



The Grand Traverse Band of Ottawa and Chippewa Indians

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SUBMISSION ON *CARCIERI'S* "UNDER FEDERAL JURISDICTION" REQUIREMENT IN CONNECTION WITH PENDING FEE-TO-TRUST APPLICATIONS

SUBMITTED TO THE DEPARTMENT OF THE INTERIOR

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This memorandum sets forth the legal and historical grounds establishing beyond any reasonable dispute that the Grand Traverse Band of Ottawa and Chippewa Indians was under federal jurisdiction on June 18, 1934, the date of the enactment of the Indian Reorganization Act (“IRA” or “Act”). As such, pursuant to the decision of the United States Supreme Court in *Carcieri v. Salazar*, 555 U.S. ___, 129 S.Ct. 1058 (2009), the Secretary of the Interior enjoys continued authority to take land into trust for the Grand Traverse Band under Section 5 of the Act (25 U.S.C. § 465).

I. Introduction

The Grand Traverse Band of Ottawa and Chippewa Indians (“GTB” or the “Band”) is a federally recognized tribe located near Grand Traverse Bay in the northwest Lower Peninsula of Michigan. GTB is comprised of approximately 4000 members, who descend primarily from the Odawa (Ottawa) and Ojibwa (Chippewa) peoples of the northern Lower Peninsula and eastern Upper Peninsula of Michigan. As the Department found in 1980, GTB (and its political forebears) have maintained “a documented continuous existence in the Grand Traverse Bay area of Michigan since at least as early as 1675.” Department of the Interior, Determination for Federal Acknowledgement of [GTB] as an Indian Tribe, 45 Fed. Reg. 19321 (March 25, 1980).

The United States first recognized and established a government-to-government relationship with GTB through the Treaty of Greenville in 1795. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the Western District of Michigan*, 369 F.3d 960, 967 (6th Cir. 2004) (“*Grand Traverse Band*”). GTB entered into subsequent treaties with the United States in 1815, 1836 and 1855 and “maintained a government-to-government relationship with the United States from 1795 until 1872[.]” *Id.* at 961.

In 1872, as explained in more detail below, the Secretary of the Interior, in violation of the United States’ solemn treaty obligations, ceased treating GTB as a federally recognized tribe. This period lasted until 1980, when the Department restored GTB to recognition, making GTB the first tribe recognized by the Department pursuant to the formal Federal Acknowledgment Process, 25 C.F.R. Part 54 (now Part 83). *See* 45 Fed. Reg. 19321-22. Despite the lapse in federal *recognition*, GTB remained under federal *jurisdiction* throughout this time period. Once recognition was restored in 1980, the Secretary enjoyed authority to take actions under the IRA with respect to GTB, including the authority to take land into trust for the Band under Section 5 of the Act.

Since 1980, the Department has frequently and consistently exercised its IRA powers in relation to GTB. In 1984, the Department took into trust (under section 5 of the IRA) and proclaimed as reservation land (under section 7 of the IRA) a 12 ½ acre parcel for the Band, which parcel is located within the Reservation set aside for the Band by the 1855 Treaty of Detroit, 11 Stat. 621. *See* 49 Fed. Reg. 2025-26. Subsequent to the Secretary’s approval of the Band’s IRA Constitution in 1988, the Secretary has taken 42 additional parcels of land into trust for the Band totaling approximately 1,012 acres. All of these trust acquisitions are within the Band’s historic territory (and corresponding DOI service area) surrounding Grand Traverse Bay.

The various trust acquisitions have been utilized by the Band for four critical governmental purposes: the provision of core governmental services (including tribal government offices, a health clinic, courts, law enforcement, social services, and natural resources management); housing (including elders housing constructed with HUD grants, and lot assignments to enrolled members for residences); economic development and diversification (two casinos, hotels and retail businesses); and treaty rights-related activities (preservation of lands utilized for the exercise of inland gathering, hunting, and fishing rights and marinas for access to Great Lakes fishing rights reserved by the 1836 Treaty of Washington (7 Stat. 491)).

Currently, the Band has eight additional fee-to-trust acquisition requests (totaling approximately 260 acres) pending with the Department. All of these proposed trust acquisitions fall within the Band's historic territory, almost all are contiguous to existing trust lands, and none are gaming-related. The Band intends to use the parcels for housing, the provision of governmental services, and economic development and diversification. None of the acquisitions are objected to by the State of Michigan or any local unit of government. However, while the Band understands that a number of these parcels were very close to being placed into trust by the Department, action on them has now been halted while the Department analyzes the implications of the *Carcieri* decision. See Table: GTB's Pending Trust Acquisition Requests (FY 2009) (attached at the end of this memorandum).

As explained below, the Secretary's actions (and inactions) between 1872 and 1980 did not, because absent explicit Congressional authorization they could not, divest the United States of its jurisdiction over GTB. Indeed, Commissioner of Indian Affairs John Collier himself, corresponding with the federal Indian agent in Michigan in 1934, just weeks before the enactment of the IRA, specifically referred to GTB as being "under your jurisdiction." See May 31, 1934 Letter, Collier to Christy (attached at the end of this memorandum) (discussed in Section III. D below). This view was fully corroborated by the findings made by the Department when it re-established a government-to-government relationship with GTB in 1980. See Department of the Interior, Office of Federal Acknowledgment, October 3, 1979 Proposed Finding Documents (GTB V001 D005). More recently, the United States Congress has made legislative findings that GTB and its sister tribes have remained under federal jurisdiction continuously from at least 1795 to the present. Justice Breyer expressed the same view in his concurring opinion in the *Carcieri* case, and that view finds ample support in the Sixth Circuit's decision in the *Grand Traverse Band* case. Accordingly, the Department has acted fully within its legal authority in exercising its powers under the IRA for the benefit of GTB, and may continue to do so subsequent to the *Carcieri* decision.

II. Legal Principles Governing Federal Jurisdiction over Indian Tribes

In *Carcieri*, the Supreme Court held that the Secretary's authority to take land into trust under section 5 of the IRA applies to those federally-recognized tribes "that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." 129 S.Ct. at 1068. Because "[n]one of the parties or *amici*, including the Narragansett Tribe itself, . . . argued that the Tribe was under federal jurisdiction in 1934," *id.*, because the representation in the petitions for certiorari that the Narragansetts were not under federal jurisdiction in 1934 had gone unopposed, *id.*, and because, "[u]nder our rules, that alone is reason to accept this as fact for

purposes of our decision in this case,” *id.*, the Court did not define the term “under federal jurisdiction” in its opinion, and did not lay out any criteria for its application. It simply stated that “the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted.” *Id.* at 1061. While the Court did not elaborate on this statement, it did note in its history of the Narragansetts that the Tribe, “having been decimated [in King Philip’s war], was placed under formal guardianship by the Colony of Rhode Island in 1709,” *id.*; that it was then convinced by the State in 1880 “to relinquish its tribal authority as part of an effort to assimilate tribal members into the local population,” *id.*; and that, “in correspondence spanning a 10-year period from 1927 to 1937 federal officials . . . not[ed] that the Tribe was, *and always had been*, under the jurisdiction of the New England States, rather than the Federal Government.” *Id.* (emphasis added).

In contrast to the Supreme Court’s characterization (accurate or not) of the Narragansetts’ status, well-established principles of federal Indian law, and well-established facts regarding GTB’s history, leave no doubt that GTB has remained under the continuous jurisdiction of the federal government from at least 1795 to the present. The legal principles underpinning this conclusion are as follows:

First, while the IRA does not define the term “jurisdiction,” that term has a readily ascertainable meaning. In *Carcieri*, the Court reiterated the cardinal principle of statutory construction that where “the statutory text is plain and unambiguous . . . [it must be applied] according to its terms.” *Id.* at 1063-64 (citing, e.g., *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). And in determining that the word “now” in the phrase “now under federal jurisdiction” had a commonly understood meaning at the time of the IRA’s enactment, the Court looked principally to dictionary definitions, primarily Webster’s New International Dictionary (2d ed. 1934). *See id.* at 1064.

That same dictionary, and others from the time period, establishes that “jurisdiction” also had a commonly understood meaning as it was used in the IRA. After providing an initial construction specific to the judiciary, Webster’s New International defined the term in the following manner:

Jurisdiction –

2. *Authority of a sovereign power to govern or legislate; power or right to exercise authority; control.*

3. *Sphere of authority; the limits, or territory, within which any particular power may be exercised.*

Syn. - Jurisdiction, authority are often interchangeable. But jurisdiction applies esp. to authority exercised within limits; as, paternal authority is paramount within its jurisdiction. Cf. power, influence, ascendance.

Webster's New International Dictionary 1347 (2d ed. 1934) (emphasis added). Other dictionaries from the time likewise defined "jurisdiction" to refer to the power or authority of a sovereign entity. *See, e.g.,* The New Century Dictionary of the English Language 888 (1929) (defining "jurisdiction" in part as "power or authority in general"). And that definition remains constant to this day. *See* Webster's Third New International Dictionary 1227 (2002) (defining "jurisdiction" in part as "2: authority of a sovereign power to govern or legislate: power or right to exercise authority: . . . 3: . . . sphere of authority . . . SYN see POWER").

As with the term "now," moreover, *see* 129 S.Ct at 1064, court decisions have construed "jurisdiction" consistent with the dictionary definitions of the term. *See, e.g., U.S. v. Kember,* 648 F.2d 1354, 1358 (D.C. Cir. 1980) ("Legislative jurisdiction refers to the *power* of a political entity to enact and apply laws to a given person, thing or occurrence. Executive jurisdiction refers to the *power* to take administrative action in regard to a given person, thing or occurrence. Judicial jurisdiction denotes the political entity's *power* to subject a given person, thing or occurrence to its judicial processes." (emphasis added)). Indeed, in *United States v. Rodgers,* 466 U.S. 475 (1984), the Supreme Court had occasion to interpret the term "jurisdiction" as it appears in amendments to the federal criminal code that were enacted *on the same day* as the IRA. *See id.* at 478 (discussing Act of June 18, 1934, 48 Stat. 996). The Court, noting that the statute before it (like the IRA) did not define "jurisdiction," looked to dictionary definitions to discern its ordinary meaning, and had little difficulty concluding that the term meant authority or power:

"Jurisdiction" is not defined in the statute. We therefore start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. . . . The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines jurisdiction as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.

Id. at 479 (internal citation and quotation marks omitted). The *Rodgers* Court's definition of jurisdiction, focusing as it does on the term as passed by the same Congress that passed the IRA (and on the same day), and relying as it does on precisely the same approach to statutory construction as that counseled by the *Carcieri* Court, is entitled to dispositive weight here.

In 1934, then, "jurisdiction" was commonly understood as referring to the "power" or "authority" of a sovereign entity. Accordingly, to be "under federal jurisdiction" meant to be subject to the power or authority of the federal government.

Second, in the context of statutes governing Indian affairs, the power and authority of the federal government was understood in 1934, as again remains the case today, to reside principally in Congress. It has been a bedrock principle of federal Indian law since the Constitution's Indian Commerce Clause was substituted for the ambiguous provisions of the Articles of Confederation, that Congress enjoys plenary authority over Indian tribes. "The courts

have recognized that Congress has ‘plenary and exclusive authority’ over Indian affairs.” Felix S. Cohen, *Handbook of Federal Indian Law*, § 5.02[1] (2005). As the Supreme Court recently reaffirmed in *United States v. Lara*, 541 U.S. 193, 200 (2004), “the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’” (citing *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); W. Canby, *American Indian Law* 2 (3d ed. 1998)). *Lara* explained that Congress’s plenary authority over the tribes is grounded in various constitutional provisions, including the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, and in the “Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as ‘necessary concomitants of nationality.’” *Lara*, 541 U.S. at 201 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936)). And Congress has expressed this same understanding regarding the breadth and source of its powers over Indian affairs. *See, e.g.*, 25 U.S.C. § 1901 (“[C]ause 3, section 8, article I of the United States Constitution provides that ‘The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes’ and, through this and other constitutional authority, Congress has plenary power over Indian affairs”); 25 U.S.C. § 4101 (“[T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs”).

The principle that Indian tribes are subject to the plenary and exclusive authority of Congress had been firmly established by the time of the IRA. As the 1929 edition of a widely read treatise from that era put it, “plenary authority 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.” 14 *Ruling Case Law* § 30 at 135 (1929 ed.) (citing, *e.g.*, *Worcester v. Georgia*, 6 Pet. 515 (1832); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911)).

In sum, “jurisdiction” was well understood in 1934 to mean “the power to exercise authority in a particular situation,” *Rodgers*, 466 U.S. at 479, and Congress was well understood to possess plenary and exclusive authority over Indian tribes. That Congress understood this plenary power to constitute jurisdiction over the tribes follows not only from the common understanding of the term at the time, but also from contemporaneous language used by Congress in describing its powers under the Commerce Clause as jurisdictional. For example, the Federal Anti-Racketeering Act of 1934 was enacted (again on the same day as the IRA) in exercise of Congress’s Commerce Clause powers. The Act explicitly equated those powers with jurisdiction, defining the term “trade or commerce” to encompass “all . . . trade or commerce over which the United States has *constitutional jurisdiction*.” Act of June 18, 1934, 48 Stat. 979 (emphasis added). Similarly, in amending the Federal Power Act, 16 U.S.C. § 791 *et seq.*, in 1935, Congress made reference to “bodies of water over which *Congress has jurisdiction* under its authority to regulate commerce[.]” *Id.* at § 797 (amended Aug. 26, 1935, c. 687, Title II, § 202, 49 Stat. 839) (emphasis added). *See also, e.g.*, *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians et al.*, 466 U.S. 765, 783 (1984) (referring to Congress’s “jurisdiction under its Commerce Clause powers”); *U.S. v. Zeigler*, 19 F.3d 486, 489 n.1 (10th Cir. 1994) (“It is generally recognized that Congress has extremely broad jurisdiction under the Commerce Clause.”); 14 *Ruling Case Law* § 34 at 138-9 (1929 ed.) (referring to Congress’s powers with respect to Indian tribes as “federal jurisdiction over the Indians”).

As remains the case today, however, Congress’s jurisdiction over “the Indian Tribes,” U.S. Const., Art. I., § 8, cl. 3, was viewed as subject to an important limitation. As the Supreme Court stated in *United States v. Sandoval*, 231 U.S. 28, 47 (1913), “it is not meant . . . that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe.” But where Congress had a rational or non-arbitrary basis for viewing a group as a “distinctly Indian communit[y],” it enjoyed exclusive authority over that tribe. *Id.* at 46; *see also id.* at 47 (“If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress.”); *United States v. Holliday*, 70 U.S. 407, 419 (1865) (stating same); *United States v. Nice*, 241 U.S. 591, 600 (1916) (“The Constitution invested Congress with power [over Indian tribes] . . . *during the continuance of the tribal relation*” (emphasis added)); *Brader v. James*, 246 U.S. 88, 95-96 (1918) (“[S]he was a tribal Indian, and *as such* still subject to the legislation of Congress enacted in discharge of the nation’s duty of guardianship over the Indians” (emphasis added)).

Third, as a practical matter, in order to “bring [a tribe] within the range of [Congress’s plenary] power,” *Sandoval*, 231 U.S. at 47, the federal government (be it through the executive or legislative branch) must take some initial action – whether by treaty, legislation, executive order, or other course of dealing – evidencing its determination that a particular group is among “the Indian Tribes” referenced in the Constitution. *See* Felix S. Cohen’s Handbook of Federal Indian Law 3 (1982) (“Historically, the federal government has determined that certain groups of Indians will be recognized as tribes for various purposes. Such determinations are incident to the Indian Commerce Clause of the Constitution, which expressly grants Congress power ‘[t]o regulate Commerce . . . with the Indian tribes.’”). In other words, a particular Indian community is brought under federal jurisdiction through actions of the federal government indicating a non-arbitrary belief that the group exists as a tribe for commerce clause purposes. This requirement of some affirmative action by the federal government tracks that applicable to other areas in which Congress enjoys plenary authority. *See, e.g., Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001) (“The ‘political departments’ plenary power in th[e] realm [of immigration], however, is neither self-defining nor self-executing; and the fact that, under the Constitution, Congress and the executive branch *may* exercise uniquely broad authority over immigration matters does not mean that these bodies need not act at all in order to animate and define the contours of this power.”).

Fourth, and of critical importance here, once a tribe has been brought under Congress’s jurisdiction by a federal exertion of authority (and for so long as it may rationally be deemed a tribe in the *Sandoval* sense), the power to terminate the exercise of jurisdiction with respect to a particular tribe rests solely with Congress. This proposition too was firmly established by the time of the IRA’s enactment. As the *Sandoval* Court declared, “‘it may be taken as the settled doctrine of this Court that *Congress*, in pursuance of the long-established policy of the government, *has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.*’ . . . [I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States *are to be determined by Congress.*” 231 U.S. at 46 (quoting *Tiger*, 221 U.S. at 315) (emphasis added); *see also United States v. Waller*, 243 U.S. 452, 459 (1917) (“[C]ertain matters . . . are well-settled by

the previous decisions of this court. The tribal Indians are wards of the government, and as such under its guardianship. *It rests with Congress to determine the time and extent of emancipation.*") (emphasis added); *Nice*, 241 U.S. at 598 ("Of course, . . . the tribal relation may be dissolved and the national guardianship brought to an end; but *it rests with Congress to determine when and how this shall be done*, and whether the emancipation shall at first be complete or only partial.") (emphasis added); 14 Ruling Case Law § 34 at 138 (1929 ed.) (same).

It was likewise well established that Congress's intention to terminate federal jurisdiction over a tribe could not be inferred, but had to be stated in explicit terms. Thus, the courts repeatedly held that Congressional actions such as the granting of citizenship to tribal members, or the provision or recognition that tribal land would be held in fee simple, could not be equated with the express Congressional intent necessary to relinquish federal jurisdiction over a tribe. *See, e.g., Waller*, 243 U.S. at 459 ("[c]onferring citizenship is not inconsistent with the continuation of [federal] guardianship"); *Sandoval*, 231 U.S. at 48 ("citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people"); *Tiger*, 221 U.S. at 315 ("it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction"); 14 Ruling Case Law § 34 at 138 (1929 ed.) ("the mere grant of citizenship does not in itself terminate federal jurisdiction over the Indians, nor does the fact that a tribe, as in the case of the Pueblos, holds its lands by a fee simple title"). This principle too remains intact in the modern era. *See, e.g., United States v. John*, 437 U.S. 634, 653-54 (1978) ("the extension of citizenship status to Indians does not, in itself, end the powers given Congress to deal with them").

Fifth, and again of critical importance here, it follows directly from the above principles that official federal recognition of a tribe by the executive branch, and federal jurisdiction over that tribe, are not synonymous concepts. The history of this country is replete with examples of tribes that were brought under federal jurisdiction by an assertion of federal authority, but that subsequently had their formal federal recognition terminated by the executive branch. As detailed in the next section, the Grand Traverse Band is a classic example of such a tribe. However, unless Congress acted to terminate federal jurisdiction over such tribes (or unless they lost their tribal character), that jurisdiction remained intact, for as just discussed, it remains Congress's prerogative to determine whether and when to end federal jurisdiction over any particular tribal group.

In *United States v. John*, 437 U.S. 634 (1978), a unanimous Supreme Court emphatically held that federal jurisdiction over a tribe is not dependent on continued executive branch recognition of that tribe. There, the State of Mississippi argued that because "the Federal Government long ago abandoned its supervisory authority [over the Mississippi Choctaws]," and because of "the long lapse in the federal recognition of a tribal organization in Mississippi, the power given Congress 'to regulate Commerce . . . with the Indian Tribes,' Const. Art. 1, § 8, cl. 3, cannot provide a basis *for federal jurisdiction*." To recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary." 437 U.S. at 652 (emphasis added). The Court rejected this argument in no uncertain terms:

[W]e do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652-53.

The federal courts of appeals have likewise demonstrated a clear understanding that federal recognition of and federal jurisdiction over Indian tribes are two distinct concepts. For example, in an important chapter in the historic *United States v. Washington* litigation, the Ninth Circuit held that even though, at the time of its decision, the Stillaguamish and Upper Skagit Tribes were “not recognized as organized tribes by the federal government,” *United States v. Washington*, 520 F.2d 676, 692 (9th Cir. 1975), they maintained the treaty fishing rights reserved to them by the Treaty of Point Elliott – as such, they were not subject to the jurisdiction of the State of Washington in the exercise of those rights, but remained under the protection of the federal government. The Ninth Circuit had little difficulty in reaching this conclusion because “rights under [a] treaty may be lost only by unequivocal action of Congress,” *id.* at 693, and because “[e]vidence supported the court’s findings that members of the two tribes are descendants of treaty signatories and have maintained tribal organizations,” *id.* Nor did the Department, based on precisely the same reasoning, have any difficulty concluding in 1980 that the Stillaguamish Tribe had been “under federal jurisdiction” in 1934, despite the fact that the Tribe was not officially recognized at the time. See Memorandum from 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 6-7 (Oct. 1, 1980) (citing *United States v. Washington*, 520 F.2d at 693).

In his concurring opinion in the *Carcieri* case, Justice Breyer drew this same distinction between federal jurisdiction and federal recognition for purposes of the IRA. He observed that the Department has not infrequently recognized Tribes subsequent to the IRA that the federal government enjoyed jurisdiction over in 1934 by virtue of prior assertions of federal authority. See *Carcieri*, 129 S.Ct. at 1070 (Breyer, J. concurring) (“The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not.”). Justice Breyer pointed to the Grand Traverse Band and the Stillaguamish Tribe as prime examples of Tribes whose “later recognition reflects earlier ‘Federal jurisdiction.’” *Id.*

Justice Breyer was undeniably correct in his characterization of the Grand Traverse Band’s jurisdictional status in 1934. As demonstrated in the next section, application of the well-established principles of federal Indian law described above to the Band’s history leads inescapably to the conclusion that the Band was under federal jurisdiction in 1934 and that the Secretary may therefore continue to take land into trust for the Band under the IRA, just as the Secretary has done for the past two decades.

III. Application of the Foregoing Legal Principles to the Grand Traverse Band

- A. Congress asserted jurisdiction over GTB in 1795 and has never since terminated the exercise of that jurisdiction, and GTB has never removed itself from federal jurisdiction by disbanding or otherwise abandoning its tribal character.**

The federal government first engaged with GTB as a tribe, and thereby brought it under federal jurisdiction, no later than the 1795 Treaty of Greenville. 7 Stat. 49 (1795). In that treaty the United States and the signatory tribes, including GTB, agreed that the tribes would be placed “under the protection of the said United States and no other power whatever.” 7 Stat. 49, 52. *See Grand Traverse Band*, 369 F.3d at 967 (“[t]he Band had treaties with the United States and a prior relationship with the Secretary of the Interior at least as far back as 1795”). The United States continued to exercise its jurisdiction over GTB in a series of nineteenth-century treaties, most notably the 1836 Treaty of Washington, 7 Stat. 491, and the 1855 Treaty of Detroit, 11 Stat. 621. Between them, those treaties provided for the cession of large swaths of land by GTB and its sister tribes, reserved for the tribes smaller areas of land for their continued occupation, and further reserved to them off-reservation hunting, fishing and gathering rights. The treaties also confirmed for the tribes the provision of federal services, supplies and annuities, federal supervision and management of their affairs, and (as discussed in Part B below) explicit federal recognition and government-to-government relationships with the United States going forward.¹

As discussed above, once a tribe has been brought under Congress’s jurisdiction by a federal exertion of authority or other act of recognition, it remains under that jurisdiction so long as (1) it may rationally be deemed a tribe in the *Sandoval* sense, and (2) the exercise of that jurisdiction is not terminated by an explicit act of Congress. *See Sandoval*, 231 U.S. at 46; *Tiger*, 221 U.S. at 315; *Waller*, 243 U.S. at 459-60; *Nice*, 241 U.S. at 598. These foundational premises of federal jurisdiction over Indian tribes are reflected in the Department’s “Mandatory Criteria for Federal acknowledgment” of Indian tribes. *See* 25 C.F.R. § 83.7 (a)-(c) (requiring substantially continuous tribal character over time) and (g) (requiring that a group has never been terminated or forbidden the federal relationship by Congress).

As the Department found in 1980 in its Determination for Federal Acknowledgment restoring GTB’s status as a federally recognized tribe, GTB readily satisfied these acknowledgment criteria because, in the first instance, it has never been terminated or forbidden the federal relationship by any Act of Congress, nor has Congress taken any other action consistent with an intent to remove GTB from under its jurisdiction. *See* 45 Fed. Reg. 19321 (“No evidence was found that . . . the band or its members have been terminated or forbidden the

¹ GTB’s substantial dealings with the United States in the nineteenth century place its history in stark contrast with the Supreme Court’s accounting of the history of the Narragansett Tribe. *See supra* at 2-3. The Department has indeed explicitly distinguished between the Narragansetts’ history and that of the Tribes of Michigan’s Lower Peninsula in a recent filing in federal court. “*Carcieri* involve[d] a completely different tribe . . . with its own unique history. The Narragansetts never had a government-to-government relationship with the United States and never signed a treaty with the United States. . . . [The history of] Indian tribes in Michigan’s lower peninsula in the 1930s . . . is factually distinguishable from the history of the Narragansett Indian Tribe.” Reply Brief for Defendants, *Patchak v. Salazar*, No. 08-1331 (D. D.C., filed Aug. 1, 2008), at 4-5.

Federal relationship by an Act of Congress.”). Furthermore, GTB has never removed itself from the purview of Congress’s jurisdiction by disbanding, dissolving or otherwise surrendering its own status as an Indian tribe. The Department expressly found that GTB has sustained its cohesiveness and identity as an Indian tribe throughout the more than three hundred years of its documented existence:

The Grand Traverse Band of Ottawa and Chippewa Indians is the modern successor of several bands of Ottawas and Chippewas which have a documented continuous existence in the Grand Traverse Bay area of Michigan since as early as 1675. Evidence indicates these bands, and the subsequent combined band, have existed autonomously since first contact, with a series of leaders who represented the band in its dealings with outside organizations, and who both responded to and influenced the band in matters of importance. The membership is unquestionably Indian, of Ottawa and Chippewa descent.

45 Fed. Reg. 19321 (March 25, 1980).

The group, and its earlier components, have consistently been identified as Indians, as specifically Ottawa or Chippewa, and as members of a particular group of such, throughout their history and are so identified at present. Such identification is made by local, state, and Federal agencies[.] . . .

October 3, 1979 Proposed Finding Documents (GTB V001 D005 at 30) (emphasis added).

With specific reference to the IRA era, the Department further expressly found:

[T]he IRA era is replete with evidence that the Band existed and that the Bureau recognized that fact.

Id. at 61.²

² The Department has denied formal federal acknowledgment to numerous petitioners under the Federal Acknowledgment Process for failure to meet the required criteria of historical tribal continuity that GTB readily satisfied. The Chinook Indian Tribe/Chinook Nation is one example. See 67 Fed. Reg. 46204-05 (July 12, 2002). Like GTB, the Chinook Tribe had demonstrated “unambiguous federal acknowledgment” by treaty negotiations with the United States as late as the 1850s, and that it had never been subsequently terminated or denied the federal relationship by Congress. *Id.* at 46205. But the Department did not restore the Chinook Tribe because the Tribe failed to demonstrate that it had sustained its tribal character on a substantially continuous basis over time. See *id.* (“[E]vidence does not show that a Chinook entity was identified on a substantially continuous basis between 1927 and 1951. . . . There is almost no evidence of political activities or leadership between the early 1930’s and 1951”). Cf. *Nice*, 241 U.S. at 699 (Congress’s constitutional powers vis-à-vis Indians are premised on “the continuance of the tribal relation”); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 557 (9th Cir. 1991) (voluntary dissolution of tribe can permanently terminate tribal status); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (“If all or nearly all members of a tribe chose to abandon the tribe, . . . the tribe would disappear”). See also, e.g., 66 Fed. Reg. 49966 (October 1, 2001) (denying federal acknowledgment of Duwamish Tribal Organization for failure to meet mandatory tribal continuity requirements under 25 C.F.R. § 83.7(a)-(c)); 71 Fed. Reg. 57995 (October 2, 2006) (denying federal acknowledgment of Burt Lake Band of Ottawa and Chippewa Indians, Inc. for same reason).

In sum, Congress extended its jurisdiction over GTB no later than 1795; that jurisdiction has never been terminated by Congress, and GTB has sustained its tribal character over time. These are the critical jurisdictional facts regarding GTB's relationship with the federal government. Accordingly, the federal jurisdiction established over GTB in 1795 remained intact in 1934, just as it remains intact to this day. As demonstrated in the following sections, this conclusion finds ample support in a recent ruling by the United States Court of Appeals for the Sixth Circuit specifically examining the history and federal status of GTB; in the concurring opinion of Justice Breyer in the *Carciere* case, where he specifically addressed GTB's jurisdictional status; in express findings of Congress specific to the history and federal status of Michigan tribes signatory to the Treaty of 1855; in this Department's findings in relation to its acknowledgment of GTB in 1980; and in statements of Commissioner of Indian Affairs John Collier explicitly confirming the federal jurisdictional status of GTB in 1934.

B. The 1855 Treaty of Detroit expressly preserved federal jurisdiction over GTB and other signatory bands.

As noted above, GTB endured a period of over a century during which the Secretary of the Interior did not treat it as a federally recognized tribe. This period lasted until 1980, when the Department restored GTB to recognition. *See* 45 Fed. Reg. 19321-22. The Treaty of 1855, 11 Stat. 621, is central to understanding the Secretary's withdrawal of GTB's recognition beginning in 1872, and to understanding why that withdrawal had no effect on the United States' continuing jurisdiction over GTB on June 18, 1934.

The Treaty of 1855 was the final treaty entered into between GTB and the United States. It set aside and provided for the allotment of a reservation land base for GTB near Grand Traverse Bay, and for other bands elsewhere in Michigan. By its terms, the Treaty of 1855 was entered into between the United States and "the Ottawa and Chippewa Indians of Michigan." *Id.* The latter was not a distinct Indian tribe, but rather was an artificial construct representing numerous Ottawa and Chippewa bands, including GTB. The United States had created this construct twenty years earlier in order to facilitate the negotiation and execution of the Treaty of 1836, which provided for a massive land cession that paved the way for Michigan's statehood. According to Stanford University historian Richard White:

The "Ottawa and Chippewa Tribe" . . . was an entirely American creation. [It] had been born in 1836 when the government had gathered the various Ottawa and Chippewa chiefs of the western Lower Peninsula and the eastern Upper Peninsula in Washington to cede most of their remaining lands in Michigan. To . . . settle the cession with one treaty instead of many, the government dealt with the Ottawas and Chippewas as a single group. This group . . . was created for only one purpose – to cede land.

Ethnohistorical Report on the Grand Traverse Ottawas ("White Report") at 25, by Dr. Richard White, 1979.³ *See also Grand Traverse Band*, 369 F.3d 962 n.2 (same).

³ GTB submitted Professor White's report to the Department with its petition for Federal Acknowledgment in 1979. The Department's findings supporting the federal acknowledgment of GTB closely tracked Professor White's analysis. *See* October 3, 1979 Proposed Finding Documents, Department of Interior, Office of Federal Acknowledgment (GTB V001 D005). Professor White, who is the Margaret Byrne Professor of History at Stanford

At the negotiations for the Treaty of 1855, representatives of the various Ottawa and Chippewa bands insisted that, going forward, the United States should no longer deal with them as a single fictional tribe, but rather as distinct political entities at the band level, and the United States agreed to do so. As the Sixth Circuit has summarized this history:

To address their complaints, the 1855 Treaty of Detroit contained language dissolving the artificial joinder of the [Ottawa and Chippewa] tribes. This language, however, was not intended to terminate federal recognition of [those] tribe[s], but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities.

Grand Traverse Band, 369 F.3d at 962 n.2.

After 1870, some federal officials (as developed below) misinterpreted the Treaty's dissolution of the fictional Ottawa and Chippewa tribe as a termination of the constituent bands who had treated with the United States. But termination ran precisely counter to Congress's intent in ratifying the Treaty of 1855. Consistent with the Sixth Circuit's holding on this score, Congress has made clear its view that the Treaty was intended to confirm the continued government-to-government relationships between the United States and the signatory bands and, as a result, to confirm its own continued jurisdiction over those bands:

The 1855 Treaty of Detroit dissolved the artificial umbrella entity, *reaffirmed the political autonomy and tribal status of the individual Odawa/Ottawa and Chippewa bands* by naming each band by region and by naming the leader of each band. The Treaty of Detroit further directed that *future negotiations be carried out with the individual bands*. The historical record is clear that the Treaty Commissioners and the Indian tribal governmental representatives understood that the 1855 treaty reaffirmed the political autonomy of the bands and created what were intended to be permanent reservations for the tribes within their traditional homelands. . . .

The historical record contains ample evidence that neither the federal agents who negotiated the 1855 treaty, nor the signatory tribal representatives believed that the treaty terminated the tribal status of the distinct Odawa/Ottawa bands.

Senate Report No. 260, 103rd Cong., 2d Sess. 1994, *Reaffirming and Clarifying the Federal Relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as Distinct Federally Recognized Indian Tribes*. 1994 WL 194298 at *1-*2 (emphasis added).

The Department has likewise interpreted the Treaty of 1855 as an affirmation of continuing federal jurisdiction over the signatory bands, and over GTB specifically:

University, is a highly respected scholar in the field of Native American History. He is the author of numerous books, including *The Middle Ground: Indians, Empires and Republic in the Great Lakes Region, 1650-1815*, which was a finalist for the 1992 Pulitzer Prize in History. Professor White is also, among numerous other honors, the recipient of a MacArthur Foundation "Genius" Fellowship.

The “Ottawa and Chippewa Tribes” were a creation of the federal government. . . . The Treaty of 1855 dissolved this legal fiction. . . . After the 1855 Treaty was ratified, the [BIA] chose to recognize the existence of various bands in lower Michigan and to deal with their leaders under the titles of chiefs and headmen [including] the “Chiefs of the Grand Traverse Band.”

October 3, 1979 Proposed Finding Documents (GTB V001 D005 at 53, 56). And Professor White has reached the same conclusion:

Cessation of services and the end of federal guardianship were exactly what [the federal negotiators of the Treaty of 1855] sought to avoid. . . . [The Treaty of 1855] did not end Indian political organization: it merely recognized the return of political jurisdiction to units where it had in reality resided all along – the bands. . . . [I]t was with the bands that the Americans would negotiate in the future.

White Report at 35, 45-48.

When Congress ratified the Treaty of 1855, then, it clearly did not intend to terminate the federal government’s relationship with or jurisdiction over GTB or any other signatory band. Instead, in ratifying a solemn treaty “reaffirm[ing] the political autonomy and tribal status of the individual Odawa/Ottawa and Chippewa bands,” Senate Report No. 260, 1994 WL 194298 at *1, Congress unequivocally asserted its continued jurisdiction over those Tribes.

C. The administrative withdrawal of GTB’s federal recognition in 1872 could not and did not affect federal jurisdiction over the Band.

Despite the clear promise underpinning the Treaty of 1855 to sustain the federal government’s relations with and jurisdiction over the signatory bands, various federal officials lost sight of the treaty’s meaning over the ensuing years. In 1872, Secretary of the Interior Columbus Delano misinterpreted the treaty as calling not merely for the dissolution of the fictional “Ottawa and Chippewa Tribe,” but for termination of the constituent bands themselves. *See* Senate Report No. 260, 1994 WL 194298 at *3 (“[S]tarting in the 1870s . . . the [BIA] interpreted the dissolution of the artificial umbrella entity as effective termination of the tribal status of the individual Odawa/Ottawa bands”). As the Sixth Circuit found in the *Grand Traverse Band* case:

Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments “tribal relations will be terminated.” *Letter from Secretary of the Interior Delano to Commission of Indian Affairs* at 3 (Mar. 27, 1872). Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.

Grand Traverse Band, 369 F.3d at 961 n.2. The Court concluded that, based on this misreading of the Treaty of 1855, “the executive branch of the government *illegally* acted as if the Band’s recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years.” *Id.* at 968 (emphasis in original).

The Sixth Circuit found that the Department’s illegal actions had indeed severed the government-to-government relationship between the United States and the Band. Its reasoning in support of that conclusion makes clear that the administrative withdrawal of GTB’s recognition did not, because as a matter of law it could not, terminate federal jurisdiction over the Band. The Court adopted as the law of the Circuit, *see id.*, language from the Cohen treatise drawing a clear distinction between the legal and empirical bases for federal recognition:

A prominent treatise on federal Indian law states that federal recognition of a tribe requires (1) a legal basis for recognition (i.e. Congressional or Executive action) *and* (2) the empirical indicia of recognition, namely, a “continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.” Cohen, *Handbook of Federal Indian Law* 6 (1982).

Id.

The Court explained that the legal and empirical bases for federal recognition of an Indian tribe are “analytically distinct,” and that by terminating the provision of services to GTB, “the federal government withdrew the Band’s recognition in 1872 *under the second factor* of the Cohen test.” *Id.* at 968-69 (emphasis added). The first factor – the “legal basis for recognition (i.e. Congressional or Executive action)” – remained unaffected by the Secretary’s illegal withdrawal of services. And in GTB’s case, the legal basis for recognition was Congress’s jurisdiction over GTB established by its ratification of the Treaty of Greenville in 1795, which jurisdiction Congress had not acted to terminate. *See id.* at 968 (“There is no dispute that only Congress had the *legal* right to terminate the Band’s recognition because Congress originally recognized the Band.”).

The Sixth Circuit’s analysis reflects the well-settled principles of federal Indian law set forth in Section II. Once “Congressional or Executive action,” *Grand Traverse Band*, 369 F.3d at 968, has been taken to confirm Congress’s jurisdiction over a particular tribe, only Congress can terminate the exercise of that jurisdiction. *Sandoval*, 231 U.S. at 46; *Waller*, 243 U.S. at 459; *Nice*, 241 U.S. at 598; *Tiger*, 221 U.S. at 315. Hence, as the Supreme Court held in *United States v. John*, 437 U.S. 634, federal jurisdiction can remain intact even in the face of “long lapse[s] in . . . federal recognition.” *Id.* at 652.

As noted above, Justice Breyer voiced this same understanding regarding GTB’s jurisdictional status in his concurring opinion in the *Carcieri* case. There, he observed that GTB was not federally recognized in 1934, “[b]ut later the Department recognized the Tribe, considering it to have existed continuously since 1675. 45 Fed. Reg. 19321 (1980).” *Carcieri*, 129 S.Ct. at 1070, (Breyer, J., concurring) (citing *Grand Traverse Band*, 369 F.3d at 961 and n.2). Justice Breyer aptly referred to GTB’s history as a prime example of a circumstance where “*later recognition reflects earlier ‘Federal jurisdiction.’*” *Id.*

D. The Department, and Commissioner Collier in particular, clearly held the view in 1934 that GTB was “under federal jurisdiction” for purposes of the IRA.

The conclusions reached by the Sixth Circuit in *Grand Traverse Band*, and by Justice Breyer in his concurring opinion in *Carcieri*, find conclusive support in statements by Commissioner of Indian Affairs John Collier at the time of the IRA. Secretary Delano’s termination of GTB’s federal recognition in 1872 had dire consequences for the Band. “Because the Department of Interior refused to recognize the Band as a political entity, the Band experienced increasing poverty, loss of land base and depletion of the resources of its community.” *Grand Traverse Band*, 369 F.3d at 969 (internal quotation marks and citation omitted). Consistent with the fact, however, that the federal government retained jurisdiction over the Band, the government continued to have at least some interactions with the Band in the decades that ensued. As a result, Commissioner Collier and his Departmental colleagues well understood at the dawn of the IRA era that GTB and its sister tribes had survived and remained “under federal jurisdiction,” and as such were eligible for reorganization under the IRA. Indeed, as Congress found in 1994, Commissioner Collier encouraged those tribes to petition for organization precisely *because of* the government’s continuing jurisdiction over them:

Citing the 1855 treaty language which directed that future negotiations be carried out with the individual bands residing at particular localities, Commissioner of Indian Affairs John Collier advised the Odawa/Ottawa to petition for reorganization as individual bands.

Senate Report No. 260, 1994 WL 194298 at *3 (emphasis added).

Frank Christy, the federal Indian agent who was ultimately charged with implementing the IRA in Michigan, met with representatives of GTB in 1934 to discuss their prospects of organizing under the IRA. See October 3, 1979 Proposed Finding Documents (GTB V001 D005 at 58).⁴ The meeting that Agent Christy held with the Band prompted an exchange of letters between the agent and Commissioner Collier that is of great significance here. In a May 9, 1934 letter, Agent Christy described the meeting to the Commissioner as follows:

[I] attended a meeting of the Grand Traverse Band of Ottawas and Chippewas . . . to study and discuss the pending Wheeler-Howard Bill. . . .

The Indians were frankly told that the question whether the provisions of the proposed legislation would apply to them or to other Indians similarly situated would depend on the amounts of the appropriations which Congress might

⁴ During the 1930s, Frank Christy was the Superintendent of the Federal Indian School at Mt. Pleasant, Michigan, and then of the Indian school at Tomah, Wisconsin. As Superintendent of those Indian Schools, Mr. Christy acted as the federal Indian agent for much of Michigan and Wisconsin pursuant to a 1907 statute. See 25 U.S.C. § 66 (“**Duties of agency devolved on superintendent of Indian school.** The Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may devolve the duties of Indian agency or part thereof upon the superintendent of the Indian school located at such agency or part thereof whenever in his judgment such superintendent can properly perform the duties of such agency.”).

provide. Notwithstanding this, when an expression of opinion was invited from the various districts represented they all without exception expressed themselves as favoring it[.]

May 9, 1934 Letter, Christy to Collier (attached at the end of this memorandum). Agent Christy's specific reference to "the Grand Traverse Band of Ottawas and Chippewas" is consistent with the Department's findings, discussed above, that GTB had maintained a continuous tribal existence even in the wake of the Secretary's action in 1872, and that "the IRA era is replete with evidence that the Band existed and that the Bureau recognized that fact." October 3, 1979 Proposed Finding Documents (GTB V001 D005 at 30 and 61). Commissioner Collier responded to Agent Christy's letter on May 31, 1934 (just weeks before the enactment of the IRA) in a manner making abundantly clear that he too specifically understood that GTB existed as a distinct and identifiable band and, moreover, that GTB remained under federal jurisdiction for the purposes of the IRA:

Mr. Frank Christy,

[May 31, 1934]

Supt., Mount Pleasant School

My dear Mr. Christy;

Receipt is acknowledged of your letter of May 9, advising of the action of *the Grand Traverse Band of Ottawas and Chippewas* and of the Chippewas residing near Bay Mills.

We are pleased to note their favorable acceptance of the Wheeler-Howard bill. Please keep us posted of the action of any other groups *under your jurisdiction*.

Sincerely yours,
(Signed) John Collier
Commissioner

May 31, 1934 Letter, Collier to Christy (attached at the end of this memorandum) (emphasis added).

Commissioner Collier's explicit reference to GTB as being "under [the federal Indian agent's] jurisdiction" in 1934 makes it crystal clear that he understood GTB to be "now under federal jurisdiction" as that term was used in the IRA. That understanding is of great significance here. As the Supreme Court observed in *Carciere*:

In addition to serving as Commissioner of Indian Affairs, John Collier was a principal author of the [IRA]. . . . [H]e appears to have been responsible for the insertion of the words "now under Federal jurisdiction" into what is now 25 U.S.C. § 479. . . . [T]he record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. . . .

Commissioner Collier's responsibilities related to implementing the IRA make him *an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it.*

129 S.Ct. at 1065 n.5 (citations and internal quotation marks omitted) (emphasis added). Accordingly, Commissioner Collier's understanding that GTB was under federal jurisdiction in 1934 carries "unusually persuasive" weight in the present context.

Congress has likewise enacted findings explicit to GTB and other Lower Peninsula tribes signatory to the Treaty of 1855 consistent with the uniform view that GTB was under federal jurisdiction in 1934. Those findings are contained in legislation enacted in 1994 expressly extending the benefits of the IRA to two of GTB's sister tribes, the Little River Band of Ottawa Indians ("LRB") and the Little Traverse Bay Bands of Odawa Indians ("LTBB"). Whereas GTB had been successful in regaining federal recognition through the Federal Acknowledgement Process in 1980, LRB and LTBB had been stymied by the process, so Congress took action to recognize them legislatively. *See* 25 U.S.C. § 1300k *et seq.* In that legislation Congress found as follows:

The Bands filed for reorganization of their existing tribal governments in 1935 under the [IRA]. Federal agents who visited the Bands, including Commissioner of Indian Affairs, John Collier, attested to the continued social and political existence of the Bands and concluded that the Bands were eligible for reorganization.

Id. at §1300k(5). As the legislation makes clear, this finding applies with full force to GTB as well.⁵

In the Report accompanying the legislation, Congress stated its view that "the Bands met *all of the standards of eligibility* under the Indian Reorganization Act[.]" Senate Report No. 260, 1994 WL 194298 at *3 (emphasis added). It is no surprise, then, that Congress's stated purpose for the 1994 legislation was "to *reaffirm and clarify* the federal relationships" of the Bands. *Id.* at *1 (emphasis added). Congress thus clearly understood that its historic jurisdiction over GTB, LRB and LTBB had endured through the Secretary's withdrawal of recognition in 1872, and through the 1930s to the present era.

The Department ultimately decided against permitting GTB and its sister tribes to reorganize under the IRA in the 1930s. That decision, however, was not based on any view that GTB had been removed from federal jurisdiction. Instead, as the Department has recently stated in federal court, "the Indians of Michigan's lower peninsula . . . were denied organization because the United States had no funding left to purchase land or provide services, not because

⁵ Congress explicitly noted the shared history and status of GTB, LRB and LTBB in the 1994 legislation. *See* 25 U.S.C. § 1300k. The Sixth Circuit has likewise found the jurisdictional history of the three sister tribes to be "essentially parallel." *See Grand Traverse Band*, 369 F.3d at 962 ("The history of [GTB's] original recognition, executive termination and later re-recognition is essentially parallel to that of . . . the Little Traverse Bay Bands of Odawa Indians, and the Little River Band of Ottawa Indians. All three tribes were parties to the same series of treaties and the same termination by Secretary Delano in 1872").

they did not fit the definition of Indian under the IRA.” Reply Brief for Federal Defendants, *Patchak v. Salazar*, No. 08-1331 (D. D.C., filed Aug. 1, 2008), at 3. *See also* 25 U.S.C. § 1300k(5) (“Due to a lack of Federal appropriations to implement the provisions of such Act, the Bands were denied the opportunity to reorganize.”); White Report at 173 (“the decision not to organize the Ottawas was, in reality, a simple administrative decision based on lack of funding.”). GTB and other Lower Peninsula bands signatory to the Treaty of 1855 were landless by the 1930s (in significant part because of the utter failure of the United States to discharge its trust obligations under the Treaty), and it was assumed that the Secretary would have to purchase land for those Bands in conjunction with their reorganization under the IRA. The fiscal obstacles to doing so (as anticipated by Agent Christy in his May 9, 1934 Letter to Commissioner Collier), rather than any jurisdictional concerns, ultimately led to the decision not to allow GTB and its sister tribes in the Lower Peninsula to re-organize. As Congress has stated:

Christy was so certain that the Michigan tribes were eligible for reorganization that he secured options to purchase 7,000 acres of land in Emmet County to reestablish a land base to be held in trust by the Ottawa/Odawa. *However, the decision on whether the Ottawa/Odawa could organize under the IRA was ultimately not based on the merits, their history or their need. It came down to a matter of funding.*

H.R. Rep. No. 621, 1994 WL 388905 (emphasis added); *see also* October 3, 1979 Proposed Finding Documents (GTB V001 D005 at 58-59) (finding same); S. Rep. No. 260, 1994 WL 194298 at *3-*4 (The “failure to permit the Bands to organize pursuant to the [IRA] was predicated on the Bureau’s assumption that residence on trust lands held in common for the Bands was required for reorganization and that appropriations to purchase such lands had run out.”); White Report at 149-50 (“Virtually from the passage of the Wheeler-Howard Act, the Bureau intended to extend reorganization to the Ottawas of Michigan. Yet they failed to do so. The failure was not the result of the limits of the Act, the ineligibility of the Ottawas, or the original intention of government officials. Instead reorganization failed because Congressional funding failed.”).

IV. Conclusion

For the foregoing reasons, the Grand Traverse Band of Ottawa and Chippewa Indians has been under continuous federal jurisdiction from at least 1795, through June 18, 1934, and continuing to the present. As such, pursuant to the decision of the United States Supreme Court in *Carcieri v. Salazar*, 555 U.S. ___, 129 S.Ct. 1058 (2009), the Secretary of the Interior enjoys continued authority to take land into trust for the Band under Section 5 of the Indian Reorganization Act (25 U.S.C. § 465).