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IN REPLY REFER TO

December 14, 2020

Memorandum

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Bureau of Indian Affairs

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Subject: Secretary's Authority to Accept Conveyance of Land into Trust for the Oneida Nation

Section 5 of the Indian Reorganization Act ("IRA" or "Act")[1] ("Section 5")[2] authorizes the Secretary of Interior ("Secretary") to acquire land in trust for "Indians." Section 19 of the Act ("Section 19") defines "Indian" to include several categories of persons.[3] As relevant here, the first definition includes all persons of Indian descent who are members of "any recognized Indian tribe now under federal jurisdiction" (hereinafter "Category 1").[4] In 2009, the United States Supreme Court ("Supreme Court") in *Carcieri v. Salazar*[5] 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."

You have asked whether the Oneida Nation ("Tribe") is eligible under Category 1 for trust land acquisitions under Section 5.[6] For the reasons explained below, we conclude that dispositive evidence demonstrates that the Tribe was "under federal jurisdiction" in 1934. The Tribe is therefore

[1] Act of June 18, 1934, c.576, § 5, 48 Stat. 984 (hereinafter "IRA" or "Act"), codified at 25 U.S.C. § 5108.
[2] IRA, § 5, codified at 25 U.S.C. § 5108.
[3] Id. at § 19, codified at 25 U.S.C. § 5129.
[4] *Ibid.*
[5] 555 U.S. 379 (2009) (hereinafter "*Carcieri*").
[6] This opinion does not address the Tribe's eligibility under any other definition of "Indian" in the IRA.

eligible under Category 1 and, consequently, the Secretary has authority to acquire land into trust for the Tribe under Section 5 of the IRA.

I. BACKGROUND

The Oneida Nation is one of the original members of the Iroquois Confederacy, tracing its homelands to the State of New York.[7] In the 1820s, however; as a result of the United States' removal policies,[8] many Oneida Indians moved west establishing settlements on Menominee Indian lands near Green Bay, Wisconsin.[9]

In response to the settlements, Menominee leaders met with the federal government and ceded 500,000 acres to the United States to "be set apart and used as a home for the New York Indians."[10] Nine days later, a second treaty with the Menominee was drafted to provide additional time for the Oneidas and other "New York Indians" to relocate to the ceded land located to the west and southwest of Green Bay.[11] This second treaty guaranteed the Oneida a new homeland in Wisconsin.[12]

Two additional treaties signed in 1838 are pivotal to the history of the Oneida Indians in Wisconsin: the Treaty of Buffalo Creek and the Treaty with the Oneida.[13] The Treaty of Buffalo Creek, which triggered the end of an Indian presence in New York, eliminated several New York reservations and created a new tribal homeland for the New York tribes in Kansas.[14] It also required the Oneida to "relinquish" all claims to land in Wisconsin except for a tract "on which a part of the New York Indians [the Wisconsin Oneidas] now reside."[15] The Oneida did not sign this treaty, however because it was intended, in part, to "dispose of 'the reservation at Green Bay.'"[16] Instead, three weeks later, Wisconsin Oneida officials representing the "First Christian" and "Orchard" parties of Oneida Indians met with federal officials in Washington, D.C. in an effort to avoid inclusion in the New York agreement and to negotiate a treaty that would guarantee their right to remain in their newly adopted homeland in Wisconsin.[17] In exchange for ceding land in Wisconsin originally

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[7] *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 669 (7th Cir. 2020) (the Seventh Circuit cites two expert reports submitted by the Oneida Nation: Frederick E. Hoxie, A History of Relations Between the Oneida Nation and the United States of America 1776-1934 1 (2017) [hereinafter Hoxie Report] and R. David Edmunds, The Oneida Indian Reservation in Wisconsin–Its Land, Its People, and Its Governance, 1838-1938 2 (2017) [hereinafter Edmunds Report].

[8] Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 205 (1984).

[9] Edmunds Report, *supra* note 1, at 6; Hoxie Report, *supra* note 1, at 28. The settlements were located to the west of Green Bay, Wisconsin on the Menominee Reservation. Hoxie Report, *supra* note 1, at 31.

[10] Treaty of Washington, Feb. 8, 1831, 7 Stat. 342.

[11] Edmunds Report, *supra* note 1, at 7.

[12] Treaty of Washington, Oct. 27, 1832, 7 Stat. 405; Edmunds Report, *supra* note 1, at 7. (The Menominee initially refused to sign this second treaty, but after a year of ensuing negotiations, the treaty was revised and agreed to).

[13] Edmunds Report, *supra* note 1, at 11.

[14] "Treaty with the New York Indians, 1838" Jan. 15, 1838; Hoxie Report, *supra* note 1, at 44-45. This treaty was negotiated in January 1838. Edmunds Report, *supra* note 1, at 9.

[15] Edmunds Report, *supra* note 1, at 9-10; Hoxie Report, *supra* note 1, at 46 ("The Indian Office responded by insisting first that the Oneidas give up their interest in the large tract earlier purchased for them from the Menominees.")

[16] Hoxie Report, *supra* note 1, at 44.

[17] Articles of a treaty made at the City of Washington between Carey A. Harris, thereto specially directed by the President of the United States and the First Christian and Orchard parties of the Oneida Indians residing at Green

purchased for them from the Menominees, the Oneidas were promised a new, smaller reservation.[18] This Treaty with the Oneida, signed February 3, 1838, provided that this new reservation would be "held as other Indian lands are held," signaling that the Tribe would receive the protection of the federal government through an ongoing relationship between the parties.[19] Specifically, the treaty "reserved . . . a tract of land" for the First Christian and Orchard parties of the Oneida as follows:

> From the foregoing cession there shall be reserved to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.[20]

The Senate subsequently ratified the agreement in May of 1838, thereby establishing the Oneidas new reservation in Green Bay.[21] The borders of the reservation were surveyed soon thereafter.[22]

Although the majority of Oneida's members disfavored allotment, most of the reservation was allotted in 1892; however, it was not allotted in its entirety.[23] Similarly, while most of the allottees received fee patents for their land, not all did.[24] However, by 1919, almost all of the land on the Oneida Reservation was allotted.[25] That same year, the Oneida Boarding School, a thriving institution that operated for twenty-five years, was closed by the federal government despite opposition by many Oneida members.[26] The school closed on July 1, 1919, causing discord in the years to follow amongst federal officials and Oneida political factions over the sale of the boarding school property, which included numerous buildings and farmland.[27] Ultimately, the site was sold in 1924 to Murphy Land and Investment Company, which quickly sold the property to the Catholic Diocese of Green Bay.[28]

Bay, by their chiefs and representatives, Feb. 3, 1838, 7 Stat. 566-67 [hereinafter "Oneida Treaty"]; Hoxie Report, *supra* note 1, at 45-46; *Vill. of Hobart, Wis. v. Midwest Reg'l Dir.*, 57 IBIA 4, 18 (2013). Oneida politics were factious. Various parties emerged over the years, including the "First Christian Party," "Second Christian Party," "First Christian Episcopalians," and "Orchard Party Methodists." Edmunds Report, *supra* note 1, at 4-5, 8. In its attempts to secure land from the Oneidas in New York, the State of New York was required to negotiate with different political factions of the Tribe. *Id.* at 4. Likewise, on a federal level, "[P]rior to 1934 no single political party or organization had been accorded formal recognition by the government," though "federal officials had met regularly with tribal representatives for years." *Id.* at 125-26. For years, tribal members disagreed about leaders. Edmunds Report, *supra* note 1, at 106.

[18] Hoxie Report, *supra* note 1 at 46; Edmunds Report, *supra* note 1, at 10; *Oneida Nation*, 968 F.3d at 669.

[19] Hoxie Report, *supra* note 1, at 46; Edmunds Report, *supra* note 1, at 10.

[20] Oneida Treaty at Art. 2.

[21] Hoxie Report, *supra* note 1, at 29, 47.

[22] *Id.* at 47.

[23] Edmunds Report, *supra* note 1, at 27; *Vill. of Hobart,* 57 IBIA at 18.

[24] *Vill. of Hobart*, 57 IBIA at 18 ("[M]uch (but certainly not all) of the allotted land on the reservation had passed from Oneida hands, but they still retained tribal lands, restricted allotments, and those fee patent allotments which had not been sold to non-Indians."); Edmunds Report, *supra* note 1, at 110.

[25] Edmunds Report, *supra* note 1, at 49.

[26] *Id.* at 52-61.

[27] *Id.* The boarding school was situated upon 118.72 acres and consisted of two adjoining tracts. *Id.* at 56.

[28] *Id.* at 61. The sale of lands within a reservation does not operate to terminate the reservation. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solom v. Bartlett*, 465 U.S. 463, 470 (1984) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

Throughout the 1920s, the Oneida Tribe was under the supervision and jurisdiction of the Keshena Agency.[29] A variety of evidence from the 1920s reflects the federal government's continued responsibility toward and recognition of the Oneidas during the decade.[30] Numerous census reports, hundreds of pieces of correspondence prepared by federal employees, Oneida entities, Oneida tribal leaders, and individual members, meetings held between the federal government and the Tribe, and the government's distribution of annuity payments and "tribal funds" demonstrate the reservation's existence through the 1920s and until the Tribe's organization under the Indian Reorganization Act of 1934 (IRA).[31]

A November 13, 1931, letter from C.J. Rhoads, Commissioner of Indian Affairs, noted that there were scattered tracts of unallotted land on the Oneida Reservation, that it was occasionally found that Oneida members were entitled to allotments, and that the land was being held in reserve from the unallotted area to make allotments.[32] By the time the Oneidas were presented with the opportunity for inclusion in the IRA, most fee-patented land was no longer under Oneida ownership, though "about 20 allotments, or parts of allotments, containing between 500 and 600 acres, remain[ed] under trust."[33] A mix of restricted allotments and Oneida tribal lands then comprised the reservation.[34] In March 1934, by letter, the Secretary of the Interior noted the status of the remaining allotments on the Oneida Reservation and specifically advised that if enacted, the IRA would apply to the Oneidas.[35] His letter refers to pending legislation, Senate Bill No. 2755 and House Bill No. 7902.[36] These bills eventually became the IRA. The Oneidas voted in favor of the IRA on December 15, 1934.[37] This was followed by an election on a tribal constitution on November 14, 1936, and a tribal election that ratified the issuance of a Charter of Incorporation on May 1, 1937.[38]

In 1934, the Commissioner of Indian Affairs prepared a report on the Indian population in the continental United States.[39] He included the Oneida Tribe in his census report–organized by state–under Wisconsin, placing it under the jurisdiction of the Keshena Agency and "Oneida Reservation."[40] His report counts 2,992 individuals on the reservation.[41] Later, on March 18, 1937, then-Commissioner of Indian Affairs John Collier wrote to the Senate Committee on Indian Affairs transmitting a list of tribes under the IRA, similarly including the Oneida Tribe under the jurisdiction of the Keshena Agency.[42] By letter dated May 10, 1937, Commissioner Collier wrote to Senator F.

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[29] Edmunds Report, *supra* note 1, at 62, 64, 76.
[30] *Id.* at 65.
[31] *Id.* at 65-103.
[32] Letter from Comm'r C.J. Rhoads to Mr. Oscar Archiquette (Nov. 13, 1931).
[33] Letter from Sec'y of the Interior, Harold L. Ickes to Mr. Walter B. Watkins (Mar. 13, 1934); *Vill. of Hobart*, 57 IBIA at 19.
[34] Edmunds Report, *supra* note 1, at 125. As an example of unallotted land, approximately 130 acres was reserved for use as a railroad right-of-way. Letter from James R. Bittorf and Rebecca M. Webster, Oneida Law Office, to Terrence Virden, Reg'l Dir., Bureau of Indian Affairs (Apr. 28, 2009).
[35] Letter from Sec'y of the Interior, Harold L. Ickes to Mr. Walter B. Watkins (Mar. 13, 1934).
[36] *Id.*
[37] *Vill. of Hobart*, 57 IBIA at 20.
[38] Edmunds Report, *supra* note 1 at 120-21.
[39] Appendix, 1933-34 Annual Report of the Comm'r of Indian Affairs; *Vill. of Hobart*, 57 IBIA at 20.
[40]Appendix, 1933-34 Annual Report of the Comm'r of Indian Affairs; *Vill. of Hobart*, 57 IBIA at 20; Letter from James R. Bittorf and Rebecca M. Webster, Oneida Law Office, to Terrence Virden, Reg'l Dir., Bureau of Indian Affairs (Apr. 28, 2009).
[41] *Vill. of Hobart*, 57 IBIA at 20.
[42] Letter from Comm'r John Collier to Hon. Elmer Thomas (Mar. 18, 1937); *Vill. of Hobart*, 57 IBIA at 20.

Ryan Duffy describing circumstances at the Oneida Reservation.[43] He explained that the Oneidas had largely, though not entirely, passed out of Government supervision due to the issuance of fee patents and noted that only 20 small allotments remained out of the original reservation.[44]

II. STANDARD OF REVIEW

A. Four-Step Procedure to Determine Eligibility

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.[45] The Solicitor of the Interior ("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[46] In 2018, continuing uncertainties over what evidence need be submitted to demonstrate federal jurisdictional status in and before 1934 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 after concluding 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."[47] The Solicitor then issued a new, four-step procedure ("Solicitor's Guidance") for use by attorneys in the Office of the Solicitor ("Solicitor's Office") for determining eligibility under Category 1.[48]

At Step One, the Solicitor's Office should determine whether Congress made the IRA applicable to the applicant tribe through separate statutory authority, as 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 analysis proceeds to Step Two, which determines whether any evidence unambiguously demonstrates that the applicant tribe was under federal jurisdiction in 1934, in which case it may be deemed eligible under Category 1 without further inquiry. In the absence of dispositive evidence of federal jurisdiction in 1934, the inquiry proceeds to Step Three, which looks for evidence that the tribe was unambiguously "recognized" prior to 1934. Where it does, the Department may presume that the tribe remained "under federal jurisdiction" through 1934 absent sufficient evidence that the tribe's jurisdictional status terminated before then. In the absence of dispositive evidence of "recognition," the inquiry proceeds to Step Four, the final step of the inquiry,

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[43] Letter from Comm'r John Collier to Sen. F. Ryan Duffy (May 10, 1937).
[44] *Id.*
[45] U.S. Dept. of the Interior, Assistant Secretary – Indian Affairs, 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) (hereafter "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).
[46] Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (hereafter "M-37029").
[47] Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).
[48] *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. 9, 2020) (hereinafter "Solicitor's Guidance").

which weighs the totality of an applicant tribe's evidence in its historical context to determine if it sufficiently demonstrates that it was "under federal jurisdiction" in 1934.

The Solicitor's Guidance does not eliminate the need for a fact-specific inquiry for each applicant tribe. Nor does it provide an exhaustive list of the forms of evidence that may be relevant at Step Four, which necessarily vary by tribe, by region, and by the relevant federal policy era at issue.

B. The Meaning of the Phrase "Now Under Federal Jurisdiction."

To further assist Solicitor's Office attorneys in understanding and implementing its four-step procedure, the Solicitor's Guidance includes a memorandum detailing the Department's revised interpretation of Category 1, which we summarize below.[49]

The Solicitor concluded that the expression "now under federal jurisdiction" in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress's plenary authority[50] and is instead best interpreted as referring to tribes with whom the United States had clearly dealt with on 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.

Statutory Context.

The Solicitor concluded that "now under federal jurisdiction" should be read as modifying the phrase "recognized Indian tribe."[51] The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,[52] 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."[53] In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been "under federal jurisdiction" *in* 1934.[54] By "recognized," Justice Breyer appeared to mean "*federally* recognized"[55] 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,"[56] and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.[57] 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

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[49] *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").
[50] Deputy Solicitor's Memorandum at 9.
[51] *Id.*; *See also Cty. of Amador*, 872 F.3d at 1020, n. 8 (*Carcieri* leaves open whether "recognition" and "jurisdiction" requirements are distinct requirements or comprise a single requirement).
[52] *Carcieri*, 555 U.S. at 382-83.
[53] *Ibid.*
[54] *Id.* at 398 (Breyer, J., concurring).
[55] *Ibid*.
[56] *Id.* at 399 (Breyer, J., concurring).
[57] *Id*. at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

Indians of Washington ("Stillaguamish Tribe") shows.[58] 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.[59]

Category 1 states that the term "Indian" shall include "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction."[60] The adverb "now" is part of the prepositional phrase "under federal jurisdiction,"[61] which it temporally qualifies.[62] Prepositional phrases function as modifiers and follow the noun phrase that they modify.[63] Category 1's grammar therefore supports interpreting the phrase "now under federal jurisdiction" as intended to modify "recognized Indian tribe." This grammatical 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.[64] This suggests Commissioner Collier understood the phrase "now under federal jurisdiction" to limit and thus modify "recognized Indian tribe." This is further consistent with the IRA's purpose and intent, which was to remedy the harmful effects of allotment.[65] These included the loss of Indian lands and the displacement and dispersal of tribal communities.[66] Lacking an

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[58] *Ibid*.
[59] 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.
[60] 25 U.S.C. § 5129.
[61] *Grand Ronde*, 830 F.3d 552, 560 (D.C. Cir. 2016). The *Grand Ronde* court found "the more difficult question" to be which part of the expression "recognized Indian tribe" the prepositional phrase modified. *Ibid*. The court concluded it modified only the word "tribe" "before its modification by the adjective 'recognized.'" *Ibid*. But the court appears to have understood "recognized" as used in the IRA as meaning "federally recognized" in the modern sense, without considering its meaning in historical context.
[62] 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).
[63] 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.
[64] Sen. Hrgs. at 266 (statement of Commissioner Collier). *See also Carcieri*, 555 U.S. at 389 (citing Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936) ([IRA Section 19] provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act* * * *") (emphasis added by Supreme Court)); *Cty. of Amador*, 872 F.3d at 1026 (""under Federal jurisdiction" should be read to limit the set of "recognized Indian tribes" to those tribes that already had *some* sort of significant relationship with the federal government as of 1934, even if those tribes were not yet "recognized" (emphasis original)); *Grand Ronde*, 830 F.3d at 564 (though the IRA's jurisdictional nexus was intended as "some kind of limiting principle," precisely how remained unclear).
[65] *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs*, *House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7902, A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs,* 73d Cong. at 233-34 (1934) (hereafter "H. Hrgs.") (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apt. 28, 1934)).
[66] *Ibid*.

official list of "recognized" tribes at the time,[67] it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,[68] left unmodified, the phrase "recognized Indian tribe" could include tribes disestablished or terminated before 1934.

Statutory Terms.

The contemporaneous legal definition of "jurisdiction" defines it as the "power and authority" of the courts "as distinguished from the other departments."[69] 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.'"[70] 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."[71]

It is therefore significant that Congress added the phrase "under federal jurisdiction" to a statute designed to govern the Department's administration of Indian affairs and certain benefits for Indians. Seen in that light, these contemporaneous definitions support interpreting the phrase as referring to the federal government's exercise and administration of its responsibilities for Indians. Further support for this interpretation comes from the IRA's context. Congress enacted the IRA to promote tribal self-government but made the Secretary responsible for its implementation. Interpreting the phrase "under federal jurisdiction" as grammatically modifying "recognized Indian tribe" supports the interpretation of "jurisdiction" to mean the 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.[72]

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

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[67] 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))).

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

[69] BLACK'S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter "BLACK'S").

[70] BLACK'S at 1774.

[71] BLACK'S at 171. It separately defines "subject to" as meaning "obedient to; governed or affected by."

[72] 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.

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:[73]

> Senator THOMAS of Oklahoma. (….) In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.
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> 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?
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> Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] Government aid.
>
> Senator THOMAS. Without regard to whether or not he is now under your supervision?
>
> Commissioner COLLIER. Without regard; yes. *It definitely throws open Government aid to those rejected Indians*.[74]

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.[75] 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."[76] 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."[77]

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

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[73] *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73rd Cong. at 80 (Apr. 26, 1934) (hereafter "Sen. Hrgs."). *See also Grand Ronde*, 75 F.Supp.3d at 387, 399 (noting same).

[74] Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).

[75] *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).

[76] Sen. Hrgs. at 80.

[77] 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.").

were "members of any recognized Indian tribe."[78] As on previous days,[79] 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."[80]

The Senate Committee's concerns for these issues touched on other provisions of the IRA as well. The colloquy that precipitated the addition of "now under federal jurisdiction" began with a discussion of Section 18, which authorized votes to reject the IRA by Indians residing on a reservation. Senator Thomas stated that this would exclude "roaming bands" or "remnants of a band" that are "practically lost" like those in his home state of Oklahoma, who at the time were neither "registered," "enrolled," "supervised," or "under the authority of the Indian Office."[81] Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."[82] 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,"[83] 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."[84] When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were

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[78] 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.

[79] *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).

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

[81] Sen. Hrgs. at 263.

[82] *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."

[83] *Ibid*.

[84] *Ibid*.

"just as much Indians as any others,"[85] 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.[86] 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.[87] Chairman Wheeler thought not, "unless they are enrolled at the present time."[88] 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.[89]

Senator Thomas then noted that Category 1 and Category 2, as drafted, were inconsistent with Category 3. Category 1 would include any person of "Indian descent" without regard to blood quantum, so long as they were members of a "recognized Indian tribe," while Category 2 included their "descendants" residing on a reservation.[90] Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.[91] 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.[92]

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,[93] Chairman Wheeler finally turned to the IRA's definition of "tribe,"[94] which as then drafted included "any Indian tribe, band, nation, pueblo, or other native political group or organization."[95] Chairman Wheeler and Senator Thomas thought this definition too broad.[96] Senator Thomas asked whether it would include the Catawbas,[97] 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.[98] Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.[99] 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."[100]

Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."[101] Senator O'Mahoney responded, saying "If you wanted to exclude any of

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[85] *Ibid*.
[86] *Ibid*.
[87] *Id*. at 264.
[88] *Ibid*.
[89] *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.").
[90] *Id*. at 264-65.
[91] *Id*. at 264.
[92] *Ibid*.
[93] *Id*. at 265.
[94] *Ibid*. at 265.
[95] *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.
[96] Sen. Hrgs. at 265.
[97] *Ibid*.
[98] *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).
[99] *Id*. at 264.
[100] *Id*. at 266.
[101] *Ibid*. at 266.

them [from the Act] you certainly would in my judgment."[102] 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.[103] 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."[104] It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,[105] asked

> Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.[106]

Without further explanation or discussion, the hearings adjourned.

The IRA's legislative history does not unambiguously explain what Congress intended "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.[107] 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."[108] Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."[109] Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,[110] described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."[111] 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."[112] But in turning

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[102] *Ibid*. Nevertheless, Senator O'Mahoney did not understand why the Act's benefits should not be extended "if they are living as Catawba Indians."
[103] *Ibid*.
[104] *Ibid*.
[105] *Id*. at 231.
[106] *Id*. at 266.
[107] H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).
[108] *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)).
[109] *Id*. at 184 (statement of Commissioner Collier) (Apr. 8, 1934).
[110] Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* https://www.justice.gov/osg/bio/charles-fahy.
[111] *Id*. at 319 (statement of Assistant Solicitor Charles Fahy).
[112] *Id*. at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

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.[113] Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the OIA having direct supervision of Indians.[114]

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.[115] 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."[116] 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:[117]

> 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.[118]

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

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[113] *Ibid*. at 37 (statement of Commissioner Collier) (Feb. 22, 1934).
[114] *See*, *e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census, 1919 (May 7, 1919) (directing Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934) (discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.,* field operations); ARCIA for 1900 at 22 (noting lack of "jurisdiction" over New York Indian students); *id.* at 103 (reporting on matters "within" jurisdiction of Special Indian Agent in the Indian Territory); *id*. at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); MERIAM REPORT at 140-41 ("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity…Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs."); Sen. Hrgs. at 282-98 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different OIA "jurisdictions").
[115] 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).
[116] *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*.
[117] *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).
[118] *Ibid*.

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."[119]

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

While today's concept of "federal recognition" merges the cognitive sense of "recognition" and the political-legal sense of "jurisdiction," as *Carcieri* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved. Sol. Op. M-37029 construed the term "recognized" as having been used historically in two senses: a "cognitive" or "quasi-anthropological" sense indicating that federal officials "knew" or "realized" that a tribe existed; and a political-legal sense connoting "that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States."[120] It concluded that in 1934, Congress used "recognized" in a cognitive or quasi-anthropological sense.[121] Sol. Op. M-37029's interpretation departed from the Department's prior, long-held understanding of this term as referring to actions taken by appropriate federal officials toward a tribe with whom the United States clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934.

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

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[119] 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."

[120] M-37029 at 8. M-37029 also noted that the political-legal sense of "recognized Indian tribe" evolved into the modern concept of "federal recognition" or "federal acknowledgment" by the 1970s, when the Department's administrative acknowledgment procedures were developed. *See* 43 Fed. Reg. 39,361 (Aug. 24, 1978). Originally classified at Part 54 of Title 25 of the Code of Federal Regulations, the Department's administrative acknowledgment procedures are today classified as Part 83. 47 Fed. Reg. 13326 (Mar. 30, 1982).

[121] *Id*. at 25 ("The members of the Senate Committee on Indian Affairs debating the IRA appeared to use the term "recognized Indian tribe" in the cognitive or quasi-anthropological sense."). *See Grande Ronde*, 75 F.Supp.3d at 397 (noting that Secretary did not reach the question of the precise meaning of "recognized Indian tribe" in the Cowlitz ROD).

[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."

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.

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. M-37029's contrary interpretation focuses on concerns expressed by some members of the Senate Committee for the ambiguous and potentially broad *scope* of the phrase. This concern arguably prompted Commissioner Collier to suggest inserting "now under federal jurisdiction" in Category 1 as a limiting phrase.[128] As explained above, Congress appears to have sought to limit the availability of the Act to those tribes over whom the United States had already asserted federal authority and for whom federal responsibilities remained in effect, contrary to Commissioner Collier's original intent.

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.

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[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).

[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).

Administrative Understandings.

Compelling support for interpreting the term "recognized" in the political-legal sense is found in the views of Department officials expressed around the time of the IRA's enactment and early implementation. Assistant Solicitor Cohen discussed the issue in the Department's HANDBOOK OF FEDERAL INDIAN LAW ("HANDBOOK"), which he prepared around the time of the IRA's enactment. The HANDBOOK's relevant passages discuss ambiguities in the meaning of the term "tribe."[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 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 have been "recognized" in

[129] Cohen 1942 at 268.
[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. Shawanesee (Apr. 24, 1935).
[134] I OP. SOL. INT. 864 (Memorandum from Solicitor Nathan M. Margold to the Commissioner of Indian Affairs, Oklahoma – Recognized Tribes (Dec. 13, 1938)); Cohen 1942 at 271.
[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).

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]

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]

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[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.
[142] U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.
[143] Act of March 3, 1871, c. 120, § 1, 16 Stat. 544, 566. Section 3 of the same Act prohibited further contracts or agreements with any tribe of Indians or individual Indian not a citizen of the United States related to their lands unless in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Id*., § 3, 16 Stat. 570-71.
[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).

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 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 Commission[156] 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

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

[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).

[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).

Indian communities."[157] It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."[158]

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 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

[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 (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.
[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.

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]

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

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[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 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...").

[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).

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 "recognition" before, in, and long-after 1934[183] 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 above interpretation of its component parts and their grammatical relation, the phrase "any recognized Indian tribe now under federal jurisdiction" in Section 19 of the IRA should be interpreted as referring to tribes for whom the United States has assumed and maintained trust responsibilities in 1934. Category 1 may thus 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.

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[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.
[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).

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. This means that Category 1 may further be seen as intended to exclude two categories of tribe from eligibility. 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 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.

The Solicitor's Guidance provides a four-step process to determine whether a tribe falls within the first definition of Indian in 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] 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.

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[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?").

[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*.

B. Dispositive Evidence of Federal Jurisdiction in 1934.

Having identified no separate statutory authority making the IRA applicable to the Tribe, the analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the applicant tribe was under federal jurisdiction in 1934.[191] 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.[192] Where any of these forms of evidence exist, then the Solicitor's Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.[193]

As explained below, the Tribe 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.

1. Section 18 Election.

The Department of the Interior held a Federal election on December 15, 1934, in order to allow the Oneidas to vote on whether to reject the IRA.[194] The Tribe did not vote to reject the IRA.[195] The vote in favor of the IRA ratified the application of the IRA to the Tribe.[196] This is reflected in the Haas Report, a compilation of Departmental Section 18 elections held between 1934-1936, as well as a letter dated April 23, 1936, from Commissioner John Collier that states "On December 15, 1934 the Indians of the Oneida Reservation accepted the Indian Reorganization Act by a vote of 688 to 126, the total vote cast 814, amounting to more than 30 percent of the eligible voters 1844."[197] The Tribe's vote in a Section 18 election, in itself, is presumptive evidence that the Tribe was under federal jurisdiction in 1934.

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[191] *Id*. at 2.
[192] *Id*. at 2-4.
[193] *Id*. at 2.
[194] *Vill. of Hobart*, 57 IBIA at 20.
[195] *Id.*
[196] *Id.*
[197] Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.* at 20 (1947). Federal courts and the Interior Board of Indian Appeals have repeatedly held that Section 18 elections constitute unambiguous evidence that the Department considered a tribe or reservation to be under federal jurisdiction in 1934. *See e.g.*, *Stand Up for California! v. U.S. Dep't of Interior*, 919 F.Supp.2d 51, 67-68 (D.D.C. 2013) (Section 18 elections are conclusive evidence of being under federal jurisdiction); *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1182 (D.C. Cir. 2018), *cert den.*, 139 S.Ct. 786 (Jan. 7, 2019); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 596 (9th Cir. 2018); *Vill. of Hobart*, 57 IBIA at 21 (Sec. 18 election provides a "brightline test" for determining whether a tribe is under federal jurisdiction); *Shawano Cnty., Wisc. v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 74 (2011) (Sec. 18 vote necessarily recognized and determined that a tribe was under federal jurisdiction, "notwithstanding the Department of the Interior's admittedly inconsistent dealings with the Tribe in previous years."); Letter from Comm'r John Collier to Sec'y of the Interior, Harold L. Ickes (Apr. 23,1936).

2. Section 16 Constitution and Section 17 Charter.

On March 28, 1936, a proposed constitution and bylaws prepared by the Oneida Constitutional Committee was approved, then submitted to the BIA for approval.[198] They were approved by the Secretary of the Interior, and on May 6, 1936, a letter was sent to an Indian Agent instructing the Tribe to hold an election on its adoption or rejection.[199] An election was held on November 14, 1936, on whether to accept the constitution and bylaws, and to participate in the IRA.[200] 808 of 1,918 eligible voters casted votes.[201] 790 votes were cast in favor; 16 against; 2 spoiled.[202] The following year, the Commissioner of Indian Affairs included the Tribe in his 1937 list of Tribes that had adopted and organized under the IRA.[203]

In April 1937, the Secretary issued the Tribe a Charter of Incorporation.[204] This was unanimously ratified in an election held on May 1, 1937.[205] Afterwards, the Assistant to the Commissioner of Indian Affairs wrote to the Secretary that "This completes the organization of the Oneida Tribe of Indians of Wisconsin of the Oneida Reservation in accordance with Sections 15 and 17 of the Indian Reorganization Act of June 18, 1934."[206]

3. 1934 Indian Population Report.

In 1884, Congress enacted legislation requiring every Indian agent to submit a census of the Indians at his agency or upon the agency under his charge in an annual report,[207] which were later compiled in the Commissioner of Indian Affairs' Annual Report to the Secretary. These census rolls generally provided the basis for determining the property rights of the Indians enrolled, including allotments and inheritances,[208] and could also be used to determine, for example, the distribution of treaty annuities.[209] The listing of a tribe in the Department's 1934 Indian Population Report is presumptive evidence that the federal government acknowledged responsibility for the tribes and the Indians identified therein. The 1934 Indian Population Report indicates that the Oneida Reservation had a

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[198] Edmunds Report, *supra* note 1, at 118-19.
[199] *Id.* at 119.
[200] *Id.* at 120.
[201] *Id.*
[202] *Id.*
[203] Letter from Comm'r John Collier to Hon. Elmer Thomas (Mar. 18, 1937); *Vill. of Hobart*, 57 IBIA at 20.
[204] *Vill. of Hobart*, 57 IBIA at 20; Edmunds Report, *supra* note 1, at 121.
[205] Edmunds Report, *supra* note 1, at 121.
[206] *Id.*
[207] Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76, 98.
[208] Indian Census Rolls, 1885-1940, National Archives and Records Administration – Washington, D.C. (updated Oct. 9, 2014), https://www.archives.gov/research/census/native-americans/1885-1940.html ("Indian Census Rolls") (citing U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1671, Annual Report and Census, 1921 (Apr. 18, 1921)). *See also, id.* (citing U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 2653, Census Roll (Jan. 10, 1930) (instructing agencies to drop from their annual census rolls "names of Indians whose whereabouts have been unknown for a considerable number of years are to be dropped from the rolls with the approval of the Department. The same pertains to bands of Indians of whom no census has been made for an extended time and who have no contact with the [Indian] Service.")).
[209] U.S. Dept. of the Interior, Office of the Solicitor, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 54 (1942) ("Cohen 1942") (describing Cherokee treaty provision for census of Indians emigrating and remaining behind for purpose of distributing annuities) (citing Treaty with the Cherokees, 7 Stat. 195 (1819)); *id*. at 98-99 (federal government's power to distribute tribal funds and land among individual tribal members required preparation of census rolls).

total of 2,992 individuals living on the reservation.[210] This enumeration further demonstrates that the Tribe was under Federal jurisdiction in 1934.

IV. CONCLUSION

Consistent with Step 2 of the Solicitor's Guidance, the United States unambiguously considered the Oneida Nation under federal jurisdiction in 1934, as evidenced by the holding of a Section 18 election, approval of a Section 16 constitution, issuance of a Section 17 charter, and the inclusion of the Tribe in the Department's 1934 Indian Population Report. Accordingly, the Oneida Nation satisfies the requirements of Category 1. We therefore conclude that the Secretary has the authority to acquire land-in-trust for the Tribe under Section 5 of the IRA.[211]

[210] Appendix, 1933-34 Annual Report of the Comm'r of Indian Affairs; *Vill. of Hobart*, 57 IBIA at 20.
[211] This conclusion is consistent with the Interior Board of Indian Appeals' holdings in *Vill. of Hobart*, 57 IBIA at 22 and *David V. Dillenburg and Thomas G. Sladek v. Midwest Reg'l Dir.*, 63 IBIA 56, 65-66 (2016) (upholding its previous holding that the Oneida Nation is eligible to place land into trust using the Indian Reorganization Act).