United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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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 ERIC SHEPARD Digitally signed by ERIC SHEPARD Date: 2020.08.14 13:39:58 -04'00'

John Hay, Acting Assistant Solicitor, Branch of Environment and Lands, Division of Indian Affairs JOHN HAY Digitally signed by JOHN HAY Date: 2020.08.13 16:33:04 -04'00'

From: Nicholas M. Ravotti, Attorney-Advisor, Branch of Environment and Lands, Division of Indian Affairs NICHOLAS RAVOTTI Digitally signed by NICHOLAS RAVOTTI Date: 2020.08.14 11:31:08 -04'00'

Subject: Federal Jurisdiction Status of the Jamestown S'Klallam Tribe in 1934

This Opinion addresses the statutory authority of the Secretary of the Interior ("Secretary") to acquire land in trust for the Jamestown S'Klallam Tribe ("Tribe")[1] pursuant to Section 5[2] of the Indian Reorganization Act of 1934 ("IRA").[3] Section 5 of the IRA ("Section 5") 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") Northwest Region, you have asked whether the Tribe is eligible for trust land

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[1] Prior to 1999, the Tribe was identified on the list of federally recognized tribes as the "Jamestown Klallam Tribe." Prior to federal acknowledgment, the Tribe was variously known as the "Jamestown Band of Clallam Indians" and the "Jamestown Clallam Tribe." "S'Klallam" and its earlier phonetic variants is translated as "the strong people."
[2] 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.").
[3] Act of June 18, 1934, c. 576, § 5, 48 Stat. 984 ("IRA" or "Act"), codified at 25 U.S.C. § 5108.
[4] *Id*. at § 19, codified at 25 U.S.C. § 5129.
[5] *Ibid*.
[6] 555 U.S. 379 (2009) ("*Carcieri*").
[7] *Jamestown S'Klallam Tribe Fee to Trust Application: Tribal Resolution # 43-18 (Amending #35-18)* (Oct. 31, 2018) (hereinafter "Application").

acquisitions under Category 1.[8] For the reasons explained below, we conclude that there is evidence presumptively demonstrating 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 earliest European contact with the S'Klallam peoples was likely in 1790, followed by contact with members of Captain George Vancouver's expedition in 1792.[9] By the 1830s, a trading post had been established at Nisqually in Puget Sound, and the S'Klallam were actively engaged in trading with settlers.[10] Significant settlement in Washington State's Olympic Peninsula began in the late 1840s,[11] and by 1850, Congress had enacted the Donation Land Claim Act[12] and the Indian Treaty Act,[13] both of which established a legal basis for non-Indians to acquire title to Indian lands.

In 1855, several leaders of the S'Klallam were signatories to the Treaty of Point No Point.[14] Among other things, the 1855 Treaty of Point No Point provided for the establishment of a reservation in Skokomish territory.[15] The majority of S'Klallam did not remove to the reservation in the Skokomish territory because the reservation was too far from the S'Klallam's usual and accustomed fishing grounds, and efforts to set aside additional lands for a different reservation were unsuccessful.[16] This ultimately resulted in the S'Klallam separating themselves into three distinct communities: Jamestown, Lower Elwha, and Port Gamble.[17]

The S'Klallam community at Jamestown was founded in 1874 by S'Klallam living in nearby villages who had been displaced by non-Indian settlers.[18] These S'Klallam pooled funds to purchase 210 acres along the Straits of Juan de Fuca, and lived as a community distinct from other S'Klallam ever since.[19]

Although there is limited information regarding federal interaction with the Tribe before 1900, the record indicates that in 1873, Edwin Eels, U.S. Indian Agent for the S'Kokomish Agency, organized a police force paid from Indian Service funds to supervise the S'Klallam living at

[8] This opinion does not address the Tribe's eligibility under any other definition of "Indian" in the IRA.
[9] Memorandum to the Assistant Secretary re: Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Jamestown Band of Clallam Indians of Washington Pursuant to 25 CFR 54 (May 16, 1980) (hereinafter "Memorandum to Assistant Secretary") at 9.
[10] *Ibid.*
[11] *Ibid.*
[12] Act of Sept. 27, 1850, Ch. 76, 9 Stat. 496.
[13] Act of June 5, 1850, Ch. 16, 9 Stat. 437.
[14] Treaty with the S'Klallam, Jan. 26, 1855, 12 Stat. 933 (*ratified* Mar. 8, 1859) (hereafter "1855 Treaty of Point No Point").
[15] 1855 Treaty of Point No Point, art. 2.
[16] Memorandum to Assistant Secretary at 10.
[17] *Id*. at 11.
[18] Memorandum to Assistant Secretary at 12.
[19] *Id*. at 3 and 12.

Jamestown.[20] And in 1879, the Office of Indian Affairs ("OIA") established a Court of Indian Offenses and jail within the community.[21]

After 1900, the record becomes clearer. In 1910, the federal government purchased two acres adjacent to Jamestown in order to construct a school and several outbuildings for the benefit of the S'Klallam children there residing.[22] Beginning in 1911, the S'Klallam were offered allotments at the Quinault Reservation – a proposal that was ultimately rejected by a council of all three S'Klallam communities in 1914.[23] In the years that followed, the Tribe led efforts to create a S'Klallam reservation in their traditional homelands. The immediate results were a Congressional appropriation in 1926 of $400,000 to be dispersed on a per capita basis, with leadership at Jamestown chairing a committee to advise Walter F. Dickens, Superintendent of the Tulalip Agency, on the S'Klallam distribution roll.[24]

After passage of the IRA in 1934, Oscar C. Upchurch, Superintendent of the Tulalip Agency, hosted a meeting with the S'Klallam of Jamestown and Lower Elwha at Port Angeles to discuss the benefits of organizing under to the IRA.[25] And on August 24, 1934, OIA Field Agent George LaVatta submitted to John Collier, Commissioner of Indian Affairs, a constitution and by-laws on behalf of the S'Klallam, with a request for the Secretary to "call a vote on the same."[26] Without a reservation and residing in three distinct communities, the S'Klallam were viewed by Fred Daiker, Assistant to the Commissioner of Indian Affairs, as "one of the more difficult problems in Indian organization."[27] Nevertheless, on December 23, 1936, William Zimmerman, Assistant Commissioner of Indian Affairs, advised Superintendent Upchurch to proceed with the adoption of the S'Klallam's constitution and by-laws, and to seek adoption of a charter upon the establishment of a suitable reservation.[28]

On January 9, 1937, Superintendent Upchurch submitted a new constitution that sought to organize the S'Klallam as a single tribe with three jurisdictional districts: Jamestown, Elwha River, and Public Domain.[29] This proposal was followed by a memorandum authored by Assistant Solicitor Kenneth Meiklejohn, finding "that the Clallam Indians constitute a recognized tribe eligible to organize as such under section 16 of the Indian Reorganization Act."[30] Despite advice from Assistant Solicitor Meiklejohn to inquire as to whether there was sufficient cooperation between the Jamestown and Lower Elwha communities to support organizing the two groups under one constitution, the OIA apparently did not pursue this information and ultimately chose not to establish a reservation or otherwise organize the S'Klallam at Jamestown.

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[20] *Id*. at 14.
[21] *Ibid*.
[22] *Id*. at 15.
[23] *Id*. at 16.
[24] *Id*. at 17. 43 Stat. 1102, 44 Stat. 173.
[25] *Id*. at 57.
[26] Letter, George LaVatta, Field Agent to John Collier, Commissioner for Indian Affairs (Aug. 24, 1934).
[27] Letter, Fred Daiker, Assistant to the Commissioner of Indian Affairs to Indian Organization (Feb. 25. 1937).
[28] Memorandum to the Assistant Secretary at 58.
[29] Letter, Oscar C. Upchurch, Superintendent Tulalip Agency to William Zimmerman, Assistant Commissioner of Indian Affairs (Jan. 9, 1937).
[30] Letter, Kenneth Meiklejohn, Attorney to the Indian Organization to Indian Organization (June 17, 1937).

Even without formally organizing under the IRA, the Tribe maintained relations with the OIA. In 1936, for example, the Tulalip Agency issued a revocable use permit to the "Jamestown Community, an organization of Indians" to occupy the two acres and government-constructed buildings located adjacent to Tribe's privately-held land.[31] And in 1939, the Tribe and OIA entered into a trust agreement pursuant to the Emergency Relief Appropriation Act,[32] authorizing grants for capital improvement projects "for the benefit of the tribe or tribes under the jurisdiction of that Agency."[33]

In the 1950s, the Tribe joined the S'Klallam at Lower Elwha and Port Gamble in their claim before the Indian Claims Commission for compensation for lands ceded to the United States in the 1855 Treaty of Point No Point.[34] Following correspondence beginning in 1968 between the Tribe and the Western Washington Agency, the Tribe petitioned the Department for acknowledgment as an Indian tribe on January 22, 1976.[35] On May 16, 1980, the Department issued its Proposed Finding recommending acknowledgement, and on February 10, 1981, the Tribe was formally acknowledged as an Indian tribe through the regulatory process set forth in 25 C.F.R. Part 83.

After receiving acknowledgment as an Indian tribe from the Department, the Tribe intervened as a plaintiff in ongoing litigation against the State of Washington to protect its reserved treaty rights under the 1855 Treaty of Point No Point. In 1970, the United States as trustee for seven Indian tribes[36] in western Washington sued the State of Washington seeking declaratory judgment that the tribes subject to two separate treaties[37] had reserved rights under the treaties to take fish at usual and accustomed places off the tribes' reservations, and that these rights were not subject to state prohibitions or regulations. The District Court for the Western District of Washington ("District Court") in *Washington I* held that the treaties at issue in the case secured

[31] Permit Granting Permission to the Executive Committee of the Jamestown Community to Use and Occupy Two Acres of Land and all Buildings of the Jamestown Day School, Tulalip Indian Agency, December 1, 1936.
[32] 49 Stat. 115 (1935).
[33] Trust Agreement for Relief and Rehabilitation Grant to Unorganized Tribe, December 11, 1939.
[34] *S'Klallam Tribe of Indians vs. the United States*, 5 Ind. Cl. Comm. 680 (Dkt. 134, Dec. 2, 1957).
[35] Memorandum to the Assistant Secretary at 61.
[36] *U.S. v. State of Washington* (hereinafter "*Washington I*"), 384 F. Supp. 312 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). The United States sued the State of Washington on behalf of the Hoh Tribe, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Puyallup Tribe, Quileute Tribe, and Skokomish Tribe. The Lummi Tribe, Quinault Tribe, Sauk-Suiattle Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit River Tribe, and Yakima Nation retained independent counsel and each intervened in the District Court suit. The Jamestown S'Klallam Tribe did not intervene at this stage of the litigation.
[37] The treaties at issue in this case were the Treaty of Point Elliott (12 Stat. 927) and the Treaty of Medicine Creek (10 Stat. 1131). Rights reserved under the 1855 Treaty of Point No Point were not examined by the District Court in *Washington I*. However, the Court referenced the 1855 Treaty of Point No Point in discussions of the similar language among the eleven treaties (generally referred to as "the Stevens Treaties") negotiated between Governor Isaac Stevens of the Territory of Washington and various Indian tribes located within the Territory. *See Washington I*, 384 F. Supp. at 330, 335.

to the "Treaty Tribes"[38] the right to take and harvest fish at all "usual and accustomed places," including locations that existed off the tribes' reservations.[39]

On remand from the Ninth Circuit,[40] five additional tribes[41] intervened in the case and asserted that each was a Treaty Tribe with off-reservation reserved fishing rights due to each tribe's status as a signatory or successor-in-interest to a signatory of the treaties at issue in *Washington I*. The District Court held that "[n]one of the Intervenor entities (...) is at this time a treaty tribe (...)" because, in part, "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States."[42] On appeal, the Ninth Circuit reversed this holding that only recognized Indian tribes can assert treaty rights.[43] The Ninth Circuit emphasized its prior holding in the appeal of *Washington I* that "[n]onrecognition of the tribe by the federal government (...) may result in loss of statutory benefits, but can have no impact on vested treaty rights."[44] The Ninth Circuit further stated that

> [w]e have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure. This single condition reflects our determination that the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty. For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.[45]

Following the Ninth Circuit's holding in *Washington II* that present-day federal recognition or acknowledgment is not required to assert off-reservation fishing rights reserved under a treaty, the District Court entered a decree that the "Jamestown Clallam Tribe of Indians" is a "(...) treaty tribe entitled to exercise on behalf of itself and its members treaty fishing rights under the [1855 Treaty of Point No Point] pursuant to all the orders and rulings in this case (...)"[46] after determining that the Jamestown S'Klallam Tribe is a Treaty Tribe under the holding in *Washington I*, and thereby subject to the District Court's continuing jurisdiction in the *United*

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[38] The Court defined a "Treaty Tribe" as a tribe that ". . . occupies the status of a party to one or more of the Stevens' treaties and therefore holds for the benefit of its members a reserved right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries, in common with others." *Washington I*, 384 F. Supp. at 406.
[39] *Washington I*, 384 F. Supp. at 402 ("Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state.").
[40] *U.S. v. State of Washington* (hereinafter "*Washington II*"), 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981).
[41] The intervenor tribes in *Washington II* were the Duwamish Tribe, Samish Tribe, Snohomish Tribe, Snoqualmie Tribe, and Steilacoom Tribe.
[42] *Washington II*, 476 F. Supp. at 1111.
[43] *U.S. v. State of Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981), *cert denied*, 454 U.S. 1143 (1982).
[44] *Id.* at 1371 (citing *U.S. v. State of Washington*, 520 F.2d. at 693).
[45] *Id.* at 1372-73 (citing *U.S. v. State of Washington*, 520 F.2d. at 693).
[46] *U.S. v. State of Washington*, 626 F. Supp. 1405, 1432 (W.D. Wash. 1985) (summarizing the District Court's Order dated May 8, 1981).

States v. Washington litigation, the District Court entered a judicial determination of the Tribe's usual and accustomed fishing places to be the following areas:

> the waters of the Strait of Juan de Fuca, all the streams draining into the Strait from the Hoko River east to the mouth of Hood Canal, the waters of the San Juan Islands archipelago, the waters off the west coast of Whidbey Island, the waters of Hood Canal, and all streams draining into Hood Canal except the Skokomish River and its tributaries. In addition, the Jamestown Klallam Tribe has usual and accustomed fishing rights on the Sekiu River, but the fishing on this river shall be subject to the control and regulation of the Makah Indian Tribe.[47]

The Tribe has thereafter remained a party in the *United States v. Washington* litigation and has continued to take fish at its usual and accustomed places pursuant to its rights as guaranteed under the 1855 Treaty of Point No Point and as affirmed by the courts in *United States v. Washington*.

II. STANDARD OF REVIEW

1. 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.[48] Section 19 defines "Indian" in relevant part as including the following three categories:

> **[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.[49]

In 2009, the Supreme Court in *Carcieri v. Salazar*[50] 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.[51] The Solicitor of the Interior

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[47] *Ibid.*
[48] 25 U.S.C. § 5108.
[49] 25 U.S.C. § 5129 (bracketed numerals added).
[50] 555 U.S. 379.
[51] 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

("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[52] 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."[53] 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").[54]

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.[55] Based on the

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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).

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

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

[54] *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").

[55] 25 C.F.R. Part 83.

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[56] 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.

III. ANALYSIS

1. Procedure for Determining Eligibility.

As noted, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.[57] It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.[58] The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.[59] 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.[60] The Tribe, as explained below, provided dispositive evidence under Step Two that it was "under federal jurisdiction" in 1934 and therefore eligible for the benefits of Section 5 of the IRA.

2. Dispositive Evidence of Federal Jurisdiction in 1934.

[56] *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").
[57] Solicitor's Guidance at 1.
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*

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.[61] Certain types of federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934. These are: elections conducted by the Department pursuant to Section 18 of the IRA; approval by the Secretary of a constitution following an election held pursuant to Section 16 of the IRA; issuance of a charter of incorporation following a petition submitted pursuant to Section 17 of the IRA; adjudicated treaty rights; inclusion in 1934 on the Department's Indian Population Report; and land acquisitions by the United States for groups of Indians in the years leading up to 1934.[62] Where any of these forms of evidence exist, the Solicitor's Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.[63]

a. Treaty of Point No Point.

As discussed above, the Tribe is a successor-in-interest to the S'Klallam who entered into the 1855 Treaty of Point No Point. The 1855 Treaty of Point No Point, having never been abrogated, remained in force in 1934[64] and the Tribe was entitled to receive the benefits secured to it by the 1855 Treaty of Point No Point's terms. Among those benefits, as discussed above, is the right reserved by the Tribe to take fish at all usual and accustomed places.[65] The District Court affirmed this right when the Tribe intervened in *United States. v. Washington*,[66] and the Tribe has relied on this holding and all subsequent orders and decrees entered thereafter. The District Court's holding that the Federal Government has a continual obligation to protect the rights secured to the Tribe by the 1855 Treaty of Point No Point is dispositive evidence that the Tribe was under federal jurisdiction in 1855 when it entered into the 1855 Treaty of Point No Point, and remained under federal jurisdiction at all times thereafter, including in 1934.[67]

b. 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. 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

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[61] *Id*. at 2.
[62] *Id*. at 2-4.
[63] *Id*. at 2.
[64] *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring) (discussing Stillaguamish Tribe's maintenance of reserved treaty rights as basis for determination that the Stillaguamish Tribe was under federal jurisdiction in 1934). *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (holding that reserved treaty rights remain in force absent clear evidence of Congressional intent to abrogate the treaty).
[65] 1855 Treaty of Point No Point, art. 4.
[66] 626 F. Supp. at 1432.
[67] Solicitor's Guidance at 4.

recognized before 1934, but no longer remained "under federal jurisdiction" in 1934.[68] 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 1855 through the present unambiguously demonstrates that the Tribe was "under federal jurisdiction" in 1934. For this reason, we conclude that the Jamestown S'Klallam Tribe satisfies Category 1, and that the Secretary has the statutory authority to acquire land in trust for the Jamestown S'Klallam Tribe under Section 5 of the IRA.

[68] Deputy Solicitor's Memorandum at 29.