United States Department of the Interior

OFFICE OF THE SOLICITOR
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MEMORANDUM

To: Tara Sweeney, Assistant Secretary – Indian Affairs

Through: Eric N. Shepard, Associate Solicitor, Division of Indian Affairs ERIC SHEPARD Digitally signed by ERIC SHEPARD Date: 2020.12.15 13:43:07 -05'00'

John Hay, Assistant Solicitor, Branch of Environment and Lands, Division of Indian Affairs JOHN HAY Digitally signed by JOHN HAY Date: 2020.12.15 12:07:24 -05'00'

From: Nicholas M. Ravotti, Attorney-Advisor, Branch of Environment and Lands, Division of Indian Affairs NICHOLAS RAVOTTI Digitally signed by NICHOLAS RAVOTTI Date: 2020.12.15 12:04:32 -05'00'

Subject: Federal Jurisdiction Status of the Stillaguamish Tribe of Indians in 1934

This Opinion addresses the statutory authority of the Secretary of the Interior ("Secretary") to acquire land in trust for the Stillaguamish Tribe of Indians of Washington("Tribe")[1] pursuant to Section 5[2] of the Indian Reorganization Act of 1934 ("IRA").[3] Section 5 of the IRA ("Section 5") authorizes the Secretary to acquire land in trust for "Indians." Section 19 of the Act ("Section 19") defines "Indian" to include several categories of persons.[4] As relevant here, the first definition includes all persons of Indian descent who are members of "any recognized Indian tribe now under federal jurisdiction" ("Category 1").[5] In 2009, the United States Supreme Court ("Supreme Court") in *Carcieri v. Salazar*[6] construed the term "now" in Category 1 to refer to

[1] In 1994 Congress passed the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103- 454, tit. I, 108 Stat. 4791 (codified at 25 U.S.C. §§ 5130-31) which requires the Secretary of the Interior to annually publish a list of Indian tribes eligible for services provided by the U.S. pursuant to the Federal Government's trust responsibility. Since 2012, the Tribe has appeared on this list as the "Stillaguamish Tribe of Indians of Washington." From 1995 until 2012, the Tribe appeared on this list as the "Stillaguamish Tribe of Washington." Prior to the initial publication of the Federally Recognized Indian Tribe List, the Tribe was variously known as the "Stillaguamish Indian Tribe," the "Stillaguamish Tribe," or the "Stillaguamish Tribe of Indians." *See U.S. v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (listing the "Stillaguamish Indian Tribe" as a Plaintiff-Intervenor in the case and referencing the "Stillaguamish Tribe" and the "Stillaguamish Tribe of Indians" in its opinion).

[2] 25 U.S.C. § 5108 ("The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.").

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

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

[5] *Ibid.*

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

1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrases "under federal jurisdiction" or "recognized Indian tribe."

In connection with the Tribe's pending fee-to-trust applications[7] to the Bureau of Indian Affairs ("BIA") Northwest Regional Office, you have asked whether the Tribe is eligible for trust land acquisitions under Category 1.[8] For the reasons explained below, we conclude that there is evidence presumptively demonstrating that the Tribe was "under federal jurisdiction" in 1934. The Tribe is therefore eligible under Category 1 and, consequently, the Secretary has authority to acquire land into trust for the Tribe.

I. BACKGROUND

The Stillaguamish Tribe is a signatory to the Treaty of Point Elliot[9] under the spelling "Stoluck-wa-mish." Under the terms of the Treaty, the Tribe ceded aboriginal and tribal lands in western Washington to the United States[10] in exchange for acknowledgment of reservation lands,[11] the right to take fish at ". . . usual and accustomed grounds and stations . . . in common with all citizens of the territory . . . ,"[12] and for total monetary payments of $150,000 within a twenty-year period after ratification of the Treaty.[13] The Tribe also acknowledged its "dependence on the Government of the United States," and agreed to submit "all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby."[14] The Treaty concludes that it "shall be obligatory on the contracting parties" as soon as ratified by the President and the Senate.[15]

After the 1855 Treaty of Point Elliott was signed and ratified, some of the Stillaguamish moved to the Tulalip reservation which was set aside for all of the western Washington Indians, but a majority of the Stillaguamish Tribe remained along the Stillaguamish River.[16] Consequently, the Stillaguamish Tribe became landless in the years following the signing of the Treaty.

Congress authorized several appropriations to fulfill its obligations under the 1855 Treaty of Point Elliott.[17] However, the Tribe and the other signatories to the 1855 Treaty of Point Elliott,

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[7] *Stillaguamish Tribe of Indians Board of Directors Resolution 2018/083: Approving Fee to Trust Transfer of 8.86 Acres M/L ("Hawkinson")* (June 21, 2018) and *Stillaguamish Tribe of Indians Board of Directors Resolution 2018/005: Approving Fee to Trust Transfer of 44.46 Acres M/L ("North Sound")* (Jan. 18, 2018).

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

[9] Treaty with the Dwamish, Suquamish, Etc., Jan. 12, 1855, 12 Stat. 927 (*ratified* Mar. 8, 1959) (hereinafter "1855 Treaty of Point Elliot").

[10] *Id.* at art. 1.

[11] *Id.* at arts. 2-3.

[12] *Id.* at art. 5.

[13] *Id.* at art. 6.

[14] *Id.* at art. 9.

[15] *Id.* at art. 15.

[16] *See U.S. v. State of Washington* (hereinafter "*Washington I*"), 384 F. Supp. 312, 378-79 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

[17] *See, e.g.*, 12 Stat. 5 (1860) (first installment on one-hundred and fifty thousand dollars pursuant to Article VI of the 1855 Treaty of Point Elliott); 24 Stat. 461 (1887) (support for D'Wamish and other allied tribes in Washington Territory, seven-thousand dollars); 32 Stat. 255 (1902) (funds for construction of school buildings on Tulalip reservation); 41 Stat. 27 (1919) (support for D'Wamish and other allied tribes in Washington Territory, $7,000)

as well as signatory tribes to the Treaty of Medicine Creek,[18] the Treaty of Point No Point,[19] and the Treaty of Olympia[20] disputed that the federal government had satisfied the terms of the treaty. In 1925, Congress enacted legislation that allowed the tribes to bring any legal and equitable claims arising out of the Treaties in the Court of Claims.[21]

The Stillaguamish and other tribes then brought claims against the United States alleging failure to comply with the terms of the Point Elliott Treaty.[22] After finding that the Stillaguamish Tribe was a party to the 1855 Treaty of Point Elliott,[23] the Court of Claims held that the plaintiff tribes collectively were owed a total award of $1,535.04 to share equally for the federal government's failure to provide annuities and services under Articles VI, XIII, and XIV of the Treaty.[24] However, the Court of Claims also found that the U.S. had expended over $2.4 million for the benefit of the Treaty tribes, including the Stillaguamish, and that amount offset any damages that were to be awarded to the signatory tribes.[25]

After Congress enacted the Indian Claims Commission Act in 1946, the Stillaguamish Tribe filed a claim against the United States under this Act for unconscionable consideration for lands ceded under the 1855 Treaty of Point Elliott.[26] For purposes of determining its jurisdiction over the case brought by the Stillaguamish Tribe against the United States, the Indian Claims Commission ("ICC") found that the Tribe was "an identifiable group of American Indians within the meaning of the Indian Claims Commission Act of August 13, 1946 and entitled to maintain [the] action."[27] The ICC again confirmed that the Tribe was a party to the Treaty of Point Elliott.[28] Ultimately, the ICC approved a stipulated settlement agreement between the Tribe and the United States wherein the United States agreed that the Tribe retained aboriginal title to 58,600 acres of disputed land and was owed $1.10 per acre for unconscionable consideration paid under the Treaty.[29]

In 1970, the United States as trustee for seven Indian tribes[30] in western Washington sued the State of Washington seeking declaratory judgment that the tribes subject to the 1855 Treaty of Point Elliott and the Treaty of Medicine Creek had reserved treaty rights to take fish at usual and accustomed places off the tribes' reservations and that these rights were not subject to state prohibitions or regulations. The District Court in *Washington I* held that the treaties at issue

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[18] Treaty with the Nisqualli, Puyallup, Etc., Dec. 26, 1854, 10 Stat. 1132 (*ratified* Mar. 3, 1855).
[19] Treaty with the S'Klallam, Jan. 26, 1855, 12 Stat. 933 (*ratified* Mar. 8, 1859).
[20] Treaty with the Quinaielt, Etc., July 1, 1855, 12 Stat. 971 (*ratified* Mar. 8, 1959).
[21] 43 Stat. 886 (1925).
[22] *Duwamish v. United States*, 79 Ct. Cl. 530 (1934).
[23] *Id.* at 533.
[24] *Id.* at 538, 584.
[25] *Id.* at 611-12.
[26] *Stillaguamish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 1 (Dkt. No. 207) (Feb. 26, 1965).
[27] *Id.* at 1, 36.
[28] *Id.* at 31-32.
[29] *Stillaguamish Tribe of Indians v. United States*, 22 Ind. Cl Comm. 361, 368-70 (Dkt. No. 207) (Jan. 8, 1970).
[30] *Washington I*, 384 F. Supp. 312 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). The United States sued the State of Washington on behalf of the Hoh Tribe, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Puyallup Tribe, Quileute Tribe, and Skokomish Tribe. The Stillaguamish Tribe retained independent counsel and intervened in the District Court suit, as did the Lummi Tribe, Quinault Tribe, Sauk-Suiattle Tribe, Squaxin Island Tribe, Upper Skagit River Tribe, and the Yakima Nation.

secured to the "Treaty Tribes" the right to take and harvest fish at all "usual and accustomed places," including those locations that existed off the tribes' reservations.[31] The District Court defined a "Treaty Tribe" as a tribe that ". . . occupies the status of a party to one or more of the Stevens' treaties and therefore holds for the benefit of its members a reserved right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries, in common with others."[32] The Court found that the Stillaguamish Tribe is a treaty tribe with reserved treaty rights.[33]

On appeal, the Ninth Circuit affirmed that the Stillaguamish Tribe was a party to the Treaty.[34] Although the Court noted that the Stillaguamish was not "recognized as an organized tribe by the federal government," it held that "[n]on-recognition of a tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights."[35] Despite the fact that the Tribe was not recognized in a political sense as an organized tribe by the federal government, the Court concluded that the evidence in the record supported a finding "that the members of the [Tribe] are descendants of treaty signatories and have maintained their tribal organization[s]."[36] The Court further noted that "once a tribe is determined to be a party to a treaty, its rights under the treaty may be lost only by unequivocal action of Congress."[37] Having no evidence showing such a loss, the court "affirm[ed] the District Court's conclusion that the Stillaguamish . . . [is an] entit[y] possessing rights under the Treaty of Point Elliott."[38]

In 1974, after *Washington I*, the Tribe petitioned the Secretary of the Interior for the Department's acknowledgment that the Tribe is an Indian tribe. However, the Secretary did not respond to the Tribe's petition. The Tribe then filed suit in Federal District Court seeking a determination that the Stillaguamish is a recognized tribe.[39] The Court ordered the Secretary to act on the Tribe's petition within 30 days. The Secretary thereafter acknowledged the Stillaguamish Tribe as an Indian tribe to which the Department owes a trust responsibility to protect the Tribe's treaty fishing rights.

II. STANDARD OF REVIEW

A. Four-Step Procedure to Determine Eligibility.

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[31] *Washington I*, 384 F. Supp. at 402 ("Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state.").
[32] *Washington I*, 384 F. Supp. at 406.
[33] *Ibid.*
[34] *United States v. State of Washington*, 502 F.2d 676, 692-93 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).
[35] *Id.*
[36] *Id.*
[37] *Id.* at 693.
[38] *Id.*
[39] *Stillaguamish Tribe v. Kleppe*, 1976 U.S. Dist. LEXIS 17381.

Section 5 of the IRA provides the Secretary discretionary authority to acquire any interest in lands for the purpose of providing lands in trust for Indians.[40] Section 19 defines "Indian" in relevant part as including the following three categories:

> **[Category 1]** all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and **[Category 2]** all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include **[Category 3]** all other persons of one-half or more Indian blood.[41]

In 2009, the Supreme Court in *Carcieri v. Salazar*[42] construed the term "now" in Category 1 to refer to 1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrase "under federal jurisdiction," however, or whether it applied to the phrase "recognized Indian tribe."

To guide the implementation of the Secretary's discretionary authority under Section 5 after *Carcieri*, the Department in 2010 prepared a two-part procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934.[43] The Solicitor of the Interior ("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[44] Despite this, however, uncertainty persisted over what evidence could be submitted for the inquiry and how the Department would weigh it, prompting some tribes to devote considerable resources to researching and collecting any and all forms of potentially relevant evidence, in some cases leading to submissions totaling thousands of pages. To address this uncertainty, in 2018 the Solicitor's Office began a review of the Department's eligibility procedures to provide guidance for determining relevant evidence. This prompted questions concerning Sol. Op. M-37029's interpretation of Category 1, on which its eligibility procedures relied. This uncertainty prompted the Solicitor to review Sol. Op. M-37029's two-part procedure for determining eligibility under Category 1, and the interpretation on which it relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029. The Solicitor concluded that its interpretation of Category 1 was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction."[45] In its place, the Solicitor issued a new, four-step

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[40] 25 U.S.C. § 5108.
[41] 25 U.S.C. § 5129 (bracketed numerals added).
[42] 555 U.S. 379.
[43] U.S. Dep't. of the Interior, Assistant Secretary, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) ("Cowlitz ROD"). *See also* Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Mar. 7, 2014), *revised* (Jan. 5, 2017).
[44] Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("M-37029").
[45] Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).

procedure for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor ("Solicitor's Office").[46]

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

Step Two determines whether the applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such. If so, the applicant tribe may be deemed eligible under Category 1 without further inquiry. The Solicitor's Guidance describes types of evidence that presumptively demonstrate that a tribe was under federal jurisdiction in 1934. In the absence of dispositive evidence, the inquiry proceeds to Step Three.

Step Three determines whether an applicant tribe's evidence sufficiently demonstrates that the applicant tribe was "recognized" in or before 1934 and remained under jurisdiction in 1934. The Solicitor determined that the phrase "recognized Indian tribe" as used in Category 1 does not have the same meaning as the modern concept of a "federally recognized" (or "federally acknowledged") tribe, a concept that did not evolve until the 1970s, after which it was incorporated in the Department's federal acknowledgment procedures.[47] Based on the Department's historic understanding of the term, the Solicitor interpreted "recognition" to refer to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy. The Solicitor identified forms of evidence that establish a rebuttable presumption that that an applicant tribe was "recognized" in a political-legal sense before 1934 and remained under federal jurisdiction in 1934. In the absence of such evidence, the inquiry finally moves to Step Four.

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

To further assist Solicitor's Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor's Guidance includes a

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

[47] 25 C.F.R. Part 83.

memorandum[48] detailing the Department's revised interpretation of the meaning of the phrases "now under federal jurisdiction" and "recognized Indian tribe" and how they work together.

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

1. Statutory Context.

The Solicitor first concluded that the phrase "now under federal jurisdiction" should be read as modifying the phrase "recognized Indian tribe."[49] The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,[50] 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."[51] In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been "under federal jurisdiction" *in* 1934.[52] By "recognized," Justice Breyer appeared to mean "*federally* recognized"[53] 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,"[54] and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.[55] Justice Breyer's suggestion that Category 1 does not preclude eligibility for tribes "federally recognized" *after* 1934 is consistent with interpreting Category 1 as requiring evidence of federal actions toward a tribe with whom the United States dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington ("Stillaguamish Tribe") shows.[56] 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.[57]

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[48] *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").

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

[50] *Carcieri* at 382-83.

[51] *Ibid.*

[52] *Id.* at 398 (Breyer, J., concurring).

[53] *Ibid.*

[54] *Id.* at 399 (Breyer, J., concurring).

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

[56] *Ibid.*

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

The Solicitor noted that Category 1's grammar supports this view. The adverb "now" is part of the prepositional phrase "under federal jurisdiction,"[58] which it temporally qualifies.[59] Prepositional phrases function as modifiers and follow the noun phrase that they modify.[60] Category 1's grammar therefore supports interpreting the phrase "now under federal jurisdiction" as intended to modify "recognized Indian tribe." This interpretation finds further support in the IRA's legislative history, discussed below, and in Commissioner of Indian Affairs John Collier's statement that the phrase "now under federal jurisdiction" was intended to limit the IRA's application.[61] 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.[62] These included the loss of Indian lands and the displacement and dispersal of tribal communities.[63] Lacking an official list of "recognized" tribes at the time,[64] it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,[65] left unmodified, the phrase "recognized Indian tribe" could include tribes disestablished or terminated before 1934.

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

[59] 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).

[60] 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.

[61] 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).

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

[63] *Ibid.*

[64] 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))).

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

2. Statutory Terms.

The Solicitor concurred with the Deputy Solicitor's conclusion that the expression "now under federal jurisdiction" in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress's plenary authority and is instead better interpreted as referring to tribes with whom the United States had clearly dealt on or a more or less sovereign-to-sovereign basis or as to whom the United States had clearly acknowledged a trust responsibility in or before 1934. [66]

The contemporaneous legal definition of "jurisdiction" defined it as the "power and authority" of the courts "as distinguished from the other departments."[67] 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.'[68] 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."[69]

Congress added the phrase "under federal jurisdiction" to a statute designed to govern the Department's administration of Indian affairs and certain benefits for Indians. Seen in that light, these contemporaneous definitions support interpreting the phrase as referring to the federal government's exercise and administration of its responsibilities for Indians. Further support for this interpretation comes from the IRA's context. Congress enacted the IRA to promote tribal self-government but made the Secretary responsible for its implementation. Interpreting the phrase "now under federal jurisdiction" as modifying "recognized Indian tribe" supports the interpretation of "jurisdiction" to mean the continuing administration of federal authority over Indian tribes already "recognized" as such. The addition of the temporal adverb "now" to the phrase provides further grounds for interpreting "recognized" as referring to a *previous* exercise of that same authority, that is, in or before 1934.[70]

3. Legislative History.

The IRA's legislative history lends additional support for interpreting "now under federal jurisdiction" as modifying "recognized Indian tribe." A thread that runs throughout the IRA's legislative history is a concern for whether the Act would apply to Indians not then under federal supervision. On April 26, 1934, Commissioner Collier informed members of the Senate

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[66] *See* Deputy Solicitor's Memorandum at 9.

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

[68] BLACK'S at 1774.

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

[70] 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.

Committee on Indian Affairs ("Senate Committee") that the original draft bill's definition of "Indian" had been intended to do just that:[71]

> 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.
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> 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.*[72]

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.[73] 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."[74] 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."[75]

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

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

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

[73] *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).

[74] Sen. Hrgs. at 80.

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

"Indian" as they stood in the committee print. Category 1 now defined "Indian" as persons of Indian descent who were "members of any recognized Indian tribe."[76] As on previous days,[77] 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."[78]

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."[79] Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."[80] 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,"[81] 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

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[76] 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.

[77] *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).

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

[79] Sen. Hrgs. at 263.

[80] *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."

[81] *Ibid.*

time."[82] When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were "just as much Indians as any others,"[83] 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.[84] 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.[85] Chairman Wheeler thought not, "unless they are enrolled at the present time."[86] 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.[87]

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.[88] Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.[89] 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.[90]

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,[91] Chairman Wheeler finally turned to the IRA's definition of "tribe,"[92] which as then drafted included "any Indian tribe, band, nation, pueblo, or other native political group or organization."[93] Chairman Wheeler and Senator Thomas thought this definition too broad.[94] Senator Thomas asked whether it would include the Catawbas,[95] 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.[96] Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.[97] 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."[98]

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

Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."[99] Senator O'Mahoney responded, saying "If you wanted to exclude any of them [from the Act] you certainly would in my judgment."[100] 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.[101] 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."[102] It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,[103] 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.[104]

Without further explanation or discussion, the hearings adjourned.

The IRA's legislative history does not unambiguously explain what Congress intended "now under federal jurisdiction" to mean or in what way it was intended to limit the phrase "recognized Indian tribe." However, the same phrase was used in submissions by the Indian Rights Association to the House of Representatives Committee on Indian Affairs ("House Committee"), where it described "Indians under Federal jurisdiction" as not being subject to State laws.[105] 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."[106] Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."[107] Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,[108] described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."[109] These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.

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

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."[110] But in turning to the draft bill's aim of allowing tribes to take responsibility for their own affairs, Commissioner Collier referred to the "absolute authority" of the Department by reference to "its rules and regulations," to which the Indians were subjected.[111] Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the Office of Indian Affairs having direct supervision of Indians.[112]

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.[113] 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."[114] 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:[115]

> 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.[116]

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

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

understanding of "recognized Indian tribe" at the time, discussed below, as referring to a tribe with whom the United States had clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility.

If "under federal jurisdiction" is understood to refer to the application and administration of the federal government's plenary authority over Indians, then the complete phrase "now under federal jurisdiction" can further be seen as resolving the tension between Commissioner Collier's desire that the IRA include Indians "[w]ithout regard to whether or not [they are] now under [federal] supervision" and the Senate Committee's concern to limit the Act's coverage to Indian wards "taken care of at the present time."[117]

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

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

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[117] 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."

[118] M-37029 at 8, n. 57 (citing *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* 512 U.S. 267, 272 (1994) (in the absence of a statutory definition of a term, the court's "'task is to construe it in accord with its ordinary or natural meaning."); *id.*at 275 (the court "presume[s] Congress intended the phrase [containing a legal term] to have the meaning generally accepted in the legal community at the time of enactment.")).

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

[120] 25 U.S.C. § 2 (charging Commissioner of Indian Affairs with management of all Indian affairs and all matters arising out of Indian relations); 43 U.S.C. § 1457 (charging Secretary with supervision of public business relating to Indians); 25 U.S.C. § 9 (authorizing President to prescribe regulations for carrying into effect the provisions of any act relating to Indian affairs). *See also* H. Hrgs. at 37 (remarks of Commissioner Collier) ("Congress through a long series of acts has delegated most of its plenary authority to the Interior Department or the Bureau of Indian Affairs, which as instrumentalities of Congress are clothed with the plenary power, an absolutist power"); *id.* at 51 (Memorandum of Commissioner John Collier) (providing statutory examples of "the broad discretionary powers conferred by Congress on administrative officers of the Government").

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

such statutes apply.[122] "Recognition" generally is a political question to which the courts ordinarily defer.[123]

Relying on the analysis contained in the Deputy Solicitor's Memorandum, the Solicitor concluded that "recognition" as used in the IRA refers to actions taken by appropriate federal officials toward a tribe with whom the United States clearly dealt on a more-or-less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934.

1. Ordinary Meaning.

The 1935 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY first defines the verb "to recognize" as meaning "to know again (...) to recover or recall knowledge of."[124] 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."[125] These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for loans to Indians for tuition and expenses in "recognized vocational and trade schools."[126] While neither the Act nor its legislative history provide further explanation, the context strongly suggests that the phrase "recognized vocational and trade schools" refers to those formally certified or verified as such by an appropriate official.

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

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

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

[125] *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."

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

2. Legislative History.

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.[127] Commissioner Collier, himself a "principal author" of the IRA,[128] also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.[129] The IRA's legislative history further suggests that Congress did not intend "recognized Indian tribe" to be understood in a cognitive, quasi-anthropological sense. The concerns expressed by some members of the Senate Committee for the ambiguous and potentially broad *scope* of the phrase arguably prompted Commissioner Collier to suggest inserting "now under federal jurisdiction" in Category 1 as a limiting phrase.[130]

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

3. Administrative Understandings.

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

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[127] *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.

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

[129] 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).

[130] 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).

[131] United States Department of the Interior, HANDBOOK OF FEDERAL INDIAN LAW (1942 ed.) at 268 (hereafter "Cohen 1942").

[132] 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.

considered as a number of independent tribes "in the political sense."[133] 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.[134]

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."[135] 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."[136]

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,[137] 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."[138] These included that the tribe had been "recognized" in 1934. Associate Solicitor Walker construed "recognized" as referring to tribes with whom the United States had had "a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time.*"[139] 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."[140] 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

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

[134] *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).

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

[136] 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.

[137] 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").

[138] *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).

[139] *Id.* at 2 (emphasis added).

[140] *Id.* at 4 (emphasis added). This is consistent with Justice Breyer's concurring view in *Carcieri*.

a tribe must have existed in 1934."[141] 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.[142]

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.[143]

Throughout the United States' early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.[144] 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.[145] 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."[146] While the question of "recognition" remained one for the political branches,[147] the contexts within which it arose expanded with the United States' obligations as guardian.[148]

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,"[149] 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

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[141] *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.

[142] 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).

[143] 25 C.F.R. Part 83.

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

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

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

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

[148] *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).

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

under the Nonintercourse Act;[150] treaty fishing-rights claims by descendants of treaty signatories;[151] and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,[152] which included tribes previously recognized and seeking restoration or reaffirmation of their status.[153] 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.[154] In January 1975, it found that federal Indian policies had "shifted and changed" across administrations "without apparent rational design,"[155] 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.[156] Finding it imperative to do so,[157] Congress established the American Indian Policy Review Commission[158] to prepare an investigation and study of Indian affairs, including "an examination of the statutes and procedures for granting Federal recognition and extending services to Indian communities."[159] It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."[160]

a. The Palmer Memorandum.

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[150] *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).

[151] *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)

[152] 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*").

[153] 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).

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

[155] *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."

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

[157] *Ibid.*

[158] AIRPC Act, § 1(a).

[159] *Id.*, § 2(3).

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

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on "Federal 'Recognition' of Indian Tribes" (the "Palmer Memorandum").[161] 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."[162] 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.[163] 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*."[164] 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.[165]

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,[166] 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.[167] Though treaties remained a "prime indicia" of political "recognition,"[168] the memorandum noted that other evidence could include Congressional recognition by non-treaty means and administrative actions fulfilling statutory responsibilities toward Indians as "domestic dependent nations,"[169] including the provision of trust services.[170]

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[161] 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.
[162] Palmer Memo at 23.
[163] *Id.* at 23-24.
[164] *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.
[165] *Ibid.* at 24.
[166] 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.
[167] *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").
[168] *Id.* at 3.
[169] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* AIPRC Final Report at 462 ("Administrative actions by Federal officials and occasionally by military officers have sometimes laid a foundation for federal acknowledgment of a tribe's rights."); *Report of Task Force Ten* at 1660 (during the Nixon Administration, "federally recognized" included tribes recognized by treaty or statute and tribes treated as recognized "through a historical pattern of administrative action.").
[170] 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.").

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."[171] 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"[172] toward a tribe, consistent with the evolution of federal Indian policy.[173]

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;[174] the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."[175] 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;[176] authorizing tribal funds to be held in the federal treasury; directing officials of the Government to exercise supervisory authority over a tribe; and prohibiting state taxation of a tribe. Specific indicia of Executive or administrative "recognition" before 1934 included the setting aside or acquisition of lands for Indians by Executive order;[177] the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;[178] 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;[179] 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

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

[172] *Id.* at 14.

[173] 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...").

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

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

[176] 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).

[177] Palmer Memo at 19 (citing Cohen 1942 at 271)); Butler Letter at 4.

[178] Palmer Memo at 19 (citing Cohen 1942 at 271).

[179] *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)).

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.[180] In making such determinations, the Department looked to indicia established by federal courts.[181] There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.[182] 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."[183] 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."[184] The manner in which the Department understood "recognition" before, in, and long-after 1934[185] supports the view that Congress and the Department understood "recognized" to refer to actions taken by federal officials with respect to a tribe for political or administrative purposes in or before 1934.

D. Construing the Expression "Recognized Indian Tribe Now Under Federal Jurisdiction" as a Whole.

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

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

Based on this understanding, the phrase "now under federal jurisdiction" can be seen to exclude two categories of tribe from Category 1. The first category consists of tribes never "recognized" by the United States in or before 1934. The second category consists of tribes who *were*

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[180] *Id.* at 18.
[181] *Ibid.*
[182] *Ibid.*
[183] *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.").
[184] Palmer Memo at 18.
[185] *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).

"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.[186] 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.[187] 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.[188]

III. ANALYSIS

A. Procedure for Determining Eligibility.

As noted, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.[189] It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.[190] The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.[191] 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.[192]

B. Dispositive Evidence of Federal Jurisdiction in 1934.

1. Step Two: Adjudicated Treaty Rights.

Having identified no separate statutory authority making the IRA applicable to the Tribe under Step One, our analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the Tribe was under federal jurisdiction in

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[186] *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?").

[187] *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).

[188] *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).

[189] Solicitor's Guidance at 1.

[190] *Ibid.*

[191] *Ibid.*

[192] *Ibid.*

1934.[193] This criterion derives from understanding the meaning of the phrase "under federal jurisdiction" as referring to the federal government's administration of its Indian affairs authority with respect to particular groups of Indians. Certain 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 the Department's 1934 Indian Population Report, land acquisitions by the United States for groups of Indians in the years leading up to 1934,[194] and federal legislation enacted before 1934 which addresses a particular tribe.[195] Where any of these forms of evidence exist, the Solicitor's Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.[196]

a. 1855 Treaty of Point Elliott.

As discussed above, the Tribe is a signatory to the 1855 Treaty of Point Elliott as the "Stoluck-wa-mish" Tribe. The Treaty was entered into in 1855 and ratified in 1859. The Tribe's status as a signatory to the Treaty has been affirmed in cases before the Court of Claims in 1934,[197] the Indian Claims Commission in 1965,[198] the U.S. District Court for the Western District of Washington in 1974,[199] and the Ninth Circuit Court of Appeals in 1975.[200] Having never been abrogated, the Treaty remained in force in 1934[201] and the Tribe was entitled to receive the benefits secured to it by the Treaty's terms. Among those benefits, as discussed above, is the right reserved by the Tribe to take fish at all usual and accustomed places.[202] The continuing existence of treaty rights guaranteed by the 1855 Treaty of Point Elliott is dispositive evidence that the Tribe was under federal jurisdiction in 1855 when it entered into the Treaty, and remained under federal jurisdiction at all times thereafter, including in 1934.[203]

Significantly, when the Tribe filed a claim under the Indian Claims Commission Act against the United States to enforce the terms of the Treaty, the ICC made a finding of fact that the Tribe was "an identifiable group of American Indians within the meaning of the Indian Claims Commission Act . . . ."[204] The ICC's finding demonstrates that the Tribe was under federal jurisdiction in 1964. There is no evidence that federal jurisdiction over the Tribe ended at any time between the signing of the 1855 Treaty of Point Elliott and date the Tribe filed its claim

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[193] Solicitor's Guidance at 2.
[194] *Id.* at 2-4.
[195] *Id.* at 6.
[196] *Id.* at 2.
[197] *Duwamish v. United States*, 79 Ct. Cl. 530 (1934).
[198] *Stillaguamish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 1 (Dkt. No. 207) (Feb. 26, 1965).
[199] *Washington I*, 384 F. Supp. at 378.
[200] *United States v. State of Washington*, 502 F.2d 676, 692 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).
[201] *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring) (discussing Stillaguamish Tribe's maintenance of reserved treaty rights as basis for determination that the Stillaguamish Tribe was under federal jurisdiction in 1934). *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (holding that reserved treaty rights remain in force absent clear evidence of Congressional intent to abrogate the treaty).
[202] 1855 Treaty of Point Elliott, art. 5.
[203] Solicitor's Guidance at 4.
[204] *Stillaguamish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 1 (Dkt. No. 207) (Feb. 26, 1965).

with the ICC. Once a government-to-government relationship is established between a tribe and the United States (as occurred with the ratification of the Treaty), the absence of probative evidence of termination or loss of a tribe's jurisdictional status suggests that such status is retained.[205]

The fact that the Tribe was under federal jurisdiction in 1934 is further bolstered by Justice Breyer's concurrence in *Carcieri.* Justice Breyer discussed the Stillaguamish Tribe as an example of a tribe that was not formally acknowledged as a tribe until after 1934, but which nonetheless was under federal jurisdiction in 1934 by virtue of its continuing relationship with the Federal Government under the terms of the 1855 Treaty of Point Elliott.[206]

Therefore, consistent with Step Two of the Solicitor's Guidance, the Tribe's status as a signatory to the Treaty of Point Elliott presumptively demonstrates that the Tribe was under federal jurisdiction in 1934, and therefore eligible to have land taken into trust.

b. Summary.

This opinion applies the framework announced in the Solicitor's Guidance and relies on the same evidence presented by the Tribe to the Department for prior "under federal jurisdiction" analyses.[207] The Solicitor's changed construction of Category 1 does not alter our conclusion that the Tribe was a "recognized Indian tribe (...) under federal jurisdiction" in 1934.

As the Solicitor's Guidance makes plain, Congress intended to exclude two categories of tribes from Category 1: those tribes never "recognized" in or before 1934 and those tribes that were recognized before 1934 but no longer remained "under federal jurisdiction" in 1934.[208] The Tribe does not fall into either of those categories.

IV. CONCLUSION

Consistent with Step Two of the Solicitor's Guidance, a ratified treaty still in effect in 1934 presumptively demonstrates the establishment of a political-legal relationship between the United States and the signatory tribe. That the treaty rights were judicially determined to remain intact from 1855 through the present unambiguously demonstrates that the Tribe was "under federal jurisdiction" in 1934. For these reasons, we conclude that the Stillaguamish Tribe of Indians satisfies Category 1, and that the Secretary has the statutory authority to acquire land in trust for the Tribe under Section 5 of the IRA.

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[205] Solicitor's Guidance at 8.
[206] *Carcieri*, 555 U.S. at 398 (Breyer J., concurring).
[207] *Determination of Whether the Stillaguamish Tribe of Indians was Under Federal Jurisdiction in 1934*, Memorandum from Lynn Peterson, Regional Solicitor, Northwest Region, to Stanly Speaks, Director, Northwest Region BIA (Jan. 4, 2011).
[208] Deputy Solicitor's Memorandum at 29.