



United States Department of the Interior

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December 16, 2020

MEMORANDUM

To: Tara Sweeney, Assistant Secretary – Indian Affairs

Through: Eric N. Shepard, Associate Solicitor, Division of Indian Affairs
John Hay, Assistant Solicitor, Branch of Environment and Lands,
Division of Indian Affairs

From: Nicholas M. Ravotti, Attorney-Advisor, Branch of Environment and Lands,
Division of Indian Affairs

Subject: Federal Jurisdiction Status of the Kickapoo Traditional Tribe of Texas in 1934

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This Opinion addresses the statutory authority of the Secretary of the Interior (“Secretary”) to acquire land in trust for the Kickapoo Traditional Tribe of Texas (“Tribe”) pursuant to Section 5 of the Indian Reorganization Act of 1934 (“IRA”).¹² 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 application⁷ to the Bureau of Indian Affairs (“BIA”) Southern Plains Regional Office, you have asked whether the Tribe is eligible for trust

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 Kickapoo Traditional Tribe of Texas Tribal Council Resolution No. 2015-2139: Authorization of the Submission of a Non-Gaming, Off-Reservation Fee-to-Trust Application for the Bowles Property, (Dec. 29, 2015).

land acquisitions under Category 1.⁸ For the reasons explained below, we conclude that the Tribe was not under federal jurisdiction in 1934, but that the Tribe is nonetheless eligible for fee-to-trust acquisition by virtue of subsequent statutory authority enacted January 8, 1983 making the IRA applicable to the Tribe.⁹ The Tribe is therefore eligible for this fee-to-trust acquisition, and the Secretary has authority to acquire land into trust for the Tribe.

I. BACKGROUND

The Kickapoo Traditional Tribe of Texas is descended from the Algonquin Kickapoo tribes of the Great Lakes region between Lake Erie and Lake Michigan.¹⁰ The Kickapoo are known to have occupied the area of present-day Michigan as early as the 1600s and, in 1654, French explorers and fur traders encountered bands of Kickapoo Indians in southeast Wisconsin.¹¹ Due to ongoing conflicts with neighboring tribes, and continued expansion of non-Native settlers and traders, the Kickapoo migrated to present-day Illinois in 1765.¹²

In 1779, the Kickapoo allied themselves with the American revolutionaries in hopes that, if the Americans were victorious, no American colonists would settle within Kickapoo's territory.¹³ Following the war, however, so many settlers moved westward into Indian territories that the Kickapoo and other tribes in Illinois and Indiana ultimately signed a treaty with the United States that ceded approximately 3 million acres of land in exchange for annuity payments and other stipulations to the various tribes.¹⁴ In hopes of avoiding the same land loss that followed the American victory in the Revolutionary War, the Kickapoo allied themselves with Britain during the War of 1812.¹⁵ After the defeat of the British, however, the Kickapoo were forced to sign a treaty ceding all of the Kickapoo's remaining territory in the Indiana and Illinois territories and removing the Kickapoo to land set aside for them in Missouri near the Osage River.¹⁶ In exchange, the Kickapoo received payment in the amount of \$2,000 per year for fifteen years from the United States.¹⁷

Following the signing of the 1819 treaty, a small band of Kickapoo moved southward from the land set aside for them in Missouri and relocated to Mexico near present day Nacogdoches, Texas.¹⁸ As westward railroad expansion encroached upon the Kickapoo land in Missouri, more

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

⁹ 25 U.S.C. 1300b-14.

¹⁰ Elisabeth A. Mager Hois, *The Kickapoo of Caohila/Texas Cultural Implications of Being a Cross-border Nation* 36.

¹¹ *History of the Mexican Kickapoo*, MILWAUKEE PUBLIC MUSEUM, <https://www.mpm.edu/research-collections/anthropology/online-collections-research/mexican-kickapoo/history> (last visited Apr. 27, 2020) (hereinafter "*History of the Mexican Kickapoo*, MPM").

¹² *Id.*; Elisabeth A. Mager Hois, *The Kickapoo of Caohila/Texas Cultural Implications of Being a Cross-border Nation* 36.

¹³ *History of the Mexican Kickapoo*, MPM.

¹⁴ Treaty of Vincennes, December 9, 1809, 7 Stat. 117 (1809).

¹⁵ *History of the Mexican Kickapoo*, MPM.

¹⁶ Treaty with the Kickapoo, July 30, 1819, 7 Stat. 200 (1819).

¹⁷ *Id.*

¹⁸ *History of the Mexican Kickapoo*, MPM.

Kickapoo relocated to Mexico.¹⁹ When white settlers rebelled against the Mexican government in 1835 and formed the Republic of Texas, the Kickapoo band splintered again with one group relocating to present-day Oklahoma, and another group moving further south into Mexico.²⁰ The Kickapoo Traditional Tribe of Texas is descended from the Kickapoo band that relocated further south into Mexico.

In 1850, the Kickapoo along with other Indian groups signed an agreement with Mexico which secured 70,000 acres of land for the Indians in exchange for the Indians' agreement to obey the laws of the area in which they were settled, maintain good relations with the U.S., muster warriors for Mexico when needed, and prevent attacks by the Comanches and other tribes.²¹ Shortly after this agreement was signed, many of the Kickapoo in Mexico moved back into the United States through the border town of Eagle Pass, Texas.²² In 1859, Benito Juárez granted the remaining Kickapoo 3,510 hectares of land in El Nacimiento, Coahuila, in exchange for further promises by the Kickapoo to defend Mexico's northern border against the Mescalero Apaches and the Lipan Apaches.²³ Members of the Kickapoo Traditional Tribe of Texas still reside on land in El Nacimiento and members who reside in Texas travel back to the village in El Nacimiento to conduct ceremonial rites.²⁴

Due to the limited economy and work opportunities near the Nacimiento village, the Kickapoo in Mexico would travel to the United States to work as migrant farmers.²⁵ The Kickapoo would rendezvous in Eagle Pass, Texas to confer on work opportunities and then would disperse to the various farms for the harvest season.²⁶ This practice continued for many decades. By the 1970s, the migrant Kickapoo had created a semi-permanent encampment under the international bridge at Eagle Pass from which they could travel to California, Colorado, and other western states for work.²⁷

By the late 1970s, the Kickapoo who resided in the encampment under the international bridge became colloquially known as the Texas Band of Kickapoo Indians.²⁸ In 1983, Congress enacted the Texas Band of Kickapoo Indians Reservation Act ("Kickapoo Act")²⁹ which formally recognized these Kickapoo as the "Texas Band of Kickapoo Indians, a subgroup of the Kickapoo Tribe of Oklahoma." Under Section 2 of the Kickapoo Act, "services which the United States provides to Indians because of their status as Indians should be provided to members of the [Texas Band of Kickapoo] . . ."³⁰ Section 5 of the Kickapoo Act explicitly states that "[the IRA] is hereby made applicable to the [Band]," and that the Secretary of the Interior is

¹⁹ Elisabeth A. Mager Hois, *The Kickapoo of Coahuila/Texas Cultural Implications of Being a Cross-border Nation* 37.

²⁰ *Id.*; *History of the Mexican Kickapoo*, MPM.

²¹ *History of the Mexican Kickapoo*, MPM.

²² *Id.*

²³ Elisabeth A. Mager Hois, *The Kickapoo of Coahuila/Texas Cultural Implications of Being a Cross-border Nation* 37.

²⁴ *Id.*; *History of the Mexican Kickapoo*, MPM.

²⁵ *History of the Mexican Kickapoo*, MPM.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Texas Band of Kickapoo Indians Reservation Act, 96 Stat. 2269 (1983).

³⁰ *Id.* at Sec. 2(b).

authorized to exercise his authority under Section 5 of the IRA to accept lands into trust on behalf of the Tribe, provided that the lands are located in Maverick County, Texas.³¹

On January 23, 1989, the Texas Band of Kickapoo submitted a draft Constitution and By-Laws to the Bureau of Indian Affairs to organize under Section 16 of the IRA³² as the “Kickapoo Traditional Tribe of Texas.”³³ On April 21, 1989, the Deputy to the Assistant Secretary – Indian Affairs scheduled a Secretarial election to seek ratification of the proposed Constitution.³⁴ The Secretarial election was held on May 27, 1989, and the Band voted in favor of adopting the proposed Constitution, casting 132 votes for and 15 votes against adoption.³⁵ On July 11, 1989, the Secretary certified the election results, approved the Constitution and By-Laws,³⁶ and acknowledged the Kickapoo Traditional Tribe of Texas as “. . . a Tribe separate and apart from the Kickapoo Tribe of Oklahoma.”³⁷ Currently, the Tribe owns approximately 198.17 acres of land that are held in trust by the federal government.

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.³⁸ 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.³⁹

In 2009, the Supreme Court in *Carcieri v. Salazar*⁴⁰ 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

³¹ *Id.* at Sec. 5(a).

³² 25 U.S.C. § 5123.

³³ *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 792 (D.D.C. 1990).

³⁴ *Id.* at 792-93.

³⁵ *Id.* at 793.

³⁶ *Id.*

³⁷ CONSTITUTION OF THE KICKAPOO TRADITIONAL TRIBE OF TEXAS, pmbl.

³⁸ 25 U.S.C. § 5108.

³⁹ 25 U.S.C. § 5129 (bracketed numerals added).

⁴⁰ 555 U.S. 379.

applicant tribe was “under federal jurisdiction” in 1934.⁴¹ The Solicitor of the Interior (“Solicitor”) later memorialized the Department’s interpretation in Sol. Op. M-37029.⁴² 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.”⁴³ 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”).⁴⁴

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

⁴¹ 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).

⁴² Sol. Op. M-37029, *The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (“M-37029”).

⁴³ Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).

⁴⁴ *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”).

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.⁴⁵ 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 memorandum⁴⁶ 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.

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.”⁴⁷ The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,⁴⁸ 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.”⁴⁹ In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been “under federal jurisdiction” *in* 1934.⁵⁰ By “recognized,” Justice Breyer

⁴⁵ 25 C.F.R. Part 83.

⁴⁶ *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”).

⁴⁷ Deputy Solicitor’s Memorandum at 19. *See also* *Cty. of Amador v. United States Dep’t of the Interior*, 872 F.3d 1012, 1020, n. 8 (9th Cir. 2017) (*Carcieri* leaves open whether “recognition” and “jurisdiction” requirements are distinct requirements or comprise a single requirement).

⁴⁸ *Carcieri* at 382-83.

⁴⁹ *Ibid.*

⁵⁰ *Id.* at 398 (Breyer, J., concurring).

appeared to mean “federally recognized”⁵¹ 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,”⁵² and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.⁵³ 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.⁵⁴ 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.⁵⁵

The Solicitor noted that Category 1’s grammar supports this view. The adverb “now” is part of the prepositional phrase “under federal jurisdiction,”⁵⁶ which it temporally qualifies.⁵⁷ Prepositional phrases function as modifiers and follow the noun phrase that they modify.⁵⁸ 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.⁵⁹ This suggests Commissioner Collier understood the phrase “now under federal

⁵¹ *Ibid.*

⁵² *Id.* at 399 (Breyer, J., concurring).

⁵³ *Id.* at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

⁵⁴ *Ibid.*

⁵⁵ 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.

⁵⁶ *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016). The *Grand Ronde* court found “the more difficult question” to be which part of the expression “recognized Indian tribe” the prepositional phrase modified. *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.

⁵⁷ 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).

⁵⁸ 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.

⁵⁹ 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

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.⁶⁰ These included the loss of Indian lands and the displacement and dispersal of tribal communities.⁶¹ Lacking an official list of “recognized” tribes at the time,⁶² it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,⁶³ left unmodified, the phrase “recognized Indian tribe” could include tribes disestablished or terminated before 1934.

2. Statutory Terms.

The Solicitor concurred with the Deputy Solicitor’s conclusion that the expression “now under federal jurisdiction” in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress’s plenary authority and is instead better interpreted as referring to tribes with whom the United States had clearly dealt on or a more or less sovereign-to-sovereign basis or as to whom the United States had clearly acknowledged a trust responsibility in or before 1934.⁶⁴

The contemporaneous legal definition of “jurisdiction” defined it as the “power and authority” of the courts “as distinguished from the other departments.”⁶⁵ 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.’”⁶⁶ 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.”⁶⁷

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,

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).

⁶⁰ *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs, House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7902, A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs*, 73d Cong. at 233-34 (1934) (hereafter “H. Hrgs.”) (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apr. 28, 1934)).

⁶¹ *Ibid.*

⁶² 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))).

⁶³ *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

⁶⁴ See Deputy Solicitor’s Memorandum at 9.

⁶⁵ BLACK’S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter “BLACK’S”).

⁶⁶ BLACK’S at 1774.

⁶⁷ BLACK’S at 171. It separately defines “subject to” as meaning “obedient to; governed or affected by.”

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 1934.⁶⁸

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.⁶⁹

Senator THOMAS of Oklahoma. (....) In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.

Commissioner COLLIER. Yes.

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

Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] Government aid.

Senator THOMAS. Without regard to whether or not he is now under your supervision?

⁶⁸ 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.

⁶⁹ *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs, 73rd Cong. at 80 (Apr. 26, 1934) (hereafter "Sen. Hrgs.")*. See also *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 75 F.Supp.3d at 387, 399 (D.D.C. 2014) *aff'd* 830 F.3d 552 (D.C. Cir. 2016) (noting same).

Commissioner COLLIER. Without regard; yes. *It definitely throws open Government aid to those rejected Indians.*⁷⁰

The phrase “rejected Indians” referred to Indians who had gone out from under federal supervision.⁷¹ 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.”⁷² 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.”⁷³

On May 17, 1934, the last day of hearings, the Senate Committee continued to express concerns over the breadth of the bill’s definition of “Indian,” returning again to the draft definitions of “Indian” as they stood in the committee print. Category 1 now defined “Indian” as persons of Indian descent who were “members of any recognized Indian tribe.”⁷⁴ As on previous days,⁷⁵ 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.”⁷⁶

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

⁷⁰ Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).

⁷¹ 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).

⁷² Sen. Hrgs. at 80.

⁷³ 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.”).

⁷⁴ 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.

⁷⁵ 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).

⁷⁶ See, e.g., Sen. Hrgs. at 239 (discussing Sec. 3), 254 (discussing Sec. 10), 261-62 (discussing Sec. 18), 263-66 (discussing Sec. 19).

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.”⁷⁷ Senator Thomas felt that “If they are not a tribe of Indians they do not come under [the Act].”⁷⁸ 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,”⁷⁹ that is, those Indians then under federal supervision.

Acknowledging that landless Indians ought to be provided for, Chairman Wheeler questioned how the Department could do so if they were not “wards of the Government at the present time.”⁸⁰ When Senator Thomas mentioned that the Catawbais in South Carolina and the Seminoles in Florida were “just as much Indians as any others,”⁸¹ 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.⁸² 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.⁸³ Chairman Wheeler thought not, “unless they are enrolled at the present time.”⁸⁴ 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.⁸⁵

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

⁷⁷ Sen. Hrgs. at 263.

⁷⁸ *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.”

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Id.* at 264.

⁸⁴ *Ibid.*

⁸⁵ *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.”).

included their “descendants” residing on a reservation.⁸⁶ Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.⁸⁷ 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.⁸⁸

After asides on the IRA’s effect on Alaska Natives and the Secretary’s authority to issue patents,⁸⁹ Chairman Wheeler finally turned to the IRA’s definition of “tribe,”⁹⁰ which as then drafted included “any Indian tribe, band, nation, pueblo, or other native political group or organization.”⁹¹ Chairman Wheeler and Senator Thomas thought this definition too broad.⁹² Senator Thomas asked whether it would include the Catawbas,⁹³ 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.⁹⁴ Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.⁹⁵ 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.”⁹⁶

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

⁸⁶ *Id.* at 264-65.

⁸⁷ *Id.* at 264.

⁸⁸ *Ibid.*

⁸⁹ *Id.* at 265.

⁹⁰ *Ibid.* at 265.

⁹¹ 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.

⁹² Sen. Hrgs. at 265.

⁹³ *Ibid.*

⁹⁴ *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).

⁹⁵ *Id.* at 264.

⁹⁶ *Id.* at 266.

⁹⁷ *Ibid.* at 266.

⁹⁸ *Ibid.* Nevertheless, Senator O’Mahoney did not understand why the Act’s benefits should not be extended “if they are living as Catawba Indians.”

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Id.* at 231.

the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.¹⁰²

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.¹⁰³ 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."¹⁰⁴ Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."¹⁰⁵ Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,¹⁰⁶ described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."¹⁰⁷ 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."¹⁰⁸ 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.¹⁰⁹ Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the Office of Indian Affairs having direct supervision of Indians.¹¹⁰

¹⁰² *Id.* at 266.

¹⁰³ H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).

¹⁰⁴ *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)).

¹⁰⁵ *Id.* at 184 (statement of Commissioner Collier) (Apr. 8, 1934).

¹⁰⁶ Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* <https://www.justice.gov/osg/bio/charles-fahy>.

¹⁰⁷ *Id.* at 319 (statement of Assistant Solicitor Charles Fahy).

¹⁰⁸ *Id.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

¹⁰⁹ *Ibid.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

¹¹⁰ *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census ("ARCIA"), 1919 (May 7, 1919) (directing Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934) (discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.*, field operations); ARCIA for 1900 at 22 (noting lack of "jurisdiction" over New York Indian students); *id.* at 103 (reporting on matters "within" jurisdiction of Special Indian Agent in the Indian Territory); *id.* at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); MERIAM

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.¹¹¹ 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.”¹¹² 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:¹¹³

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.¹¹⁴

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.”¹¹⁵

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

REPORT at 140-41 (“[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity...Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs.”); Sen. Hrgs. at 282-98 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different Office of Indian Affairs “jurisdictions”).

¹¹¹ 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).

¹¹² *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.*

¹¹³ *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).

¹¹⁴ *Ibid.*

¹¹⁵ 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.”

Today's concept of "federal recognition" merges the cognitive sense of "recognition" and the political-legal sense of "jurisdiction," as *Carcieri* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved.¹¹⁶ Congress's authority to recognize Indian tribes flows from its plenary authority over Indian affairs.¹¹⁷ Early in this country's history, Congress charged the Secretary and the Commissioner of Indian Affairs with responsibility for managing Indian affairs and implementing general statutes enacted for the benefit of Indians.¹¹⁸ Because Congress has not generally defined "Indian,"¹¹⁹ it left it to the Secretary to determine to whom such statutes apply.¹²⁰ "Recognition" generally is a political question to which the courts ordinarily defer.¹²¹

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.

¹¹⁶ 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.")).

¹¹⁷ *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.")).

¹¹⁸ 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").

¹¹⁹ U.S. Dept. of the Interior, Commissioner of Indian Affairs, "Indian Wardship," Circular No. 2958 (Oct. 28, 1933) ("No statutory definition seems to exist of what constitutes an Indian or of what Indians are wards of the Government."); *Eligibility of Non-enrolled Indians for Services and Benefits under the Indian Reorganization Act*, Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Acting Deputy Commissioner of Indian Affairs (Dec. 4, 1978) ("there exists no universal definition of 'Indian'"). *See also* Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esq. on behalf of the Stillaguamish Tribe, at 8-9 (Oct. 27, 1976) (suggesting that "recognized Indian tribe" in IRA § 19 refers to tribes that were "administratively recognized" in 1934).

¹²⁰ *Secretary's Authority to Extend Federal Recognition to Indian Tribes*, Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, at 1 (Aug. 20, 1974) (hereafter "Chambers Memo") ("the Secretary, in carrying out Congress's plan, must first determine, i.e., recognize, to whom [a statute] applies"); Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate Committee on Interior and Insular Affairs at 5 (Jun. 7, 1974) (hereafter "Butler Letter") (same); *Dobbs v. United States*, 33 Ct. Cl. 308, 315-16 (1898) (recognition may be effected "by those officers of the Government whose duty it was to deal with and report the condition of the Indians to the executive branch of the Government").

¹²¹ *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").

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."¹²² 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."¹²³ These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for loans to Indians for tuition and expenses in "recognized vocational and trade schools."¹²⁴ 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.¹²⁵ Commissioner Collier, himself a "principal author" of the IRA,¹²⁶ also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.¹²⁷ 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

¹²² WEBSTER'S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for "recognize" (v.t.).

¹²³ *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."

¹²⁴ 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."

¹²⁵ *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.

¹²⁶ *Carcieri*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

¹²⁷ 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).

Collier to suggest inserting “now under federal jurisdiction” in Category 1 as a limiting phrase.¹²⁸

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

3. Administrative Understandings.

Compelling support for interpreting the term “recognized” in the political-legal sense is found in the views of Department officials expressed around the time of the IRA’s enactment and early implementation. Assistant Solicitor Cohen discussed the issue in the Department’s HANDBOOK OF FEDERAL INDIAN LAW, which he prepared around the time of the IRA’s enactment. The Handbook’s relevant passages discuss ambiguities in the meaning of the term “tribe.”¹²⁹ Assistant Solicitor Cohen explains that the term “tribe” may be understood in both an ethnological and a political-legal sense.¹³⁰ 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.”¹³¹ 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.¹³²

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.”¹³³ 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

¹²⁸ 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).

¹²⁹ United States Department of the Interior, HANDBOOK OF FEDERAL INDIAN LAW (1942 ed.) at 268 (hereafter “Cohen 1942”).

¹³⁰ 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.

¹³¹ *Id.* at 268 (emphases added).

¹³² *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).

¹³³ Letter, Commissioner John Collier to Ben C. Shawanese (Apr. 24, 1935).

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.”¹³⁴

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,¹³⁵ Hans Walker, Jr., Associate Solicitor for Indian Affairs, distinguished the modern concept of formal “federal recognition” (or “federal acknowledgment”) from the political-legal sense of “recognized” as used in Category 1 in concluding that “formal acknowledgment in 1934” is not a prerequisite for trust-land acquisitions under the IRA, “*so long as the group meets the [IRA’s] other definitional requirements.*”¹³⁶ These included that the tribe had been “recognized” in 1934. Associate Solicitor Walker construed “recognized” as referring to tribes with whom the United States had had “a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time.*”¹³⁷ 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.”¹³⁸ 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.”¹³⁹ 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 1934.¹⁴⁰

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.¹⁴¹

¹³⁴ 1 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.

¹³⁵ 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”).

¹³⁶ *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).

¹³⁷ *Id.* at 2 (emphasis added).

¹³⁸ *Id.* at 4 (emphasis added). This is consistent with Justice Breyer’s concurring view in *Carcieri*.

¹³⁹ *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.

¹⁴⁰ 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).

¹⁴¹ 25 C.F.R. Part 83.

Throughout the United States' early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.¹⁴² 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.¹⁴³ 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."¹⁴⁴ While the question of "recognition" remained one for the political branches,¹⁴⁵ the contexts within which it arose expanded with the United States' obligations as guardian.¹⁴⁶

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,"¹⁴⁷ 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;¹⁴⁸ treaty fishing-rights claims by descendants of treaty signatories;¹⁴⁹ and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,¹⁵⁰ which included tribes previously recognized and seeking restoration or reaffirmation of their status.¹⁵¹ At around this same time, Congress began a critical historical review of the federal government's conduct of its special legal

¹⁴² U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.

¹⁴³ Act of March 3, 1871, ch. 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.

¹⁴⁴ *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).

¹⁴⁵ *United States v. Holliday*, 70 U.S. 407, 419 (1865).

¹⁴⁶ *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).

¹⁴⁷ *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). *See also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at § 1.06 (Nell Jessup Newton ed., 2012) (hereafter "Cohen 2012") (describing history and implementation of termination policy). During the termination era, roughly beginning in 1953 and ending in the mid-1960s, Congress enacted legislation ending federal recognition of more than 100 tribes and bands in eight states. Michael C. Walsh, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983). Congress has since restored federal recognition to some terminated tribes. *See* Cohen 2012 at § 3.02[8][c], n. 246 (listing examples).

¹⁴⁸ *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).

¹⁴⁹ *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)

¹⁵⁰ 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").

¹⁵¹ 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).

relationship with American Indians.¹⁵² In January 1975, it found that federal Indian policies had “shifted and changed” across administrations “without apparent rational design,”¹⁵³ 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.¹⁵⁴ Finding it imperative to do so,¹⁵⁵ Congress established the American Indian Policy Review Commission¹⁵⁶ 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.”¹⁵⁷ It was against this backdrop that the Department undertook its own review of the history and meaning of “recognition.”¹⁵⁸

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”).¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹ 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*.”¹⁶² Despite these ambiguities, the Palmer Memorandum concludes

¹⁵² Pub. L. No. 93-580, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, (hereafter “AIPRC Act”), *codified at* 25 U.S.C. § 174 note.

¹⁵³ *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.”

¹⁵⁴ *Ibid.* (citing MERIAM REPORT).

¹⁵⁵ *Ibid.*

¹⁵⁶ AIRPC Act, § 1(a).

¹⁵⁷ *Id.*, § 2(3).

¹⁵⁸ *See, e.g.*, Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate Committee on Interior and Insular Affairs (Jun. 7, 1974) (hereafter “Butler Letter”) (describing authority for recognizing tribes since 1954); Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, Secretary’s Authority to Extend Federal Recognition to Indian Tribes (Aug. 20, 1974) (hereafter “Chambers Memo”) (discussing Secretary’s authority to recognize the Stillaguamish Tribe); Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal “Recognition” of Indian Tribes (Jul. 17, 1975) (hereafter “Palmer Memo”).

¹⁵⁹ 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.

¹⁶⁰ Palmer Memo at 23.

¹⁶¹ *Id.* at 23-24.

¹⁶² *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.

that the concept of “recognition” could not be dispensed with, as it had become an accepted part of Indian law.¹⁶³

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,¹⁶⁴ 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.¹⁶⁵ Though treaties remained a “prime indicia” of political “recognition,”¹⁶⁶ 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,”¹⁶⁷ including the provision of trust services.¹⁶⁸ 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.”¹⁶⁹ 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”¹⁷⁰ toward a tribe, consistent with the evolution of federal Indian policy.¹⁷¹

¹⁶³ *Ibid.* at 24.

¹⁶⁴ 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.

¹⁶⁵ *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”).

¹⁶⁶ *Id.* at 3.

¹⁶⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* AIPRC Final Report at 462 (“Administrative actions by Federal officials and occasionally by military officers have sometimes laid a foundation for federal acknowledgment of a tribe’s rights.”); *Report of Task Force Ten* at 1660 (during the Nixon Administration, “federally recognized” included tribes recognized by treaty or statute and tribes treated as recognized “through a historical pattern of administrative action.”).

¹⁶⁸ 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.”).

¹⁶⁹ *Id.* at 2-14.

¹⁷⁰ *Id.* at 14.

¹⁷¹ 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...”).

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;¹⁷² the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."¹⁷³ 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;¹⁷⁴ 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;¹⁷⁵ the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;¹⁷⁶ 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;¹⁷⁷ 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.¹⁷⁸ In making such determinations, the Department looked to indicia established by federal courts.¹⁷⁹ There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.¹⁸⁰ 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."¹⁸¹ 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."¹⁸² The manner in which the Department understood

¹⁷² Butler Letter at 6; Palmer Memo at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).

¹⁷³ Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memo at 19.

¹⁷⁴ 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)).

¹⁷⁵ Palmer Memo at 19 (citing Cohen 1942 at 271)); Butler Letter at 4.

¹⁷⁶ Palmer Memo at 19 (citing Cohen 1942 at 271).

¹⁷⁷ *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)).

¹⁷⁸ *Id.* at 18.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *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.")).

¹⁸² Palmer Memo at 18.

“recognition” before, in, and long-after 1934¹⁸³ 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 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.¹⁸⁴ Though outside Category 1’s definition of “Indian,” Congress may later enact legislation recognizing and

¹⁸³ 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).

¹⁸⁴ *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?”).

extending the IRA's benefits to such tribes, as *Carcieri* instructs.¹⁸⁵ 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.¹⁸⁶

III. ANALYSIS

A. Procedure for Determining Eligibility.

As noted, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.¹⁸⁷ It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.¹⁸⁸ The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.¹⁸⁹ 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.¹⁹⁰

B. Post-1934 Legislation Making the IRA Applicable.

1. Step One: Texas Band of Kickapoo Indians Reservation Act.

The Tribe submitted evidence demonstrating under Step One that separate statutory authority exists that makes the IRA applicable to the Tribe. Section 5(a) of the Texas Band of Kickapoo Act explicitly states that "[t]he [IRA] is hereby made applicable to the Band: *Provided, however,* That the Secretary is only authorized to exercise his authority under section 5 of [the IRA] with respect to lands located in Maverick County, Texas."¹⁹¹ The subject property in the Tribe's fee-to-trust application is located within Maverick County, Texas. The Tribe is therefore eligible for the benefits of Section 5 of the IRA for this trust acquisition, and further analysis or exploration under Steps Two through Four are not required.

2. Summary.

Consistent with Step One of the Solicitor's Guidance, evidence that Congress enacted separate statutory authority making the IRA applicable to the Tribe presumptively establishes that the Tribe is eligible for the benefits of Section 5 of the IRA.

IV. CONCLUSION

¹⁸⁵ *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).

¹⁸⁶ 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).

¹⁸⁷ Solicitor's Guidance at 1.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ 96 Stat. 2270, Sec. 5(a).

Consistent with Step One of the Solicitor's Guidance, we find the evidence presumptively demonstrates that Congress enacted separate statutory authority, namely the Texas Band of Kickapoo Act, which made Section 5 of the IRA applicable to the Tribe. For this reason, we conclude that the Secretary has the statutory authority to acquire land in trust for the Kickapoo Traditional Tribe of Texas under Section 5 of the IRA.