICE OF THE SOLICITOR
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Memorandum

To: Tara Sweeney, Assistant Secretary – Indian Affairs

Through: Kyle Scherer, Deputy Solicitor for Indian Affairs

Eric N. Shepard, Associate Solicitor, Division of Indian Affairs

John Hay, Acting Assistant Solicitor, Branch of Environment and Lands, Division of Indian Affairs

From: Robert S. Hitchcock, Attorney-Advisor, Branch of Environment and Lands, Division of Indian Affairs

Subject: Federal Jurisdiction Status of the Grand Traverse Band of Ottawa and Chippewa Indians, Michigan in 1934

This Opinion addresses the statutory authority of the Secretary of the Interior ("Secretary") to acquire land in trust for the Grand Traverse Band of Ottawa and Chippewa Indians, Michigan ("Tribe") pursuant to Section 5 of the Indian Reorganization Act of 1934 ("IRA").[1][2] Section 5 of the IRA ("Section 5")[3] authorizes the Secretary to acquire land in trust for "Indians." Section 19 of the Act ("Section 19") defines "Indian" to include several categories of persons.[4] As relevant here, the first definition includes all persons of Indian descent who are members of "any recognized Indian tribe now under federal jurisdiction" ("Category 1").[5] In 2009, the United States Supreme Court ("Supreme Court") in *Carcieri v. Salazar*[6] construed the term "now" in Category 1 to refer to 1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrases "under federal jurisdiction" or "recognized Indian tribe."

In connection with the Tribe's pending fee-to-trust application[7] to the Bureau of Indian Affairs ("BIA") Midwest Region, Michigan Agency, you have asked whether the Tribe is eligible for trust land acquisitions under Category 1.[8] For the reasons explained below, we conclude that

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[1] 25 U.S.C. § 5108 ("The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.").

[2] Act of June 18, 1934, c. 576, § 5, 48 Stat. 984 ("IRA" or "Act"), codified at 25 U.S.C. § 5108.

[3] IRA, § 5.

[4] *Id.* at § 19, codified at 25 U.S.C. § 5129.

[5] *Ibid.*

[6] 555 U.S. 379 (2009) ("*Carcieri*").

[7] *The Grand Traverse Band of Ottawa and Chippewa Indians Request to the Secretary of Interior for Acquisition of Trust Title and Reservation Proclamation for Parcel 88* (Oct. 27, 2016) ("Application").

[8] This opinion does not address the Tribe's eligibility under any other definition of "Indian" in the IRA.

dispositive evidence demonstrates that the Tribe was "under federal jurisdiction" in 1934. The Tribe is therefore eligible under Category 1 and, consequently, the Secretary has authority to acquire land into trust for the Tribe.

I. BACKGROUND

The Tribe's relationship with the federal government began as early as 1795 as signatories to the Treaty of Greenville.[9] In 1836, the United States and several bands of Indians, including the Tribe, entered into the 1836 Treaty of Washington ("1836 Treaty") which ceded to the United States a large portion of land in the territory that would become the State of Michigan ("Michigan").[10] The 1836 Treaty reserved hunting rights throughout the ceded territory[11] and the bands were to receive annual funding for specified periods of time for education, teachers, school-houses, books, agricultural implements, cattle, tools, salt, fish barrels, medicines, and doctors, and thereafter so long as Congress appropriated funding.[12] Despite the known differences among the bands, the United States treaty commissioners insisted on negotiating with them collectively as the "Ottawa and Chippewa Tribe."[13]

Because of uncertainty regarding the reservation boundaries of the 1836 Treaty, the bands entered negotiations for a second treaty.[14] On May 21, 1855, Commissioner George Manypenny sent a memorandum to Secretary Robert McClelland urging such negotiations "with a view of adjusting all matters now in an unsettled condition, and making proper arrangements for [the Ottawas' and Chippewas'] permanent residence in that state."[15] Following the completed survey of Michigan counties and townships, the bands and the United States entered into the 1855 Treaty of Detroit ("1855 Treaty"),[16] which more specifically defined the location of the lands set aside in the 1836 Treaty, and provided for individual Indian allotments.[17] The United States again negotiated jointly with all the signatory bands as the "Ottawa and Chippewa Tribe."[18]

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[9] 7 Stat. 491 (Aug. 3, 1795)("Treaty of Greenville"); *See also, Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan,* 369 F.3d 960, 967 (6th Cir. 2004)(holding that "[t]he Band had treaties with the United States and a prior relationship with the Secretary of the Interior at least as far back as 1795").

[10] 7 Stat. 491, Art. I (Mar. 28, 1836)("1836 Treaty"); *See also, Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Dep't Nat. Res.*, 141 F.3d 635 (6th Cir. 1998). The Tribe descends from, and is the political successor to, signatories of the 1836 Treaty and the 1855 Treaty. *Id.* at 637.

[11] 1836 Treaty at Art. XIII, *See also, Grand Traverse,* 141 F.3d at 639 (The treaty-reserved hunting rights included an easement of access over land surrounding the Tribe's traditional fishing grounds that remained in effect even after the land became privately owned).

[12] *Id.*

[13] *Grand Traverse*, 369 F.3d at 961 n.2 (finding that "Henry Schoolcraft, who negotiated the 1936 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty").

[14] *See, United States v. Michigan*, 471 F. Supp. 192, 231 (W.D. Mich. 1979)(noting that "[t]he precise boundary of the cession was not known in 1836 because most of the land area was uninhabited and had not been thoroughly explored").

[15] Letter from George Manypenny to Secretary Robert McClelland (May 21, 1855).

[16] 11 Stat. 621 (Jul. 31, 1855)("1855 Treaty").

[17] 1855 Treaty at Art. V.

[18] *See* Matthew L.M. Fletcher et al., *Commentary: Politics, History, and Semantics: the Federal Recognition of Indian Tribes*, 82 N. Dak. L. Rev. 487, 502–03 (2006); *see also Michigan*, 471 F. Supp. at 247–248.

Article 5 of the 1855 Treaty expressly dissolved the "tribal organization of said Ottawa and Chippewa Indians."[19] Although intended to apply only to the tribal organization created by the United States for the sole purpose of treaty negotiations, the Department later misconstrued the provision to mean the individual bands' relationship with the federal government had been terminated.[20] This confused reading was subsequently examined and clarified by the United States District Court for the Western District of Michigan ("District Court") in 1979, and later mentioned in Justice Breyer's concurring opinion in *Carcieri v. Salazar*.[21]
Prior to examination by the District Court, however, significant confusion was caused by Article V of the 1855 Treaty. During the 1930s, for example, the Tribe received numerous and inconsistent responses from the Department regarding its jurisdictional status. In June 1933, John Collier, Commissioner of Indian Affairs, advised Congressman Harry Musselwhite that the affairs of the Tribe had been completed and closed under the terms of the 1855 Treaty.[22] In September 1933, Harold Ickes, Secretary of the Interior, advised Congressman Douglas Tibbets the same.[23] Just a few months later, however, and immediately prior to the passage of the IRA, Commissioner Collier confirmed to the Tomah Agency Superintendent that the applicability of the IRA to the Ottawas and Chippewas of the Grand Traverse District depended on congressional appropriations, and suggested that the Indians there residing should contact their congressional representatives if they favored the bill.[24]

As noted above, these arguably conflicting views within the Department of the effect of the 1855 Treaty were clarified by the District Court in *United States v. Michigan*. There, Judge Noel Peter Fox found that the 1855 Treaty terminated only the collective tribal entity formed by the United States for the purpose of treaty negotiations, and not the political status of the individual bands.[25] The impact of this decision was considered fully by the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") nearly twenty years later.[26]

> There is no dispute that only Congress had the *legal* right to terminate the Band's recognition because Congress originally had recognized the Band. But the relevant question is whether a termination nevertheless took place because the executive branch of the government *illegally* acted as if the Band's recognition had been terminated, as evidence by its refusal to carry out any trust obligations for over one hundred years.[27]

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[19] Treaty of Detroit at Art. V.

[20] Letter from Secretary of the Interior, C. Delano (Mar. 27, 1872).

[21] *Michigan*, 471 F. Supp. at 278 (declaring that "[t]he termination of this entity, not the termination of the Ottawa and Chippewa tribes or bands, was all that was accomplished by [Article 5]"); *See also*; *Carcieri*, 555 U.S. at 398-99 (Breyer, J. concurring)(concluding that the Department operated under the mistaken belief that the 1855 Treaty of Detroit terminated the Tribe).

[22] Letter from John Collier, Commissioner of Indian Affairs to Harry W. Musselwhite, Representative (Jun. 8, 1933).

[23] Letter from Harold Ickes, Secretary of the Interior to Douglas Tibbits, Representative (Sep. 20, 1933).

[24] Letter from John Collier, Commissioner of Indian Affairs, to Frank Christy, Superintendent (May 4, 1934) (response to Letter from Frank Christy, Superintendent, to John Collier, Commissioner of Indian Affairs (Apr. 28, 1934)).

[25] *Michigan*, 471 F. Supp. at 264.

[26] *Id.* at 968-69.

[27] *Id.* at 968.

The Sixth Circuit found that the Department's neglect operated as a *de facto* termination, but carefully explained that empirical acts resulting in treatment that is akin to the termination of federal recognition are analytically distinct from the legality of those acts.[28]

Despite decades of Department disavowals of responsibility, the Tribe continually sought to assert its treaty rights and regain its status as a recognized tribe.[29] In 1905, the United States recognized the Tribe as an organized entity that could sue the United States to account for obligations established under the 1836 Treaty and 1855 Treaty.[30] The United States Court of Claims ("Court of Claims") awarded the Tribe $62,496 in March 1907,[31] which led to the compilation of the so-called Durant Roll, a list compiled by Horace B. Durant of all members or descendants of members enrolled with the "Ottawa and Chippewa Tribe" in 1870, grouped by four bands: Grand River Band, Sault Ste. Marie Band, Mackinac Band, and Traverse Band.[32] The Durant Roll was approved by the Department in 1910[33] and was the basis for determining eligibility for distribution of the Court of Claims award.[34] Subsequent to the affirmative litigation undertaken by the United States in the 1970s to vindicate reserved fishing rights under the 1836 Treaty, the Tribe in 1980 became the first to gain federal acknowledgment through the 25 C.F.R. Part 54 federal acknowledgment process.[35] In the Department's Proposed Finding and Final Determination, the Department concluded that the Tribe "is the modern successor of several bands of Ottawas and Chippewas which have documented continuous existence in the Grand Traverse Bay area of Michigan since as early 1675," and which were signatories to both the 1836 Treaty of Washington and the 1855 Treaty of Detroit.[36]

II. STANDARD OF REVIEW

A. Four-Step Procedure to Determine Eligibility.

Section 5 of the IRA provides the Secretary discretionary authority to acquire any interest in lands for the purpose of providing lands in trust for Indians.[37] Section 19 defines "Indian" in relevant part as including the following three categories:

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[28] *Ibid.*

[29] *Id.* at 962.

[30] 33 Stat. 1048, 1081-1082 (Mar. 3, 1905).

[31] 42 Ct. C1. 240, 243-244 (Mar. 4, 1907).

[32] 35 Stat, 70, 81(Apr. 30, 1908); *See also*, Application, Exhibit 6 at 21 (Prof. Richard White, *Synopsis of Report on the Taking of The Grand Traverse Band's 1855 Reservation*)("White Report").

[33] White Report at 21 (citing Payment to Ottawa and Chippewa Indians of Michigan, 29 July 1910, NARA-DC, RG75, CCF 1907-1939, General Services, Box 32, 96000-1919m 013, 2 of 2).

[34] *Id.*

[35] 45 Fed. Reg. 19321 (1980)(The federal acknowledgment regulations were re-designated without change as 25 C.F.R. Part 83, and later amended in 1994 and 2015). *See also*, U.S. Dep't. of the Interior, Memorandum from Acting Deputy Commissioner of Indian Affairs to Assistant Secretary, *Recommendation and summary of evidence for proposed finding for Federal acknowledgement of the Grand Traverse Band of Ottawa and Chippewa Indians, Peshawbestown, Michigan pursuant to 25 CFR 54*, (Oct. 3, 1979).("Proposed Finding").

[36] Proposed Finding at 1.

[37] 25 U.S.C. § 5108.

> **[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.[38]

In 2009, the Supreme Court in *Carcieri v. Salazar*[39] construed the term "now" in Category 1 to refer to 1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrase "under federal jurisdiction," however, or whether it applied to the phrase "recognized Indian tribe."

To guide the implementation of the Secretary's discretionary 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.[40] The Solicitor of the Interior ("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[41] 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."[42] 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").[43]

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[38] 25 U.S.C. § 5129 (bracketed numerals added).

[39] 555 U.S. 379.

[40] U.S. Dep't. 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).

[41] Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("M-37029").

[42] Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).

[43] *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").

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 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.[44] 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[45] 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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[44] 25 C.F.R. Part 83.

[45] *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."[46] The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,[47] 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."[48] In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been "under federal jurisdiction" *in* 1934.[49] By "recognized," Justice Breyer appeared to mean "*federally* recognized"[50] 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,"[51] and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.[52] 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.[53] 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.[54]

The Solicitor noted that Category 1's grammar supports this view. The adverb "now" is part of the prepositional phrase "under federal jurisdiction,"[55] which it temporally qualifies.[56]

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[46] Deputy Solicitor's Memorandum at 19. *See also Cty. of Amador*, 872 F.3d at 1020, n. 8 (*Carcieri* leaves open whether "recognition" and "jurisdiction" requirements are distinct requirements or comprise a single requirement).
[47] *Carcieri* at 382-83.
[48] *Ibid.*
[49] *Id.* at 398 (Breyer, J., concurring).
[50] *Ibid.*
[51] *Id.* at 399 (Breyer, J., concurring).
[52] *Id.* at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).
[53] *Ibid.*
[54] 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.
[55] *Grand Ronde*, 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. *Ibid.* The court concluded it modified only the word "tribe" "before its modification by the adjective 'recognized.'" *Ibid.* 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.
[56] 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).

Prepositional phrases function as modifiers and follow the noun phrase that they modify.[57] 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.[58] 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.[59] These included the loss of Indian lands and the displacement and dispersal of tribal communities.[60] Lacking an official list of "recognized" tribes at the time,[61] it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,[62] left unmodified, the phrase "recognized Indian tribe" could include tribes disestablished or terminated before 1934.

2. Statutory Terms.

The Solicitor concluded that the expression "now under federal jurisdiction" in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress's plenary authority63 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.

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[57] 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.

[58] 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).

[59] *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 (Apt. 28, 1934)).

[60] *Ibid.*

[61] 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))).

[62] *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

[63] Deputy Solicitor's Memorandum at 9.

The contemporaneous legal definition of "jurisdiction" defined it as the "power and authority" of the courts "as distinguished from the other departments."[64] 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.'[65] 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."[66]

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.[67]

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:[68]

> 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.

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[64] BLACK'S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter "BLACK'S").
[65] BLACK'S at 1774.
[66] BLACK'S at 171. It separately defines "subject to" as meaning "obedient to; governed or affected by."
[67] 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.
[68] *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 Grand Ronde*, 75 F.Supp.3d at 387, 399 (noting same).

> 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.*[69]

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.[70] 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."[71] Commissioner Collier's broad view was consistent with the bill's original stated policy to "reassert the obligations of guardianship where such obligations have been improvidently relaxed."[72]

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

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[69] Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).
[70] *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).
[71] Sen. Hrgs. at 80.
[72] 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.").

Indian descent who were "members of any recognized Indian tribe."[73] As on previous days,[74] 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."[75]

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."[76] Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."[77] 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,"[78] that is, those Indians then under federal supervision.

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[73] 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.

[74] *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); *ibid.* (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).

[75] *See, e.g.,* Sen. Hrgs. at 239 (discussing Sec. 3), 254 (discussing Sec. 10), 261-62 (discussing Sec. 18), 263-66 (discussing Sec. 19).

[76] Sen. Hrgs. at 263.

[77] *Ibid.* 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" 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. *Ibid.* 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."

[78] *Ibid.*

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."[79] When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were "just as much Indians as any others,"[80] 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.[81] 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.[82] Chairman Wheeler thought not, "unless they are enrolled at the present time."[83] 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.[84]

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.[85] Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.[86] 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.[87]

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,[88] Chairman Wheeler finally turned to the IRA's definition of "tribe,"[89] which as then drafted included "any Indian tribe, band, nation, pueblo, or other native political group or organization."[90] Chairman Wheeler and Senator Thomas thought this definition too broad.[91] Senator Thomas asked whether it would include the Catawbas,[92] 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.[93] Chairman Wheeler thought not, if they could not meet the blood-

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[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*
[82] *Id.* at 264.
[83] *Ibid.*
[84] *Ibid.* (statement of Chairman Burton Wheeler) ("You will find here [*i.e.*, Section 19] later on a provision covering just what you have reference to.").
[85] *Id.* at 264-65.
[86] *Id.* at 264.
[87] *Ibid.*
[88] *Id.* at 265.
[89] *Ibid.* at 265.
[90] *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.
[91] Sen. Hrgs. at 265.
[92] *Ibid.*
[93] *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).

quantum requirement.[94] 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."[95]

Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."[96] Senator O'Mahoney responded, saying "If you wanted to exclude any of them [from the Act] you certainly would in my judgment."[97] 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.[98] 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."[99] It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,[100] 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.[101]

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 laws.[102] 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."[103] Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."[104] Assistant Solicitor Charles Fahy, who would later become Solicitor

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[94] *Id.* at 264.
[95] *Id.* at 266.
[96] *Ibid.* at 266.
[97] *Ibid.* Nevertheless, Senator O'Mahoney did not understand why the Act's benefits should not be extended "if they are living as Catawba Indians."
[98] *Ibid.*
[99] *Ibid.*
[100] *Id.* at 231.
[101] *Id.* at 266.
[102] H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).
[103] *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)).
[104] *Id.* at 184 (statement of Commissioner Collier) (Apr. 8, 1934).

General of the United States,[105] described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."[106] 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."[107] 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.[108] Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the OIA having direct supervision of Indians.[109]

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" of Congress over the Indians.[110] 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."[111] 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:[112]

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

[106] *Id.* at 319 (statement of Assistant Solicitor Charles Fahy).

[107] *Id.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

[108] *Ibid.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

[109] *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census, 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 OIA "jurisdictions").

[110] 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).

[111] *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." *Ibid.*

[112] *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).

> 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.[113]

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."[114]

C. The Meaning of the Phrase "Recognized Indian Tribe."

Today's concept of "federal recognition" merges the cognitive sense of "recognition" and the political-legal sense of "jurisdiction." As *Carcieri* makes clear, however, the issue is what Congress meant in 1934, not how the concepts may have later evolved.[115] Congress's authority to recognize Indian tribes flows from its plenary authority over Indian affairs.[116] 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

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[113] *Ibid.*

[114] 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."

[115] 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 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.")).

[116] *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.")).

benefit of Indians.[117] Because Congress has not generally defined "Indian,"[118] it left it to the Secretary to determine to whom such statutes apply.[119] "Recognition" generally is a political question to which the courts ordinarily defer.[120]

Relying on the analysis contained in the Deputy Solicitor's Memorandum, the Solicitor concluded that "recognition" as used in the IRA refers 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."[121] 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."[122] These political-legal understandings seem consistent with how Congress used

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[117] 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").

[118] U.S. Dept. of 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).

[119] *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 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").

[120] *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").

[121] WEBSTER'S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for "recognize" (v.t.).

[122] *Ibid.*, 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."

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."[123] 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.

2. Legislative History.

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.[124] Commissioner Collier, himself a "principal author" of the IRA,[125] used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.[126] 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.[127]

As originally drafted, Category 1 referred only to "recognized" Indian tribes, leaving unclear whether it was used in a cognitive or 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.

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[123] 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."

[124] *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.

[125] *Carcieri*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

[126] 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).

[127] 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).

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 ("HANDBOOK"), 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."[128] Assistant Solicitor Cohen explains that the term "tribe" may be understood in both an ethnological and a political-legal sense.[129] 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."[130] 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.[131]

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."[132] 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."[133]

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,[134] 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*

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[128] Cohen 1942 at 268.

[129] 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.

[130] *Id.* at 268 (emphases added).

[131] *Ibid.* 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).

[132] Letter, Commissioner John Collier to Ben C. Shawanesee (Apr. 24, 1935).

[133] 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.

[134] 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 at 1 (Oct. 1, 1980) (hereafter "Stillaguamish Memo").

long as the group meets the [IRA's] other definitional requirements."[135] These included that the tribe have been "recognized" in 1934. Associate Solicitor Walker construed "recognized" as referring to tribes with whom 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*."[136] 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."[137] 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."[138] 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.[139]

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.[140]

Throughout the United States' early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.[141] 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.[142] 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."[143] While the

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[135] *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).
[136] *Id.* at 2 (emphasis added).
[137] *Id.* at 4 (emphasis added). This is consistent with Justice Breyer's concurring view in *Carcieri*.
[138] *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.
[139] 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).
[140] 25 C.F.R. Part 83.
[141] U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.
[142] 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.
[143] *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).

question of "recognition" remained one for the political branches,[144] the contexts within which it arose expanded with the United States' obligations as guardian.[145]

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,"[146] 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;[147] treaty fishing-rights claims by descendants of treaty signatories;[148] and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,[149] which included tribes previously recognized and seeking restoration or reaffirmation of their status.[150] 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.[151] In January 1975, it found that federal Indian policies had "shifted and changed" across administrations "without apparent rational design,"[152] 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.[153] Finding it imperative to do

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[144] *United States v. Holliday*, 70 U.S. 407, 419 (1865).

[145] *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).

[146] *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). *See also* Cohen 2012 at § 1.06 (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).

[147] *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).

[148] *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)

[149] AMERICAN INDIAN POLICY REVIEW COMMISSION, *Final Report, Vol. I* [Committee Print] at 462 (GPO 1977) (hereafter "AIPRC 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*").

[150] 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).

[151] Pub. L. No. 93-580, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, (hereafter "AIPRC Act"), *codified at* 25 U.S.C. § 174 note.

[152] *Ibid.* 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."

[153] *Ibid.* (citing MERIAM REPORT).

so,[154] Congress established the American Indian Policy Review Commission[155] to prepare an investigation and study of Indian affairs, including "an examination of the statutes and procedures for granting Federal recognition and extending services to Indian communities."[156] It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."[157]

a. The Palmer Memorandum

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on "Federal 'Recognition' of Indian Tribes" (the "Palmer Memorandum").[158] 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."[159] 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.[160] 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*."[161] 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.[162]

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,[163] 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.[164] Though treaties remained a "prime indicia" of political

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[154] *Ibid.*
[155] AIRPC Act, § 1(a).
[156] *Id.*, § 2(3).
[157] *See, e.g.*, Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate (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); Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal "Recognition" of Indian Tribes (Jul. 17, 1975) (hereafter "Palmer Memo").
[158] Associate Solicitor Reid P. Chambers approved the Palmer Memo in draft form. *Ibid.* The Palmer Memo came on the heels of earlier consideration by the Department of the Secretary's authority to acknowledge tribes.
[159] Palmer Memo at 23.
[160] *Id.* at 23-24.
[161] *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.
[162] *Ibid.* at 24.
[163] The Palmer Memo 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.
[164] *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").

"recognition,"[165] the memorandum noted that other evidence could include Congressional recognition by non-treaty means and administrative actions fulfilling statutory responsibilities toward Indians as "domestic dependent nations,"[166] including the provision of trust services.[167] 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."[168] 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"[169] toward a tribe, consistent with the evolution of federal Indian policy.[170]

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;[171] the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."[172] 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;[173]

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[165] *Id.* at 3.

[166] *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 Nixon Administration "federally recognized" included tribes recognized by treaty or statute and tribes treated as recognized "through a historical pattern of administrative action.").

[167] Palmer Memo 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.").

[168] *Id.* at 2-14.

[169] *Id.* at 14.

[170] Having ratified no new treaties since 1868, ARCIA 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. ARCIA 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...").

[171] Butler Letter at 6; Palmer Memo at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).

[172] Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memo at 19.

[173] Butler Letter at 5; Palmer Memo 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 (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).

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;[174] the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;[175] 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;[176] 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.[177] In making such determinations, the Department looked to indicia established by federal courts.[178] There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.[179] 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."[180] 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."[181] The manner in which the Department understood "recognition" before, in, and long-after 1934[182] 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.

D. 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

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[174] Palmer Memo at 19 (citing Cohen 1942 at 271)); Butler letter at 4.
[175] Palmer Memo at 19 (citing Cohen 1942 at 271).
[176] *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)).
[177] *Id.* at 18.
[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.* (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.").
[181] Palmer Memo at 18.
[182] *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).

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.[183] Though outside Category 1's definition of "Indian," Congress may later enact legislation recognizing and extending the IRA's benefits to such tribes, as *Carcieri* instructs.[184] For purposes of the eligibility analysis, however, it is important to bear in mind that neither of these categories would 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.[185]

III. ANALYSIS

A. Procedure for Determining Eligibility.

As noted above, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.[186] It is not, however, necessary to proceed through

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[183] *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?").

[184] *Carcieri*, 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).

[185] *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).

[186] Solicitor's Guidance at 1.

each step of the procedure for every fee-to-trust application.[187] The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.[188] 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.[189] The Tribe, as explained below, provided dispositive evidence demonstrating under Step Two that it was "under federal jurisdiction" in 1934. Therefore, the Tribe is eligible for the benefits of Section 5 of the IRA.

B. Previous Under Federal Jurisdiction Determinations for the Tribe

In 2011, the Department approved the Tribe's trust application for 13 acres in Peshawbestown, Michigan.[190] The Department noted that the Tribe's 1836 and 1855 treaties "have continuing force and effect today."[191] The Department found that the Tribe "unquestionably was under federal jurisdiction prior to 1934," and that "the Federal Government had a jurisdictional relationship with the Band that remained intact until 1934."[192]

Again in 2013 the Department determined that the Tribe was eligible for the land into trust provisions in Section 5 when it accepted conveyance of 158.91 acres of land ("Parcel 82") into trust for the Tribe.[193] The Department determined that the Tribe "was under federal jurisdiction prior to 1934; in 1795, 1836, and 1855, the [Tribe] entered into treaties with the United States, with continuing rights and benefits in force today."[194] This determination was affirmed by the Interior Board of Indian Appeals ("IBIA") in 2015.[195] The Department issued both the 2011 and 2013 fee-to-trust decisions after *Carcieri*, but before the Solicitor's Office issued Sol. Op. M-37029. Although both decisions preceded issuance of Sol. Op. M-37029, they appear consistent with the opinion's two-part analysis.

C. Dispositive Evidence Demonstrating Federal Jurisdiction in 1934

Having identified no separate statutory authority making the IRA applicable to the Tribe under Step One, our analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the Tribe was under federal jurisdiction in 1934.[196] Certain types of federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934.[197] 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.[198] The Tribe, as explained below, provided dispositive evidence under Step Two that it was "under federal jurisdiction" in 1934.

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[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] U.S. Department of the Interior, Fee to Trust Acquisition – Decision Letter Parcel 25 (May 3, 2011).
[191] *Id. at 17*
[192] *Ibid.*
[193] U.S. Department of the Interior, Fee to Trust Acquisition – Decision Letter Parcel 82 (Jul. 22, 2013).
[194] *Id.* at 3.
[195] *Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director*, 61 IBIA 273 (2015).
[196] Solicitor's Guidance at 2.
[197] *Id.* at 2-4.
[198] *Id.* at 2.

1. Adjudicated Treaty Rights

Before 1934, the United States entered into multiple treaties with the Tribe. The 1836 Treaty included fishing rights, which have been judicially determined to exist from the time of the treaty to the present day.[199] As the Solicitor's Guidance makes plain, where there is any doubt about the continuing of treaty obligations, the Solicitor's Office may rely on post-1934 adjudications confirming the existence of such obligations.[200] The District Court's 1979 decision in *United States v. Michigan* – litigated by the United States on behalf of successors in interest to the signatories of the 1836 Treaty – provides dispositive evidence that the Tribe was under federal jurisdiction in 1934. As explained by the IBIA in affirming the Parcel 82 acquisition, "the existence of hunting and fishing rights, reserved in and protected by Congressionally ratified treaties, and for which the United States continued to have an obligation, is as compelling and dispositive evidence to demonstrate that the Tribe was under Federal jurisdiction in 1934 as would be the case if the United States had held land in trust for the Tribe."[201]

2. Breyer Concurrence

Justice Breyer's concurrence in *Carcieri* advised that a tribe recognized after 1934 may nonetheless have been "under federal jurisdiction" in 1934.[202] He specifically identified the Tribe as an example where a mistaken belief about its jurisdictional relationship in 1934 was later corrected:

> Similarly, in 1934 the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. (. . .) But later the Department recognized the Tribe, considering it to have existed continuously since 1675.[203]

The Tribe's history highlights how neglect of responsibilities as to a tribe by the United States does not foreclose a finding that the tribe was "under federal jurisdiction" in 1934 for purposes of the IRA. Due primarily to a misunderstanding in the 1870s of Article V of the 1855 Treaty, the Department mistakenly terminated its administrative relationship with the Tribe. Although the Tribe was not federally acknowledged under 25 C.F.R. Part 54 until 1980, this later acknowledgment, and the conclusions reached by the Department in its Proposed Finding and Final Determination, reflect that the Tribe was indeed "under federal jurisdiction" in 1934.

3. Summary

This opinion applies the framework announced in the Solicitor's Guidance and relies on the same evidence presented by the Tribe to the Department for prior "under federal jurisdiction" analyses.

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[199] *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).
[200] Solicitor's Guidance at 4.
[201] *Grand Traverse County Board of Commissioners*, 62 IBIA at 282.
[202] *Carcieri* at 398-99 (Breyer, J., concurring)(discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).
[203] *Id.* at 398.

The Solicitor's changed construction of Category 1 does not alter our conclusion that the Tribe was a "recognized Indian tribe (...) under federal jurisdiction" in 1934.

As the Solicitor's Guidance makes plain, Congress intended to exclude two categories of tribes from Category 1: those tribes never "recognized" in or before 1934; and those tribes that were recognized before 1934, but no longer remained "under federal jurisdiction" in 1934.[204] The Tribe does not fall into either of those categories. The forms of evidence identified in the Solicitor's Guidance that demonstrate the administration of the federal government's Indian affairs authority in and around 1934 only bolster this conclusion.

IV. CONCLUSION

Consistent with Step Two of the Solicitor's Guidance, a ratified treaty still in effect in 1934 presumptively demonstrates the establishment of a political-legal relationship between the United States and the signatory tribe. That the treaty rights were judicially determined to remain intact from 1836 through the present unambiguously demonstrates that the Tribe was "under federal jurisdiction" in 1934. For these reasons, we conclude that the Grand Traverse Band of Ottawa and Chippewa Indians, Michigan satisfies Category 1, and that the Secretary has the statutory authority to acquire land in trust for the Tribe under Section 5 of the IRA.

[204] Deputy Solicitor's Memorandum at 29.