United States Department of the Interior

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Memorandum

To: Amy Dutschke, Regional Director, BIA Pacific Region

Through: Kyle Scherer, Deputy Solicitor for Indian Affairs

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

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

Subject: Federal Jurisdiction Status of Tejon Indian Tribe in 1934

On August 24, 2016, the Tejon Indian Tribe ("Tejon Tribe" or "Tribe") submitted an application to the Bureau of Indian Affairs ("BIA") requesting that the Secretary of the Interior ("Secretary") acquire land in trust for the Tribe's benefit ("Application").[1] The Tribe submitted its Application pursuant to Section 5 of the Indian Reorganization Act ("IRA") [2] and its implementing regulations.[3]

This Opinion addresses the statutory authority of the Secretary to acquire land in trust for the Tribe pursuant to Section 5 of the IRA ("Section 5).[4] Section 5 authorizes the Secretary to acquire land in trust for "Indians." [5] Section 19 of the Act ("Section 19") defines "Indian" to include several categories of persons.[6] 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").[7] In 2009, the United States Supreme Court ("Supreme Court") in

[1] *See* Letter, Tejon Indian Tribe to BIA Pacific Regional Office, Request to Take Land Into Trust, (Aug. 24, 2016) (The Tribe's fee-to-trust Application contained a 19-page Introduction and 39 exhibits totaling over 300 pages).
[2] Act of June 18, 1934, § 5, Pub. L. No. 73-383, 48 Stat. 984 (1934)("IRA or "Act"), codified at 25 U.S.C. § 5108.
[3] 25 C.F.R. Part 151.
[4] IRA, § 5.
[5] *Id*. ("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.").
[6] *Id*. at § 19, codified at 25 U.S.C. § 5129.
[7] *Ibid*.

Carcieri v. Salazar[8] construed the term "now" in Category 1 to refer to 1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrases "under federal jurisdiction" or "recognized Indian tribe."

In connection with the Tribe's pending fee-to-trust Application, you have asked whether the Tribe is eligible for trust land acquisitions under Category 1.[9] For the reasons explained below, we conclude that dispositive evidence demonstrates that the Tribe was "under federal jurisdiction" in 1934. The Tribe is therefore eligible under Category 1 and, consequently, the Secretary has authority to acquire land into trust for the Tribe.

I. BACKGROUND

The Tejon Tribe is located in Kern County, California. The Tribe's temporary governmental offices are located on fee land owned by the Tribe in Bakersfield, California, where the majority of its tribal members currently reside.

In 1979, BIA published its first formal list of federally recognized tribes, which did not include the Tejon Tribe.[10] In 2006, the Tribe requested that BIA confirm its status as a federally recognized tribe.[11] In support of this request, the Tribe submitted detailed historical records.[12] Concluding that the Tribe had been inadvertently omitted from the BIA's list of recognized tribal entities,[13] on December 30, 2011, Assistant Secretary – Indian Affairs ("Assistant Secretary") Larry Echo Hawk reaffirmed the Tribe's federally recognized status.[14] Assistant Secretary Echo Hawk determined that failure to include the Tribe on the 1979 list was the result of administrative error,[15] and that the Tribe's government-to-government relationship with the United States had never lapsed or been terminated.[16] The evidence that demonstrated the Tribe's prior acknowledgment included treaty negotiations with the Tribe in 1851; the establishment of the Tule River Indian Reservation for Tejon Indians and other tribes in 1864; federal efforts to secure land on behalf of Tribal members who remained on Tejon Ranch lands; and the withdrawal of 880 acres of public domain lands for the Tribe's use between 1916 and 1962.[17] As

[8] 555 U.S. 379 (2009) ("*Carcieri*").
[9] This opinion does not address the Tribe's eligibility under any other definition of "Indian" in the IRA.
[10] U.S. Dept. of the Interior, Bureau of Indian Affairs, "Indian Tribal Entities That Have A Government-to-Government Relationship with the United States," 44 Fed. Reg. 7235 (Feb. 6, 1979).
[11] Letter, Chairwoman Kathryn Montes Morgan, Tejon Indian Tribe, to Associate Deputy Secretary James Cason, Dept. of the Interior (June 29, 2006).
[12] *See* Tejon Indian Tribe, Request for Confirmation of Status (June 30, 2006); Request and Supporting Materials, Historical Exhibits, Vols. I-III (June 30, 2006).
[13] Memorandum, Larry Echo Hawk, Assistant Secretary – Indian Affairs to Pacific Regional Director (Apr. 24, 2012) ("2012 Memo").
[14] Letter, Larry Echo Hawk, Assistant Secretary – Indian Affairs to Kathryn Morgan, Chairwoman Tejon Tribe (Dec. 30, 2011).
[15] *Id*.
[16] 2012 Memo at 4.
[17] *Id*.

a result, the Tribe was added to the Department's list of recognized tribal entities in August 2012.[18]

The Tribe's Historical Background

A. 1851 Treaty

The confluence of two seminal events in California history – the discovery of gold at Sutter's Mill and the United States' acquisition of California at the end of the Mexican-American War – served as the trigger for the first federal interactions with the Tejon Tribe.[19] The Mexican-American War ended in February 1848 with the signing of the Treaty of Guadalupe Hidalgo.[20] The treaty transferred ownership of the territory that would become California to the United States.[21] The discovery of gold at Sutter's Mill just days prior to the treaty set off the California gold rush and a massive migration to the newly acquired territory. The influx of newcomers resulted in dramatic impacts on California Indian communities,[22] as well as conflicts between miners, settlers and the various tribes.[23]

To relieve tensions, the United States sought to negotiate treaties with the California Indians.[24] In September 1850, Congress enacted legislation authorizing the President to appoint three treaty commissioners,[25]who arrived in San Francisco in early 1851 and began meeting and treating with tribes located throughout the State shortly thereafter.[26]

On June 10, 1851, Commissioner George W. Barbour met with tribal leaders and headmen at Tejon Pass in south-central California.[27] The tribal leaders represented nearly six hundred Indians from the southern San Joaquin Valley region, including the Tejon Tribe, represented by[28] Chief Vicente and his brother Chico. At the conclusion of negotiations, leaders from eleven tribes, including six representatives from the Tejon Tribe, signed the 1851 Treaty.[29] Under the

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[18] Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,871 (Aug. 10, 2012).

[19] Phillips, *supra* note 11, at 24; *See also*, Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, 9 Stat. 922 (1848)("Treaty of Guadalupe Hidalgo").

[20] Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic, 9 Stat. 922 (Feb. 2, 1848)("Treaty of Guadalupe Hidalgo").

[21] *Id*.

[22] *See* Phillips, *supra* note 11, at 24.

[23] *See* Phillips, *supra* note 11, Chap. 2.

[24] *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370 (Fed. Cir. 2000).

[25] 9 Stat. 519 (Sept. 28, 1850); 9 Stat. 544, 558 (Sept. 30, 1850)(Appropriating $25,000 "to enable the President to hold treaties with the various Indian tribes in the State of California").

[26] Brief of the United States Solicitor, *Stuart v. United States*, 1859 WL 5368 (Ct. Cl. 1859).

[27] Treaty Made and Conducted at Camp Persifer F. Smith, at the Texan Pass, State of California, June 10, 1851, Between George W. Barbour, United States Commissioner, and the Chiefs, Captains and Head Men of the "Castake," "Texon," &c., Tribes of Indians ("1851 Treaty"); *see also,* Letter, Special Indian Agent Asbury to Commissioner of Indian Affairs (Aug. 18, 1914) (relaying that early reports described an 1851 treaty with the Tejon Indian Tribe and clarifying that the spelling "Texon," is a spelling variation on Tejon).

[28] *See* Phillips, *supra* note 11, at 24, 36.

[29] 1851 Treaty at Art. I.

terms of the 1851 Treaty, the signatory tribes agreed to cede their aboriginal lands to the United States in exchange for a 763,000-acre reservation between Tejon Pass and the Kern River.[30] The signatory tribes also acknowledged themselves to be under the "exclusive jurisdiction, control and management of the government of the United States."[31]

By February 1852, the 1851 Treaty – along with seventeen additional treaties negotiated with other California Indians – had been submitted to the United States Senate for consideration and ratification.[32] On June 8, 1852, the Senate declined to ratify any of the treaties negotiated by the commissioners with the California tribes.[33]

B. 1852 to 1911

Although the Senate declined to ratify any of the California Indian treaties, in March 1853, Congress authorized the President to make five military reservations from the public domain in California "for Indian purposes."[34] That fall, Edward Fitzgerald Beale, Superintendent of Indian Affairs for California, met with tribal headmen and chiefs from in and around Tejon Pass for two days to explain the federal government's intentions in relation to their "future support."[35] In his subsequent report to the Commissioner of Indian Affairs, Superintendent Beale noted the Indians' anxiety "to know the intentions of the government towards them."[36] Their farming agent, already employed by Superintendent Beale to assist the tribes, had been unable to assure them of "anything permanent in relation to their affairs."[37]

Superintendent Beale proposed that the federal government commence a system of farming and instruction to enable the tribes to support themselves by their own labor in time.[38] For this purpose, Beale explained, the federal government would provide them with seed of all kinds and provisions sufficient to allow them to live until they could become self-sufficient.[39] Beale's report to the Commissioner of Indian Affairs expressly noted the example of the Tejon Indians, "who had embraced this new mode of life."[40] He closed this report with the following words:

> [I]t gives me pleasure to state that I have entire confidence in the ultimate success of the plan I have proposed for the support of the Indians in California, and that if

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[30] *Id.* at Art. 3.
[31] *Id*. at Art. I.
[32] *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1371 (C.A. Fed. 2000) (The three commissioners divided California into eighteen regions and negotiated similar treaties with the tribes in each region.).
[33] *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1372 (Fed.Cir. 2000); Richard E. Crouter and Andrew Rolle, "Edward Fitzgerald Beale and the Indian Peace Commissioners in California, 1851-1854", HISTORICAL SOCIETY OF SOUTHERN CALIFORNIA QUARTERLY, Vol. 42 (June 1960) 107-132, 119.
[34] 10 Stat. 226, 238 (Mar. 3, 1853) ("1853 Act").
[35] Report No. 92, Supt. E.F. Beale to Commissioner of Indian Affairs (Sept. 30, 1853), in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at 229-232 (1853) ("ARCIA").
[36] *Id*. at 229.
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid.*
[40] *Id*. at 230.

> this plan is pursued, that they will ultimately form industries and useful communities. The small experiment I have already made proves that they are worthy of the paternal care of the government.[41]

Superintendent Beale further explained the need for the Indians to settle at a point where "the government would be able to watch over and protect them from the whites, as well as the whites from them."[42] The Tejon Indians remained reluctant to give up their old mode of life until Superintendent Beale "had promised them that the reserve selected for them" would be near to the Tejon Pass.[43]

As Superintendent Beale noted, however, the 1853 Act presumed "a sufficiency of vacant public land" on which the reserve could be established, which was not the case. Superintendent Beale found it almost impossible to find any lands unclaimed by Spanish or Mexican land grants or free from pre-emption claims by white settlers.[44] Complicating matters, Superintendent Beale complained that the 1853 Act provided "no authority to purchase lands for the United States" for Indian purposes.[45] Superintendent Beale therefore recommended that authority be obtained to purchase Spanish and Mexican land grants for that purpose while inexpensive land was still available.[46] With that expectation in mind, Superintendent Beale therefore continued his farming system on behalf of the Tejon Tribe, "leav[ing] it to Congress to purchase the land should the title prove good, or remove the Indians to some less suitable locality."[47]

Pursuant to the policy announced in the 1853 Act, and consistent with his stated plan, Superintendent Beale mapped and named a 50,000-acre military reserve for William K. Sebastian of Arkansas, Chairman of the Senate Committee on Indian Affairs Committee.[48] Superintendent Beale began gathering groups from surrounding tribal communities to join those already settled on the reserve.[49] However, the area proposed for the Sebastian Military Reserve was actually located on a Mexican land grant rather than on public land. And despite no formal designation as such, contemporaries and Indian Agents commonly referred to the Sebastian Military Reserve as the "Tejon Reservation."[50]

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[41] *Ibid*.

[42] *Ibid*.

[43] *Ibid*.

[44] *Ibid*.

[45] *Ibid*.

[46] *Id*. at 231. Beale further reported that he had consulted on the issue with the California congressional delegation.

[47] *Id*. at 230.

[48] *See* Map of the Sebastian Military Reserve as surveyed by H.S. Washburn, under the direction of E.F. Beale, Superintendent of Indian Affairs, Approved by Maj. Gen J.E. Wool Com. Pac. Div. U.S.A., Cont +/- 49,928 Acres; *see also* National Park Service, *Five Views: An Ethnic Historic Site Survey for California*, https://www.nps.gov/parkhistory/online_books/5views/5views1h92.htm (last visited May 1, 2020)(citing Latta, Frank, *Handbook of the Yokuts Indians*, 2nd ed., 736 (1977)).

[49] John R. Johnson, Ph.D., *Ethnohistory of the Tejon Indian Tribe* (Sep. 2016)(citing Latta, Frank, *Handbook of the Yokuts Indians*, 2nd ed., 736 (1977)).

[50] *See* Phillips, *supra* note 11, at 120 (noting that the Sebastian Military Reserve was more commonly known by the name Tejon Reservation).

In 1854, Beale was removed from his post as Superintendent, in part because he had focused too much of his efforts on improving the Tejon Reservation.[51] Supervision of the Tejon Tribe continued under T.J. Henley, who succeeded Beale as Superintendent. In August of 1854, Superintendent Henley wrote to George Manypenny, Commissioner of Indian Affairs, that:

> [I] have visited the Indian reservation at Tejon, (the only reservation at which, as yet, any Indians have been collected,) and taken possession and supervision of the public property, schedules of which will accompany my report at the expiration of the quarter.[52]

By 1862 the Tejon Reservation had fallen into a state of decay.[53] Through neglect or willful destruction, most of the crops were destroyed.[54] In 1862, Superintendent John P.H. Wentworth noted the presence of the Kitanemuk (ancestors of the Tejon Tribe) at the Tejon Reservation and provided a census for their numbers, including Chief Vicente, a signatory to the 1851 Treaty.[55]

That same year, Superintendent Wentworth urged William Dole, Commissioner of Indian Affairs, to have the Tejon Reservation set aside by an act of Congress for the exclusive use of the Indians, and indicated that he believed private parties claimed the land under a Mexican land grant. In his report to Commissioner, he suggested that the district's United States Attorney determine title to the property.[56]

On April 8, 1864, Congress passed a law stating that no more than four tracts of land in California would "be retained by the United States for the purpose of Indian Reservations."[57] At the time, there were five tracts in use for this purpose: Smith River, Round Valley, and Mendocino in Northern California; and Tejon and Tule River in the Central California.[58] In response to the 1864 Act, Austin Wiley, the recently appointed Superintendent, ordered the relocation of as many Indians as possible from the Tejon Reservation to the Tule River Farm.[59] As part of the federal relocation, Superintendent Wiley, in a report that year to the Commissioner of Indian Affairs, noted the lack of food at the Tejon Reservation.[60]

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[51] Phillips, *supra* note 11, at pg. 131 (President Pierce removed Beale on May 31, 1854 and appointed Thomas Henley as superintendent of Indian Affairs in California).
[52] Letter, T.J. Henley, Superintendent of Indian Affairs in California, to Commissioner Manypenny (Aug. 28, 1854).
[53] Phillips, *supra* note 11, at 240.
[54] *Ibid*.
[55] Extract from Report No. 67, Report to the Commissioner of Indian Affairs, Annual Report, 1862, by P.H. Wentworth Superintendent for the Southern District of California (Aug. 30, 1862)("The Indians properly belonging at present to the Tejon reservation may be numbered at about 1,370. . . ." The Sierra or Caruana Indians [Kitanemuk] under their chief, Vicente, number 36 men, 40 women, and 20 children . . . .").
[56] Extract from Report No. 67, Report to the Commissioner of Indian Affairs, Annual Report, 1862, by P.H. Wentworth Superintendent for the Southern District of California (Aug. 30, 1862).
[57] 13 Stat. 39 (Apr. 8, 1864) ("1864 Act").
[58] Phillips, *supra* note 11, at 250.
[59] *Ibid*. (the Tule River Indian Reservation was created by Executive Order in 1873, prior to that it was referred to as Tule River Farm).
[60] ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at 131 (1864).

The underlying ownership status of the Tejon Reservation also presented uncertainty for those Tejon Indians who remained. Between 1855 and 1866, the land underlying the Tejon Reservation became available to private parties through patents issued by the Federal Board of Commissioners. The tracts that would eventually comprise the Tejon Reservation and later the Tejon Ranch began as four Mexican land grants: the Rancho Los Alamos y Agua Caliente; Rancho El Tejon; Rancho Castac; and Rancho La Liebre.[61] The Sebastian Military Reserve had been established on the Rancho El Tejon in 1853. In 1855, Beale, no longer Superintendent, purchased Rancho La Liebre. He bought Rancho El Tejon and Rancho de los Alamos y Agua Caliente in 1865, and Rancho Castac in 1866. With the purchase of these four Mexican land grants, Beale created the Tejon Ranch.[62] In total, Beale acquired approximately 265,000 acres of the Tejon Valley, including most or all of the Tejon Tribe's aboriginal territory.[63]

Despite Superintendent Wiley's attempt to remove the Tribe from the Tejon Ranch, approximately 300 such Indians remained – approximately the same number Beale reported in the area when he mapped the reserve in 1853.[64]

Beale died in 1893, leaving management of the Tejon Ranch to his son, Truxton Beale. While Beale and his son owned Tejon Ranch, federal officials reported that the Tribe lived on the Tejon Ranch in relative peace.[65] In 1911, Truxton Beale sold Tejon Ranch to a Los Angeles business consortium, the Tejon Ranch Syndicate.[66]

C. 1911 to 1934

Notwithstanding the lack of a formal reservation, the federal government continued to take actions that reflected federal obligations, duties, responsibility for and authority over the Tejon Tribe and its members while they resided on the Tejon Ranch. The United States took repeated steps to secure land for the Tribe's benefit, enumerated the Tribe in censuses, and appropriated funding to build a schoolhouse and educate the Tribe's children.

1. Federal Oversight and Efforts to Secure Land

[61] Phillips, *supra* note 11, at 254.
[62] Phillips, *supra* note 11, at 254; *Robinson v. Jewell*, 790 F.3d 910, 915 (9th Cir. 2015).
[63] Phillips, *supra* note 11, at 250. Beale purchased grants as land became available through patents issued by the Federal Board of Commissioners to private parties. By 1867 Beale had acquired patents to 265,215 acres of the Tejon Valley.
[64] Phillips, *supra* note 11, at 250; *see also*, David S. Whitley, "Sebastian Indian Reserve Discontiguous Archeological District", unpublished National Register of Historic Places registration forms (2013)(Asserting that the cultural and genetic diffusion that occurred on the Tejon Reservation is responsible for the ethnogenesis of the Tejon Indian Tribe).
[65] Letter, Assistant Secretary to Attorney General, (1916)(the Assistant Secretary provided as an attachment to the letter his report to the Secretary of the Interior which relayed that "no complaints were made by the Indians, who were unmolested.").
[66] Giffen & Woodward, *supra* note 8, at 51.

In 1914, at the direction of the Commissioner of Indian Affairs, Special Agent C.H. Asbury visited the Tejon Ranch and made careful inquiry into the Tribe's living conditions.[67] In summarizing old reports from the Commissioner of Indian Affairs, he noted the many references to the Tribe "from the time the *jurisdiction* of the United States was extended over them."[68] He indicated that the Tejon Indians had lived at the same place for many years, but that their numbers had been diminished by death and removal to other places.[69]

Based on his visit, Special Agent Asbury estimated about 60 Tejon Indians continued to make their home at Tejon Ranch. [70] Special Agent Asbury initiated federal negotiations with the owners of the Tejon Ranch to purchase a tract of land for the Tribe.[71] He stated that "unless some ground can be found to support the claim of the Indians to rights to the land occupied it seems that it will be necessary for us to buy the land, if it can be bought, or to try to buy land of some one [*sic*] else in that same locality."[72]

By 1915, federal officials had received a number of complaints regarding the Tejon Tribe's treatment. Special Agent J.J. Terrell investigated the complaints and concluded that the ranch owners and manager treated the Tribe's members poorly.[73] He recommended that the federal government make appropriations to purchase land for the Tribe.[74] He also provided as an attachment to his report a "Census of the Indians of El Tejon Band in Kern Co. Calif,"[75] in which he stated that there were 79 Tejon Indians residing on the Tejon Ranch.[76]

Special Agent Terrell described the Tribe's welfare again the following year, and recommended that the Tribe remain in its territory.[77] He indicated that it would be a mistake to remove the Tribe from its present location and if possible "(...) to have set aside for use of these Indians all Government lands remaining untaken within these three Ranges and Township at the earliest possible moment."[78] Based on Special Agent Terrell's reports, the Commissioner of Indian Affairs agreed that "the present condition of these Indians is unsatisfactory."[79]

Special Agent Terrell, in his September 21, 1916 letter to the Commissioner of Indian Affairs, described his "hope that I might find suitable location for their removal either by purchase or allotments on Government lands (...)."[80] He described travelling with "Juan Lozada, Chief of this

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[67] *Ibid*.
[68] Asbury Report (emphasis added).
[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] Report, Special Indian Agent Terrell to Commissioner of Indian Affairs (Dec. 12, 1915) ("Terrell Census").
[74] *Ibid*.
[75] *Ibid*. The reaffirmation Letter issued by the Assistant Secretary - Indian Affairs cited the importance of the 1915 Terrell Census as it related to the Tribe's citizens, *supra* note 12 at 9.
[76] Terrell Census.
[77] Report, Special Indian Agent Terrell to Commissioner of Indian Affairs (Sept. 21, 1916).
[78] *Ibid*.
[79] Report to the Secretary of Interior (1916).
[80] Letter, John Terrell to Commissioner of Indian Affairs, 1 (Sept. 21, 1916).

band" in an effort to find land suitable to the Chief because removal would otherwise be out of the question.[81] He explained that the majority of the Tribe living at the Rancheria had lived there all their lives and were "more ignorantly and persistently attached than ordinarily to the Tejon Canyon and its narrow thread of valley land where nestles their little cabin homes."[82] He explained, "[t]heir dead as far back as they know are sleeping their last sleep within their every day [*sic*] sight."[83] Special Agent Terrell recommended in his letter that "the following lands may be (...) set aside as an Indian Reservation (...),"[84] and he provided a sketch and a legal description for 1,070 acres made up of portions of Sections 2, 12, 26, 28 and 34 within Township 11 North, Range 17.[85] Special Agent Terrell believed that setting aside the land for the Tribe would mean "we will have succeeded in forever retaining these Indians in their beloved Tejon Valley . . ."[86]

The Secretary accepted Special Agent Terrell's recommendation with a slight modification, resulting in the withdrawal of 880 acres in 1916.[87] The Secretary ordered the lands withdrawn from the public domain "for the use of the El Tejon Band of Indians, Kern County, California.[88] However, no Tejon Indians relocated to the withdrawn land, as it was "steep hillside grazing land of poor quality without water."[89]

The withdrawal order for the 880-acre reservation anticipated a suit to quiet title and specifically referenced a request by the Department on October 25, 1916 that the Attorney General file suit against the Tejon Ranch.[90] The order recommended the temporary withdrawal of the reservation lands "should the United States be unsuccessful in this suit (...)" or the Tejon Ranch seek to eject them.[91]

As part of an effort to negotiate with the Tejon Ranch owners, Special Assistant to the Attorney General George Fraser sent a letter to Harry Chandler, a member of the Tejon Ranch Board of Directors on May 28, 1920. The letter outlined the Tejon Tribe's use of the land and the legal theory in support of the United States' claim that the Tejon Tribe retained rights under Spanish, Mexican and American law because of their uninterrupted occupancy.[92] The letter detailed efforts by the Tejon Ranch owners to steadily reduce the Tribe's numbers living on Tejon Ranch and asserted that those efforts were contrary to law.[93] The letter requested that in lieu of

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[81] *Id*. at 2.
[82] *Id*. at 6.
[83] *Ibid*.
[84] *Id*. at 7.
[85] *Ibid*.
[86] *Id*. at 8.
[87] Order, Approving request to withdraw land from the public domain for the El Tejon band of Indians (Nov. 9, 1916).
[88] *Ibid*.
[89] Letter, Leonard Hill, Area Director, to Commissioner, Bureau of Indian Affairs (Sept. 29, 1961).
[90] Order, Approving request to withdraw land from the public domain for the El Tejon band of Indians (Nov. 9, 1916).
[91] *Ibid*.
[92] Letter, George Fraser, Special Assistant to the Attorney General to Harry Chandler, Tejon Ranch Syndicate (May 28, 1920).
[93] *Id*. at ¶ 3.

litigation, the Tejon Ranch voluntarily grant the United States fee title to an area on the Ranch that would serve as a permanent home for the Tejon Tribe.[94] Correspondence between Mr. Fraser and Mr. Chandler continued into July, but by December, the United States had filed suit in federal district court to quiet title.[95]

The United States Department of Justice actively asserted the federal government's guardian-ward relationship with the Tejon Tribe in its Complaint:

> "[t]his is a suit by the United States, as *guardian* of certain Mission Indians, to quiet in them a 'perpetual right' to occupy, use, and enjoy a part of a confirmed Mexican land grant in Southern California, for which the defendants hold a patent from the United States" and that ". . . said Indians are and from time immemorial have been tribal Indians, and at all times since July 7, 1846, have been and now are *wards* of the United States (...)."[96]

The United States sought to confirm the Tribe's perpetual right to occupy a 5,364 acre tract located within the boundaries of the Tejon Ranch.[97] The United States asserted that the Tribe's right of possession to the land was based on its occupancy, as well as on Spanish and Mexican land claims.[98] The lawsuit ultimately failed when the Supreme Court held on appeal that the Tribe's title had been extinguished as a result of its failure to comply with the time limitations imposed by the California Claims Act.[99]

After the Supreme Court decision, the Office of Indian Affairs ("OIA") again attempted to negotiate with the owners of the Tejon Ranch to purchase a tract of land for the Tejon Tribe.[100] On June 19, 1924, Assistant Commissioner E.B. Merritt, responding to a telegram from Superintendent L.A. Dorrington, wrote that Dorrington should make an investigation into "how large an appropriation should be requested at the next session of Congress to adequately provide

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[94] *Id*. at ¶ 11.

[95] Letter, George Fraser, Special Assistant to the Attorney General to Harry Chandler, Tejon Ranch Syndicate (July 12, 1920); United States Bill of complaint, filed Dec. 20, 1920 (The Bill of complaint filed in the United States District Court for the Southern District of California is included as part of the Transcript of Record on Appeal from the Ninth Circuit Court of Appeals in *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472 (1924)) ("U.S. Complaint").

[96] U.S. Complaint at Sec. I (emphasis added).

[97] *Ibid*.

[98] *Id*. at Sec. V.

[99] *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 481(1924). In March of 1851 Congress sought to determine the validity of prior Spanish and Mexican land grants protected by the Guadalupe Hidalgo Treaty by passing the California Claims Act of March 3, 1851. The Act effectively required California's Indian tribes to perfect their claims within two years or they were deemed abandoned.

[100] *See* Telegram, E.B. Merritt, Assistant Commissioner to F.G. Collette (June 14, 1924); Letter, E.B. Merritt, Assistant Commissioner to L.A. Dorrington, Superintendent (June 19, 1924); Letter, Hubert Work, Secretary of the Interior, to the Attorney General (Sept. 12, 1924); Letter, L.A. Dorrington, Superintendent, to Commissioner of Indian Affairs (Oct. 18, 1924); Letter, E.C. Finney, Acting Secretary of the Interior, to the Attorney General (Nov. 8, 1924).

land for the Tejon Indians, in addition to the $7,900 you have already been authorized to use (...)."[101]

The Tejon Ranch Board of Directors entered into an agreement allowing continued occupation by the Tejon Tribe, so long as no further claims were made against Tejon Ranch.[102] In 1925, the BIA investigated the Tribe's condition and reported on its status, including its occupation of Tejon Ranch.[103] Superintendent L.A. Dorrington wrote to the Commissioner of Indian Affairs regarding efforts to purchase land for the Tribe, the rental agreement for occupation at Tejon Ranch, and the futility of purchasing other land, as the Tribe would refuse to move.[104]

In 1929, the OIA published a list entitled "Indian tribes of the United States," and included the Tejon Tribe as a separate entity under the jurisdiction of the Tule River Subagency.[105]In 1930, the Secretary responded to an inquiry from the Vice President of the United States regarding the welfare of the Tejon Tribe, recounting the agreement to occupy the Tejon Ranch for nominal consideration. The Secretary stated that he "question[s] the wisdom of disturbing [the Tribe] in their present occupancy of the privately owned lands or in any way disrupting their evident orderly and peaceful mode of living."[106] And in March 1938, the Assistant Commissioner of Indian Affairs again recounted the agreement for the Tejon Tribe's occupation of the Tejon Ranch in response to a letter from a local California attorney inquiring as to the Tribe's status on Tejon Ranch.[107]

2. Federal Support and Funding for Tribal School

At the same time the federal government sought to provide the Tribe with a permanent land base, it also took responsibility for constructing and funding a schoolhouse on the Tejon Ranch for the purpose of educating the Tribe's children.

In his April 13, 1915 letter to the Commissioner of Indian Affairs, Special Agent Asbury reported on the status of education for the Tejon Indian Tribe's children.[108] Special Agent Asbury recommended that the federal government cooperate with the county superintendent to share in the expense of educating the Tribe's children.[109] He stated in his letter "[f]rom my present information, I would favor the building of a small school house and paying a reasonable

[101] Letter, E.B. Merritt, Assistant Commissioner, to L.A. Dorrington, Superintendent (June 19, 1924).
[102] *See supra* note 129.
[103] *See*, Letter, E.B. Merritt, Assistant Commissioner, to L.A. Dorrington, Superintendent (Apr. 3, 1925); Letter, L.A. Dorrington, Superintendent, to E.B. Merritt, Assistant Commissioner (May 8, 1925); Letter, L.A. Dorrington, Superintendent to Commissioner of Indian Affairs (Dec. 16, 1925).
[104] Letter, L.A. Dorrington, Superintendent to Commissioner of Indian Affairs (June 25, 1927).
[105] Bulletin No. 23, *Indian Tribes of the United States*, Department of Interior, Office of Indian Affairs (1929).
[106] Letter, Ray Wilbur, Secretary of the Interior to Charles Curtis, Vice President (June 26, 1930).
[107] Letter, William Zimmerman Assistant Commissioner to George W. Hurley (Mar. 28, 1938).
[108] Letter, Special Indian Agent Asbury to Commissioner of Indian Affairs (Apr. 13, 1915).
[109] *Ibid*.

tuition for these children, in order that the Government may cooperate with the county in the education of these children."[110]

On this recommendation, in 1916 and 1917 the OIA approved contracts with Kern County for children of the Tejon Tribe to attend a public school approximately nine miles from the Tribe's settlement.[111] However, due the impracticability of transportation to the school and a reluctance from some to send their children to the school, it was determined that a school was needed at Tejon Ranch.[112]

In 1922, the United States leased a tract of land from the El Tejon School District in order to provide school facilities for the Tribe's children residing at the Tejon Ranch.[113] Justification for the expenditure indicated that "[t]he Indians are wards of the Government and very poor."[114] The Lease for the property similarly stated that consideration for the lease included "[i]nstruction given unto Indian children, wards of the Federal Government (...)."[115] Once the location was secured, the federal government contracted with the El Tejon School District to provide education at the school site.[116] Applications for Public School Contracts between the federal government and the El Tejon School District indicate that a portable wooden building was erected for use as a schoolhouse.[117]

D. Federal Jurisdiction through 1934 and after

The Department has been able to locate contracts for the school at the Tejon Ranch through school year 1926-1927,[118] but there is strong evidence that the school at Tejon Ranch operated through 1934 and until 1945.[119] Reports submitted by teacher Anna Knowles record 6-8 students

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[110] *Ibid.*

[111] Application for Public School Contract, (Nov. 22, 1916).

[112] Letter, Special Indian Agent Dorrington to Commissioner of Indian Affairs, (June 25, 1917).

[113] Lease, El Tejon School, between Superintendent of the Tule River Indian School and Trustees of the El Tejon School District (June 28, 1922)("School Lease"). The lease is between the federal government and the school district. Tejon Ranch was not a party to the lease. Other evidence makes clear however that the school was constructed on Tejon Ranch lands. *See*, Letter, T.J. Brown, Tejon Ranch to Chenoweth, Superintendent of Schools (Sept. 25, 1926); *see also*, Letter, Superintendent Rockwell to Commissioner of Indian Affairs (May 29, 1945)(indicating the El Tejon Schoolhouse is located on Tejon Ranch and that the building is on the Office of Indian Affairs property list).

[114] Justification for Schoolhouse (Jan. 7, 1921)(Indicates that arrangement is being made whereby school district agrees to removal of any improvements that the United States may place on the tract of land leased for school purposes.).

[115] School Lease at 1.

[116] Application for Public School Contracts, (July 28, 1923); Application for Public School Contracts, (Aug. 21, 1924); Application for Public School Contracts (May 25, 1925); Application for Public School Contracts, (Aug. 21, 1926); ("School Contracts") All four contracts indicate that one teacher was paid to teach pupils from the Tejon Indian Tribe ranging from 5 to 17 years old.

[117] School Contracts.

[118] School Contracts. (The Aug. 21, 1926 School Contract was for the 1926-27 school year).

[119] Letter, Superintendent Rockwell to Commissioner of Indian Affairs (May 29, 1945). The letter indicates Rockwell's recommendation is to close the school and have the children transported to a different school. He also

in attendance at the school in various months from 1934-35.[120] And the portable schoolhouse erected on the Tejon Ranch lands continued to be carried on the OIA property list until 1945.[121]

In his May 29, 1945 letter, Superintendent John Rockwell wrote to the Commissioner of Indian Affairs recommending that the government close the El Tejon School and instead transport the children to the Sunset Public School,[122] noting that "[t]he El Tejon Schoolhouse is on our property list."[123]

In response to Superintendent Rockwell's letter, the Commissioner of Indian Affairs indicated that "[t]he building was acquired in 1921 from 'Indian School Support' and 'Indian School Buildings' at an approximate cost of $1,940."[124] He further recommended that the school be razed and the materials salvaged for use at the Sunset Public School, where the Indian children enrolled at the Tejon school would soon be attending.[125]

This correspondence indicates that the Tejon school was operational up to and through 1934; that the federal government built and funded the Tejon school; and that the United States recognized a federal responsibility for the Tejon children's education by contracting with the public school district to provide a teacher.

The federal government continued to hold the 880 acres of land withdrawn for the Tribe's benefit through 1934. Indeed, not until 1961 did the Department examine the status of the withdrawn land and determine that it should be restored to the public domain,[126] and then only after the Area Director determined that the land was largely unusable, and that no Tejon Indians were living there.[127] A 1962 Public Land Order restored the land to the public domain and the jurisdiction of the Bureau of Land Management ("BLM").[128] While there is no evidence that the federal government treated the withdrawn land as the Tribe's "reservation" or that the Tribe ever occupied the lands, the federal government continued to hold the land for the Tribe's use. Consistent with this is the fact that between 1928 and 1933, the BIA continued to enumerate the Tribe' members as under the jurisdiction of California Indian agencies.[129]

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indicated that the "[o]ffice is perpetuating a rather poor school at El Tejon." This contemporary statement indicates the school was operational at the time of Rockwell's letter.

[120] Report, Teacher's Monthly Report of Attendance of Indian Pupils in Public Schools (Oct. 31, 1934; Dec. 31, 1934; Nov. 30, 1934; Jan. 31, 1935; Apr. 20, 1935; Mar. 29, 1935; June 7, 1935).

[121] Letter, Superintendent Rockwell to Commissioner of Indian Affairs, (May 29, 1945).

[122] *Ibid*.

[123] *Ibid*.

[124] Letter, Commissioner of Indian Affairs to Superintendent Rockwell (Sept. 12, 1945).

[125] *Ibid*.

[126] Letter, Leonard Hill, Area Director, to Commissioner, Bureau of Indian Affairs (Sept. 29, 1961).

[127] *Ibid*.

[128] Public Land Order 2738, Revoking Departmental Order of November 9, 1916, 27 Fed. Reg. 7,636 (Aug. 2, 1962)

[129] *See Extracts from the Annual Report of the Secretary of the Interior, Fiscal Year 1928, Relating to the Bureau of Indian Affairs* (GPO 1928) at 37 ("Indian Table 1. Indian population of the United States, exclusive of Alaska, as of June 30, 1928") (listing Tejon as under jurisdiction of Tule River Subagency); ARCIA FY1930 at 38 ("Table 2. Indian population in continental United States enumerated at Federal agencies according to tribe, sex, and residence, April 1, 1930") (listing Tejon at Tule River Reservation and under the jurisdiction of the Sacramento Agency);

II. STANDARD OF REVIEW

A. Four-Step Procedure to Determine Eligibility.

Section 5 of the IRA provides the Secretary discretionary authority to acquire any interest in lands for the purpose of providing lands in trust for Indians.[130] 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.[131]

In 2009, the Supreme Court in *Carcieri v. Salazar*[132] 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.[133] The Solicitor of the Interior ("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[134] 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

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ARCIA FY1931 at 46 ("Table 2. Indian population in United States enumerated at Federal agencies according to tribe, sex, and residence, April 1, 1931") (listing Tejon under public domain allotments within jurisdiction of Sacramento Agency); ARCIA FY1932 at 38 (Table 2. Indian Population in Continental United States Enumerated at Federal Agencies According to Tribe, Sex, and Residence April 1, 1932") (listing Tejon among "Tulare County Indians" within the jurisdiction of the Sacramento Reservation).

[130] 25 U.S.C. § 5108.

[131] 25 U.S.C. § 5129 (bracketed numerals added).

[132] 555 U.S. 379.

[133] 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).

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

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."[135] In its place, the Solicitor issued a new, four-step procedure for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor ("Solicitor's Office").[136]

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.[137] 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

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[135] Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).
[136] *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").
[137] 25 C.F.R. Part 83.

over time, and the corresponding evolution of the Department's responsibilities, a one-size-fits-all approach for evaluating the totality of a tribal applicant's evidence is not possible or desirable. Attorneys in the Solicitor's Office must evaluate the evidence on a case-by-case basis within the context of a tribe's unique circumstances, and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

To further assist Solicitor's Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor's Guidance includes a memorandum[138] 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."[139] The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,[140] 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."[141] In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been "under federal jurisdiction" *in* 1934.[142] By "recognized," Justice Breyer appeared to mean "*federally* recognized"[143] 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,"[144] and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.[145] 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

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[138] *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").

[139] Deputy Solicitor's Memorandum at 19. *See also Cty. of Amador*, 872 F.3d at 1020, n. 8 (*Carcieri* leaves open whether "recognition" and "jurisdiction" requirements are distinct requirements or comprise a single requirement).

[140] *Carcieri* at 382-83.

[141] *Ibid.*

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

[143] *Ibid.*

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

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

trust responsibility in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington ("Stillaguamish Tribe") shows.[146] 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.[147]

The Solicitor noted that Category 1's grammar supports this view. The adverb "now" is part of the prepositional phrase "under federal jurisdiction,"[148] which it temporally qualifies.[149] Prepositional phrases function as modifiers and follow the noun phrase that they modify.[150] 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.[151] 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.[152] These

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[146] *Ibid.*

[147] 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.

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

[149] 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).

[150] 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.

[151] 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).

[152] *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*

included the loss of Indian lands and the displacement and dispersal of tribal communities.[153] Lacking an official list of "recognized" tribes at the time,[154] it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,[155] left unmodified, the phrase "recognized Indian tribe" could include tribes disestablished or terminated before 1934.

2. Statutory Terms.

The Solicitor concluded that the expression "now under federal jurisdiction" in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress's plenary authority[156] 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.

The contemporaneous legal definition of "jurisdiction" defined it as the "power and authority" of the courts "as distinguished from the other departments."[157] 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.'[158] 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."[159]

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

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By Establishing A Federal Court Of Indian Affairs, 73d Cong. at 233-34 (1934) (hereafter "H. Hrgs.") (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apt. 28, 1934)).

[153] *Ibid*.

[154] 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))).

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

[156] Deputy Solicitor's Memorandum at 9.

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

[158] BLACK'S at 1774.

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

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.[160]

3. Legislative History.

The IRA's legislative history lends additional support for interpreting "now under federal jurisdiction" as modifying "recognized Indian tribe." A thread that runs throughout the IRA's legislative history is a concern for whether the Act would apply to Indians not then under federal supervision. On April 26, 1934, Commissioner Collier informed members of the Senate Committee on Indian Affairs ("Senate Committee") that the original draft bill's definition of "Indian" had been intended to do just that:[161]

> Senator THOMAS of Oklahoma. (….) In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.
>
> Commissioner COLLIER. Yes.
>
> Senator THOMAS. Numerous tribes have been lost (….) It is contemplated now to hunt those Indians up and give them a status again and try do to something for them?
> Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] Government aid.
>
> Senator THOMAS. Without regard to whether or not he is now under your supervision?
>
> Commissioner COLLIER. Without regard; yes. *It definitely throws open Government aid to those rejected Indians*.[162]

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[160] 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.

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

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

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.[163] 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."[164] 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."[165]

On May 17, 1934, the last day of hearings, the Senate Committee continued to express concerns over the breadth of the bill's definition of "Indian," returning again to the draft definitions of "Indian" as they stood in the committee print. Category 1 now defined "Indian" as persons of Indian descent who were "members of any recognized Indian tribe."[166] As on previous days,[167] 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."[168]

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

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[163] *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).

[164] Sen. Hrgs. at 80.

[165] 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.").

[166] 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.

[167] *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).

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

discussion of Section 18, which authorized votes to reject the IRA by Indians residing on a reservation. Senator Thomas stated that this would exclude "roaming bands" or "remnants of a band" that are "practically lost" like those in his home state of Oklahoma, who at the time were neither "registered," "enrolled," "supervised," or "under the authority of the Indian Office."[169] Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."[170] 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,"[171] that is, those Indians then under federal supervision.

Acknowledging that landless Indians ought to be provided for, Chairman Wheeler questioned how the Department could do so if they were not "wards of the Government at the present time."[172] When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were "just as much Indians as any others,"[173] 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.[174] 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.[175] Chairman Wheeler thought not, "unless they are enrolled at the present time."[176] 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.[177]

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

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[169] Sen. Hrgs. at 263.

[170] *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."

[171] *Ibid*.

[172] *Ibid*.

[173] *Ibid*.

[174] *Ibid*.

[175] *Id*. at 264.

[176] *Ibid*.

[177] *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.").

quantum, so long as they were members of a "recognized Indian tribe," while Category 2 included their "descendants" residing on a reservation.[178] Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.[179] 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.[180]

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,[181] Chairman Wheeler finally turned to the IRA's definition of "tribe,"[182] which as then drafted included "any Indian tribe, band, nation, pueblo, or other native political group or organization."[183] Chairman Wheeler and Senator Thomas thought this definition too broad.[184] Senator Thomas asked whether it would include the Catawbas,[185] 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.[186] Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.[187] 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."[188]

Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."[189] Senator O'Mahoney responded, saying "If you wanted to exclude any of them [from the Act] you certainly would in my judgment."[190] 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.[191] 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

[178] *Id*. at 264-65.
[179] *Id*. at 264.
[180] *Ibid*.
[181] *Id*. at 265.
[182] *Ibid*. at 265.
[183] *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.
[184] Sen. Hrgs. at 265.
[185] *Ibid*.
[186] *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).
[187] *Id*. at 264.
[188] *Id*. at 266.
[189] *Ibid*. at 266.
[190] *Ibid*. Nevertheless, Senator O'Mahoney did not understand why the Act's benefits should not be extended "if they are living as Catawba Indians."
[191] *Ibid*.

general definition."[192] It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,[193] 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.[194]

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.[195] 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."[196] Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."[197] Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,[198] described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."[199] These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.

The IRA's legislative history elsewhere shows that Commissioner Collier distinguished between Congress's plenary authority generally and its application to tribes in particular contexts. He noted that Congress had delegated "most of its plenary authority to the Interior Department or the Bureau of Indian Affairs," which he further described as "clothed with the plenary power."[200] 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

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[192] *Ibid*.
[193] *Id*. at 231.
[194] *Id*. at 266.
[195] H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).
[196] *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)).
[197] *Id*. at 184 (statement of Commissioner Collier) (Apr. 8, 1934).
[198] Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* https://www.justice.gov/osg/bio/charles-fahy.
[199] *Id*. at 319 (statement of Assistant Solicitor Charles Fahy).
[200] *Id*. at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

rules and regulations," to which the Indians were subjected.[201] Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the OIA having direct supervision of Indians.[202]

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.[203] 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."[204] 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:[205]

> 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.[206]

The terms of Category 1 suggest that the phrase "under federal jurisdiction" should not be interpreted to refer to the outer limits of Congress's plenary authority, since it could encompass tribes that existed in an anthropological sense but with whom the federal government had never exercised any relationship. Such a result would be inconsistent with the Department's understanding of "recognized Indian tribe" at the time, discussed below, as referring to a tribe

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

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

[203] 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).

[204] *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*.

[205] *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).

[206] *Ibid*.

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."[207]

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

Today's concept of "federal recognition" merges the cognitive sense of "recognition" and the political-legal sense of "jurisdiction." As *Carcieri* makes clear, however, the issue is what Congress meant in 1934, not how the concepts may have later evolved.[208] Congress's authority to recognize Indian tribes flows from its plenary authority over Indian affairs.[209] 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.[210] Because Congress has not generally defined "Indian,"[211] it left it to the

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[207] 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."

[208] 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.")).

[209] *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.")).

[210] 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").

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

Secretary to determine to whom such statutes apply.[212] "Recognition" generally is a political question to which the courts ordinarily defer.[213]

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."[214] 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."[215] 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."[216] While neither the Act nor its legislative history provide further explanation, the context strongly

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

[213] *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").

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

[215] *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."

[216] 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."

suggests that the phrase "recognized vocational and trade schools" refers to those formally certified or verified as such by an appropriate official.

2. Legislative History.

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.[217] Commissioner Collier, himself a "principal author" of the IRA,[218] also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.[219] 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.[220]

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

3. Administrative Understandings.

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

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[217] *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.

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

[219] 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).

[220] 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).

"tribe."[221] Assistant Solicitor Cohen explains that the term "tribe" may be understood in both an ethnological and a political-legal sense.[222] The former denotes a unique linguistic or cultural community. By contrast, the political-legal sense refers to ethnological groups "recognized as single tribes for administrative and political purposes" and to single ethnological groups considered as a number of independent tribes "in the political sense."[223] 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.[224]

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."[225] 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."[226]

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,[227] 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."[228] These included that the tribe have been "recognized" in 1934. Associate Solicitor Walker construed "recognized" as

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[221] Cohen 1942 at 268.
[222] 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.
[223] *Id*. at 268 (emphases added).
[224] *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).
[225] Letter, Commissioner John Collier to Ben C. Shawanesee (Apr. 24, 1935).
[226] 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.
[227] 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").
[228] *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).

referring to tribes with whom the United States had "a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time*."[229] 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."[230] Implicitly construing the phrase "now under federal jurisdiction" to modify "recognized Indian tribe," Associate Solicitor Walker found it "clear" that Category 1 "requires that some type of obligation or extension of services to a tribe must have existed in 1934."[231] 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.[232]

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.[233]

Throughout the United States' early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.[234] 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.[235] 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."[236] While the

[229] *Id*. at 2 (emphasis added).
[230] *Id*. at 4 (emphasis added). This is consistent with Justice Breyer's concurring view in *Carcieri*.
[231] *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.
[232] 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).
[233] 25 C.F.R. Part 83.
[234] U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.
[235] Act of March 3, 1871, c. 120, § 1, 16 Stat. 544, 566. Section 3 of the same Act prohibited further contracts or agreements with any tribe of Indians or individual Indian not a citizen of the United States related to their lands unless in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Id*., § 3, 16 Stat. 570-71.
[236] *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).

question of "recognition" remained one for the political branches,[237] the contexts within which it arose expanded with the United States' obligations as guardian.[238]

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,"[239] Indian groups that the Department did not otherwise consider "recognized" began to seek services and benefits from the federal government. The most notable of these claims were aboriginal land claims under the Nonintercourse Act;[240] treaty fishing-rights claims by descendants of treaty signatories;[241] and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,[242] which included tribes previously recognized and seeking restoration or reaffirmation of their status.[243] 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.[244] In January 1975, it found that federal Indian policies had "shifted and changed" across administrations "without apparent rational design,"[245] and that

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

[238] *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).

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

[240] *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).

[241] *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)

[242] 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*").

[243] 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).

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

[245] *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."

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.[246] Finding it imperative to do so,[247] Congress established the American Indian Policy Review Commission[248] 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."[249] It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."[250]

a. The Palmer Memorandum

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on "Federal 'Recognition' of Indian Tribes" (the "Palmer Memorandum").[251] 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."[252] 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.[253] 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*."[254] 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.[255]

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

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[246] *Ibid*. (citing MERIAM REPORT).
[247] *Ibid*.
[248] AIRPC Act, § 1(a).
[249] *Id*., § 2(3).
[250] *See*, *e.g.*, Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate (Jun. 7, 1974) (hereafter "Butler Letter") (describing authority for recognizing tribes since 1954); Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, Secretary's Authority to Extend Federal Recognition to Indian Tribes (Aug. 20, 1974) (hereafter "Chambers Memo") (discussing Secretary's authority to recognize the Stillaguamish Tribe); Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal "Recognition" of Indian Tribes (Jul. 17, 1975) (hereafter "Palmer Memo").
[251] 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.
[252] Palmer Memo at 23.
[253] *Id*. at 23-24.
[254] *Id*. at 24. The memorandum concluded that the former question necessarily implied the latter.
[255] *Ibid*. at 24.

indistinguishable from the question of tribal existence,[256] 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.[257] Though treaties remained a "prime indicia" of political "recognition,"[258] 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,"[259] including the provision of trust services.[260] 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."[261] 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"[262] toward a tribe, consistent with the evolution of federal Indian policy.[263]

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[256] 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.

[257] *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").

[258] *Id*. at 3.

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

[260] 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.").

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

[262] *Id*. at 14.

[263] Having ratified no new treaties since 1868, ARCIA 1872 at 83 (1872), Congress ended the practice of treaty-making in 1871, more than 60 years before the IRA's enactment. *See* Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, *codified at* 25 U.S.C. § 71. This caused the Commissioner of Indian Affairs at the time to ask what would become of the rights of tribes with which the United States had not yet treated. ARCIA 1872 at 83. As a practical matter, the end of treaty-making tipped the policy scales toward expanding the treatment of Indians as wards under federal guardianship, expanding the role of administrative officials in the management and implementation of Indian Affairs. Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship); *Brown v. United States*, 32 Ct. Cl. 432, 439 (1897) ("But since the Act 3d March, 1871 (16 Stat. L., 566, § 1), the Indian tribes have ceased to be treaty-making powers and have become simply the wards of the nation."); *United States v. Kagama*, 118 U.S. 375, 382 (1886) ("But, after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,-to govern them by acts of congress. This is seen in the act of March 3, 1871...").

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;[264] the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."[265] 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;[266] 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;[267] the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;[268] 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;[269] and the expenditure of funds appropriated for the use of particular Indian groups.

The Palmer Memorandum also considered the Department's early implementation of the IRA, when the Solicitor's Office was called upon to determine tribal eligibility for the Act. While this did not provide a "coherent body of clear legal principles," it showed that Department officials closely associated with the IRA's enactment believed that whether a tribe was "recognized" was "an administrative question" that the Department could determine.[270] In making such determinations, the Department looked to indicia established by federal courts.[271] There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.[272] 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."[273] 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

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[264] Butler Letter at 6; Palmer Memo at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).
[265] Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memo at 19.
[266] 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).
[267] Palmer Memo at 19 (citing Cohen 1942 at 271)); Butler letter at 4.
[268] Palmer Memo at 19 (citing Cohen 1942 at 271).
[269] *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)).
[270] *Id*. at 18.
[271] *Ibid.*
[272] *Ibid.*
[273] *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.").

sovereign or quasi-sovereign basis."[274] The manner in which the Department understood "recognition" before, in, and long-after 1934[275] supports the view that Congress and the Department understood "recognized" to refer to actions taken by federal officials with respect to a tribe for political or administrative purposes in or before 1934.

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

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

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

Based on this understanding, the phrase "now under federal jurisdiction" can be seen to exclude two categories of tribe from Category 1. The first category consists of tribes never "recognized" by the United States in or before 1934. The second category consists of tribes who *were* "recognized" before 1934 but no longer remained under federal jurisdiction in 1934. This would include tribes who had absented themselves from the jurisdiction of the United States or had otherwise lost their jurisdictional status, for example, because of policies predicated on "the dissolution and elimination of tribal relations," such as allotment and assimilation.[276] Though

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[274] Palmer Memo at 18.

[275] *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).

[276] *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

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.[277] 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.[278]

III. ANALYSIS

A. Procedure for Determining Eligibility.

As noted above, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.[279] It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.[280] The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.[281] 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.[282] The Tribe, as explained below, provided dispositive evidence under Step Two demonstrating that it was "under federal jurisdiction" in 1934. Therefore, the Tribe is eligible for the benefits of Section 5 of the IRA. We note that in addition to providing dispositive evidence of federal jurisdiction in 1934, the Tribe's evidence also demonstrates that it was "recognized" in or before 1934 and remained "under federal jurisdiction" in 1934 under Step Three.

B. Dispositive Evidence of Federal Jurisdiction in 1934.

Having identified no separate statutory authority making the IRA applicable to the Tribe under Step One, our analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the Tribe was under federal jurisdiction in 1934.[283] Certain types of federal actions, including federal land acquisitions,[284] may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934.[285] Where any of these forms of evidence exist, then the Solicitor's Office may consider the tribe to

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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?").

[277] *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).

[278] *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).

[279] Solicitor's Guidance at 1.

[280] *Ibid.*

[281] *Ibid.*

[282] *Ibid.*

[283] Solicitor's Guidance at 2.

[284] *Id*. at 5.

[285] *Id*. at 2-4.

have been under federal jurisdiction in 1934 and eligible under Category 1.[286] The Tribe, as explained below, provided dispositive evidence under Step Two that it was "under federal jurisdiction" in 1934.

In 1915, Special Agent Terrell reported that the federal government needed to make appropriations to purchase land for the Tribe.[287] Based on Special Agent Terrell's recommendation, in November 1916, the Secretary withdrew 880 acres from the public domain "for the use of the El Tejon Band of Indians, Kern County, California."[288] In the 1920s, as part of its effort to establish a land base for the Tribe, the United States also sought to confirm through litigation the Tribe's perpetual right to occupy land within the boundaries of the Tejon Ranch.[289] When the litigation was unsuccessful, the OIA attempted to negotiate with owners of the Tejon Ranch to buy a tract of land for the Tejon Indians residing there.[290] Even though the federal government's efforts to secure a portion of the Tejon Ranch for the Tribe were unsuccessful, the United States continued to hold the 880 acres of land withdrawn for the Tribe's benefit until a 1962 Public Land Order restored the land to the public domain and placed the land under the jurisdiction of the BLM.[291]

As the Solicitor's Guidance explains "[c]lear evidence that the United States took efforts to acquire lands on behalf of an applicant tribe in the years leading up to 1934" presumptively demonstrates that the tribal applicant was under federal jurisdiction in 1934.[292] Here the United States' sought to acquire land for the Tribe through negotiation, litigation and withdrawal from the public domain in the years leading up to 1934. The federal government's efforts coupled with the fact that the United States held 880 acres in trust for the Tribe from 1916 to 1962, provides dispositive evidence that the Tribe was under federal jurisdiction in 1934.

C. Presumptive Evidence Demonstrating Federal Jurisdiction in 1934.

Though we find the Tribe satisfies the requirements of Category 1 under Step Two of the Solicitor's Guidance, because of the significant weight of the Tribe's evidence, we also note the strength of the Tribe's evidence of eligibility under Step Three. Step Three looks to whether an applicant tribe's evidence sufficiently demonstrates that it was "recognized" in or before 1934 and remained "under federal jurisdiction" in 1934.[293]

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[286] *Id*. at 2.
[287] Report, Special Indian Agent Terrell to Commissioner of Indian Affairs (Dec. 12, 1915) ("Terrell Census").
[288] *Ibid*.
[289] *Ibid*.
[290] *See* Telegram, E.B. Merritt, Assistant Commissioner to F.G. Collette (June 14, 1924); Letter, E.B. Merritt, Assistant Commissioner to L.A. Dorrington, Superintendent (June 19, 1924); Letter, Hubert Work, Secretary of the Interior, to the Attorney General (Sept. 12, 1924); Letter, L.A. Dorrington, Superintendent, to Commissioner of Indian Affairs (Oct. 18, 1924); Letter, E.C. Finney, Acting Secretary of the Interior, to the Attorney General (Nov. 8, 1924).
[291] Public Land Order 2738, Revoking Departmental Order of November 9, 1916, 27 Fed. Reg. 7,636 (Aug. 2, 1962)
[292] Solicitor's Guidance at 5.
[293] Solicitor's Guidance at 6.

Step Three first examines whether a tribe was unambiguously "recognized" before 1934. The Solicitor's Guidance identifies general and specific indicia of such recognition. General indicia include *inter alia* treaties; the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated as a tribe.[294] Specific indicia of Executive or administrative recognition include *inter alia* the institution of suits on behalf of a tribe and the establishment of schools for the tribe's benefit.[295]

Here, the Tribe's negotiations with Commissioner Barbour in 1851 resulted in an executed, though unratified treaty. By entering into treaty negotiations with the Tejon Tribe, the United States acknowledged the Tribe as a sovereign entity capable of treaty-making, thus "recognizing" the Tribe as that term was understood in 1934. Further, the balance of the record evidence demonstrates that from 1852 through 1934, federal officials continued to take actions that reflect a course of dealings demonstrating that the Tejon Indians were under federal authority. The United States supervised and acknowledged a responsibility for the welfare of the Tejon Tribe, even though the Tribe was residing on the privately held Tejon Ranch.[296] The federal government engaged in persistent efforts to acquire lands for the Tejon Tribe, and the United States, as *guardian*, initiated litigation to secure land on the Tribe's behalf.[297] And at the same time the federal government sought to provide the Tribe with a permanent land base, it also took responsibility for constructing and funding a schoolhouse on the Tejon Ranch for the education of the Tribe's children, which it maintained through 1934.[298]

The Solicitor's four-step procedure is premised on the understanding that "under federal jurisdiction" as used in Category 1 does not refer to the outer limits of Congress's plenary authority,[299] but rather the "*application* and *administration* of the federal government's plenary authority over Indians."[300] The continuing course of dealings between the Tribe and the federal government from 1851 and through 1934, establishes that the Tribe was subject to the jurisdiction of the United States through the application and administration of the federal government's plenary authority. The evidence presumptively demonstrates that the tribe was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934 and thus supports a finding that the Tribe satisfies Category 1.

D. Conclusion that Tribe was Under Federal Jurisdiction in 1934 is Consistent with Reaffirmation Decision.

The Solicitor's Guidance recognizes that the Department on occasion "reaffirmed the federally acknowledged status of tribes through administrative means other than Part 83" and that "the

[294] Solicitor's Guidance at 7.
[295] Solicitor's Guidance at 7-8.
[296] Discussed above, Section I, (C) (1).
[297] *Ibid.*
[298] Discussed above, Section I, (C) (2); *Id*. at (D).
[299] Deputy Solicitor's Memo at 18.
[300] *Ibid*. (emphasis added).

Solicitor's Office should determine the eligibility under Category 1 of any applicant tribe that was administratively restored or reaffirmed outside Part 83 based on the specific facts of each case."[301] Evidence that a tribe was "federally recognized or reaffirmed after 1934 does not in itself preclude a finding that the tribe was under federal jurisdiction in 1934."[302]

Assistant Secretary Echo Hawk concluded that the Department improperly excluded the Tribe from the list of Indian Entities Eligible to Receive Services from the Bureau of Indian Affairs finding that the Tribe's relationship with the United States began as early as 1851 and remained intact at the time of reaffirmation in 2011.[303] In his April 24, 2012 Memorandum, Assistant Secretary Echo Hawk provided a detailed analysis in support of his decision.[304] Significantly, Assistant Secretary Echo Hawk indicated that, "[t]he Federal Government's withdrawal of land from the public domain in 1916 for the Tribe, as well as its repeated attempts to secure ownership of the land at the Tejon Ranch for the Tribe provide evidence, through a unique history, of the United States' acknowledgment of the Tribe as a political entity *under its jurisdiction*."[305]

Assistant Secretary Echo Hawk's decision to reaffirm the Tribe's status analyzed much of the same historical evidence at issue for this opinion. The Department's reaffirmation decision does not preclude a finding that the Tribe was under federal jurisdiction in 1934.

IV. CONCLUSION

Consistent with Step Two of the Solicitor's Guidance, we find that the Tejon Indian Tribe has provided dispositive evidence that the United States considered it to be under federal jurisdiction in 1934. As such, the Tribe satisfies the definition of "Indian" contained in Category 1. We therefore conclude that the Secretary has the statutory authority to acquire land in trust for the Tribe under Section 5 of the IRA.

[301] Solicitor's Guidance at 10.
[302] Solicitor's Guidance at 9.
[303] Letter, Larry Echo Hawk, Assistant Secretary – Indian Affairs to Kathryn Morgan, Chairwoman Tejon Tribe (Dec. 30, 2011).
[304] Memorandum, Larry Echo Hawk, Assistant Secretary – Indian Affairs to Pacific Regional Director (Apr. 24, 2012).
[305] *Id*. at 4 (emphasis added).