ORAL ARGUMENT SCHEDULED FOR MARCH 18, 2016

No. 14-5326

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

Appellant,

CLARK COUNTY, WASHINGTON, IN CASE NO.: 13-CV-850, ET AL.,

Appellees,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Appellees.

Appeal from the United States District Court
for the District of Columbia
No. 13-cv-849-NJR

REPLY BRIEF OF APPELLANT THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a), the following is a statement of the parties, *amici*, rulings under review, and related cases.

A. Parties and Amici: Appellant is the Confederated Tribes of the Grand Ronde Community of Oregon. The Confederates Tribes of the Grand Ronde Community of Oregon is not a corporation and no parent company or publicly held company has a 10% or greater ownership interest in Appellant.

Clark County, Washington; the City of Vancouver, Washington; Citizens Against Reservation Shopping; Al Alexanderson; Greg Gilbert; Susan Gilbert; Dragonslayer, Inc.; and Michels Development, LLC, are Appellants in No. 15-5033, which has been consolidated with this case.

Appellees are Sally Jewell, in her official capacity as Secretary of the U.S. Department of the Interior; Kevin Washburn, in his official capacity as Assistant Secretary – Indian Affairs, U.S. Department of the Interior; and Stanley M. Speaks, in his official capacity as Regional Director, Northwest Region, Bureau of Indian Affairs.

The Intervenor for Appellees is the Cowlitz Indian Tribe.

The following have appeared as *amici* in this Court: Samish Indian Nation; United South and Eastern Tribes, Inc.; and Jamestown S'Klallam Tribe.

The following appeared as *amici* in the district court proceedings: City of La Center, Washington; Confederated Tribes of the Warm Springs Reservation of Oregon; Samish Indian Nation; United South and Eastern Tribes, Inc.; Jamestown S'Klallam Tribe; and Chinook Nation.

B. Rulings Under Review: The rulings under review are the Order, JA0103, and Memorandum Opinion, JA0104-60, issued by Judge Barbara J. Rothstein on December 12, 2014, in *Confederated Tribes of the Grand Ronde Community of Oregon* v. *Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014) (Doc. Nos. 84, 85).

C. Related Cases: This case was consolidated with No. 15-5033 on the Court's own motion.

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GLOSSARY

IBIA:	Interior Board of Indian Appeals
IGRA:	Indian Gaming Regulatory Act
Interior:	The Department of the Interior
IRA:	Indian Reorganization Act
NIGC:	National Indian Gaming Commission
ROD:	Record of Decision
The Secretary:	The Secretary of the Interior

INTRODUCTION

The government, backed by the Cowlitz intervenors, understandably invokes *Chevron* deference at every turn. Defendants turn cartwheels in their effort to make this case look fact-intensive, highly technical, and thus ripe for affirmance under a highly deferential standard of review.

Not so fast. The ROD is riddled with purely *legal* errors. It rests, first, on a deeply flawed construction of the plain language of the IRA—including an inexplicable failure to cite the Supreme Court's decision in *United States* v. *John*, prior agency interpretations of "recognized," and prior agency determinations that the government *terminated* any exercise of jurisdiction over the Cowlitz as of 1934. The ROD rests, as well, on an equally unexplained failure to apply the agency's "natural inference" test for determining "significant historical connections" under IGRA. Having stumbled on the law at the threshold, it is scarcely surprising that the evidence marshaled by the Secretary—of "recognized" and "under Federal jurisdiction" (under the IRA) and of "significant historical connections" (under IGRA)—is so utterly threadbare. The ROD should be set aside.

ARGUMENT

I. THE SECRETARY LACKED AUTHORITY TO TAKE TRUST TITLE TO THE PARCEL

A. The Cowlitz Are Not A "Recognized Indian Tribe" Within The Meaning Of The IRA

Until the decision below, every other court to address the issue had stated that the IRA requires a tribe to have been recognized *in 1934*. If this Court agrees, then the ROD cannot stand. That is because the Secretary concluded that the IRA covers even tribes that were recognized for the first time only *in 2002*. She expressly declined to determine the meaning of "recognized"—or whether the Cowlitz satisfied that definition in 1934. Thus, while the Cowlitz contend (at 21-24) that the tribe was, in fact, recognized in 1934, that is beside the point. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943). The sole question is whether Congress required recognition in 1934, or whether it allowed recognition 70 years later.

1. *The IRA Requires "Recognition" In 1934*

Defendants' entire textual argument is that the word "now" bisects the IRA's first definition of "Indian." By "placing the adjective 'now' before 'under Federal jurisdiction' but after 'recognized Indian tribe,'" the government says, "Congress evidenced its intent to have 'now' modify only 'under federal jurisdiction.'" Gov. Br. 38. But that misses the point, and it is a big point to miss. We do not contend that "now" modifies "recognized Indian tribe." Rather, we contend that "*the*

phrase 'now under Federal jurisdiction' modifies the term 'recognized Indian tribe.'" GR Br. 11 (emphasis added). Defendants cannot dispute that point, which the Secretary herself acknowledged. See JA0260.

The question, then, is whether a tribe can be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934. As we showed in our opening brief (at 11-14), the answer to that question is no. The same temporal requirement applies to the *entire* first definition of Indian. Statutory provisions do not divide themselves across a century, absent unmistakable contrary textual support. Here, the text cuts just the other way.

It is a "fundamental canon of statutory construction," moreover, "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see *King* v. *Burwell*, 135 S. Ct. 2480, 2492 (2015). And as we explained (at 14), the IRA as a whole ties its requirements to "events contemporaneous with the Act's enactment." *Carcieri* v. *Salazar*, 555 U.S. 379, 389 (2009). Even if "recognized" were ambiguous when read in isolation (and it is not), its statutory context confirms that the IRA unambiguously requires recognition in 1934.

The government responds to what it calls our "formulaic construction" (Gov. Br. 41) by invoking statutory purpose. It says that Congress added "'under Federal

jurisdiction' to limit the IRA to those Indian tribes over which the United States *already* had assumed duties." *Id.* at 38. "In contrast," the government continues, "the term 'recognized' goes to whether the subject group is an *actual* 'Indian tribe.'" *Id.* at 39 (emphasis added). But that just proves our point: Why would Congress limit the Secretary's authority to tribes that were "*under Federal jurisdiction*" in 1934, but allow the Secretary to take land in trust for groups that were not even "actual" Indian tribes in 1934? The government has no answer.[1]

Instead, the government addresses an argument we did not make. It observes that there was no "official list" of "recognized Indian tribes" in 1934 because Congress did not require the agency to maintain an official list until 1994. Gov. Br. 42. Thus, the government contends, "Interior reasonably construes § 479's first definition of Indian as including Indian tribes that were under federal jurisdiction in 1934 but not formally recognized until later." *Id.* at 43.

The government misconstrues our argument. While we disagree with the Secretary's view that "recognition" requires mere "cognitive" awareness of a tribe, we do not take the position that only those tribes on an official "list" in 1934

[1] The government protests (at 43-44) that, if the IRA required recognition when the IRA was enacted in 1934, Interior would lack authority to take land in trust for a tribe that was not recognized when the statute was enacted, but was recognized shortly afterwards. But that's equally true for the "under Federal jurisdiction" requirement. The government does not explain why Congress would intend that result with respect to the "under Federal jurisdiction requirement," but would not intend the same result with respect to the "recognized" requirement.

qualify for benefits under the IRA. Rather, our view—and the agency's own consistent view (until now)—is that the IRA requires recognition of a tribe as a political entity. GR Br. 19-20. *Of course* Congress did not intend to exclude tribes that were not on a formal list created only in 1994. But that says nothing about the question at issue here, which is *when* Congress required recognition. "Recognized" had a clear meaning when Congress used the term in 1934, and the IRA fixes the date of that recognition as 1934. The government's suggestion that Congress *intended* "recognized" to float in time because it wanted to encompass tribes that were first recognized through an official list that did not exist until 60 years later strains credulity.

The Cowlitz focus on two other provisions that, they say, show that the IRA does not require recognition in 1934. First, they contend that IGRA's initial-reservation exception would be "nonsensical" unless the Secretary has authority to take land in trust for "tribes whose Federal recognition is confirmed or restored through the Part 83 Federal acknowledgment process." Cowlitz. Br. 20. But we don't dispute that the Secretary has authority to take land in trust for tribes whose recognition is restored: A tribe that was recognized (and under Federal jurisdiction) in 1934, terminated in the 1950s, and then had its recognition restored in 2000 *would* qualify as "Indian" under the IRA. Our only point is that the

Secretary lacks authority to take land in trust for tribes that were not recognized in 1934. IGRA's exceptions shed no light on that issue.

The Cowlitz also point to a 1994 amendment providing that "agencies of the United States shall not . . . make any decision or determination pursuant to [the IRA] with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(f). The Cowlitz argue that distinguishing between tribes that were recognized in 1934 and those that were not violates section 476(f)—and they suggest that the provision effectively overturns *United States* v. *John*, 437 U.S. 634 (1978). Cowlitz Br. 19.

But the parties in *Carcieri* made that same argument, and the Supreme Court rejected it. In *Carcieri*, the government argued that, because of section 476(f), the IRA must extend to "all federally recognized tribes, without regard to whether they were 'under Federal jurisdiction'" in 1934. Br. for Respondents, *Carcieri* v. *Kempthorne*, No. 07-526, 2008 WL 3883433, at *37 (Aug. 18, 2008); see *id.* at *10 (arguing that section 476(f) mandates that "all federally recognized tribes are to be treated equally with respect to Indian programs and services"). The Supreme Court disagreed, holding that the IRA expressly distinguishes between tribes that

were under federal jurisdiction in 1934 and those that were not. Section 476(f) presented no obstacle to that conclusion—and it presents no obstacle here.[2]

2. *Defendants Ignore The IRA's Legislative History*

The legislative history confirms that the IRA's "recognized" requirement applies only to tribes that were recognized in 1934. See *Bell Atlantic Telephone Cos.* v. *FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (under *Chevron*'s first step, the Court employs "traditional tools of statutory construction" and looks to "the statute's text, legislative history, and structure").

The IRA's first definition of Indian originally included only the "recognized Indian tribe" requirement. Addressing that definition, Chairman Wheeler stated that the IRA was being enacted "to take care of the Indians that are taken care of *at the present time*," JA0376; Chairman Wheeler again stated that Indians of "less than half blood" would not qualify as "Indian" "unless they are enrolled *at the present time*," JA0377; Commissioner Collier stated that Indians would not qualify unless they "are actually residing within the present boundaries of an Indian reservation *at the present time*," *ibid.*; and the IRA's House sponsor explained that

[2] The legislative history shows that section 476(f) simply clarified that all recognized tribes have the same sovereign powers, regardless of whether they were "historic" or "created" tribes. 140 Cong. Rec. S4334, 1994 WL 130063 (Apr. 14 1994) (statement of Sen. McCain). Section 476(f) has nothing to do with whether the Secretary has authority to take land in trust for tribes that were not recognized in 1934.

the IRA's "definition of 'Indian'" "recognizes the status quo of the *present* reservation Indians," JA0524 (emphases added).

The government's only response is that Chairman Wheeler's statements do not show that "Congress used 'member[] of any recognized Indian tribe' to mean 'enrolled.'" Gov. Br. 46. But the government again takes aim at the wrong target. *Whatever* "recognized" means—whether it requires "enrollment" or some other indication of recognition—the legislative history shows that Congress intended that requirement to apply "at the present time." And that was *before* Congress added the "now under Federal jurisdiction" proviso, which, if anything, *strengthens* the inference that "recognized" is as of 1934.

3. *Judicial Precedent Requires Recognition In 1934*

In *United States* v. *John*, the Supreme Court stated that the IRA's first definition of Indian requires recognition "in 1934." 437 U.S. at 650. The government's only response is that *John* was dicta. Gov. Br. 40-41. But "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as *authoritative*," *United States* v. *Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (emphasis added). The government acknowledges that dicta has "force" when expressed "unequivocally." Gov. Br. 41. But the government does *not* argue that the Court was equivocal in *John*. Nor could it: The Court expressly

stated that the IRA's first definition of Indian requires recognition "in 1934." That could hardly be clearer.

The government notes that the Supreme Court did not rely on *John* when it decided *Carcieri*. But while the Supreme Court is free to ignore its own precedent, other courts are not. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989).[3]

Defendants, moreover, ignore this Court's decision in *Maynor* v. *Morton*, 510 F.2d 1254 (D.C. Cir. 1975), which stated that "the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation *at that time*"—*i.e.*, when the IRA was enacted in 1934. *Id.* at 1256 (emphasis added). They also ignore the Fifth Circuit's decision in *United States* v. *State Tax Commission of Mississippi*, 505 F.2d 633 (5th Cir.

[3] The Cowlitz assert (at 18) that *John* "did not address the Secretary's authority to take land into trust." Not so. As the Cowlitz later acknowledge (at 19), the Fifth Circuit in *John* held that a post-1934 reservation proclamation was of "no effect *because the IRA was not intended to apply* to the Mississippi Choctaws." *John*, 437 U.S. at 649-650 (emphasis added). Rejecting that argument, the Supreme Court held that, while the IRA's *first* definition of Indian requires recognition "in 1934," its *third* definition applies to all persons of one-half or more Indian blood—a requirement satisfied by the Chocktaw.

1974), which likewise held that "[t]he language of Section 19 *positively dictates* that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the *additional language* to like effect." *Id*. at 642 (emphasis added). Those authorities confirm that the IRA unambiguously requires recognition in 1934.

4. *Agency Precedent Requires Recognition In 1934*

As we explained (at 18), the Interior Board of Indian Appeals (IBIA) held in *Brown* v. *Commissioner of Indian Affairs*, 8 IBIA 183, 188 (1980), that the IRA requires recognition in 1934. The government observes (as if this mattered) that the IBIA "expressly declined to 'dwell on' the phrase 'now under Federal jurisdiction.'" Gov. Br. 48 (quoting *Brown*, 8 IBIA at 188). But the government omits to mention *why* the IBIA did not "dwell on" that phrase: because the nephew (a Cowlitz member) was *not* "a member of a federally recognized tribe on June 18, 1934 (the date of enactment of section 19)," and so flunked the IRA's first definition of "Indian" regardless. 8 IBIA at 189.

The government also attempts to distinguish *Brown* on the ground that the IBIA went on to hold that that Indian nephew was a "constructive resident" of another reservation in 1934. Again, that cuts against the government. The reason why the IBIA went on to decide whether the newphew had constructive residency

(and therefore met the IRA's *second* definition of Indian) was because it had already determined that he was *not* a member of a recognized Indian tribe in 1934.

In any event, as we explained (at 18), the agency expressly reiterated in 1994 that section 19 defines "Indians" as "all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction." JA4636 [alteration in original]. The Secretary's failure to grapple with those conflicting agency interpretations renders her decision unreasonable.[4]

B. The Cowlitz Were Not "Under Federal Jurisdiction" In 1934

1. *The Cowlitz Were Terminated As Of 1934*

The government does not dispute that termination is the antithesis of "under Federal jurisdiction"—nor can it, given that the Secretary's own test asks whether a tribe's jurisdictional status has been "terminated." JA0261. Instead, it suggests that the *administrative* termination of the Cowlitz in 1934 is irrelevant because "[t]he authority to terminate the sovereignty of recognized Indian tribes has long been understood to reside exclusively with Congress." Gov. Br. 60. That position, of course, conflicts with the government's prior briefing, which conceded that a tribe's jurisdictional status can be "administratively or congressionally

[4] For the reasons explained in our opening brief (at 20-22), the Cowlitz were not recognized in the political sense in 1934. Indeed, the government acknowledges that the Cowlitz adopted a constitution in 1950 precisely for the purpose of *securing* "just recognition" from the United States. Gov. Br. 17.

terminated"—and with the ROD itself, which likewise acknowledged that the agency can terminate jurisdiction over a tribe. See GR Br. 26-27.

And it doesn't take long for the government to change its tune again: On the very next page of its brief, the government concedes that administrative action *can* terminate a tribe. The government states that "Interior reasonably looks to *its own past actions*" to determine whether the jurisdictional "relationship remained intact in 1934" and that "termination *by administrative action*" should not be lightly presumed. Gov. Br. 61 (emphases added).[5]

So the government instead contends that jurisdiction over the Cowlitz was *not* actually administratively terminated—even though the Cowlitz themselves argued to the NIGC that they *were* administratively terminated in 1934. Defendants attempt to downplay that dispositive concession on the ground that "[t]hose statements were made in a different context." Gov. Br. 62; see Cowlitz Br. 16. But Defendants provide no reason why this "different context" should

[5] The Cowlitz assert (at 16) that *TOMAC* v. *Norton*, 433 F.3d 852 (D.C. Cir. 2006), shows that the term "administrative termination" is "how Interior describes what has happened when Interior has made a mistake about a tribe's jurisdictional status." That is not what *TOMAC* says. *TOMAC* equated "administrative[] terminat[ion]" with the cessation of "government-to-government relations" and the inability to organize under the IRA. *Id.* at 854. Because of the administrative termination of the tribe in *TOMAC*, Congress enacted legislation in 1994 that specifically authorized the Secretary to acquire property for the tribe. *Id.* at 856. Congress must do the same here to authorize the Secretary to take land in trust for the Cowlitz.

matter. The Cowlitz argued to the NIGC that they were "administratively terminated in the early twentieth century, as evidenced by numerous and unambiguous statements from federal officials," JA1260, and by "the Department of the Interior's refusal to allow the Tribe to reorganize its government under the [IRA]," JA1254. How can the agency's refusal to allow a tribe to organize under the IRA be *irrelevant* to the question whether the agency believed that the tribe is entitled to benefits under the IRA?[6]

Finally, the government attempts to walk back from the agency's concession, made during the Cowlitz's acknowledgement proceedings in 2000, that the Cowlitz were not a "reservation tribe under Federal jurisdiction or under direct Federal supervision" in 1934. JA1076. The government dismisses that dispositive concession as a mere "*post-hoc* statement" that we latch on to "[i]n the absence of contemporaneous evidence of termination." Gov. Br. 62. But as the government acknowledges a few pages earlier, we also cited documents from 1924 and 1933 showing that the agency *then* took the position that "the Cowlitz Tribe had ceased to exist" as of 1934—and therefore were not under Federal jurisdiction at that time. *Id.* at 60. We also explained (at 30) that the agency determined in 1934 that the

[6] The government also suggests that it is not bound "by the assertions of an applicant"—*i.e.*, the Cowlitz. Gov. Br. 62. But the NIGC itself *agreed* that the Cowlitz were terminated in 1934. The Secretary cannot depart from agency precedent without explanation.

Cowlitz were not entitled to vote on the IRA. The government just waves off those and other contemporaneous statements as "mistaken." Gov. Br. 60.

So the government wants it both ways. When we point to *contemporaneous* evidence that the agency had terminated the tribe as of 1934, the government dismisses that evidence as "mistaken." And when we point to recent evidence *confirming* the agency's longstanding view that it had terminated the tribe as of 1934, the government dismisses that evidence as "after-the-fact." The government's whack-a-mole argument would free the agency to ignore any evidence—including concessions from the Cowlitz—it doesn't like.[7]

The Cowlitz, for their part, dispute the ROD itself. They contend that Congress has "plenary jurisdiction" over Indian tribes, and that the existence of that jurisdiction "cannot be 'terminated.'" Cowlitz Br. 8. But the Secretary expressly rejected "[t]his plenary authority interpretation," holding that the IRA requires a further showing that "the United States has *exercised* its jurisdiction." JA0263 (emphasis added). And of course the Secretary's own test asks whether

[7] The government also tries to distinguish the agency's concession that the Cowlitz were not a "reservation tribe under Federal jurisdiction or under direct Federal supervision" (JA1076) on the ground that the IRA requires only that a tribe be "under Federal jurisdiction"—and not "direct Federal supervision." Gov. Br. 62. But that is a distinction without a difference. The ROD itself equates "under Federal jurisdiction" with "a continuous course of dealings that strongly reflects *federal supervision of the Tribe*" as of 1934. JA0272 (emphasis added). The government does so here, too. See Gov. Br. 59 (citing evidence of "continued supervision" over the Cowlitz).

the tribe "remained under federal jurisdiction in 1934" or whether "the United States terminated the Tribe's jurisdictional status." JA00263-64.

2. *"Under Federal Jurisdiction" Requires A Government-To-Government Relationship With The United States*

The government does not dispute that the Cowlitz lacked a government-to-government relationship with the United States in 1934. Instead, it responds that the term "under Federal jurisdiction" does not require such a relationship.[8] But the Secretary's own jurisdictional test asks whether there exists a "jurisdictional relationship between the Tribe and the United States" in 1934. JA0272. What can that possibly mean if *not* a government-to-government relationship with the United States?

Even on appeal, Defendants repeatedly acknowledge that the term "under Federal jurisdiction" requires a "jurisdictional *relationship* with the Cowlitz tribe." Gov. Br. 56 (emphasis added); see *id.* at 4, 50, 57, 58, 59, 60, 61 (all describing a "jurisdictional relationship"). Indeed, the government contends that the exercise of jurisdiction over the Cowlitz was affirmatively demonstrated by "continued *government-to-government relations* through 1880." *Id.* at 31 (emphasis added). That is impossible to square with the government's later assertion (at 61) that

[8] The Cowlitz appear to dispute (at 23-24) that the tribe lacked such a relationship—a contention that is baffling given the Secretary's statement that the Cowlitz had no "government-to-government" relationship in 1934. JA0270, JA0272.

"under Federal jurisdiction" does not require any such government-to-government relationship.

The agency itself, moreover, has repeatedly recognized that a government-to-government relationship forms the basis of any jurisdictional analysis under the IRA. See GR Br. 29 (citing agency authorities). Justice Breyer's concurring opinion in *Carcieri* likewise states that the term "under Federal jurisdiction" requires a "relationship between the tribe and Federal Government." 555 U.S. at 399 (Breyer, J., concurring). The Secretary did not acknowledge those interpretations—and Defendants do not do so here.

3. *Failed Treaty Negotiations Did Not Place The Cowlitz Under Federal Jurisdiction*

If this Court agrees that the Cowlitz were terminated as of 1934, that should be the end of the matter; a terminated tribe cannot, as a matter of law, have been under Federal jurisdiction. And if this Court agrees that the term "under Federal jurisdiction" requires a government-to-government relationship, that, too, is dispositive, since the Cowlitz lacked any such relationship in 1934.

But even if the Cowlitz can clear those two hurdles (and they cannot), the Secretary's determination is still contrary to law. Under the first part of her two-part inquiry (which requires a showing that jurisdiction was created before 1934) the Secretary relied exclusively on the failed treaty negotiations with the Cowlitz in 1855. Those failed negotiations, the Secretary concluded, "constitute[] *sufficient*

evidence of federal jurisdiction as of at least 1855." JA0263 (emphasis added). As we explained (at 33), however, only "a treaty with the United States (in effect in 1934)" can demonstrate federal jurisdiction over a tribe. *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring).

The government protests that an actual treaty is unnecessary; after all, the government says, "the United States plainly can exercise jurisdiction over tribes in a variety of ways, *e.g.*, via legislation, without treaty making." Gov. Br. 57. True enough, but that again proves our point. Surely if Congress tried—but *failed*—to enact legislation for a tribe, that failed legislation would not establish jurisdiction over the tribe. The same goes here. Indeed, the treaty negotiations didn't just fail; they failed *precisely because the Cowlitz "refused to subordinate themselves to the white man by entering into a treaty with them*." *Id.* at 14 (emphasis added). By rejecting the treaty, the Cowlitz refused to place themselves under Federal jurisdiction.

The government also states that the "guardian-ward relationship . . . does not derive from treaties, but from the status of tribes as 'dependent nations' within the territorial borders of the United States." Gov. Br. 57. But that sounds just like the argument—rejected by the Secretary—that Congress's "plenary jurisdiction" over a tribe is all that is necessary for federal jurisdiction. The government appears to acknowledge as much when it goes on to explain that "[a] treaty with a tribe would

constitute *an exercise* of Federal jurisdiction within a pre-existing guardian-ward relationship." *Id.* at 57 n.13 (emphasis added). That's right: A "treaty with a tribe" *would* constitute an exercise of jurisdiction. A *non-treaty* does not.

Defendants therefore try to shift the focus from the failed treaty negotiations to the ROD's citation to sporadic contacts between agency officials and individual Indians of Cowlitz descent. See Gov. Br. 55-56; Cowlitz Br. 11-15. But the Secretary relied on those "dealings" only as part of the *second* step of her jurisdictional inquiry to show that the Cowlitz's jurisdictional status was not terminated before 1934. If this Court agrees that the failed treaty negotiations did not create jurisdiction in the first place, those additional actions are irrelevant—as they are in any event in light of the fact that the Cowlitz were terminated and lacked a government-to-government relationship with the United States as of 1934.

If this Court nevertheless considers those additional dealings with individual Cowlitz Indians, we explained (at 34-35) why they are insufficient to demonstrate the exercise of jurisdiction over the Cowlitz as a tribe. In response, the Cowlitz rely on the Supreme Court's decision in *Halbert* v. *United States*, 283 U.S. 753 (1931), as evidence that Cowlitz Indians received allotments by virtue of the Cowlitz's status as a tribe—"not on the person's status as an individual 'Indian.'" Cowlitz Br. 15. But, as the Department's 2000 acknowledgment determination makes clear, "[t]he Supreme Court did not rule that there was a government-to-

government relationship between the Cowlitz and the United States, nor did the Court rule that the Cowlitz were a tribe in 1911 or in 1931."[9] That position is consistent with case law explaining that *Halbert* "was concerned only with allotment and addressed the rights of individual Indians, not tribal rights." *Confederated Tribes of Chehalis Indian Reservation* v. *Washington*, 96 F.3d 334, 340 (9th Cir. 1996).

The Cowlitz also cite a 1934 letter from Commissioner Collier to a BIA agent stating that individual Cowlitz Indians living on the Quinault reservation should be enrolled there and listed as Cowlitz. Cowlitz Br. 13. The government, too, relies on the enumeration of individual Cowlitz Indians in the 1878 and 1880 censuses. Gov. Br. 58. But as we explained (at 34), it is undisputed that, as the Secretary acknowledged, the Department did *not* "enumerate the Cowlitz Tribe on various annual population censuses for Tribes as opposed to individual Indians during the 20th century." JA0266. The Cowlitz have likewise conceded that the

[9] *Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe*, Technical Report at 64, http://www.bia.gov/cs/groups/xofa/documents/text/idc-001348.pdf (AR015272 in district court record).

"BIA *never* kept an 'official' census or roll for the Cowlitz." JA4239 (emphasis added).[10]

II. THE COWLITZ PARCEL IS NOT ELIGIBLE FOR GAMING UNDER IGRA'S "INITIAL RESERVATION" EXCEPTION

A. "Significant Historical Connections" Requires A Natural Inference That The Tribe Used Or Occupied The Parcel Itself

To meet IGRA's "initial reservation" exception, a tribe must show that the proposed gaming land is "within an area where the tribe has significant historical connections." 25 C.F.R. § 292.6. The term "significant historical connection," in turn, means that "a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." *Id.* at 292.2.[11]

As we explained in our opening brief (at 37-40), the agency has interpreted "vicinity" narrowly to require use or occupancy of the parcel itself—not just the use of land *near* the parcel. Specifically, the agency has held that "a determination of whether a particular site with direct evidence of historic use or occupancy is

[10] The Cowlitz's charge (at 13) that it was misleading for Plaintiffs to fail to cite Collier's 1934 letter is therefore without merit; the Cowlitz *conceded* that BIA did not keep any roll for the Cowlitz tribe. And as noted, the agency denied the Cowlitz the right to vote on the IRA in 1934.

[11] The government contends that, because the "initial reservation" exception is an exception to an exception, it should be interpreted *broadly*, rather than narrowly (as exceptions typically are). Gov. Br. 63. The case cited by the government, *Comm'r of Internal Revenue* v. *Clark*, 489 U.S. 726, 739 (1989), provides no support for that novel rule of construction.

within the vicinity of newly acquired land depends on the nature of the tribe's historic use and occupancy, and whether those circumstances lead to the natural inference that the tribe *also used or occupied the newly acquired land*." *Scotts Valley Op.* at 15 (JA4350) (emphasis added).

One will search in vain, however, for any application of that test in the government's brief (or in the ROD). The government does not point to any evidence leading to the natural inference that the tribe "used or occupied the" Parcel. Instead, just like the ROD itself, the government points only to evidence that, it says, shows that Cowlitz used land *near* (and often far away from) the Parcel. The government defends that approach on the ground that even "considerable distance" can be in the "vicinity." Gov. Br. 65-66. Thus, the government says, Interior can declare lands eligible for gaming so long as those lands are "within close proximity" to lands that are historically significant to the tribe, *id.* at 66—even if the agency does not show (as it did not show here) that the tribe used or occupied the parcel itself.

That interpretation flatly contradicts the "natural inference" test adopted by the agency, which requires that the direct evidence of use or occupancy "on *other* lands cause a natural inference that the tribe historically used or occupied *the subject parcel as well*." *Scotts Valley Op.* at 15 (JA4350). Indeed, the agency

expressly rejected "[a] definition of 'vicinity' based solely on proximity"—the very definition the government adopts here. *Ibid.*

B. The Natural Inference Test Applies To The "Initial Reservation" Exception

The government's response is that it doesn't have to show that the Parcel satisfies the "natural inference" test, because that test is applicable only to the "restored lands" exception—not to the "initial reservation" exception. Gov. Br. 71. But *both* the "initial reservation" and "restored lands" exceptions contain a "significant historical connection" requirement. See 25 C.F.R. § 292.6(d) (initial reservation); *id.* § 292.12 (restored lands). And the Part 292 regulations provide a single definition of "significant historical connection" that applies to both exceptions. Consistent with that common definition, *Scotts Valley* did not limit its interpretation of "vicinity" to the "restored lands" exception. Rather, it stated that "[t]he Department used the word 'vicinity' *in the Part 292 regulations* to permit a finding of restored land on parcels . . . where the particular location and circumstances of available direct evidence on other lands cause a natural inference that the tribe historically used or occupied the subject parcel as well." *Scotts Valley Op.* at 15 (JA4350) (emphasis added).

And the Secretary's 2015 Mashpee Opinion confirms that the "natural inference" test applies as fully to the "initial reservation" exception as it does to the "restored lands" exception. In that case, the agency determined that two sites—the

Mashpee parcel and the Taunton parcel—were eligible for gaming under the "initial reservation exception." In reaching that conclusion, the agency reviewed *Scotts Valley* in detail—including its interpretation of "vicinity" to require evidence that gives rise to the "natural inference that the tribe historically used or occupied the subject parcel." *Mashpee Op.* at 58 (JA4518).

The agency then applied the "natural inference" test. It first held that the evidence, taken as a whole, "furthers the natural inference that the Mashpee Tribe *used and occupied the Taunton parcel*." *Id.* at 74 (JA4534) (emphasis added).[12] It next held that the tribe had also "established evidence of historical subsistence *use and occupancy of the Mashpee parcel*." *Id.* at 75 (JA4535) (emphasis added). *Mashpee* therefore confirms that the "natural inference" test applies to the "initial reservation" exception.

The Cowlitz agree. They acknowledge that *Scotts Valley*'s natural inference test *is* the applicable test for "vicinity," including in the "initial reservation" context. See Cowlitz Br. 30-31. Thus, they say, the "initial reservation" exception requires the "Secretary to infer that the Cowlitz covered the distance and historically used or occupied the Parcel" itself. *Id.* at 31. The government's

[12] The agency stated that it was applying "the Department's definition of 'vicinity,'" citing *Scotts Valley*. *Mashpee Op.* at 72 & n.123 (JA4532).

contrary conclusion is belied by agency precedent—and by the Cowlitz themselves.

C. The Secretary Did Not Apply The Natural Inference Test

The government's fallback argument is that the Secretary actually applied the "natural inference" test. Gov. Br. 71. It is true that the Secretary *cited* the "natural inference test." Our argument, however, is that the "ROD did not *apply* the 'Natural Inference' test." GR Br. 42 (emphasis added). Thus, we explained, while the Secretary asserted that various Cowlitz "are in the 'vicinity' of the parcel, she never explained how they meet the agency's definition of 'vicinity.'" *Id.* at 47. The government does not contend otherwise.

Nor can it. The Secretary did not conclude that any of the Cowlitz evidence gives rise to the "natural inference" that the Cowlitz "used or occupied the subject parcel" itself. *Scotts Valley Op.* at 15 (JA4350). Rather, she stated only that such activities "brought Cowlitz Indians *close to* the Cowlitz Parcel"—which, according to the Secretary, "qualifies as a significant historical connection." JA0298 (emphasis added). That is not the "natural inference" test.

The Cowlitz assert that the Secretary not only cited the "natural inference" test, but that she in fact applied that test and concluded that the Cowlitz in fact "historically used or occupied the Parcel." Cowlitz Br. 31. Not so. As shown above, all the Secretary found is evidence of "occupation of lands *in the vicinity of*

the Cowlitz Parcel." JA0301 (emphasis added). And the portions of the ROD cited by the Cowlitz do not show otherwise. For example, the Cowlitz note that the Secretary determined that the Cowlitz "traded furs *near* the Cowlitz Parcel"; engaged in "skirmishes *within a few miles* of the Cowlitz Parcel"; and had "members in the *area*" of the Parcel. Cowlitz Br. 28 (emphasis added). But what the Cowlitz do not say, and what they cannot say, is that the Secretary actually inferred, based on that (or any other) evidence, that the Cowlitz "used or occupied the subject parcel as well." *Scotts Valley Op.* at 15 (JA4350).

As the government acknowledges, an agency's interpretation of its own regulations do not merit deference when that interpretation "constitutes an unreasoned departure from prior decisions." Gov. Br. 65. The government does not contend that the agency's failure to apply the "natural inference" test was reasoned—it just contends that that test does not apply. A remand is therefore required so that the agency can apply its longstanding interpretation of "vicinity"—or explain why it chose not to do so here.[13]

CONCLUSION

This Court should reverse the district court's decision and vacate the ROD.

[13] For the reasons stated in our opening brief (at 42-48), the Secretary's evidence does not remotely satisfy the "natural inference" test, which may explain why the Secretary elected not to apply it.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point Times New Roman.

Dated: January 5, 2016

/s/ Lawrence S. Robbins
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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2016, I electronically filed the foregoing Reply Brief by using the appellate CM/ECF system, which will send notice of such filing to counsel for Appellee. In addition, I caused paper copies of the brief and Appendix to be sent via Federal Express overnight delivery to the Clerk of Court's office.

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