No. 15-17253

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF AMADOR, California,

Plaintiff – Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; S.M.R. JEWELL, Secretary of the United States Department of the Interior; LARRY ROBERTS, Acting Assistant Secretary of Indian Affairs, United states Department of the Interior,

Defendants – Appellees,

IONE BAND OF MIWOK INDIANS,

Intervenor-Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FEDERAL APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

LEGISLATIVE HISTORY:

OTHER AUTHORITIES:

GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
EIS	Environmental Impact Statement
ER	Amador County's Excerpts of Record
FSER	Federal Appellees' Supplemental Excerpts of Record
IGRA	Indian Gaming Regulatory Act
Interior	U.S. Department of the Interior
Ione Band or Band	Ione Band of Miwok Indians
IRA	Indian Reorganization Act of 1934
NEPA	National Environmental Policy Act
Part 83 regulations	Interior tribal acknowledgment regulations (1978)
§ 2719 regulations	Interior regulations interpreting IGRA § 2719 (2008)

STATEMENT OF JURISDICTION

The Jurisdictional Statement of Plaintiff-Appellant County of Amador (hereinafter, Amador County or County) is correct.

STATEMENT OF THE ISSUES

The Ione Band of Miwok Indians (Ione Band or Band) is a federally recognized tribe with approximately 750 members located in the vicinity of Plymouth, California, about 40 miles southeast of Sacramento in Amador County. The Band's ancestors, like northern California Indians generally, were displaced and nearly annihilated by successive waves of invasion of their territory. Although an 1851 treaty negotiated and signed between those ancestors and the United States promised them a reservation, the treaty was never ratified by the Senate, and the Indians were overrun in the gold rush. The Ione Band settled on a 40-acre tract within the contemplated reserved area, which the United States spent more than two decades trying to acquire for it as a reservation in the early 1900s, but that effort stalled due to repeated title problems with the property. In 1970, the Band renewed its request that the United States acquire land in trust for it but that request, initially agreed to, got caught up in I policy disputes within the U.S. Department of the Interior (Interior) over the Band's recognition that were not resolved until 1994.

Finally, on May 24, 2012, Interior issued a decision to acquire approximately 228 acres of land in Plymouth, California (the Plymouth Parcels) in trust for the Band, a federally recognized tribe. Interior determined that it has authority to acquire the

Plymouth Parcels in trust for the Ione Band under the Indian Reorganization Act of 1934, 25 U.S.C. § 5, 48 Stat. 985, 25 U.S.C. § 465, because the Band is a "recognized Indian Tribe now under Federal jurisdiction," within the meaning of § 19 of the Act, 25 U.S.C. § 479. Interior further determined that the Plymouth Parcels are eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, because Interior will acquire them in trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." The issues on appeal are:

1. Regarding Interior's determination that the Plymouth Parcels are "restored lands" eligible for gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(B)(iii):

A. Did Interior reasonably apply its "grandfather" regulation, 25 C.F.R. § 292.26(b), which allows Interior to rely on agency determinations regarding gaming eligibility under IGRA made prior to the 2008 regulations even if those determinations apply standards different from those in the regulations?

B. Did Amador County waive its as-applied challenge to the grandfather regulation by failing to allege the regulation's illegality in the County's complaint?

2. Regarding Interior's determination that it possesses authority under § 465 of the Indian Reorganization Act (IRA) to acquire land in trust for the Ione Band because the Tribe is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934 within the meaning of IRA § 479:

A. Did Interior reasonably determine that modern-day inclusion of the Ione Band on the Federal Register list of federally recognized tribes satisfies the "recognized Indian tribe" requirement of IRA § 479?

B. Did Interior reasonably determine that the Ione Band was "under federal jurisdiction" in 1934 when the IRA was enacted?

STATEMENT OF FACTS

A. Statutory and Regulatory Provisions

1. The Indian Reorganization Act of 1934 (IRA)

Congress enacted the IRA in 1934 to encourage tribes "to revitalize their self-government," take control of their "business and economic affairs," and assure a viable territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). This "sweeping" legislation, *Morton v. Mancari*, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, which had been designed to "put an end to tribal organization" and to "dealings with Indians * * * as tribes." *United States v. Celestine,* 215 U.S. 278, 290 (1909). It also repudiated the previous policies that sought to end tribal communal land ownership. *See e.g.*, 25 U.S.C. §§ 461, prohibiting further allotment of land); *id.* at § 462 (extending indefinitely the periods of trust or restrictions on alienation of Indian lands); *id.* at § 464 (prohibiting any transfer of Indian lands except exchanges authorized by the Secretary).

Section 5 of the IRA, codified at 25 U.S.C. § 465, authorizes the Secretary "in h[er] discretion, to acquire * * * any interest in lands * * * for the purpose of providing land for Indians." *Id.* at § 465. Any such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian," and "shall be exempt from State and local taxation." *Id.* By authorizing new trust acquisitions, § 465 allows the Secretary to restore or replace the lands and related economic opportunities that were lost or rendered unavailable through allotment and other governmental policies. *See Mescalero Apache Tribe*, 411 U.S. at 151; *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005).

Section 19 of the IRA provides three definitions of "Indians" eligible for benefits, including land acquisition, under the IRA. *See* 25 U.S.C. § 479. The first definition, relevant here, pertains to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* It defines "tribe" to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.* As discussed *infra*, pp. 34-35, the Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009), addressed the IRA's first definition of "Indians" and held that the word "now" in the phrase "now under Federal jurisdiction" means in 1934, when the IRA was enacted, such that a tribe must have been "under Federal jurisdiction" in 1934 to qualify for IRA benefits.

Interior regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's exercise of discretionary authority to acquire land in

trust for Indian tribes and individual Indians. 25 C.F.R. § 151.1. Those regulations provide that the Secretary may acquire land into trust "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." *Id.* § 151.3(a)(3). The Secretary must allow a period for state and local governments to comment on the proposed acquisition and must consider, *inter alia*, the tribe's need for the land, the purposes for which the land will be used, the impact of removing the land from state and local tax rolls, and potential jurisdictional problems and land use conflicts. *See id.* § 151.10(b), (c), (e), (f). Interior must also determine whether the acquisition complies with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 to 4370h. *Id.* § 151.10(h).

2. The Indian Gaming Regulatory Act (IGRA)

IGRA governs gaming on Indian lands.[1] Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The National Indian Gaming Commission (NIGC) monitors gaming under IGRA. *Id.* §§ 2704(a), 2706(b). Under IGRA, a tribe may engage in Class III gaming, which includes slot machines and casino games, only

[1] Congress enacted IGRA after the Supreme Court held that states generally lack civil regulatory authority to regulate gaming on Indian reservations. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

if certain conditions are satisfied, including that the tribe and the State enter into a compact approved by the Secretary of the Interior to govern the conduct of such gaming. *Id.* § 2710(d)(1)(C), (d)(8). IGRA thus "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712*,* 715 (9th Cir. 2003).

IGRA applies only to federally recognized tribes and governs gaming on "Indian lands," which includes lands held in trust by the United States for an Indian tribe. *Id.* §§ 2710, 2703(4)(B). IGRA, however, generally prohibits gaming activities on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," IGRA's effective date. *Id.* § 2719(a). The statute makes certain exceptions to this prohibition, including—as relevant here—for lands "taken into trust as part of * * * the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* at § 2719(b)(1)(B)(iii). The exceptions "ensur[e] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones," *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), and provide "some sense of parity between tribes that had been disbanded and those that had not," *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 161 (D.D.C. 2002).

In 2008, Interior published regulations setting forth its current policy and standards for implementing IGRA § 2719. 73 Fed. Reg. 29,354 (May 20, 2008) (codified at 25 C.F.R. pt. 292). The § 2719 regulations interpreting the "restored

lands" exception provide that a tribe qualifies for the exception only if it was restored to federal recognition by Congress, a federal court, or through Interior's "administrative Federal Acknowledgment Process" under Interior's regulations at 25 C.F.R. part 83. The § 2719 regulations generally apply prospectively by virtue of a provision that grandfathers "applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment." 25 C.F.R. § 292.26(b). The grandfather regulation reserves to Interior or NIGC, however, the "full discretion to qualify, withdraw or modify such opinions" prior to the issuance of a final agency decision. *Id.*

B. Factual Background

1. The Ione Band in the 19th Century

The Ione Band traces its ancestry to the Miwok and Nisenan people who historically resided on lands that today make up Amador County. Federal Appellees' Supplemental Excerpts of Record (FSER) 473-476. The Band's ancestors, like northern California Indians generally, were effectively enslaved, marginalized, and nearly annihilated by successive waves of invaders, beginning in the mid-1700s with the establishment of missions supported by the Spanish and Mexican governments. FSER471. In 1848, California became a territory of the United States and, in that same year, gold was discovered at Sutter's Mill, causing tens of thousands of miners

and settlers to pour into the area. California was quickly made a state in 1850, and the United States immediately commenced government-to-government relations with the native Californians. In 1851 and 1852, pursuant to congressional authorization, three commissioners entered into 18 treaties with California Indian tribes or bands, which would have set aside an estimated 7.5 million acres in California as reservations. FSER483.

One of these treaties, Treaty J, encompasses the lands of the ancestors of the Ione Band, and the lands to be reserved under the treaty were located in the traditional territory of the Northern Sierra Miwok, from which the Ione Band derives specific ancestry. The Band itself is a successor in interest to signatories of Treaty J. FSER488. And the Plymouth Parcels lie within the boundaries of the treaty reservation area. FSER484.

California's new Senators, however, opposed ratification and the treaties were not ratified. *Id.*, FSER486. The failure to follow through on promises of protection and support for these vulnerable populations "had a more rapid and destructive effect on the California Indian population and culture than any other single event," reducing the population from about 100,000 to 30,000 in 20 years. FSER484.

2. 1905 to 1941: Interior's Efforts to Acquire a Reservation for the Ione Band

By the beginning of the twentieth century, most of the northern California Indians had been evicted from their villages, including the Miwok, and they scattered

as a matter of survival. FSER487. The Ione Band located on a 40-acre tract of land southeast of Sacramento, which it has occupied since before 1900. FSER588.

In 1905, attention was focused on the plight of landless Indians in California. In 1906, C. E. Kelsey, a special agent to the Commissioner of Indian Affairs, wrote a report on the conditions of California Indians, based on eight months of hands-on research and a census of the Indians. Kelsey's report prompted Congress in 1906 to appropriate funds to purchase lands for the Indians living in small settlements in northern and central California; additional acquisition funds were repeatedly appropriated through 1933. *See Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1176 n.1 (E.D. Cal. 2003).

Kelsey's 1906 report identified 36 Ione Indians in Amador County and designated them as being "without land."[2] FSER588. In May 1915, another special agent, John J. Terrell, described in detail his efforts to negotiate a purchase for the Ione Band of their "Indian Village," noting the Band's deep attachment to "their old home spot around which cluster so many sacred memories," and finding that the Ione Indians "have stronger claims to their ancient Village than any others." *Id.*; FSER2-3. Agent Terrell's census of the Ione Band, prepared with the assistance of the Band's

[2] The extensive correspondence and reports documenting Interior's interactions with the Ione Band and efforts to acquire a reservation for them is reproduced at FSER1-506. It is also summarized in the ROD. *See* FSER530.

newly elected leader, Chief Charlie Maximo, identified 101 residents, including many in the 1905 census. FSER6, 492.

By August 1916 Agent Terrell had received approval to purchase the 40 acres, but the effort stalled due to title problems, documented in a series of letters between 1916 and 1920. FSER60-306, 589. In 1917, Agent Terrell reported on the "sore disappointment to the Indians" that the acquisition might fail, relating that the "chief of this band" explained that the Ione had always resided at that location. FSER589. A 1920 report to the Commissioner of Indian Affairs continued to document the Band's residence on the 40 acres. *Id.* Correspondence and reports between 1923 and 1925 again continued to document the Indians at Ione and included a request from the Assistant Commissioner of Indian Affairs to the Superintendent of the Sacramento Agency to give the purchase of land for the Ione "early attention with a view to clearing the way for final action." *Id.* A 1927 report documented the Ione Band population to be 46 and reported on the legal difficulties in purchasing land. In 1930, a letter summarized the problem of getting clear title to the parcel, noting that it had persisted "for more than eight years." FSER590.

In 1933, as described in a series of letters, Interior continued to attempt to address the problem of landless Indians in Amador County, including those living near Ione, in coordination with local authorities, but no breakthrough occurred. *Id.* The next correspondence was in 1941, when the Band sent a letter petitioning Interior to acquire the land. *Id.* That same year, the Sacramento Indian Agency, in a letter to

the Commissioner, detailed then-recent efforts to again try to purchase the land for the Ione Band and described impediments to the acquisition, including the lack of clear title. *Id.*

The record shows no contacts between Interior and the Ione Indians for the next 30 years. This lack of contact is unexplained, but it coincides with the onset of World War II and another shift in federal Indian policy which, from the late 1940s to the early 1960s, supported the assimilation of Native Americans into the dominant society and the termination of the federal trust relationship with tribes. The policy included, for example, the 1958 California Rancheria Act, which authorized the Secretary to terminate the federal government's trust supervision of 41 California reservations. S*ee Amador County, California v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011).

3. 1972: Commissioner Bruce's Decision

In the late 1960s, the United States again adopted a policy of Indian self-determination. Congress repudiated its policy of terminating recognized Indian tribes and actively promoted their restoration. *Cohen's Handbook of Federal Indian Law* at § 1.07 at 97-104 (Nell Jessup Newton ed. (2012)). Thus, beginning in 1970, with the help of California Indian Legal Services, the Ione Band sought again to have Interior acquire the 40-acre parcel as its reservation, but title problems remained. In October 1972, the Band in a state-court action successfully quieted title to the 40-acre tract in the names of the plaintiffs and "other members of the Ione Band of Indians."

FSER447-448. The Band contacted Interior, stating its desire that the United States agree to accept title to the land and hold it in trust for the Band. FSER442-444.

On October 18, 1972, Commissioner of Indian Affairs Louis Bruce responded to the Band's request, expressly confirming that the Secretary had the authority to acquire the 40-acre parcel in trust for the Band under IRA § 465. FSER445-446, 591. Commissioner Bruce found that Interior had "evidently recognized" the Band when trust acquisition of the 40-acre parcel was contemplated in the early 1900s, noted that the Band had never voted to reject the IRA, and concluded that the Band "thus [is] eligible for the purchase of the land under this Act." FSER446. The Commissioner directed the Bureau of Indian Affairs (BIA) to take steps to call an election for the Band to reorganize its tribal government under the IRA and agreed to accept the land in trust. FSER446, 591.

4. 1975-1993: Interior's *De Facto* Termination of the Band's Recognition and the *Burris* Litigation

Commissioner Bruce's instructions, however, were not carried out. Interior was unable to verify that the Band had clear title to the 40-acre tract, and in the interim Interior began developing regulations for the first time establishing a formal administrative process for recognizing, or "acknowledging" tribes, which took effect in 1978. *See* 25 C.F.R. pt. 83 (the Part 83 acknowledgment regulations). Interior informed the Ione Band that it would have to apply for recognition under the acknowledgment regulations and, in 1979, placed the Band on the list of tribes

petitioning for recognition thereunder. FSER449. Interior's first list of recognized tribes, published in the Federal Register in 1979, did not include the Ione Band. *See* 44 Fed. Reg. 7235, 7235-37 (Feb. 5, 1979).

The Band began the laborious process of finding the historical documents required to support acknowledgment under the regulations. In 1988, the recognition issue came to a head when Amador County notified the Band that it intended to assess property taxes on the 40-acre parcel. FSER450. A faction of the Band sued the United States to compel a determination that the Band was a recognized tribe and that the 40-acre parcel was not subject to non-federal jurisdiction. A competing faction of the Band, comprising individuals sharing ownership of the 40-acre parcel, was also named as a defendant. *See Ione Band of Miwok Indians v. Burris*, CIV-S-90-0993 (Appellant's Excerpts of Record (ER) 168-192) (Complaint).

In the *Burris* litigation, Interior initially maintained the view that the Band was *not* a recognized tribe and moved for summary judgment on the ground that the Band, by failing to avail itself of the acknowledgment process, had not exhausted its administrative remedies. ER240-264. In 1992, the district court granted the United States' motion, without addressing whether any of Interior's past actions constituted recognition. The claims between the two competing factions of the Band regarding the status of the 40-acre parcel, however, continued. Judgment was not entered in the case until September 1996, at which time the district court, unable to determine that either faction represented the Band and the Band's claim to the 40-acre parcel, held

that the County had jurisdiction over it and dismissed the matter. ER526-530. In the interim, however, as explained below, Interior reaffirmed the Band's status as a federally recognized tribe.

5. Interior's 1994 Reaffirmation of the Band's Recognition

In 1994, Assistant Secretary – Indian Affairs[3] Ada Deer reaffirmed Commissioner Bruce's 1972 decision confirming the federal recognized status of the Band and directed that the Band be placed on the list of federally recognized tribes. FSER458. In a follow-up letter, Assistant Secretary Deer subsequently advised the Band to investigate different land for trust acquisition in light of the continuing title issues plaguing the 40-acre tract. FSER460.1-460.3. Interior included the Ione Band on the Secretary's 1995 Federal Register list of recognized tribes, 60 Fed. Reg. 9250, 9252 (Feb. 16, 1995), and on every list thereafter, *e.g.*, 81 Fed. Reg. 26,826, 26,828 (May 4, 2016). In late 1996, the Band held tribal government elections that resulted in Interior acknowledging the Band's tribal government. *Esther Burris and Nicolas Villa, Jr. v. Sacramento Area Director, BIA*, 33 IBIA 66 (Nov. 25, 1998).

C. Administrative Proceedings

The Band resumed in earnest its efforts to have Interior acquire land in trust for it, now focusing on the Plymouth Parcels rather than the problem-ridden 40-acre

[3] The Assistant Secretary – Indian Affairs replaced and assumed the duties of the Commissioner of Indian Affairs in 1977. 42 Fed. Reg. 53,682, 53,628 (Oct. 3, 1977).

parcel. In November 2003, Interior began the requisite NEPA process by publishing a notice of intent in the Federal Register that the Band proposed that Interior acquire in trust for the Band approximately 200 acres in the Plymouth area for a gaming facility. FSER527. Interior held public hearings over the next three months and began work on a draft Environmental Impact Statement (EIS). *Id.* The Band submitted its formal trust acquisition application in November 2005.

1. Interior's 2006 Indian Lands Determination

Prior to its submitting its trust application, the Band in September 2004 requested a determination that the Plymouth Parcels, if taken in trust, would qualify under IGRA as "Indian lands" on which the Band could conduct gaming. FSER462-464, 582. On September 19, 2006, Interior Associate Solicitor Carl Artman concluded, in a memorandum to the Associate Deputy Secretary, that the Plymouth Parcels would qualify for gaming under IGRA, because the Parcels satisfied the "restored lands" exception for land acquired in trust after IGRA's enactment.

Artman first concluded that the Ione Band is a "tribe restored to Federal recognition" as required by IGRA § 2719(b)(1)(B)(iii). Artman concluded that Commissioner Bruce's 1972 letter directing the BIA to take land into trust for the Band was a "clear, unambiguous statement" that Interior was dealing with the Band as a recognized tribe "in accordance with the practices of the Department at the time." FSER506-507. Artman further concluded that Interior's failure to follow through on the Commissioner's instructions, and the agency's position in the *Burris* litigation that

the Band was *not* recognized, were actions "wholly inconsistent with" the Commissioner's recognition and as such "manifest[ed] a termination of the recognized relationship." FSER507. Finally, Artman concluded that Assistant Secretary Deer's 1994 reaffirmation of Commissioner Bruce's position and inclusion of the Ione Band on the list of federally recognized tribes "amounts to a restoration of the Band's status as a recognized Band." *Id.*

Artman also concluded that the Plymouth Parcels qualified as "restored lands." Artman found that the Band had a historical connection to the land due to the Parcels' proximity to the Band's historic tribal burial grounds and the site where its predecessors signed Treaty J, as well as a modern connection through the residence of tribal members and holding of tribal governmental meetings in the area. FSER507-508. On September 26, 2006, Interior Associate Deputy Secretary James Cason concurred in the Artman opinion, making it the Department's position that the Plymouth Parcels qualified for gaming under IGRA (hereinafter referred to as the "2006 Indian Lands Determination").[4] FSER510.

[4] The 2006 Indian Lands Determination was purportedly reversed and withdrawn in 2009 by Solicitor David Bernhardt, but in 2011, Solicitor Hilary Tompkins reaffirmed the 2006 Determination, after concluding that neither Bernhardt's circulation of his draft legal opinion nor his issuance of a memorandum regarding it to the Acting Deputy Assistant Secretary had the effect of withdrawing or reversing it. FSER515-523. On appeal, Amador County does not challenge the 2006 Determination based on the purported 2009 withdrawal.

2. NEPA Proceedings

In April 2008, Interior issued a draft Environmental Impact Statement (EIS) evaluating the impacts of the proposed casino and hotel project and a reasonable range of alternatives. After an extended comment period, a public hearing, and consideration and incorporation of comments on the draft EIS, Interior issued the final EIS in August 2010. FSER526, 531. The EIS explained that the purpose and need for taking the land into trust was to allow for the development of uses of the Plymouth Parcels that would improve the long-term economic condition of the Band and its members through the establishment of a stable, sustainable source of employment and revenue. FSER527. Such revenues would be used to support social and educational programs for the elderly, the poor, and younger tribal members. *Id.*

D. Record of Decision

On May 24, 2012, then Acting Assistant Secretary – Indian Affairs, Donald E. Laverdure, issued a Record of Decision (ROD) accepting the Band's application for trust acquisition of the Plymouth Parcels. FSER530-597; 77 Fed. Reg. 31,871 (May 30, 2012). The ROD implements the gaming and hotel proposal set forth as the preferred alternative in the EIS, with mitigation measures that adequately address the project's environmental impacts. FSER531-532. Interior determined that the preferred alternative best promotes the long-term economic self-sufficiency, self-determination, and self-governance of the Band and provides the best opportunity for attracting and maintaining a significant, stable, long-term source of tribal

governmental revenue. As such, it provides the best prospects for maintaining and expanding tribal governmental programs to provide health, education, housing, social, cultural, and environmental programs as well as employment and career development opportunities for its members. FSER531.

1. Eligibility for Gaming

Interior determined that the Plymouth Parcels qualify for gaming under IGRA's restored lands exception, as set forth in the 2006 Indian Lands Determination. The ROD noted that Interior's § 2719 regulations, which took effect in August 2008, provide that a tribe may qualify as having been "restored to Federal recognition" under IGRA only if recognition is restored by Congress, by a federal court, or under Interior's Part 83 acknowledgment regulations. But Interior concluded that the § 2719 regulations do not apply to the 2006 Determination because it qualifies for grandfathering under § 292.26(b) of those regulations. FSER582. Interior then concluded that the 2006 Determination properly concludes that the Band is a restored tribe based on the unique history of the Band's relationship with the United States. Interior also determined that the Plymouth Parcels qualify as "restored lands" for the Ione Band. FSER583.

2. Statutory Authority under the IRA

Interior determined it had authority to take land into trust for the Ione Band under the IRA. The ROD acknowledged that Interior's authority to take land into trust under the IRA's first definition of Indian, *see* 25 U.S.C. § 479, is limited to

"recognized Indian tribes" that were "under Federal jurisdiction" in 1934. FSER584. Interior relied on a thorough analysis of the statutory language, legislative history and context, course of the IRA's implementation, and the Supreme Court's *Carcieri* opinion, originally undertaken in the record of decision pertaining to a trust acquisition for the Cowlitz Indian Tribe, dated December 17, 2010 (Cowlitz ROD).[5] That interpretation, with some revisions, has since been formalized in a Solicitor's Memorandum Opinion applicable to all fee-to-trust decisions.[6]

Interior determined that "recognized" has a meaning distinct from "under Federal jurisdiction" and that the IRA "places no time limit on recognition." Cowlitz ROD at 89 (Addendum (ADD) 56) (quoting *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring)). Interior concluded, therefore, that it was sufficient that the Ione Band was federally recognized at the time of the trust acquisition determination. FSER591.

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[5] *See* U.S. Dep't of the Interior, BIA, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* (Dec. 2010). Available at http://www.bia.gov/cs/groups/mywcsp/documents/text/idc012719.pdf (relevant portions reproduced in the Addendum at 41-73). The Cowlitz Record of Decision was challenged in federal court and remanded to the agency for reasons unrelated to the *Carcieri* decision. Interior's new decision issued in April 2013 was just upheld by the D.C. Circuit. *See Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, __F.3d__, No. 14-5326, 2016 WL 4056092 (D.C. Cir. July 29, 2016).

[6] *See* Solicitor's Opinion M-37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act* (Mar. 12, 2014 (2014 IRA M-Opinion), available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf (reproduced in the Addendum at 15-40).

As for "under Federal jurisdiction," Interior observed that a "plain meaning" interpretation coextensive with Congress's plenary authority over Indians would allow Interior to acquire land for any recognized tribe and would be inconsistent with *Carcieri*. Cowlitz ROD at 96 (ADD63). Finding the phrase thus ambiguous in its context, Interior reasoned that Congress intended to limit the IRA to those tribes for which the United States had actually exercised jurisdiction and assumed federal responsibilities or obligations. *Id.* To implement this interpretation, Interior adopted a two-part inquiry: (1) whether, at some point before the IRA's 1934 enactment, the United States had taken an action or series of actions establishing or reflecting federal obligations, duties, responsibility, or authority over a tribe; and (2) whether such "jurisdictional status remained intact" at the time of the IRA's enactment. FSER586.

Interior concluded that the United States' "consistent efforts to acquire land in order to establish a reservation for the Band" constituted a "substantial effort[]" that "confirms the existence of a jurisdictional relationship in 1934," thus satisfying step one of the two-step inquiry. FSER590-591. These efforts extended without disruption prior to and past 1934, thus satisfying the second step of the inquiry. Interior thus determined that the Ione Band was under federal jurisdiction in 1934 within the meaning of the IRA. FSER593.

E. District Court Proceedings

Amador County filed its suit in the district court alleging that Interior's determinations that the Ione Band was "under Federal jurisdiction" in 1934 within the

meaning of the IRA and that the Plymouth Parcels are "Indian lands" subject to gaming under IGRA were arbitrary and capricious or contrary to law. FSER598-628 (Complaint). On cross-motions for summary judgment, the district court held for Interior in all respects. We focus only on the portions of the district court opinion relevant to the issues on appeal.

The district court upheld Interior's determination that the Ione Band was "under Federal jurisdiction" in 1934 within the meaning of the IRA, agreeing with Interior that the statutory phrase "under Federal jurisdiction" is ambiguous, according *Chevron* deference to Interior's interpretation, and concluding that the Department's two-part inquiry and its application to the Ione Band is reasonable. Memorandum and Order (Order) 16-18. The district court found no support for the County's contention that a tribe had to have reservation land to be "under Federal jurisdiction." Order 27-28. The court also rejected the County's assertion that that the *Burris* litigation collaterally estopped Interior from finding that the Ione Band was recognized by Commissioner Bruce in 1972 for both legal and equitable reasons.[7] Order 28-33.

[7] The district court rejected other arguments pertaining to the IRA's requirements that the County does not raise on appeal: (1) that the Ione Band was not a "tribe" in 1934 because it did not opt out of or hold special elections under the IRA or because of ambiguities in the record regarding the political and genealogical support for the Ione Band's status as a distinct tribe (Order 18-26); and (2) that the Bruce and Deer letters arbitrarily departed from established agency procedures and criteria for recognizing tribes (Order 33-35).

The district court also upheld Interior's reliance on the 2006 Indian Lands Determination to demonstrate the Plymouth Parcels qualify for gaming under IGRA. The court rejected the County's contention that Interior could not "grandfather" the 2006 Indian Lands Determination from Interior's subsequent § 2719 regulations which provide that Interior could "restore" a tribe to "Federal recognition" under IGRA only through the Part 83 acknowledgment regulations. The court concluded that IGRA's language is ambiguous on this question and does not compel use of the regulatory acknowledgment process, that the grandfather regulation allows Interior to rely on agency gaming eligibility determinations made prior to subsequently enacted regulations, and that the grandfather regulation had previously been similarly applied by NIGC in the restored lands context. Order 38.

SUMMARY OF THE ARGUMENT

1. Interior reasonably determined that the Plymouth Parcels are eligible for gaming as "restored lands" under IGRA § 2719 based on its conclusion that the 2006 Indian Lands Determination properly applied the standards in use by Interior at that time and was grandfathered from any contrary standards in the subsequent 2008 § 2719 regulations. Amador County does not challenge the 2006 Determination's findings that Interior recognized the Ione Band, terminated that recognition, and then reaffirmed the Band's recognition and placed it on the Federal Register list of recognized tribes. The County argues only that IGRA limits the "restored lands" exception to tribes whose recognition (if by Interior rather than Congress or a court)

is restored under the Part 83 acknowledgment regulations—a limitation that Interior imposed in its 2008 § 2719 regulations. The County thus contends that Interior could not lawfully grandfather the 2006 Determination from that regulatory requirement, such that the grandfather regulation is unlawful as applied to the Ione Band. The County's argument is incorrect: IGRA's broad statutory language, applying the exception to tribes "restored to Federal recognition," is ambiguous and leaves to Interior the interpretation of that language as a matter of agency policy. Interior thus has discretion, which it properly exercised, to apply its 2008 "restored lands" regulation prospectively only, and the County does not demonstrate otherwise.

2. Interior reasonably determined that the Ione Band is a "recognized Indian tribe" within the meaning of the first definition of "Indian" in IRA § 479, pertaining to members of "any recognized Indian tribe now under Federal jurisdiction." Interior determined, based on the language, context, and legislative history of § 479, as well as the concurring opinions in *Carcieri*, that "now" does not modify the phrase "recognized Indian tribe" so that a tribe need not have been recognized in 1934. That interpretation has been upheld in all post-*Carcieri* court opinions addressing the question including, significantly, the D.C. Circuit, which recently issued the first court of appeals decision to address the question after *Carcieri*. *See Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell (Grand Ronde)*, __F.3d__, No. 14-5326, 2016 WL 4056092 (D.C. Cir. July 29, 2016). Interior thus properly relied on the 1994 reaffirmation of the Ione Band's recognition to conclude that it is a

"recognized Indian tribe" within the meaning of § 479. Because Amador County did not allege in its complaint or argue in the district court that the IRA requires the Ione Band to have been recognized in 1934, this argument is waived. In any event, the County fails to show any error in Interior's analysis.

3. Interior also reasonably determined that the Ione Band was "under Federal jurisdiction" in 1934, as required by § 479. Interior reasonably construed "now under Federal jurisdiction" to include those tribes over which the United States had exercised jurisdiction in a manner reflecting Federal responsibilities or obligations and where such relationship remained extant on the date of the IRA's enactment. The term "Federal jurisdiction" is ambiguous and not plainly limited to "reservation" tribes or tribes "within Indian country." The D.C. Circuit in *Grand Ronde*, in the only federal court decision to address this question, deferred to and upheld this reasonable interpretation. *Id.*

The United States exercised jurisdiction over the Ione Band through its consistent and substantial efforts, beginning in 1915 and continuing well past 1934, to acquire for the Band the 40-acre parcel on which the Band had lived since before 1900—efforts that failed due only to the property's title problems. The United States' exercise of jurisdiction harkened back to its government-to-government relations with the Ione Band's ancestors and predecessors in the successful negotiation of Treaty J in 1851. Although the Senate did not ratify the Treaty, the negotiations reflected federal acknowledgment of the land claims of the Band's predecessors and federal

responsibility for the Ione Band's welfare as a result of the loss of the land the Treaty promised to reserve. Interior plainly understood that the Ione Indians constituted a Band with an elected chief, making their home on land within the area reserved by the treaty, which Interior sought for over two decades to acquire as a reservation—circumstances fully consistent with the IRA's purpose of benefitting tribes under federal jurisdiction at the time of the IRA's enactment.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same standards that the district court applied. *See Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Plaintiffs' claims are reviewed under the deferential standard of review in the Administrative Procedure Act (APA); a court may set aside the agency's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012).

Interior's statutory interpretations are governed by the two-step inquiry set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If, upon review of the statute's language, structure, purpose, and legislative history, this Court determines that Congress has "directly spoken to the precise question at issue," this Court must give effect to Congress's "unambiguously expressed intent." *Id.* at 843. If this Court finds the statute to be silent or ambiguous on a specific issue—including a question regarding the scope of the agency's authority—this Court must

uphold Interior's construction if "permissible." *City of Arlington, Texas v. Federal Communications Comm'n*, 133 S. Ct. 1863 (2013). An agency's interpretation is permissible so long as it is not "arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44, 53 (2011) (citation omitted).

ARGUMENT

I. Interior reasonably determined that the Plymouth Parcels are eligible for gaming under IGRA § 2719.

Amador County focuses its appeal first on Interior's determination that the Plymouth Parcels are eligible for gaming under IGRA § 2719 because they satisfy the "restored lands" exception to IGRA's bar against gaming on lands acquired in trust after 1988. The County first focuses its challenge on Interior's § 2719 regulations, issued in 2008, some 20 years after IGRA's enactment, which set forth for the first time the agency's current policy and standards for determining which lands are eligible for the exceptions in IGRA § 2719. The regulations state that the "restored lands" exception is limited to tribes "restored to Federal recognition" through congressional action, a federal court decision, or the federal acknowledgment process in Interior's regulations at 25 C.F.R. § 83.8. The regulations, however, allow Interior to grandfather gaming eligibility opinions issued by Interior or NIGC prior to the effective date of the 2008 regulations. Based on the grandfather regulation, Interior

affirmed the 2006 Determination, even though the Ione Band did not go through the Part 83 acknowledgment process.

Amador County contends that a tribe cannot be administratively "restored to Federal recognition" for IGRA purposes except through the Part 83 regulations, that the grandfather clause in Interior's § 2719 regulations is invalid as applied, and thus Interior's decision is contrary to law. That challenge is waived, and in any event, fails on the merits.

A. The County's challenge to Interior's grandfathering regulation is waived.

The County does not dispute that the 2006 Indian Lands Determination satisfied the requirements of the grandfather regulation at 25 C.F.R. § 292.26(b); rather the County argues that the grandfather regulation itself is unlawful as applied. That argument is waived. A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the * * * claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). Amador County's complaint never alleges the invalidity of § 292.26(b) as a ground for relief. While the complaint does argue, in a footnote (FSER605), that the grandfather regulation was *inapplicable* because the 2006 Determination was allegedly withdrawn by Solicitor Bernhardt, that is a wholly

distinct ground from the County's argument here. The County's argument should be rejected on this ground alone.

B. Interior properly applied its grandfathering regulation to the 2006 Indian Lands Determination for the Ione Band.

Assuming the County's argument is not waived, it fails on the merits. First, it is important to note that the County's challenge is very narrow. The County does not challenge the underlying findings on which the 2006 Indian Lands Determination rests: that Interior recognized the Ione Band no later than 1972, subsequently engaged in actions that effected a *de facto* termination of the Band's recognition for a period, and restored recognition to the Band in 1994. The County does not contend that the Band is not validly included on the Federal Register list of federally recognized tribes today. The County argues only that the Ione Band was not "restored to Federal recognition" for the purposes of qualifying for IGRA's restored lands exception.

The County contends that, where a tribe is recognized by Interior (rather than by Congress or a court), IGRA's plain language limits the "restored lands" exception to tribes whose recognition is restored through the Part 83 process. As a result, the County argues, Interior may grandfather only those pre-regulatory Indian lands determinations that satisfy specific factors set forth in the D.C. Circuit's 1988 decision in *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988)—which, the County contends, the 2006 Indian Lands Determination does not satisfy. That argument fails because IGRA's "restored lands" exception plainly does *not*

constrain the manner in which a tribe's recognition may be restored; rather, the statutory language is broad and ambiguous. Thus Interior has discretion to apply its regulations interpreting that exception prospectively, pursuant to Interior's reasonable grandfather regulation.

1. IGRA is ambiguous as to how a tribe may be "restored to Federal recognition."

Contrary to the County's assertions, IGRA's "restored lands" exception does not limit the manner by which a tribe may be "restored to Federal recognition" in order to qualify for the exception. The statutory provision does not refer to Interior's Part 83 regulations or depend for its application on adherence to them. 25 U.S.C. § 2719(b)(1)(B)(iii). "Federal recognition" is a broad term that is not limited to administrative recognition, let alone recognition through Interior's Part 83 regulations (which were promulgated at Interior's discretion and are not required by statute). Rather, an Indian tribe also may be "federally recognized" by congressional statute or court order. *See Butte Cty. v. Hogen*, 613 F.3d 190, 192 (D.C. Cir. 2010) (discussing tribe's restoration to recognition pursuant to court order); *City of Roseville*, 348 F.3d at 1021-1022 (discussing restoration pursuant to legislation). Consistent with this case law, Interior's 2008 "restored lands" regulation incorporates all these forms of recognition. *See* 25 C.F.R. § 292.10(a)-(c).

Also, in contrast with the "restored lands" exception, IGRA's "initial reservation" exception applies to land acquired in trust as part of the initial reservation

of an Indian tribe "acknowledged by the Secretary under the Federal acknowledgment process." *Compare* 25 U.S.C. § 2719(b)(1)(B)(ii) ("initial reservation" exception) with *id.* § 2719(b)(1)(B)(iii) ("restored lands" exception). Congress is presumed to act intentionally when it includes particular language in one section of a statute but omits it in another section of the same Act. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (cited in *Carcieri*, 555 U.S. at 389-90). IGRA's statutory language thus does not support a conclusion that Congress in IGRA spoke to the "precise question" of the manner in which a tribe could be restored to federal recognition; rather the term "recognition" is inherently ambiguous. *See, e.g.*, *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1277 (D. Or. 2003).

In addition, many courts have concluded that IGRA § 2719 generally, and the "restored lands" exception specifically, should be interpreted broadly to effectuate IGRA's intent of promoting tribal economic development, self-sufficiency, and strong tribal governments. *See, e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 369 F.3d 960, 971 (6th Cir. 2004); *City of Roseville*, 348 F.3d at 1022. And courts have expressly held that the exception is ambiguous and that Interior's interpretation may be accorded *Chevron* deference. *See, e.g., Oregon v. Norton*, 271 F. Supp. 2d at 1277.

Amador County does not analyze the statutory language, purpose, or relevant case law pertinent to the "restored lands" exception. Rather, the County relies on language in the preamble to Interior's § 2719 regulations. The preamble, however,

does not purport to undertake the requisite analysis to demonstrate an unambiguous statutory meaning. To the contrary, the preamble begins by explaining that "[n]either the express language of IGRA nor its legislative history defines restored tribe for the purposes of section 2719(b)(1)(B)(iii)." 73 Fed. Reg. 29,354, 29,363 (May 20, 2008). The preamble merely "infer[s]" Congress's awareness of the existence of the acknowledgment regulations, expresses Interior's "belie[f]" about what Congress must have meant, and notes Congress's enactment of the Federally Recognized Indian Tribe List Act of 1994 six years after IGRA's passage. The preamble does not and was not intended to support a conclusion that Congress unambiguously required Interior to impose that limitation.[8]

Interior's regulation defining the restored lands exception thus represents an agency policy choice, by which Interior exercised its discretion to fill a gap in ambiguous statutory language. *See Chevron*, 467 U.S. at 843-844. As such, Interior had discretion to decide, as a matter of agency policy, to grandfather from the 2008 regulations' requirements prior restored lands opinions that relied, as here, on

[8] The preamble contemplates that specific exceptions to using the Part 83 regulations might exist where, as here, Interior corrects a mistaken termination of a tribe's recognition. 73 Fed. Reg. 29363. The preamble generally assumes that prospective administrative recognition decisions would be made under the Part 83 regulations, but notes that some "past reaffirmations" were administered under § 2719 "to correct particular errors." *Id.* As the district court noted, the NIGC applied the grandfather regulation to a "restored lands" determination for the Karuk Tribe in a nearly identical situation involving correction of an erroneous administrative termination of recognition. *See* Order 42; FSER 646, 655-656.

Interior's restoration of tribal recognition by reaffirmation. This Court has recognized that agencies may exercise grandfathering authority in multiple circumstances, particularly where—as here—grandfathering "was explicitly built into the new regulations." *See Sierra Club v. U.S. Environmental Protection Agency*, 762 F.3d 971, 983 (9th Cir. 2014). This Court has also recognized the validity of regulations that provide for grandfathering of agency decision processes pending when new regulations take effect, in order to ease the transition process. *Id.* at 982 (approving grandfathering of pending permit applications). Interior's regulations—which have the effect, *inter alia*, of grandfathering pending fee-to-trust applications and prior gaming eligibility determinations related thereto—accomplish just that. Interior's grandfather regulation, therefore, is valid as applied to the 2006 Indian Lands Determination.

2. ***NRDC v. Thomas*** **does not apply here.**

The D.C. Circuit's analysis in *NRDC*, on which the County solely relies, does not apply here. *NRDC* set forth a set of factors, based on retroactivity analysis, for considering whether an agency had a "duty" to apply a rule retroactively. 838 F.2d at 1243-44. *NRDC* applied these factors to Clean Air Act regulations pertaining to pollutant emissions that were required by the statute for achieving air quality goals. The factors enabled the Court to "balanc[e] * * * the interest in prompt and complete fulfillment of statutory goals against the inequity of enforcing a new rule against

person that justifiably made investment decisions in reliance on a past rule or practice." *Id.* at 1244.

NRDC thus addressed a specialized circumstance, and we have found no other cases that have applied the *NRDC* analysis.[9] Furthermore, *NRDC* is readily distinguishable from the circumstances here. In contrast to the statutory provisions at issue in *NRDC*, IGRA imposes no "duty" on Interior to regulate; indeed, Interior did not issue regulations implementing § 2719 until 20 years after IGRA's enactment. Nor does IGRA impose statutory goals requiring "prompt and complete fulfillment" that would be hindered by grandfathering. And finally, the agency regulations in *NRDC* differentiated between classes of regulated parties, in a manner the Court found to be arbitrary and capricious. No such arbitrary categorization is involved in Interior's grandfather regulation; rather, Interior's regulation simply allows the agency to apply the § 2719 regulations prospectively, avoiding the need to re-evaluate and revise agency determinations previously made. That is a sound decision that advances general principles pertaining to administrative efficiency and reliance.

II. Interior reasonably construed and applied IRA § 479 to determine that it could take land in trust for the Ione Band.

The IRA provides three definitions of "Indians" as used in the statute:

[9] *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (*en banc*), cited by the County, addressed whether the Court could apply an agency's statutory interpretation retroactively and has no application here.

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

25 U.S.C. § 479. These definitions all require prospective IRA beneficiaries to prove Indian descent, but otherwise reflect three different classification principles. The third definition of Indian relies on a threshold blood quantum, the second on residence on an existing reservation, and the first (relevant here) on membership in a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934. Interior has authority to take land into trust for persons (and tribes) who meet any of these definitions. *Id.* § 465.

In *Carcieri*, the Supreme Court construed the IRA's first definition of Indian, in part. *Carcieri* involved the Narragansett Tribe, which the Colony of Rhode Island had "placed under formal guardianship" in 1709, and which the State of Rhode Island had convinced to "relinquish" nearly all tribal authority in 1880. 555 U.S. at 383. When the Narragansett first sought federal aid in the early 1900s, Interior declined, finding that the tribe "was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government." *Id.* at 384. In 1983, however, Interior formally recognized the Narragansett Tribe, which subsequently asked Interior to take certain lands into trust for it under the IRA. *Id.*

The Supreme Court held that "'now under Federal jurisdiction' * * * unambiguously refers to those tribes that were under * * * federal jurisdiction * * *

when the IRA was enacted in 1934." *Id.* at 395. Because no party had suggested that the Narragansett Tribe was under federal jurisdiction in 1934, the Court found that the tribe was not eligible to be the beneficiary of an IRA trust acquisition. *Id.* at 396. The Court majority did not, however, address the meaning of "under Federal jurisdiction" or whether "now" modifies "recognized Indian tribe."

In a concurring opinion, Justice Breyer explained that, while § 479 requires a tribe to have been "under Federal jurisdiction" in 1934, "[t]he statute," in contrast, "imposes no time limit upon *recognition*." *Id.* at 398 (Breyer, J. concurring) (emphasis added). Justice Breyer thus concluded that "later recognition [could] reflect[] earlier 'Federal jurisdiction.'" *Id.* at 399. Justice Souter filed an opinion, joined by Justice Ginsburg, concurring in the Court's ruling that a tribe had to be "under federal jurisdiction" in 1934, but dissenting from the ruling that the Narragansett Tribe did not satisfy that requirement. In his concurrence, Justice Souter agreed with Justice Breyer that the IRA does not require a tribe to have been recognized in 1934, explaining that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Id.* at 400 (Souter, J., concurring in part and dissenting in part). He agreed with Justice Breyer that "the statute imposes no time limit upon recognition," and concluded that "giving each phrase its own meaning would be consistent with established principles of statutory interpretation." *Id.*

Adopting the construction of the concurring Justices,[10] Interior reasonably concluded that the Ione Band's modern-day inclusion on the list of federally recognized tribes satisfies the IRA's requirement that it be a "recognized Indian tribe." Interior also reasonably determined that "under Federal jurisdiction" may be satisfied under its two-part test and that the Ione Band satisfies that test. The County fails to demonstrate otherwise.

A. Interior reasonably determined that the Ione Band is a "recognized Indian tribe" within the meaning of § 479.

Amador County contends (Br. 47-52) that the Ione Band is not a "recognized Indian tribe" within the meaning of the IRA because (1) the IRA requires a tribe to have been recognized in 1934; (2) such recognition had to be formal political recognition; and (3) the Band does not satisfy these requirements. These arguments are waived and, in any event, fail on the merits.

1. Amador County's challenge to the meaning of "recognized Indian tribe" is waived.

The County's argument based on the IRA's recognition requirement is waived. Regarding the IRA, the County's complaint challenges only Interior's determination that the Band was "under Federal jurisdiction" (*see* FSER598-628). *Jachetta v. United States*, 653 F.3d 898, 906 (9th Cir. 2011) (court will not consider argument based on cause of action not stated in complaint); *Bell Atlantic Corp. v. Twombly*, 555 U.S. 544,

[10] *See* Cowlitz ROD at 80-81, 87-89 (ADD47-78, 54-55); 2014 IRA M-Opinion at 23-26 (ADD37-39).

555 (2007) (complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the * * * claim is and the grounds upon which it rests") (internal quotation marks and citation omitted). In addition, Amador County did not argue in the district court that recognition had to be confirmed in 1934, and the district court did not address this question. This Court thus should not address the argument. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) (arguments raised for the first time on appeal are waived).

2. Interior reasonably determined that "now" does not modify "recognized."

Assuming the County's "recognition" argument is not waived, it fails on the merits. As Justices Breyer, Souter, and Ginsburg concluded, the IRA's first definition of Indian imposes no time limit upon tribal recognition. *Carcieri*, 555 U.S. at 398. This follows from § 479's syntax. *Id.* Any recognized Indian tribe" and "under Federal jurisdiction" are separate phrases, and the Justices unanimously recognized in *Carcieri* that "now" modifies the phrase "under Federal Jurisdiction," describing at what time federal jurisdiction must exist. Indeed that timing question was the sole statutory interpretation issue decided by the Court in *Carcieri*. The *Carcieri* majority opinion, in fact, relied on an explanation of the statutory language by Commissioner of Indian Affairs John Collier, provided shortly after the IRA was enacted, that the first definition of "Indian" included "persons of Indian descent who are members of

any recognized tribe *that was under Federal jurisdiction at the date of the Act*," 555 U.S. at 390 (emphasis in original), which separates the two phrases with the words "that was" and attributes "now" to the latter.

Reading "now" to modify only "under federal jurisdiction" is also supported by the IRA's legislative history. The original version of the first definition of "Indians" considered by Congress applied simply to "all persons of Indian descent who are members of any recognized Indian tribe," with no specification as to when such recognition should occur. *Hearing on S. 2755 and S. 3645 Before the Senate Committee on Indian Affairs,* 73 Cong. 2d Sess., Pt. 2 (Committee Hearing) at 234, 264 (FSER635, 641). The word "now" was subsequently included in the legislation as part of the separate phrase "now under Federal jurisdiction," which was added at the suggestion of Commissioner Collier in response to concerns expressed by Senators at a hearing before the Senate Committee on Indian Affairs. At the end of a discussion about various aspects of the three definitions of "Indian," Committee Chairman Wheeler stated, without reference to any specific text, that the bill ought to exclude persons "no more Indian than you or I." Committee Hearing at 266 (FSER643). Senator O'Mahoney then suggested handling such concern "by *some separate* provision excluding from the benefits of the act "*certain types*." *Id.* (emphasis added). Commissioner Collier suggested inserting "now under Federal jurisdiction" after the words "recognized Indian tribe, and the hearing ended shortly thereafter, without further elaboration. *Id.* The word "now" was added as part of the separate phrase

"now under Federal jurisdiction" and made no change to the meaning of the pre-existing phrase "recognized Indian tribe."

Reading the word "now" to modify only "under Federal jurisdiction" also reflects the different functions served by the terms "recognized" and "under Federal jurisdiction." As demonstrated by the legislative history, Congress added "under Federal jurisdiction" to limit the IRA to those Indian tribes over which the United States *already* had assumed duties, responsibilities or obligations through a prior exercise of authority. Committee Hearing at 263-265 (FSER641-643). The term "now" was necessary to express that limitation. In contrast, the term "recognized" goes to whether the subject group is an actual "Indian tribe," which may be demonstrated by residence on a reservation, 25 U.S.C. § 479, or for non-reservation groups, on other factors, including "ethnological and historical considerations," s*ee* Felix S. Cohen, *Handbook of Federal Indian Law* 271 (1942 ed.). For purposes of verifying tribal status, the relevant concern is not the state of federal knowledge at the time of the IRA's enactment—when information regarding tribal status might be missing and/or before a formal investigation is made—but whether tribal status is confirmed (and the tribe "recognized") before land is taken into trust under § 465. *See Carcieri*, 555 U.S at 397-398 (Breyer, J., concurring).

This reading also makes practical sense because in 1934 and the several decades that followed, Interior had no formal process for recognizing Indian tribes. *See Mackinac Tribe v. Jewell*, __F.3d__, No. 15-5118, 2016 WL 3902667, *2 (D.C. Cir. July

19, 2016) ("Recognition by the federal government proceeded in an ad hoc manner, even after the passage of the IRA"). Nor did Interior have an official list of federally recognized tribes until one was published in 1979. *See* 44 Fed. Reg. 7,235, 7.235-37 (Feb. 5, 1979).

Finally, the courts to reach the question have unanimously upheld Interior's interpretation of the first definition of "Indians" in § 479 as not requiring recognition in 1934. The D.C. Circuit, the first court of appeals to address the meaning of "recognized Indian tribe" in the wake of *Carcieri*, applied "the familiar *Chevron* analysis" to hold that "'recognized' is ambiguous," and deferred to Interior's interpretation. *See Grand Ronde*, 2016 WL 4056092 (Slip Op. 11, 13, 15). The district courts to address the question have held the same. *See Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 401 (D.D.C. 2014); *Cent. New York Fair Bus. Ass'n. v. Jewell*, No. 6:08-CV-0660 LEK/DEP, 2015 WL 1400384, at *10 (N.D.N.Y. Mar. 26, 2015) (unpublished disposition).

3. The County's contrary arguments fail.

The County rests its argument that "now" modifies "under Federal jurisdiction" first on its contention (Br. 48) that the phrase "now under Federal jurisdiction" modifies the phrase "recognized Indian tribe," such that the temporal limitation in the second phrase must apply to the term "recognized" in the first. The County provides no support for that argument but rather presents it merely as an *ipse dixit*. Because "recognized" and "under Federal jurisdiction" both modify "tribe," the

County argues that "now" must limit both modifiers. But Congress only attached now to "under federal jurisdiction" and the County provides no reason it interpret it differently. At a minimum, as the D.C. Circuit concluded, whether the phrase "now under Federal jurisdiction" modifies only "tribe" or "recognized tribe" is "ambiguous and susceptible to either interpretation. *Grande Ronde*, 2016 WL 4056092 (Slip Op. 12-13).

The County further argues (Br. 48-49) that several pre-*Carcieri* cases confirm that the IRA requires recognition in 1934. None of the cases on which the County relies, however, analyze the meaning of "recognized Indian tribe" or reach a holding on that question. In *United States v. John*, 437 U.S 634, 650 (1978), the Supreme Court affirmed Interior's reservation proclamation for the Mississippi Choctaws because there was "no doubt" that the Choctaws satisfied the IRA's third definition of Indian (not the first definition at issue here), relating to persons of "one-half or more Indian blood." The Court in passing referred to the IRA's first definition of Indian, which it paraphrased as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction." *Id.* (brackets in original). But the Court did not explain why it added the bracketed phrase "[in 1934]" or why it placed that phrase where it did, and did not otherwise address this language. *John*'s lack of significance on this question is confirmed by the absence of any reference to it in *Carcieri*. *See Grand Ronde*, 2016 WL 4056092 (Slip Op.) 18 (noting that the Supreme Court in *Carcieri* "was unswayed by the persuasive authority of precisely this type of

parenthetical," because it nowhere cited *John*). Indeed, because the parties did not dispute that the Narragansett was not recognized in 1934, *John* would have compelled reversal in *Carcieri* if it had decided that "now" modifies "recognized."

The County's reliance on three other decisions non-precedential for this Court is similarly unavailing. In *United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974), the Fifth Circuit held that the Choctaws did not constitute a "recognized Indian tribe now under federal jurisdiction" because the Interior Solicitor had ruled in 1936 that there was no Choctaw Tribe in Mississippi. The court did not address whether *both* the recognition and jurisdiction requirements had to be satisfied in 1934. Moreover, the Fifth Circuit recently characterized this "alternative" holding as "akin to dicta" and concluded it was "subsequently eroded" by the Supreme Court's decision in *John*, *supra*. *See Poarch Band of Creek Indians v. Hildreth*, __ Fed Appx. ___, No. 15-13400, 2016 WL 3668021, at *5 (11th Cir. July 11, 2016) (unpublished disposition). The County's reliance on *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975), fails in light of the D.C. Circuit's decision in *Grand Ronde*, 2016 WL 4056092, upholding Interior's interpretation of "recognized." The district court in *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 160-161 (1980), simply assumed arguendo that to benefit from the IRA a tribe must have been federally recognized in 1934, and held that Interior's 1972 recognition of the Chippewas, which referred to them as an "historic band" satisfied that standard (a rationale that could apply here).

In short, no precedent holds that a tribe must have been recognized in 1934 to satisfy the first definition of IRA § 479. Nevertheless, the County proceeds to argue (Br. 49-50) that, *if* the IRA requires recognition in 1934, it unambiguously requires formal political recognition, which the County contends the Ione Band did not have. However, because Interior interprets "recognized" to have no time limitation, Interior based its determination that the Band satisfied the IRA's recognition requirement on the Band's *modern-day* status as a federally recognized tribe. Interior did not, therefore, address whether the Ione Band was a "recognized Indian tribe" in 1934. Accordingly, that issue should not be addressed absent a remand to Interior to address it in the first instance.

In any event, the County's argument that "recognized Indian tribe" was a term of art by 1934 that referred to a tribe's political status was recently rejected by the D.C. Circuit in *Grande Ronde*. The D.C. Circuit found no "clarity on * * * what [recognition] entails" and concluded that the IRA's legislative history "counters Appellants' contention that 'recognized Indian tribe' was a term of art unambiguously referring to a tribe's political status." 2016 WL 4056092 (Slip Op. 14-15). That conclusion is consistent with Interior's interpretation of "recognized Indian tribe" in the fee-to-trust decision in the Cowlitz ROD and the 2014 IRA M-Opinion.

Interior's interpretation explains that, at the time the IRA was enacted, "recognized Indian tribe" was used in at least two distinct senses. It was used in the cognitive or quasi-anthropological sense, to mean that "federal officials simply 'knew'

or realized' that an Indian tribe existed as one would 'recognize.'" 2014 IRA M-Opinion at 24 (ADD38) (quoting Felix Cohen, *Handbook of Federal Indian Law* 268 (1942 ed.)). It was also sometimes used in a more formal legal sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States. *See id.*; *see also Grand Ronde*, 2016 WL 4056092 (Slip Op. 10). Interior's view is that the IRA appears to use "recognized" in the cognitive, quasi-anthropological sense, an interpretation upheld by the only court to consider the meaning of "recognized" thus far. *See, e.g., Stand Up for Cal.! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 70 (D.D.C. 2013). Interior has not, however, had the opportunity to fully address the meaning of "recognize" in the context of this case, and this Court need not address those questions here.

B. Interior reasonably determined that the Ione Band was "under Federal jurisdiction" in 1934.

1. "Under Federal jurisdiction" is ambiguous, and Interior's reasonable interpretation is due deference.

As just explained, Congress added "now under Federal jurisdiction" to limit the IRA's first definition of Indian. Even while the legislation was still under consideration, however, Interior officials struggled to understand its meaning. In a memorandum comparing the pending House and Senate bills, Assistant Interior

Solicitor Felix Cohen[11] noted that the Senate bill's definition of Indian included the term "'now under federal jurisdiction,' *whatever that may mean*." 2014 IRA M-Opinion at 12 (ADD26) (emphasis added). An Interior internal memo recommended deleting "now under Federal jurisdiction" on the grounds that it would "likely * * * provoke interminable questions of interpretation." *Id.*

The phrase's ambiguity stems from the breadth of the word "jurisdiction." Long before the IRA's enactment, it was understood that the United States had jurisdiction over all Indian tribes within the exterior boundaries of the United States, by virtue of federal territorial sovereignty. *See United States v. Kagama*, 118 U.S. 375, 378-385 (1883). In this sense, any recognized Indian tribe within the United States is a dependent sovereign, subject to Congress's plenary powers, and thus "under Federal jurisdiction." *Id.*; *see also Grand Ronde*, 2016 WL 4056092 (Slip Op. 20) (explaining that "jurisdiction" as applied to Indian tribes "is a term of extraordinary breadth"); *Am. Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002), *as amended on denial of reh'g* (July 29, 2002). But this construction would add nothing to "recognized Indian tribe," indicating that Congress used "Federal jurisdiction" in § 479 in a narrower sense. *See Negonsott v. Samuels*, 507 U.S. 99, 106, 113 (1993) (court attempts to give meaning to every clause in a statute).

[11] Cohen subsequently authored the leading treatise on Indian law (Felix S. Cohen, *Handbook of Federal Indian Law* (1942 ed.)). *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012).

Congress did not, however, specifically define "Federal jurisdiction" and the legislative history (*infra* pp38-39) "provides no further clues, except that the jurisdictional nexus was meant as some kind of limiting principle." *Grand Ronde*, 2016 WL 4056092 (Slip Op. 20-21). The district court thus correctly deferred to Interior's reasonable interpretation of this ambiguous language. *Id.* (according *Chevron* deference to Interior's interpretation of "under Federal jurisdiction"). An agency's interpretation of a statutory provision qualifies for *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); *see also Fournier v. Sebelius*, 718 F.3d 1110, 1120 (9th Cir. 2013). Interior's interpretation here meets the first prong of the *Mead* test, because Congress has delegated Interior plenary authority over the management of Indian affairs, 25 U.S.C. § 2, and to promulgate regulations "for carrying into effect *the various provisions of any act relating to Indian affairs*," *id.* § 9. *Mead*'s second prong is also satisfied, based on "the form and context" of Interior's interpretation. *Fournier*, 718 F.3d at 1120. That Interior's interpretation was not undertaken through notice-and-comment procedures does not foreclose applying *Chevron* deference.[12] *See Barnhart v. Walton*, 535 U.S. 212,

[12] The Supreme Court has frequently applied *Chevron* to uphold administrative determinations that involve the application of an agency's delegated authority to a particular set of facts in the context of informal adjudication. *See, e.g., NationsBank of*

Cont.

222 (2002); *Fournier*, 718 F.3d at 1120. In such circumstances, *Chevron* deference may be justified by considerations such as "the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222; *Fournier*, 718 F.3d at 1120.

Those considerations warrant the application of *Chevron* deference here: Interior's expertise in Indian matters is indisputable; the meaning of "under Federal jurisdiction" is fundamental to administering the IRA for tribes; and the IRA's administration is highly complex given the breadth of its impact on Indian tribes and the complicated and multifaceted historic, factual, and policy considerations surrounding the essential matters of Indian affairs that the IRA affects. Furthermore, Interior has given the interpretive question careful consideration, undertaking an extensive and thorough analysis in the Cowlitz ROD, which Interior applied to the Ione Band here and has codified in the Solicitor's 2014 IRA M-Opinion. Finally, by virtue of its incorporation in the M-Opinion, the interpretation has "precedential value" that may "bind future parties." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc). Solicitor's M-Opinions are binding on the Department as a

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North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

whole,[13] including the Interior Board of Indian Appeals (IBIA), the adjudicative body that hears appeals from Bureau of Indian Affairs decisions.[14] *See* Solicitor's Opinion M-37003, *Binding Nature of Solicitor's Opinions on the Office of Hearings and Appeals* (Jan. 18, 2001).[15]

Interior's fact-specific, two-part inquiry for identifying Indian tribes that were "under Federal jurisdiction" in 1934 is reasonable. *See Grand Ronde*, 2016 WL 4056092 (Slip Op. 21). Tribes that satisfy that inquiry are: (1) those tribes over which the United States had exercised authority through an action or series of actions establishing or reflecting Federal obligations, responsibilities, duties, or authority; and (2) as to which such relationship remained intact at the time of the IRA's enactment. FSER586. This test is broad enough to account for and acknowledge the United States' trust obligation to tribes that were specifically displaced or made wards by federal actions, while honoring Congress's intent to exclude tribes over which, at the

[13] *See* 209 DM 3.2A(11), available at ADD8; see also http://elips.doi.gov/ELIPS/0/doc/792/Page1.aspx.

[14] This Court previously considered but did not reach the question whether to accord *Chevron* deference to a Solicitor M-Opinion that, like the one here, is issued with a "lawmaking pretense," sets forth a rule of interpretation that applies to a class of entities, and is binding on Interior's Office of Hearings and Appeals parties. *See McMaster v. United States*, 731 F.3d 881, 891-892 n.4 (9th Cir. 2013). The Court there found *Skidmore* deference sufficient to uphold Interior's interpretation.

[15] Available at ADD11; see also https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37003.pdf

time of the IRA's enactment, the government had no such obligations. *Cf. Carcieri*, 555 U.S. at 383-84. Because Interior's interpretation is not "manifestly contrary to the statute" or "arbitrary and capricious in substance," it is owed deference by this Court. *See Mayo Foundation*, 562 U.S. at 53.

2. A non-treaty tribe need not have been residing on federal land in 1934 to have been"under Federal jurisdiction."

Amador County argues (Br. 52-60) that the term "under federal jurisdiction" unambiguously requires a tribe lacking a treaty with the United States to have been residing on federally held land in 1934. That argument is inconsistent with the statute's language and purpose and is unsupported in the legislative history.

First, the County's argument is inconsistent with the IRA's statutory language. The first definition of "Indians" expressly requires federal jurisdiction over *members* of a *tribe*, not over tribal land. 25 U.S.C. § 479. In contrast, Congress elsewhere expressly imposed reservation residency requirements. The second definition of Indians in § 479, for example, includes "descendants of such members who were, on June 1, 1934, *residing within the present boundaries of any Indian reservation*." 25 U.S.C. § 479 (emphasis added). Similarly, § 479 defines a "tribe" to be "any Indian tribe, organized band, pueblo, *or the Indians residing on one reservation*." *Id.* (emphasis added). The omission of a residency requirement from the first definition of "Indians," which is expressly included elsewhere, must thus presumed to be intentional. *Russello*, 464 U.S. at 23.

The County's reliance (Br. 53) on IRA § 476 (as enacted) is unavailing. That language stated that "[a]ny Indian tribe, or tribes, residing *on the same reservation*, shall have the right to organize for its common welfare." 48 Stat. 987 (emphasis added). But making a tribe's ability to "organize" under the IRA contingent on having a reservation does not mean that the tribe had to initially *have* a reservation to qualify for the IRA's other benefits. This includes, notably, the benefit of having the Secretary acquire for such a landless tribe trust lands "within *or without* existing reservations," 25 U.S.C. § 465 (emphasis added), or having the Secretary create for it a "*new* Indian reservation[]," *id.* § 467 (emphasis added).[16]

The County's reliance (Br. 53-54) on *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), and its predecessors is similarly unpersuasive. Those cases address federal statutes under which Congress exercised specified federal jurisdiction within land areas that Congress described as "Indian country." Thus those cases do not support the County's proposition that Congress had federal jurisdiction only over Indians on federally-owned land. Rather, those cases address Congress's jurisdiction over Indian *lands* because it was jurisdiction over land that was at issue in those cases—not, as the IRA provides, jurisdiction over "tribes" or their "members." Furthermore, Congress began using "Indian country" as a term of art to describe the

[16] The statement noting that "Indians under Federal jurisdiction *are not subject to State laws*," on which the County relies, is from written testimony by a private organization and does not address the IRA's definition of tribe or Indian.

lands over which it chose to exercise jurisdiction a century before the IRA's enactment, *see United States v. LeBris*, 121 U.S. 278, 280 (1887) (discussing Act of June 30, 1834, c. 161, 4 Stat. 732), and "Indian country" remained an important and well-recognized construct in Indian law through the enactment of the IRA and beyond.[17] Had Congress intended to limit § 479's first definition of Indians to members of "recognized Indian tribes now within Indian country," Congress readily could have so provided, but it did not.[18]

Finally, the County's reliance (Br. 56-60) on the IRA's legislative history is unavailing. First, the legislative history on which the County relies consists of only a few pages from an extensive hearing record, and its content defies clear understanding. *See* FSER640-643. As the D.C. Circuit explained, "[a]t most, th[e] [legislative] history reflects Congressional intent to limit what was a much broader concept of recognition by some 'jurisdictional connection to the government, * * * even though nobody seemed to know what that jurisdictional connection might be." *Grand Ronde*, 2016 WL 4056092 (Slip Op. 14). The wandering hearing discussion cannot overcome the presumption that Congress, if it intended to limit IRA benefits

[17] Congress codified a definition of "Indian country" in 1948. *See* Act of June 25, 1948, c. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151).

[18] The cases cited in the County's brief (at 54-55) for the proposition that Indians are subject to state law beyond reservation boundaries similarly interpret specific land-based statutory or treaty provisions.

to tribes with reservations, would have said so in the statute, especially given the statute's use of the term elsewhere.

In any event, the County's assertion that the hearing demonstrates that "under Federal jurisdiction" was added to restrict the IRA's benefits to tribes with reservations is incorrect. The primary concern the Senators expressed during the portion of the hearing on which the County relies pertained to the exercise of jurisdiction over persons with little Indian blood. That concern was addressed in part by changing the third definition of "Indians" to require Indians who did not satisfy either of the first two definitions to have one-half rather than one-quarter Indian blood. FSER641.

The Senators, however, came to recognize that the second definition of "Indians," pertaining to descendants of members of recognized tribes who were residing on a reservation in 1934, did not contain the blood quantum limitation. *Id.* It was in this context, of the second definition, that Commissioner Collier made one of the statements on which the County relies—that such non-tribal members could take advantage of the Act "[i]f they are actually residing within the present boundaries of an Indian reservation at the present time"—which exactly describes the second definition. *Id.*. Another statement the County cites—Senator Mahoney's question why the Catawba Indians should be limited "any more than we limit those who are on the reservation"—also is a reference to the second definition of Indian, which he in

fact quotes several lines previously to that statement, and is still made in the context of discussing blood quantum limitations. FSER643.

As noted *supra* p. 38, Commissioner Collier's suggestion to add the phrase "under Federal jurisdiction" follows Committee Chairman Wheeler's statement that "you have to sooner or later eliminate those Indians who are at the present time * * * no more Indians than you or I, perhaps," which Senator Mahoney suggests could be accomplished "by excluding from the benefits of the Act certain types." *Id.* Commissioner Collier asks whether adding the phrase "now under Federal jurisdiction" to the first definition of Indian "would not meet your thought, Senator, and explains: "That would limit the Act to the Indians now under Federal jurisdiction except that other Indians of more than one-half Indian blood would get help." *Id.* Notably, Commissioner Collier did *not* suggest adding a phrase such as "now residing on federally-owned land"; nor did he describe his suggested language as accomplishing that result.

In short, nothing in the plain language, legislative history, or any of the County's arguments refutes Interior's reasonable interpretation of the phrase "now under Federal jurisdiction" in the IRA. Interior's determination that "jurisdiction may be shown by an action or series of actions establishing or reflecting Federal obligations, responsibilities, duties, or authority provides a "contextual analysis [that] takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian affairs and implementing

the statute." *Grand Ronde*, 2016 WL 4056092 (Slip Op. 21); *see id.* (concluding Interior's interpretation is reasonable "in light of the remedial purposes of the IRA and applicable canons of statutory construction").

3. Interior reasonably determined that the Ione Band was "under Federal jurisdiction" in 1934.

Interior reasonably determined that the United States' consistent efforts to acquire a reservation for the Band, beginning in 1915 and continuing well past 1934, constitute a substantial undertaking that provides clear evidence of a jurisdictional relationship between the United States and the Ione Band satisfying Interior's two-part test for determining whether a tribe was "under Federal jurisdiction" in 1934. AR 10106, 10111. The record extensively documents Interior's understanding that the Ione Indians were a band, with an elected chief, living together on the same land since the late 1800s, which Interior vigorously sought to purchase for the Band as a rancheria (*i.e.*, reservation)—an effort that failed only due to title-related problems. *See supra* pp. 8-11.

Amador County's contention that the Band's eligibility for IRA benefits is defeated by Interior's failure to accomplish this purchase by 1934 is unsupported by law and, as demonstrated above, would arbitrarily rest the determination of the nature of the Band's relationship with the United States in 1934 on the happenstance of the unavailability of the particular reservation land that Interior was attempting to acquire for it. It would also limit Interior's authority to acquire land in trust under the IRA to

Indians already possessing trust lands, despite the potentially *greater* needs of tribes rendered landless by federal actions and for whom the United States had not acquired land *prior* to enactment of the IRA. Nor is Interior's determination undermined, as the County argues (Br. 55-56), by a 1933 letter from the Sacramento Indian Agency noting that the Ione Indians are classified as "non-wards" under a 1925 Comptroller General ruling because they lack a treaty or trust land. That Comptroller General decision pertains to "relief of indigent Indians." 5 Comp. Gen. 86 (1925). The IRA, however, does not define tribes by reference to "indigent Indians" or a guardian-and-ward relationship; indeed, the IRA's third definition of Indians applies to *all* half-blood Indians and thus plainly intends a broader coverage of Indians than is set forth in the Comptroller General's decision.

Amador County further argues (Br. 62-65) that the district court erroneously relied on the unratified Treaty J and Kelsey's 1906 census of Indians. As the County notes, however, Interior's decision did not specifically or solely rely on those facts. Moreover, the negotiation of the Treaty with the Band's predecessors and the extensive efforts to document the existence and status of the Band, rendered landless as a result of the Treaty's non-ratification, are significant precursor facts to the extensive federal efforts to restore a land base to the Band. The Treaty negotiations thus further bolster Interior's determination that the efforts to acquire a reservation for the Band reflects federal obligations, duties, responsibility for or authority over the Band. *See, e.g., Grand Ronde*, 2016 WL 4056092 (Slip Op. 21) (reasoning that "[i]t

makes sense to take treaty negotiations into account * * * even if they did not ultimately produce agreement"); *Stand Up for Cal.!*, 919 F. Supp. 2d at 69 n.22 (reasoning that treaty signed by tribe's predecessors, which was not confirmed by Congress, may provide some evidence of federal jurisdiction).

The County's attack (Br. 64) on the 1906 census as including members of two other bands is immaterial; the record contains extensive evidence that federal officials understood the Ione to be a distinct band. *See, e.g.,* FSER6, 70-71, 453-457, 467, 514; *see also Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 214 (D.C. Cir. 2013) (distinguishing the Muwekma from the Ione Band because the historical evidence "'reflects dealings between the federal government and the Ione and Lower Lake tribes as *entities*'") (quoting *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 199 (D.D.C. 2011) (emphasis in original)).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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AUGUST 2016
90-6-21-00954/1

STATEMENT OF RELATED CASES

The pending appeal in *No Casino in Plymouth v. S.M.R. Jewell*, No. 15-17189, is related to this case: It challenges the same agency decision at issue in this appeal and was designated by the district court as related to this case.

s/*Katherine J. Barton*
KATHERINE J. BARTON

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I certify that this brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4 because it contains 13,995 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/*Katherine J. Barton*
KATHERINE J. BARTON

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/*Katherine J. Barton*
KATHERINE J. BARTON

ADDENDUM

County of Amador v. U.S. Department of the Interior, No. 15-17253

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter V. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 465

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

Currentness

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

Notes of Decisions (164)

25 U.S.C.A. § 465, 25 USCA § 465
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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Proposed Legislation

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter V. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 479

§ 479. Definitions

Currentness

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

CREDIT(S)
(June 18, 1934, c. 576, § 19, 48 Stat. 988.)

Notes of Decisions (29)

25 U.S.C.A. § 479, 25 USCA § 479
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 29. Indian Gaming Regulation (Refs & Annos)

25 U.S.C.A. § 2719

§ 2719. Gaming on lands acquired after October 17, 1988

Currentness

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of--

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to--

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

CREDIT(S)

(Pub.L. 100-497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

Notes of Decisions (70)

25 U.S.C.A. § 2719, 25 USCA § 2719
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter N. Economic Enterprises
Part 292. Gaming on Trust Lands Acquired After October 17, 1988 (Refs & Annos)
Subpart B. Exceptions to Prohibitions on Gaming on Newly Acquired Lands
"Restored Lands" Exception

25 C.F.R. § 292.10

§ 292.10 How does a tribe qualify as having been restored to Federal recognition?

Effective: June 19, 2008
Currentness

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or

(c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

SOURCE: 73 FR 29375, May 20, 2008; 73 FR 35579, June 24, 2008, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

Notes of Decisions (2)

Current through July 28, 2016; 81 FR 49813.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter N. Economic Enterprises
Part 292. Gaming on Trust Lands Acquired After October 17, 1988 (Refs & Annos)
Subpart D. Effect of Regulations

25 C.F.R. § 292.26

§ 292.26 What effect do these regulations have on pending applications, final agency decisions, and opinions already issued?

Effective: June 19, 2008
Currentness

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

(a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.

(b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

SOURCE: 73 FR 29375, May 20, 2008; 73 FR 35579, June 24, 2008, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

Notes of Decisions (2)

Current through July 28, 2016; 81 FR 49813.

End of Document

Department of the Interior
Departmental Manual

Effective Date: 3/16/92
Series: Delegations
Part 209: Secretarial Officers
Chapter 3: Solicitor

Originating Office: Office of the Solicitor

This chapter has been given a new release number.* No text changes were made.

209 DM 3

3.1 **General Authority**. Subject to the limitations contained in 200 DM 1 the Solicitor is authorized to exercise all of the authority of the Secretary, including, but not limited to:

A. All the legal work of the Department,

B. The authority to issue amendments of and additions to the material in the Code of Federal Regulations,

C. The administration of the oath of office or any oath required by law in connection with employment.

3.2 **Authority in Specified Matters**.

A. The responsibilities of the Solicitor in 209 DM 3.1A include but are not limited to the authority:

(1) Conferred by the provisions of 28 U.S.C. 2672, with respect to tort claims;

(2) With respect to claims under 25 U.S.C. 388, for damage arising out of the survey, construction, operation, or maintenance of irrigation works on Indian irrigation projects; and under Public Works for Water Appropriation Acts, for damage to or loss of property, personal injury, or death arising out of activities of the Bureau of Reclamation:

(3) With respect to the disposition of appeals to the Secretary:

(a) Involving estates of Indians of the Five Civilized Tribes;

(b) From decisions of the Appellate Division of the High Court of American Samoa which affirm sentences of death pursuant to section 3.0505, as amended, of the Code of American Samoa (1961 Ed.);

(4) To supervise, administer, and control all activities within or on behalf of the Department relating to intellectual property including patents, inventions, trademarks, and copyrights;

(5) When acting upon a proposal by a bureau, to acquire real estate for the United States by condemnation pursuant to section 1 of the Act of August 1, 1888, as amended (40 U.S.C. 257) whenever in the opinion of the Solicitor it is necessary or advantageous to the Government to do so and to submit to the Attorney General of the United States applications for the institution of proceedings for condemnation;

(6) Under section 1 of the Act of February 26, 1931 (40 U.S.C. 258a), to sign declarations of taking;

(7) When acting upon a proposal to acquire real estate for the United States pursuant to section 3 of the Helium Act (50 U.S.C. 167a) by condemnation pursuant to section 1 of the Act of August 1, 1888, as amended (40 U.S.C. 257) whenever the Solicitor determines that a satisfactory agreement to acquire such land or interests in land cannot be made and that such acquisition by condemnation is necessary in the national interest and to submit to the Attorney General of the United States applications for the institution of proceedings for condemnation;

(8) Under 43 CFR Part 2, with respect to the availability of official records and testimony of employees;

(9) With respect to the settlement of claims against the United States by employees for damage to, or loss of personal property pursuant to the Military Personnel and Civilian Employee Claims Act of 1964, as amended (31 U.S.C. 240-243);

(10) With respect to claims arising under the Act of March 9, 1920 (46 U.S.C. 742, 747, 749 and 750), as amended by Public Law 92-417, also known as the Suits in Admiralty Act; and

(11) To issue final legal interpretations, in the form of M-Opinions published in Decisions of the United States Department of the Interior, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

B. The Solicitor is authorized:

(1) To determine, compromise, and settle claims and demands of the United States pursuant to section 12 of the Act of August 20, 1937, as amended (16 U.S.C. 832K);

(2) If he/she determines in connection with a claim under a contract that, as a matter of justice and equity, all or any part of the liquidated damages assessed on or after July 1, 1949, because of delay, against a party to a contract made by the Department on behalf of the

Government should be remitted, to recommend to the Comptroller General that such remission be made, pursuant to the provisions of 41 U.S.C. 256a;

(3) To accept on behalf of any Secretarial Officer service of judicial process and service of process issued by the legislative branch of the Government.

3.3 **Authority to Redelegate.** The Solicitor may, in writing, redelegate or authorize written redelegation of any authority delegated to him/her in this chapter except where prohibited by statute, Executive Order or limitations established by other competent authority. However, the Solicitor may redelegate the authority described in 209 DM 3.2A(11) only to a Deputy Solicitor.
*

3/16/92 #3537
Replaces 3/16/92 #2937

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

M-37003

JAN 18 2001

Memorandum

To: Assistant Secretary, Policy, Management and Budget
Director, Office of Hearings and Appeals

From: Solicitor

Subject: Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals

On November 29, 1988, Solicitor Ralph W. Tarr sent a memorandum to the Assistant Secretary, Policy, Budget and Administration, explaining proposed revisions to the Departmental Manual clarifying that the authority delegated by the Secretary to the Office of Hearings and Appeals (OHA) does not include the authority to overrule or modify Solicitor's M-Opinions. On December 13, 1988, Secretary Donald Paul Hodel amended the Departmental Manual in the manner described by Solicitor Tarr. In keeping with Solicitor Tarr's memorandum and the release signed by Secretary Hodel, both attached here, we wish to reaffirm that Solicitor's M-Opinions are binding on the OHA. Furthermore, M-Opinions do not require the Secretary's concurrence to bind OHA.

The Departmental regulations state:

> The Office of Hearings and Appeals headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary.

43 C.F.R. § 4.1 (1999). This section was published in the Federal Register with a footnote stating:

> The organization of the Office of the Hearings and Appeals and the authority delegated by the Secretary to the Director and other principal officials of the Office are set forth in Part 111, Chapter 13, of the Departmental Manual; in Release No. 1213 of July 17, 1970 (211 DM 13), and a notice published in the Federal Register on July 28, 1970, 35 F.R. 12081.

36 Fed. Reg. 7187 n.1 (1971). This footnote clarifies that nothing in section 4.1 conferred

jurisdiction on OHA in excess of that granted in the Departmental Manual. The purpose of the phrase, "as fully and finally as might the Secretary," in section 4.1 is merely to inform the public that decisions by OHA are final agency actions for purposes of judicial review.

John D. Leshy
Solicitor

I concur in this Opinion:

Secretary of the Interior

01/18/01
Date

Attachments (2)

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

March 12, 2014

M-37029

Memorandum

To: Secretary

From: Solicitor

Subject: The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act

I. INTRODUCTION

In February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*.[1] The Court in that decision held that the word "now" in the phrase "now under federal jurisdiction" in the Indian Reorganization Act ("IRA") refers to the time of the passage of the IRA in 1934. The *Carcieri* decision specifically addresses the Secretary's authority to take land into trust for "persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction."[2] The case does not address taking land into trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA. This opinion addresses interpretation of the phrase "under federal jurisdiction" in the IRA for purposes of determining whether an Indian tribe can demonstrate that it was under federal jurisdiction in 1934.

II. Supreme Court Decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009)

In 1983, the Narragansett Indian Tribe of Rhode Island ("Narragansett") was acknowledged as a federally recognized tribe.[3] Prior to being acknowledged, the Narragansett filed two lawsuits to recover possession of approximately 3,200 acres of land comprising its aboriginal territory that were alienated by Rhode Island in 1880 in violation of the Indian Trade and Intercourse Act. On September 30, 1978, the parties settled the lawsuit which was incorporated into federal implementing legislation known as the Rhode Island Indian Claims Settlement Act.[4] In exchange for relinquishing its aboriginal title claims, the Narragansett agreed to accept possession of 1,800 acres within the claim area.

In 1985, after the Narragansett had been acknowledged, the Rhode Island Legislature transferred the settlement lands to the Narragansett. Subsequently, the Narragansett requested that its settlement lands be taken into trust by the Federal Government pursuant to Section 5 of the IRA.

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[1] 555 U.S. 379 (2009).
[2] *See* 25 U.S.C. § 479.
[3] 48 Fed. Reg. 6177 (Feb. 10, 1983).
[4] 25 U.S.C. §§ 1701-1716 (2014).

The Narragansett's application was approved by the Bureau of Indian Affairs ("BIA") and upheld by the Interior Board of Indian Appeals ("IBIA") notwithstanding a challenge by the Town of Charlestown.[5] The settlement lands were taken into trust with the restriction contained in the Settlement Act that the lands were subject to state criminal and civil jurisdiction.[6]

In 1998, the BIA approved, pursuant to Section 5 of the IRA, the Narragansett's application to acquire approximately 32 acres into trust for low income housing for its elderly members. The IBIA affirmed the BIA's decision.[7]

The State and local town filed an action in district court against the United States claiming that the Department of the Interior's ("Department's" or "Interior's") decision to acquire 32 acres into trust violated the Administrative Procedure Act; that the Rhode Island Indian Claims Settlement Act precluded the acquisition; and that the IRA was unconstitutional and did not apply to the Narragansett. In 2007, the First Circuit, acting *en banc*, rejected the State's argument that Section 5 did not authorize the BIA to acquire land for a tribe who first received federal recognition after the date the IRA was enacted.[8] The State sought review in the Supreme Court, which the Court granted on February 25, 2008. Among other parties, the Narragansett Tribe filed an *amicus* brief in the Supreme Court case.

A. Majority Opinion

The Supreme Court in a 6-3 ruling (Breyer, J., concurring; Souter and Ginsburg, J.J., concurring in part and dissenting in part; Stevens, J., dissenting) reversed the First Circuit and held that the Secretary did not have authority to take land into trust for the Narragansett because the Narragansett was not under federal jurisdiction at the time the IRA was enacted in 1934. Justice Thomas, writing for the majority, determined that the Court's task was to interpret the term "now" in the statutory phrase "now under federal jurisdiction," which appears in IRA Section 19's first definition of "Indian."[9]

Interpreting Section 19, in concert with Section 5, the Supreme Court applied a strict statutory construction analysis to determine whether the term "now" in the definition of Indian in Section 19 referred to 1998 when the Secretary made the decision to accept the parcel into trust or referred to 1934 when the IRA was enacted.[10] The Court analyzed the ordinary meaning of the word "now" in 1934,[11] within the context of the IRA,[12] as well as contemporaneous departmental

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[5] *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 18 IBIA 67 (Dec. 5, 1989).
[6] 25 U.S.C. § 1708.
[7] *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (June 29, 2000).
[8] *Carcieri v. Kempthorne*, 497 F.3d 15, 30-31 (1st Cir. 2007)
[9] *Carcieri*, 555 U.S. at 382. Furthermore, while the definition of Indian includes members of "any recognized Indian tribe now under federal jurisdiction," the Supreme Court did not suggest that the term "recognized" is encompassed within the phrase "now under federal jurisdiction." Consistent with the grammatical structure of the sentence – in which "now" modifies "under federal jurisdiction" and does not modify "recognized" – and consistent with Justice Breyer's concurring opinion, we construe "recognized" and "under federal jurisdiction" as necessitating separate inquiries. *See* discussion Section III.F.
[10] *Carcieri*, 555 U.S. at 388.
[11] The Court examined dictionaries from 1934 and found that "now" meant "at the present time" and concluded that such an interpretation was consistent with the Court's decisions both before and after 1934. *Id.* at 388-89.

correspondence,[13] concluding that "the term 'now under the federal jurisdiction' in [Section 19] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."[14] The majority, however, did not address the meaning of the phrase "under federal jurisdiction" in Section 19, concluding that the parties had not disputed that the Narragansett Tribe was not under federal jurisdiction in 1934.[15]

B. Justice Breyer's Concurring Opinion

Justice Breyer wrote separately, concurring in the majority opinion with a number of qualifications. One of these qualifications is significant for the Department's implementation of the Court's decision. He stated that an interpretation that reads "now" as meaning "'in 1934' may prove somewhat less restrictive than it first appears. That is because a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time."[16] Put another way, the concepts of "recognized" and "under federal jurisdiction" in Section 19 are distinct – a tribe may have been under federal jurisdiction in 1934 even if BIA officials at the time did not realize it.

Justice Breyer cited to specific tribes that were erroneously treated as not under federal jurisdiction by federal officials at the time of the passage of the IRA, but whose status was later recognized by the Federal Government.[17] Justice Breyer further suggested that these later-recognized tribes could nonetheless have been "under federal jurisdiction" in 1934 notwithstanding earlier actions or statements by federal officials to the contrary. In support of these propositions, Justice Breyer cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under federal jurisdiction in 1934, but which nevertheless exhibited a "1934 relationship between the tribe and Federal Government that could be described as jurisdictional."[18]

Justice Breyer specifically cited to the Stillaguamish Tribe as an example in which the tribe had treaty fishing rights as of 1934, even though the tribe was not formally recognized by the United

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[12] The Court also noted that in other sections of the IRA, Congress had used "now or hereafter" to refer to contemporaneous and future events and could have explicitly done so in Section 19 if that was Congress' intent in the definition. *Id.* at 390.

[13] The Court noted that in a letter sent by Commissioner Collier to BIA Superintendents, he defined Indian as a member of any recognized tribe "that was under [f]ederal jurisdiction at the date of the Act." *Id.* at 390 (quoting from *Letter from John Collier, Commissioner to Superintendents*, dated March 7, 1936).

[14] *Id.* at 395.

[15] *Id.* at 382, 392. The issue of whether the Narragansett Tribe was "under federal jurisdiction in 1934" was not considered by the BIA in its decision, nor was evidence concerning that issue included in the administrative record before the courts. When the BIA issued its decision, the Department's long standing position was that the IRA applied to all federally recognized tribes. Because the Narragansett Tribe was federally recognized, the administrative record assembled pertained solely to the Bureau's compliance with the Part 151 regulatory factors. *See* 25 C.F.R. Part 151.

[16] *Carcieri*, 555 U.S. at 397 (Breyer, J., concurring).

[17] *Id.* at 398.

[18] *Id.* at 399. Justice Breyer concurred with Justices Souter and Ginsburg that "recognized" was a distinct concept from "now under federal jurisdiction." However, in his analysis he appears to use the term "recognition" in the sense of "federally recognized" as that term is currently used today in its formalized political sense (i.e., as the label given to Indian tribes that are in a political, government-to-government relationship with the United States), without discussing or explaining the meaning of the term in 1934. *See infra* discussion Section III.F.

States until 1976.[19] The concurring opinion of Justice Breyer also cited Interior's erroneous 1934 determination that the Grand Traverse Band of Ottawa and Chippewa Indians had been "dissolved," a view that was later repudiated by Interior's 1980 correction concluding that the Band had "existed continuously since 1675."[20] Finally, Justice Breyer cited the Mole Lake Band as an example of a case in which the Department had erroneously concluded the tribe did not exist, but later determined that the anthropological study upon which that decision had been based was erroneous and thus recognized the tribe.[21]

Thus, Justice Breyer concluded that, regardless of whether a tribe was formally recognized in 1934, a tribe could have been "under federal jurisdiction" in 1934 as a result, for example, of a treaty with the United States that was in effect in 1934, a pre-1934 congressional appropriation, or enrollment as of 1934 with the Indian Office.[22] Justice Breyer, however, found no similar indicia that the Narragansett were "under federal jurisdiction" in 1934. Indeed, Justice Breyer joined the majority in concluding that the evidence in the record before the Supreme Court indicated that the Narragansett were not federally recognized or under federal jurisdiction in 1934.[23] Justices Souter and Ginsburg, by contrast, would have reversed and remanded to allow the Department an opportunity to show that the Narragansett Tribe was under federal jurisdiction in 1934, contending that the issue was not addressed in the record before the Court.[24] Justice Stevens dissented, finding that the IRA placed no temporal limit on the definition of an Indian tribe,[25] and criticizing the majority for adopting a "cramped reading" of the IRA.[26]

In sum, the Supreme Court's majority opinion instructs that in order for the Secretary to acquire land under Section 5 of the IRA for a tribe pursuant to the first definition of "Indian" in Section 19, a tribe must have been "under federal jurisdiction" in 1934. The majority opinion, however, did not identify the types of evidence that would demonstrate that a tribe was under federal jurisdiction. Nor, in 1934, was there a definitive list of "tribes under federal jurisdiction."[27] Therefore, to interpret the phrase "now under federal jurisdiction" in accordance with the holding in *Carcieri*, the Department must interpret the phrase "under federal jurisdiction."

III. STATUTORY INTERPRETATION

A. Statutory Construction and Deference

Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency's statutory interpretation. At the first step, the agency must answer

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[19] *Id.* at 398.
[20] *Id.*
[21] *Id.* at 399.
[22] *Id.*
[23] *Id.* at 395-96 (noting the petition for writ of *certiorari* represented that the Tribe was neither federally recognized nor under federal jurisdiction in 1934; *id.* at 399 (Breyer, J., concurring) ("neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934."). *But see supra* note 5.
[24] *Id.* at 401 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part).
[25] *Id.* (Stevens, J., dissenting).
[26] *Id.* at 413-14.
[27] Memo. from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, at 7 ("Stillaguamish Memorandum").

"whether Congress has directly spoken to the precise question at issue."[28] If the language of the statute is clear, the court and the agency must give effect to "the unambiguously expressed intent of Congress."[29] If, however, the statute is "silent or ambiguous,"[30] pursuant to the second step, the agency must base its interpretation on a "reasonable construction" of the statute.[31] When an agency charged with administering a statute interprets an ambiguity in the statute or fills a gap where Congress has been silent, the agency's interpretation should be either controlling or accorded deference unless it is unreasonable or contrary to the statute.[32]

Even when agency decisions may not be entitled to deference under *Chevron*, they are entitled to some respect because these decisions are "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[33] *Skidmore* deference requires that a court establish the appropriate level of judicial deference towards an agency's interpretation of a statute by considering several factors, including "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[34] For *Skidmore* deference to apply, a reviewing court need only find the existence of factors pointing toward a reason for granting the agency deference. Even if the court does not agree with the agency decision, it should nonetheless extend deference if the agency's position is deemed to be reasonable.[35]

Finally, the canons of construction applicable in Indian law, which derive from the unique relationship between the United States and Indian tribes, also guide the Secretary's interpretation of any ambiguities in the IRA.[36] Under these canons, statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians, with any ambiguities to be resolved in their favor.[37]

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[28] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).
[29] *Id.* at 843.
[30] *Id.*
[31] *Id.* at 840.
[32] The Secretary receives deference to interpret statutes that are consigned to her administration. *See Chevron,* 467 U.S. at 842-45; *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). *See also City of Arlington, Tex. V. FCC*, 133 S. Ct. 1863, 1866-71 (2013) (courts must give *Chevron* deference to an agency's interpretation of a statutory ambiguity, even whether the issue is whether the agency exceeded the authority authorized by Congress); *Skidmore v. Swift*, 323 U.S. 134, 139 (1944) (agencies merit deference based on the "specialized experience and broader investigations and information" available to them). The *Chevron* analysis is frequently described as a two-step inquiry. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serves.*, 545 U.S. 967, 986 (2005) ("If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is a 'reasonable policy choice for the agency to make.'").
[33] *Skidmore*, 323 U.S. at 139.
[34] *Id.* at 140.
[35] *See, e.g., Cathedral Candle Co. v. United States Int'l Trade Comm'n*, 400 F.3d 1352, 1366 (Fed. Cir. 2005) (noting that the court need not have initially reached the same conclusion as the agency). *See also Tualatin Valley Builders Supply Inc. v. United States*, 522 F.3d 937, 942 (9th Cir. 2008); *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1069 (9th Cir. 2003) (en banc).
[36] *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783 (D.S.D. 2006) (outlining the principles of liberality in construction of statutes affecting Indians).
[37] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

1. The IRA

The IRA was the culmination of many years of effort to change the Federal Government's Indian policy. As the Supreme Court has held, the "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[38] This "sweeping" legislation manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy characterized by the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes."[39]

While the IRA's land acquisition provision was to address in part the dismal failure of the assimilation and allotment policy, it also had a broader purpose to "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property."[40] As Commissioner Collier acknowledged in his testimony before Congress during the introduction of the IRA legislation, "[t]he Indians are continuing to lose ground; yet Government costs must increase, while the Indians must still continue to lose ground, unless existing law be changed. . . . While being stripped of their property, these same Indians cumulatively have been disorganized as groups and pushed to a lower social level as individuals . . . . The disastrous condition peculiar to the Indian situation in the United States . . . is directly and inevitably the result of existing law – principally, but not exclusively, the allotment law and its amendments and its administrative complications."[41] During the time of the IRA's passage, Tribes' economic conditions were unconscionable and Congress had sought to disband and dismantle tribal governance structures.[42] The BIA administratively controlled reservation life, which included the establishment and imposition of governance systems on the tribes.[43] After the publication of the Meriam Report documenting the conditions of Indians and tribes,[44] a concerted effort was made to reverse course. The IRA was enacted to help achieve this shift.[45]

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[38] *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974).
[39] *United States* v. *Celestine*, 215 U.S. 278, 290 (1909).
[40] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler). *See also* The Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (1928) ("Meriam Report") (detailing the deplorable status of health, *id.* at 3-4, 189-345, poverty, *id.* at 4-8, 430-60, 677-701, education, *id.* at 346-48, and loss of land, *id.* at 460-79). The IRA was not confined to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of "Indian tribe." 25 U.S.C. § 479.
[41] Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 15-16 (Feb 22, 1934) ("House Hearings").
[42] *Id.* at 15-18 (At the conclusion of the allotment era in 1934, Indian land holdings were reduced from 138,000,000 acres to 48,000,000 acres, a loss of more than eighty-five percent of the land allotted to Indians.).
[43] Meriam Report at 6 ("The economic basis of the . . . Indians has been largely destroyed by the encroachment of white civilization. The Indians can no longer make a living as they did in the past by hunting, fishing, gathering wild products, and the . . . limited practice of primitive agriculture."); *id.* at 7 ("[P]olicies adopted by the government in dealing with Indians have been of a type which, if long continued, would tend to pauperize any race. . . . Having moved the Indians from their ancestral lands to restricted reservations . . . , the government undertook to feed them and to perform . . . services for them . . . ."); *id.* at 8 ("The work of the government directed toward the education and advancement of [Indians] . . . is largely ineffective. . . . [T]he government has not appropriated enough funds to permit the Indian Service to employ an adequate personnel properly qualified for the task before it.").
[44] *See supra* note 40 ("Meriam Report").
[45] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972).

As originally introduced, the IRA was a self-governance act. It acknowledged the right of tribes to self-organize and self-govern. As passed, the IRA had the following express purposes:

> An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organization; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.[46]

To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-governance. Congress authorized Indian tribes to adopt their own constitutions and bylaws[47] and to incorporate.[48] It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application.[49] In service of the broader goal of "recogn[izing] [] the separate cultural identity of Indians," the IRA encouraged Indian tribes to revitalize their self-government and to take control of their business and economic affairs.[50] Congress also sought to assure a solid territorial base by, among other things, "put[ting] a halt to the loss of tribal lands through allotment."[51] Of particular relevance here, Section 5 of the IRA provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> ***
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> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.[52]

Section 19 of the IRA defines those who are eligible for its benefits. That section provides that the term "tribe" "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[53] Section 19 further provides as follows:

> The term "Indian" . . . shall include all persons of Indian descent who are [1] members of any recognized Indian tribe now under [f]ederal jurisdiction, and [2] all persons who are

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[46] Pub. L. No. 73-383, 48 Stat. 984 (1934).
[47] Section 16, 25 U.S.C. § 476,
[48] Section 17, 25 U.S.C. § 477.
[49] Section 18, 25 U.S.C. § 478.
[50] Graham Taylor, *The New Deal and American Indian Tribalism*, 39 (1980). *See also* Act of June 18, 1934, 48 Stat. 984 ("An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses . . . .")
[51] *Mescalero*, 411 U.S. at 151.
[52] 25 U.S.C. § 465.
[53] 25 U.S.C. § 479.

> descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.[54]

With a few amendments, the IRA has remained largely unchanged since 1934. Indeed, the IRA is one of the main cornerstones promoting tribal self-determination and self-governance policies promulgated by the United States. These concepts remain the United States' guiding principles in modern times.[55]

2. Meaning of the phrase "under federal jurisdiction"

In examining the statute, the first inquiry is to determine whether there is a plain meaning of the phrase "under federal jurisdiction." For the purposes of this memorandum, I analyze this phrase in the context of the first definition of "Indian" in the IRA – members of any recognized Indian tribe now under federal jurisdiction.[56] The IRA does not define the phrase "under federal jurisdiction," and as shown below, the apparent author of the phrase, John Collier, did not provide a definition either. In discerning the meaning of the phrase since Congress has not spoken directly on this issue, one option is to look to the dictionary definitions of the word "jurisdiction."[57] In 1933, Black's Law Dictionary defined the word "jurisdiction" as:

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.[58]

The entry in Black's includes the following quotation: "The authority of a court as distinguished from the other departments; . . ."[59] Since the issue before the Department concerns an "other department" rather than a court, I turn to the contemporaneous Webster's Dictionary for assistance. Webster's definition of "jurisdiction" provides a broader illustration of this concept as it pertains to governmental authority:

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[54] *Id.*

[55] *See, e.g.,* President Obama's Executive Order 13647 (June 26, 2013) (establishing the White House Council on Native American Affairs); Department of the Interior's Tribal Consultation Policy (December 2011); and President Obama's Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (November 5, 2000), (reiterating a commitment to the policies set out in Executive Order 13175).

[56] 25 U.S.C. § 479.

[57] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (When a term is not defined in statute, the court's "task is to construe it in accord with its ordinary or natural meaning."); *id.* at 275 (With a legal term, the court "presume[s] Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment.").

[58] *Black's Law Dictionary* at 1038 (3d ed. 1933).

[59] *Id.*

> 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.[60]

These definitions, however, while casting light on the broad scope of "jurisdiction," fall short of providing a clear and discrete meaning of the specific statutory phrase "under federal jurisdiction." For example, these definitions do not establish whether in the context of the IRA, "under federal jurisdiction" refers to the outer limits of the constitutional scope of federal authority over the tribe at issue or to whether the United States exercised jurisdiction in fact over that tribe. I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction."

3. The Legislative History of the IRA

The Department of the Interior drafted the proposed legislation that subsequently was enacted as the IRA. The Interior Solicitor's Office took charge of the legislative drafting, with much of the work undertaken by the Assistant Solicitor, Felix S. Cohen.[61] In February 1934, the initial version of the bill was introduced in both the House of Representatives and the Senate. The Indian Affairs Committees in both bodies held hearings on the bill over the next several months, which led to significant amendments to the bills. These amendments included the addition of the phrase "now under federal jurisdiction" to the definition of the term "Indian." Confusion regarding whether the blood quantum requirement applied to the first two parts of the definition, as well as a desire to limit the scope of the definition, led to the addition of the "under federal jurisdiction" language. However, other than indicating a desire to limit the scope of eligibility for IRA benefits, the legislative history did not otherwise define or clarify the meaning of the term "under federal jurisdiction."

In the initial version of the Senate bill proposed in February 1934, the term "Indian" was defined as persons who are members of recognized tribes without any reference to federal jurisdiction. The definition also included descendants residing on the reservation and a one-quarter or more blood quantum requirement, as follows:

> Section 13 (b) The term 'Indian' as used in this title to specify the person to whom charters may be issued, *shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation*, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood, but nothing in this definition or

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[60] *Merriam-Webster's New International Dictionary* (2d ed. 1935). *See, e.g., Sanders v. Jackson,* 209 F.3d 998, 1000 (7th Cir. 2000) (The plain meaning of a statutory term can sometimes be ascertained by looking to the word's ordinary dictionary definition.).

[61] Elmer Rusco, *A Fateful Time*, 192-93 (2000); *id.* at 207 ("In a memorandum to Collier on January 17, 1934, Felix Cohen reported that drafts of the proposed legislation . . . are now ready . . . . On January 22, Cohen sent the commissioner drafts of two bills . . . .") (internal quotations and citations omitted). *See also* John Collier, *From Every Zenith; A Memoir and Some Essays on Life and Thought*, 229-30 (1964) (discussing the role of the Indian Service in bringing about Indian self-government).

> in this Act shall prevent the Secretary of the Interior or the constituted authorities of a chartered community from prescribing, by provision of charter or pursuant thereto, additional qualifications or conditions for membership in any chartered community, or from offering the privileges of membership therein to nonresidents of a community who are members of any tribe, wholly or partly comprised within the chartered community.[62]

The amended definition of "Indian" in Section 19 of the version of the bill that was before the Senate Committee during the Committee hearing on May 17, 1934 included "all persons of Indian descent who are members of any recognized tribe."[63] This definition was further amended following the Senate Committee hearings on May 17, 1934. At one point in that hearing Senators Thomas and Frazier raised questions regarding the bill's treatment of Indians who were not members of tribes and were not enrolled, supervised, or living on a reservation:

> The CHAIRMAN [Wheeler]. They do not have any rights at the present time, do they?
>
> Senator THOMAS of Oklahoma. No rights at all.
>
> The CHAIRMAN. Of course this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of at the present time.
>
> Senator FRAZIER. Those other Indians have got to be taken care of, though.
>
> The CHAIRMAN. Yes; but how are you going to take care of them unless they are wards of the Government at the present time?[64]

Countering this notion, Senator Thomas then brought up the deplorable conditions of the Catawbas of South Carolina and the Seminoles of Florida, stating that they "should be taken care of."[65] Chairman Wheeler responded:

> The CHAIRMAN. There is a later provision in here I think covering that, and defining what an Indian is.
>
> Commissioner COLLIER. This is more than one-fourth Indian blood.
>
> The CHAIRMAN. That is just what I was coming to. As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half. In other words, I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter

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[62] House Hearings at 6 (emphasis added).
[63] To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., at 237 (May 17, 1934) ("Senate Hearing").
[64] *Id.* at 263.
[65] *Id.*

> bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.
>
> Senator THOMAS of Oklahoma. If your suggestion should be approved then do you think that Indians of less than half blood should be covered with regard to their property in this act?
>
> The CHAIRMAN. No; not unless they are enrolled at present time.[66]

To address this concern, Chairman Wheeler proposed amending the third definition of "Indian" in the IRA to include "all other persons of one-half or more Indian blood,"[67] rather than those of one-quarter blood.[68] Chairman Wheeler, however, remained concerned that the term "recognized Indian tribe" was still over-inclusive in the first definition of "Indian" and could include "Indians" who were essentially "white people."[69] In response to the Chairman's concerns and to Senators O'Mahoney and Thomas' interest in including landless tribes such as the Catawba, Commissioner Collier at the close of the hearing on May 17, 1934, suggested that the language "now under federal jurisdiction" be added after "recognized Indian tribe," as follows:

> Commissioner COLLIER. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.[70]

Almost immediately after Commissioner Collier offered this proposal, the hearing concluded without any explanation of the phrase's meaning. Nor did subsequent hearings take up the meaning of the phrase "under federal jurisdiction," which does not appear anywhere else in the statute or legislative history.[71] Although there was significant confusion over the definition of

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[66] *Id.* at 263-64.
[67] 25 U.S.C. § 479.
[68] Senate Hearing at 264. Thus, the Committee understood that Indians that were neither members of existing tribes or descendants of members living on reservations came within the IRA only if they satisfied the blood-quantum requirement. *Id.* at 264-66. In other words, the blood-quantum requirement was not imposed on the other two definitions of "Indian" included in the Act. Chairman Wheeler initially misunderstood the interplay between the three parts of the definition of the term "Indian," seeming to believe (incorrectly) that the blood quantum limitation applied to all parts of the definition. *Id.* at 266. Senator O'Mahoney attempted to correct the Chairman's misunderstanding by pointing out that the one-half' blood quantum limitation does not apply to the first part of the definition of the term "Indian": "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe–comma. There is no limitation of blood so far as that [definition] is concerned." *Id.*
[69] *Id.*
[70] *Id.* at 266.
[71] The legislative history refers elsewhere to more limiting terms such as "federal supervision," "federal guardianship," and "federal tutelage." Yet Congress chose not to use those terms, and instead relied on the broader

"Indian" during the hearing,[72] which renders difficult a precise understanding of the colloquy, Commissioner Collier's suggested language arguably sought to strike a compromise that addressed both Senators O'Mahoney and Thomas' desire to include tribes like the Catawba that maintained tribal identity and Chairman Wheeler's concern that groups of Indians who have abandoned tribal relations and connections be excluded.[73]

Concerns about the ambiguity of the phrase "under federal jurisdiction" surfaced in an undated memorandum from Assistant Solicitor Felix Cohen, who was one of the primary drafters of the initial proposal for the legislation. In that memorandum, which compared the House and Senate bills, Cohen stated that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' *whatever that may mean.*"[74] Based on Cohen's analysis, the Solicitor's Office prepared a second memorandum recommending deletion of the phrase "under federal jurisdiction" because it was likely to "provoke interminable questions of interpretation."[75] The phrase, however, remained in the bill; and Cohen's prediction that the phrase would trigger "interminable questions of interpretation" is remarkably prescient.

On June 18, 1934, the IRA was enacted into law. In order to be eligible for the benefits of the IRA, an individual must qualify as an Indian as defined in Section 19 of the Act, which reads in part as follows:

> Section 19. The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[76]

Using this definition, the Department immediately began the process of implementing the IRA and its provisions.

B. Backdrop of Congress' Plenary Authority

The discussion of "under federal jurisdiction" should be understood against the backdrop of basic principles of Indian law, which define the Federal Government's unique and evolving relationship with Indian tribes. The Constitution confers upon Congress, and to a certain extent

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concept of being under federal jurisdiction. *See, e.g.,* Senate Hearing at 79-80 (Senate discussion of the notion that federal supervision over Indians ends when Indians are divested of property and that the bill would not be so limiting).

[72] During the crucial discussion in which "under federal jurisdiction" was proposed, Senate Hearing at 265-66, the Senators are not clear whether they are discussing the Catawba or the Miami Tribe; whether the first definition of "Indian" – members of recognized tribes – or the second definition – descendants of tribal members living on a reservation – is at issue; whether the Catawba were understood to have land; or the meaning of the term "member."

[73] *Id.*

[74] Memo of Felix Cohen, *Differences Between House Bill and Senate Bill*, at 2, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 2, (undated) (National Archives Records) (emphasis added).

[75] *Analysis of Differences Between House Bill and Senate Bill*, at 14-15, Box 11, Records Concerning the Wheeler-Howard Act, 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4) (undated) (National Archives Records).

[76] 25 U.S.C. § 479.

the Executive Branch, broad powers to administer Indian affairs. The Indian Commerce Clause provides the Congress with the authority to regulate commerce "with the Indian tribes,"[77] and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate.[78] The Supreme Court has long held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[79]

The Court has also recognized that "[i]nsofar as [Indian affairs were traditionally an aspect of military and foreign policy], Congress' legislative authority would rest in part, not upon affirmative grants of the Constitution, but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as necessary concomitants of nationality."[80] In addition, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation . . . ."[81] In order to protect Indian lands from alienation and third party claims, Congress enacted a series of Indian Trade and Intercourse Acts ("Nonintercourse Acts")[82] that ultimately placed a general restraint on conveyances of land interests by Indian tribes:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.[83]

Indeed, in *Johnson v. M'Intosh*, the Supreme Court held that while Indian tribes were "rightful occupants of the soil, with a legal as well as just claim to retain possession of it," they did not own the "fee."[84] As a result, title to Indian lands could only be extinguished by the Sovereign.[85]

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[77] U.S. CONST., art. I, § 8, cl. 3.
[78] U.S. CONST., art. II, § 2, cl. 2.
[79] *United States v. Lara*, 541 U.S. 193, 200 (2004). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (If Congress possesses legislative jurisdiction then the question is whether and to what extent Congress has exercised that undoubted jurisdiction.); *Mancari*, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").
[80] *Lara*, 541 U.S. at 201 (internal citations and quotation marks omitted).
[81] *Mancari*, 417 U.S. at 552 (citation omitted).
[82] *See* Act of July 22, 1790, Ch. 33, § 4, 1 Stat. 137; Act of March 1, 1793, Ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, Ch. 30, § 12, 1 Stat. 469; Act of Mar. 3, 1799, Ch. 46, § 12, 1 Stat. 743; Act of Mar. 30, 1802, Ch. 13, § 12, 2 Stat. 139; Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729. In applying the Nonintercourse Act to the original states the Supreme Court held "that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 670 (1974). This is the essence of the Act: that all land transactions involving Indian lands are "exclusively the province of federal law." *Id.* The Nonintercourse Act applies to both voluntary and involuntary alienation, and renders void any transfer of protected land that is not in compliance with the Act or otherwise authorized by Congress. *Id.* at 668-70.
[83] Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729, codified at 25 U.S.C. § 177.
[84] 21 U.S. 543, 574 (1823).
[85] *See Oneida Indian Nation of New York*, 414 U.S. at 667 ("Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.").

Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities . . . ."[86] Once a federal relationship is established with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease.[87] And Congress must authorize the transfer of tribal interests in land.

Lastly, the Supremacy Clause[88] ensures that laws regulating Indian Affairs and treaties with tribes supersede conflicting state laws. These constitutional authorities serve as the continuing underlying legal authority for Congress, as well as the Executive Branch, to exercise jurisdiction over tribes, and thus serve as the backdrop of federal jurisdiction.[89]

A brief overview of Congress' powers over Indian affairs is also necessary to reflect the unique legal relationship between the United States and Indian tribes that forms the underlying basis of any "jurisdictional" analysis.

Between 1789 and 1871, over 365 treaties with tribes were negotiated by the President and ratified by the Senate under the Treaty Clause. Many more treaties were negotiated but never ratified. Many treaties established on-going legal obligations of the United States to the treaty tribe(s), including, but not limited to, annuity payments, provisions for teachers, blacksmiths, doctors, usufructuary hunting, fishing and gathering rights, housing, and the reservation of land and water rights. Furthermore, treaties themselves implicitly established federal jurisdiction over tribes. Even if the treaty negotiations were unsuccessful, the act of the Executive Branch undertaking such negotiations constitutes, at a minimum, acknowledgment of jurisdiction over those particular tribes.[90]

As Indian policy changed over time — from treaty making to legislation to assimilation and allotment — the types of federal actions that evidenced a tribe was under federal jurisdiction changed as well. Legislative acts abound, the implementation of which demonstrate varying degrees of jurisdiction over Indian tribes. Beginning with the Trade and Intercourse Act of 1790,[91] Congress first established the rules for conducting commerce with the Indian tribes. The

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[86] *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913). *See also United States v. Kagama*, 118 U.S. 375, 384-85 (1886) ("From [the Indians'] very weakness[,] so largely due to the course of dealing of the Federal Government . . . and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . It must exist in that government, because it never has existed anywhere else . . . .").

[87] *Grand Traverse Tribe of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960, 968-69 (6th Cir. 2004) (citing *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975)). *See also United States v. Nice*, 241 U.S. 591, 598 (1916); *Tiger v. W. Investment Co.*, 221 U.S. 286, 315 (1911).

[88] U.S. CONST., art. VI, §1, cl. 2.

[89] Because this authority lies in the Constitution, it cannot be divested except by Constitutional amendment.

[90] *Worcester v. Georgia*, 31 U.S. 515, 556, 569-60 (1832); Felix Cohen, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 271 (1942 ed.) (listing treaty relations as one factor relied upon by the Department in establishing tribal status); Memo from Duard R. Barnes, Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, Nov. 16, 1967 (M-36759) (discussing treaty relations between the Federal Government and the Burns Paiute Tribe as evidence of tribal status even though such relations did not result in a ratified treaty).

[91] Act of July 22, 1790, 1 Stat. 137.

Trade and Intercourse Act (sometimes referred to as the Non-Intercourse Act), last amended in 1834,[92] regulated trading houses, liquor sales, land transactions, and other various commercial activities occurring in Indian Country. The Trade and Intercourse Acts also established both civil and criminal jurisdiction over non-Indians who violated the Act. Notably, these Acts did not assert such jurisdiction over the internal affairs of Indian tribes or over individual Indians, but over certain interactions between tribes and tribal members and non-Indians.[93] The Indian Contracting Act required the Secretary of the Interior to approve all contracts between non-Indians and Indian tribes or individuals.[94] As a result, any contracts formed between Indian tribes and non-Indians without federal approval were automatically null and void. The Major Crimes Act gave the federal courts jurisdiction for the first time over crimes committed by Indians against Indians in Indian Country.[95] Bolstered by the Supreme Court decision in *United States v. Kagama*,[96] which held that Congress has "plenary authority" over Indians, Congress continued passing legislation that embodied the exercise of jurisdiction over Indians and Indian tribes. Both legislation and significant judicial decisions reflected the move to a more robust "guardian-ward" relationship between the Federal Government and Indian tribes.[97] Additionally, annual appropriations bills listed appropriations for some individually named tribes and reservations.[98] In 1913 Congress passed the Snyder Act, which granted the Secretary authority to direct congressional appropriations to provide for the general welfare, education, health, and other services for Indians.[99]

In what some would consider the ultimate exercise of Congress' plenary authority, the General Allotment Act was enacted to break up tribally-owned lands and allot those lands to individual Indians based on the Federal Government's policy during that time to assimilate Indians into mainstream society.[100] Congress subsequently enacted specific allotment acts for many tribes.[101] Pursuant to these acts, lands were conveyed to individual Indians and the Federal Government retained federal supervision over these lands for a certain period of time. Lands not allotted to individual Indians were held in trust for tribal or government purposes. The remaining lands were considered surplus, and sold to non-Indians. Eventually the Federal Government kept individual allotments in trust or otherwise restricted the alienability of the land. This left federal supervision over Indian lands firmly in place.

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[92] Act of June 30, 1834, 4 Stat. 729.

[93] The courts have held that the Non-Intercourse Act created a special relationship between the Federal Government and those Indians covered by the Act. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[94] Act of March 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71.

[95] Act of Mar. 3, 1885, § 9, 23 Stat. 362. The Major Crimes Act was passed in response to *Ex Parte Crow Dog*, where the Supreme Court held that the federal courts did not have jurisdiction over crimes committed by individual Indians against another Indian. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[96] 118 U.S. 375 (1886).

[97] *See* Comment, *supra* note 45 at 956-60.

[98] For example, the same legislation that contained the Indian Contracting Act also appropriated funds for over 100 named tribes and bands. *See* Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 547 550, 551 (for such purposes as assisting a band in operating its village school, paying a tribal chief's salary, and providing general support of a tribal government). *See also* Act of May 31, 1900, ch. 598, 31 Stat. 221, 224 (appropriating funds for a variety of tribal services, such as Indian police and Indian courts).

[99] Act of Nov. 2, 1921, 42 Stat. 208.

[100] Act of Feb. 8, 1887, 24 Stat. 388 ("Dawes Act").

[101] *See, e.g.,* Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 ("Five Civilized Tribes Act"); Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act'); Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 ("Nelson Act of 1889").

The IRA itself, intended to reverse the effects of the allotment acts and the allotment era as well as the broader purpose of fostering self-governance and prosperity for Indian tribes, was also an exercise in Congress' plenary authority over tribes.[102]

The Executive Branch has also regularly exercised such authority over tribes. The War Department initially had the responsibility for Indian affairs. In 1832, Congress established the Commissioner of Indian Affairs, who was responsible, at the direction of the Secretary of War, for the "direction and management of all Indian affairs, and of all matters arising out of Indian relations . . . ."[103] The Office of Indian Affairs ("Office") was thus charged with implementing and executing treaties and other legislation related to tribes and Indians. The Office was transferred to the Department of the Interior in 1849.[104] With the allotment and assimilation eras, and at the time the IRA was passed, the Office of Indian Affairs and the agents and superintendents of the Indian reservations exercised virtually unfettered supervision over tribes and Indians.[105] The Office of Indian Affairs became responsible, for example, for the administration of Indian reservations, in addition to implementing legislation.[106] The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their land. As part of the exercise of this administrative jurisdiction, the Office produced annual reports, surveys, and census reports on many of the tribes and Indians under its jurisdiction.

This summary of the exercise of authority and oversight by the United States through treaty, legislation, the Executive Branch and the Office of Indian Affairs is intended to serve as a non-exclusive representation of the great breadth of actions and jurisdiction that the United States has held, and at times, asserted over Indians over the course of its history.

C. Defining "Under Federal Jurisdiction"

As noted above, the Supreme Court did not interpret the phrase "under federal jurisdiction" in the IRA. Rather, the Court reached its holding that the Narragansett Tribe was ineligible to have land taken into trust based on the State's assertion in its *certiorari* petition that the Tribe was under state jurisdiction, which the United States, and the Tribe as *amicus*, did not directly

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[102] In addition, since the IRA, Congress has exercised its constitutional jurisdiction in various ways. For example in the 1940s and 1950s, as the termination era began, Congress reversed the policy of the IRA and terminated the federal supervision over several tribes. *See* Act of June 17, 1954, 68 Stat. 250 ("Menominee Indian Termination Act of 1954"); Act of Aug. 18, 1958, 72 Stat. 619 ("California Rancheria Termination Act"); Act of Aug. 13, 1954, 68 Stat. 718 ("Klamath Termination Act"). Then, in the 1970's Congress reversed position again, and restored many of those tribes that had been terminated. And, in a policy consistent with the IRA, in 1975 Congress passed the hallmark Indian Self-Determination and Education Assistance Act. Act of Jan. 4, 1975, 88 Stat. 2203.

[103] Act of July 9, 1832, 4 Stat. 564.

[104] Act of March 3, 1849, 9 Stat. 395.

[105] Meriam Report at 140-54 (recommending decentralization of control); *id.* at 140-41("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity . . . . Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs.").

[106] *See generally* 25 U.S.C. §§ 2, 9.

contest.[107] As such, the issue of whether the Tribe "was under federal jurisdiction" was not litigated before the Court nor had the Department considered that particular question when issuing its land into trust decision in that case. Indeed, Justices Souter and Ginsburg would have reversed and remanded to allow the Department an opportunity to show that the Narragansett Tribe was under federal jurisdiction in 1934. However, the majority of the Court disagreed with them, and thus, neither the Court nor the parties elaborated on what would be necessary to demonstrate that a tribe was under federal jurisdiction in 1934. In that regard, the *Carcieri* decision is unique given the manner in which the "under federal jurisdiction" issue was addressed. Other tribes, therefore, are free to demonstrate their jurisdictional status in 1934 and that that they are eligible to have land taken into trust under the Court's interpretation of the IRA.

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction." Nor does the legislative history clarify the meaning of the phrase. The only information that can be gleaned from the Senate hearing of May 17, 1934, is that the Senators intended it as a means of attaching some degree of qualification to the term "recognized Indian tribe." The addition of the phrase was proposed during an ambiguous and confused colloquy at the conclusion of the Senate hearing, discussed above. Chairman Wheeler queried whether a "limitation after the description of the tribe" was needed.[108] He also noted that "several so-called 'tribes' . . . . They are no more Indians than you or I, perhaps."[109] Based on his reading of this portion of the Senate hearing, Justice Breyer concluded that the Senate Committee adopted this phrase to "resolve[] a specific underlying difficulty" in the first part of the definition of "Indian."[110] The task before the Department in exercising the Secretary's authority to acquire land into trust post-*Carcieri* is to give meaning to this limiting phrase.

Because the IRA does not unambiguously give meaning to the phrase "under federal jurisdiction," I conclude that Congress "left a gap for the agency to fill."[111] In light of this, and the "delegation of authority" to the agency to interpret and implement the IRA, the Secretary's reasonable interpretation of the phrase should be entitled to deference. Moreover, in the wake of *Carcieri*, an understanding of the phrase the "under federal jurisdiction" will guide the Secretary's exercise of the trust land acquisition authority delegated to her under Section 5 of the IRA.

It has been argued that Congress' constitutional plenary authority over tribes is enough to fulfill the "under federal jurisdiction" requirement in the IRA. This argument is based on the assertion that the phrase "under federal jurisdiction" has a plain meaning, and that meaning is synonymous with Congress' plenary authority over tribes pursuant to the Indian Commerce Clause. Proponents of the plain meaning interpretation rely on *United States v. Rodgers*.[112] There the Supreme Court interpreted the term "jurisdiction" as used in a federal criminal code amendment

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[107] The Court in *Carcieri* stated that "none of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary." *Carcieri*, 555 U.S. at 395(citing the Tribe's federal acknowledgement determination).
[108] Senate Hearing at 266 (Statement of Chairman Wheeler).
[109] *Id.*
[110] *Carcieri*, 555 U.S. at 396-97 (Breyer, J. concurring).
[111] *See supra* notes 28-32 and corresponding text (discussing *Chevron*).
[112] 466 U.S. 475, 479 (1984).

enacted the same day as the IRA.[113] Since the term "jurisdiction" was not defined in the statute, *Rodgers* relied on dictionary definitions to discern the term's "ordinary meaning":

> "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.[114]

Based on this interpretation, when the IRA was enacted in 1934, "jurisdiction" meant the sphere of authority; and "under federal jurisdiction" in Section 19 meant that the recognized Indian tribe was subject to the Indian Affairs' authority of the United States, either expressly or implicitly.

In my view, however, it is difficult to argue that the phrase "under federal jurisdiction" has a plain meaning, and as I noted above, I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction." Nonetheless, the plenary authority doctrine serves as a relevant backdrop to the analysis as to whether a federally recognized tribe today is eligible under the IRA to have land taken into trust. Given plenary authority's long standing, pervasive existence and constitutionally-based origin, as well as the fact that Congress's authority over Indian tribes cannot be divested absent express intent by Congress, it is likely that in showing a tribe was under federal jurisdiction, the Department will rely on evidence of a particular exercise of plenary authority, even where the United States did not otherwise believe that the tribe was under such jurisdiction.[115]

Accordingly, I believe that the Supreme Court's ruling in *Carcieri* counsels the Department to point to some indication that in 1934 the tribe in question was under federal jurisdiction. Having indicia of federal jurisdiction beyond the general principle of plenary authority demonstrates the federal government's exercise of responsibility for and obligation to an Indian tribe and its members in 1934.[116] While the unique circumstances of the *Carcieri* decision did not require the Court to address Congress's plenary authority,[117] given the specific holding that a tribe must have been under federal jurisdiction in the precise year of 1934, and the ambiguous nature of the

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[113] *Id.* at 478.

[114] *Id.* at 479 (internal citations and quotation marks omitted).

[115] This view is consistent with the legislative history in which members of Congress and Commissioner John Collier discussed various other terms that reflected limited federal authority over Indians and rather than choosing one of the more narrow terms, Commissioner Collier suggested and Congress accepted the broader term "under federal jurisdiction." *See supra* note 70

[116] At oral argument the United States asserted that "if the Court is going to take that view of the statute, then . . . a remand is preferable[,]" however, the Court declined and instead concluded that neither the United States nor the tribe (as *amicus*) contested the State's assertion it was not under federal jurisdiction. Oral Argument Transcript at 41-42, *Carcieri v. Salazar*, 555 U.S. 379, No. 07-526 (Nov. 3, 2008).

[117] The Court never addressed the issue of plenary authority because it based its ruling solely on the State of Rhode Island's undisputed position that the Narragansett Tribe was not under federal jurisdiction in 1934.

phrase, a showing must be made that the United States has exercised its jurisdiction at some point prior to 1934 and that this jurisdictional status remained intact in 1934.[118] It is important also to recognize that this approach may prove somewhat less restrictive than it first appears because a tribe may have been under federal jurisdiction in 1934 even though the United States did not believe so at the time.[119]

Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.,* whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

For example, some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealings with the tribe. Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe. Evidence may also consist of actions by the Office of Indian Affairs, which became responsible, for example, for the administration of the Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. There may, of course, be other types of actions not referenced herein that evidence the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe, which will require a fact and tribe-specific inquiry.

Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.

Indeed, for some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous, thus obviating the need to examine the tribe's history prior to 1934. For such

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[118] This opinion does not address those tribes that are unable to make a showing of federal jurisdiction and any legal authority that may exist to address that circumstance.

[119] *See supra* Section II.B (discussing Justice Breyer's concurring opinion in *Carcieri*).

tribes, there is no need to proceed to the second step of the two-part inquiry. For example, tribes that voted whether to opt out of the IRA in the years following enactment (regardless of which way they voted) generally need not make any additional showing that they were under federal jurisdiction in 1934. This is because such evidence unambiguously and conclusively establishes that the United States understood that the particular tribe was under federal jurisdiction in 1934.[120] It should be noted, however, that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status.[121] And evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action.[122] Indeed, there may be periods where federal jurisdiction exists but is dormant.[123] Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

This interpretation of the phrase "under federal jurisdiction," including the two-part inquiry outlined above, is consistent with the legislative history, as well as with Interior's post-enactment practices in implementing the statute.[124]

D. The Significance of the Section 18 Elections Held Between 1934-1936

As discussed above, the Department recognizes that some activities and interactions could so clearly demonstrate federal jurisdiction over a federally recognized tribe as to render elaboration of the two-part inquiry unnecessary.[125] The Section 18 elections under the IRA held between 1934 and 1936 are such an example of unambiguous federal actions that obviate the need to examine the tribe's history prior to 1934.

Section 18 of the IRA provides that "[i]t shall be the duty of the Secretary of the Interior, within one year after the passage [of the IRA] to call . . . an election" regarding application of the IRA to each reservation.[126] If "a majority of the adult Indians on a reservation . . . vote against its

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[120] *See, e.g., Shawano County v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 53 IBIA. 62 (2011). *See generally* Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report") (specifying, in part, tribes that either voted to accept or reject the IRA); *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 67-68 (D.D.C. 2013).

[121] *See* Stillaguamish Memorandum.

[122] It is a basic principle of federal Indian law that tribal governing authority arises from a sovereignty that predates establishment of the United States, and that "[o]nce recognized as a political body by the United States, a tribe retains its sovereignty until Congress [affirmatively] acts to divest that sovereignty. Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1] (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142-43 (D.D.C. 1976)).

[123] *See* Stillaguamish Memorandum at 2 (noting that enduring treaty obligations maintained federal jurisdiction, even if the federal government did not realize this at the time); *United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost 100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

[124] Certain tribes are subject to specific land acquisition authority other than the IRA. *See, e.g.*, Oklahoma Indian Welfare Act, 25 U.S.C. § 501 *et seq.* In such cases it is important to determine whether the *Carcieri* decision applies to that tribe's particular request.

[125] *See supra* Part III.C.

[126] Act of June 18, 1934, 48 Stat. 984, 988 (codified at 25 U.S.C. § 478).

application," the IRA "shall not apply" to the reservation.[127] The vote was either to reject the application of the IRA or not to reject its application. Section 18 required the Secretary to conduct such votes "within one year after June 18, 1934," which Congress subsequently extended until June 18, 1936.[128] In order for the Secretary to conclude a reservation was eligible for a vote, a determination had to be made that the relevant Indians met the IRA's definition of "Indian" and were thus subject to the Act. Such an eligibility determination would include deciding the tribe was under federal jurisdiction, as well as an unmistakable assertion of that jurisdiction.

A vote to reject the IRA does not alter this conclusion. In 1983, Congress enacted the Indian Land Consolidation Act (ILCA).[129] This Act amended the IRA to provide that Section 5 of the IRA applies to "all tribes notwithstanding section 18 of such Act," including Indian tribes that voted to reject the IRA.[130] As the Supreme Court stated in *Carcieri*, this amendment "by its terms simply ensures that tribes may benefit from [Section 5] even if they opted out of the IRA pursuant to Section 18, which allowed tribal members to reject the application of the IRA to their tribe."[131] As such, generally speaking, the calling of a Section 18 election for an Indian tribe between 1934 and 1936 should unambiguously and conclusively establish that the United States understood that the particular tribe was under federal jurisdiction in 1934, regardless of which way the tribe voted in that election.[132]

E. The Interior Department's Interpretation and Implementation of the IRA

The above-discussed approach for defining the phrase "under federal jurisdiction" is consistent with the Department's past efforts to define this phrase. Initially, the Department recognized the difficulty in defining the phrase and only made a passing reference to it in a circular memorandum. Commissioner Collier issued a circular in 1936 that gave direction to Superintendents in the Office of Indian Affairs regarding recordkeeping for enrollment under IRA. The primary purpose of the circular was to give recordkeeping instructions regarding the second two categories under the Section 19 definition of "Indian." He did note that no such recordkeeping need occur for the first category in the definition – members of recognized tribes now under federal jurisdiction – because they would be "carried on the rolls as members of the tribe, which is all that is necessary to qualify them for benefits under the Act."[133] This short statement, standing alone without further analysis, was not the full extent of the Department's view of tribes under federal jurisdiction, particularly given the Solicitor's office simultaneous determination that the phraseology was difficult to interpret.[134]

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[127] *Id.*
[128] Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378.
[129] Act of Jan. 12, 1983, 96 Stat. 2515, 2517-19 (codified at 25 U.S.C. § 2201 *et seq.*).
[130] 25 U.S.C. § 2517.
[131] *Carcieri*, 555 U.S. at 394-95.
[132] *See, e.g., Village of Hobart v. Midwest Reg'l Dir.*, 57 IBIA 4 (2013); *Thurston County v. Acting Great Plains Reg'l Dir.*, 56 IBIA 62 (2012); *Shawano County.*, 53 IBIA 62. *See also* Haas Report (specifying, in part, tribes that either voted to accept or reject the IRA).
[133] Circular No. 3134, Enrollment Under the IRA (1936 Circular) 1 (March 7, 1936).
[134] *See supra* notes 74-75 and accompanying text.

As the Department began to implement the IRA, it began to more closely examine whether a particular tribe was eligible for IRA benefits. At times, this inquiry involved an analysis by the Solicitor's Office. For example, beginning in the first few years after the IRA was enacted, the Solicitor issued several such opinions determining eligibility for IRA benefits.[135] Because those opinions "arise . . . out of requests to organize and petitions to have land taken in trust for a tribe,"[136] both of which require status as a "recognized tribe now under federal jurisdiction" as a "prerequisite,"[137] they are instructive in our analysis.[138] The opinions were of critical importance in the 1930s because "it is very clear from the early administration of the Act that there was no established list of 'recognized tribes now under [f]ederal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups."[139]

For example, beginning with the Mole Lake Band of Chippewas,[140] the Solicitor's Office looked at factors such as whether the group ever had a treaty relationship with the United States, whether it had been denominated as a tribe by an act of Congress or executive order, and whether the group had been treated by the United States as having collective rights in tribal lands or funds, even if the group was not expressly designated as a tribe.[141] In the Mole Lake Band opinion, the Solicitor referenced federal actions such as the receipt of annuities from a treaty, education assistance, and other federal forms of support.[142] Likewise, in a later opinion regarding and reassessing the status of the Burns Paiute Indians, the Associate Solicitor noted that "the United States has, over the years, treated the Burns Indians as a distinct entity, placed them under agency jurisdiction, provided them with some degree of economic assistance and school, health and community services and, for the specific purpose of a rehabilitation grant, has designated them as Burns Community, Paiute Tribe, a recognized but unorganized tribe."[143] The opinion also specifically cited an unratified treaty between the United States and predecessors of the Burns Paiute as "showing that they have had treaty relations with the government."[144] Similarly, in finding that the Wisconsin Winnebago could organize separately, the Solicitor

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[135] *See* Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion, August 31, 1936, I Op. Sol. on Indian Affairs 668 (U.S.D.I. 1979) ("Purchases Under Wheeler-Howard Act"); Solicitor's Opinion, May 1, 1937, I Op. Sol. on Indian Affairs 747 (U.S.D.I. 1979) ("Status of Nahma and Beaver Indians"); Solicitor's Opinion, February 8, 1937, I Op. Sol. on Indian Affairs 724 (U.S.D.I. 1979) ("Status of St. Croix Chippewas"); Solicitor's Opinion, March 15, 1937, I Op. Sol. on Indian Affairs 735 (U.S.D.I. 1979) ("St Croix Indians – Enrollees of Dr. Wooster"); Solicitor's Opinion, January 4, 1937, I Op. Sol. on Indian Affairs 706 (U.S.D.I. 1979) ("IRA – Acquisition of Land"); Solicitor's Opinion, December 13, 1938, I Op. Sol. on Indian Affairs 864 (U.S.D.I. 1979) ("Oklahoma – Recognized Tribes"). In the ultimate irony, the Solicitor issued an opinion that, contrary to Commissioner Collier's belief that "the Federal Government has not considered these Indians as Federal wards," the Catawba Tribe was eligible to reorganize under the IRA. Solicitor's Opinion, March 20, 1944, II Op. Sol. on Indian Affairs 1255 (U.S.D.I. 1979) ("Catawba Tribe – Recognition Under IRA").

[136] Stillaguamish Memorandum at 6, note 1.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 7.

[140] Memorandum from the Solicitor of the Interior to the Comm'r of Indian Affairs, Feb. 8, 1937.

[141] *Id.* at 2-3.

[142] *Id.*

[143] Memorandum from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, Nov. 16, 1967 (M-36759).

[144] *Id.* at 2; *see also* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 3.02[6][d] at 151 (2005 ed.) (citing M-36759).

pointed to factors such as legislation specific to the tribe and the approval of attorney contracts.[145]

A 1980 memorandum from the Associate Solicitor, Indian Affairs, to the Assistant Secretary, Indian Affairs, regarding a proposed trust acquisition for the Stillaguamish Tribe, also discusses Interior's prior interpretation of Section 19 of the IRA.[146] According to this memorandum, the phrase "'recognized tribe now under [f]ederal jurisdiction' . . . includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time." The Associate Solicitor ultimately concluded that the Secretary could take land into trust for the Stillaguamish, noting that, "[t]he Solicitor's Office was called upon repeatedly in the 1930's to determine the status of groups seeking to organize. . . . None of these opinions expresses surprise that the status of an Indian group should be unclear, nor do they contain any suggestion that it is improper to determine the status of a tribe after 1934 . . . . Thus it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a 'recognized tribe now under [f]ederal jurisdiction' and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability."[147]

Admittedly, the Department made errors in its implementation of the IRA.[148] As such, as Justice Breyer notes, the lack of action on the part of the Department in implementing the IRA for a particular tribe does not necessarily answer the legal question whether the tribe was "under federal jurisdiction in 1934."[149]

In sum, while the *Carcieri* Court found the term "now" to be an unambiguous reference to the year 1934, the court did not find the phrase "under federal jurisdiction" to be unambiguous. Thus, the Department must interpret the phrase and, while it has a long history in interpreting it, it has always recognized its ambiguous nature and the need to evaluate its meaning on a case by case basis given a tribe's unique history.[150]

F. "Recognition" versus "Under Federal Jurisdiction"

The definition of "Indian" in the IRA not only includes the language which was the focus of the *Carcieri* decision -- "now under federal jurisdiction" – but also language that precedes that

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[145] Memorandum from Nathan R. Margold, Solicitor, to the Comm'r on Indian Affairs, Mar. 6, 1937.
[146] This memorandum, the Stillaguamish Memorandum, was lodged with the Supreme Court as part of the *Carcieri* case and cited by Justice Breyer in his concurrence. *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring).
[147] Stillaguamish Memorandum at 7-8 (citing various decisions by the Department).
[148] *See Indian Affairs and the Indian Reorganization Act: The Twenty Year Record* (W. Kelly ed. 1954).
[149] *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).
[150] Certain tribes may have settlement acts that inform the legal analysis as to whether they can take land into trust. In *Carcieri*, the Court declined to address Petitioners' argument that the Rhode Island Indian Claims Settlement Act barred application of the IRA to the Narragansett Tribe. 555 U.S. at 393, n.7. Petitioners argued that the Rhode Island Indian Claims Settlement Act was akin to the Alaska Native Claims Settlement Act (ANSCA). Recently, in *Akiachak Native Cmty. v. Salazar*, the U.S. District Court for the District of Columbia ruled that ANSCA did not repeal the 1936 inclusion of Alaska into the land acquisition provisions of the IRA. *See* 935 F. Supp. 2d 195, 203-08 (D.D.C. 2013).

clause -- "persons of Indian descent who are members of any recognized Indian tribe."[151] Based on this language, some contend that *Carcieri* stands for the proposition that a tribe must have been both federally recognized as well as under federal jurisdiction in 1934 to fall within the first definition of "Indian" in the IRA, and thus, to be eligible to have land taken into trust on its behalf. That contention is legally incorrect.

The *Carcieri* majority held, rather, that the Secretary was without authority under the IRA to acquire land in trust for the Narragansett Tribe because it was not under federal jurisdiction in 1934, not because the Tribe was not federally recognized at that time.[152] The Court's focused discussion on the meaning of "now" never identified a temporal requirement for federal recognition. As Justice Breyer explained in his concurrence, the word "now" modifies "under federal jurisdiction," but does not modify "recognized." As such, he aptly concluded that the IRA "imposes no time limit on recognition."[153] He reasoned that "a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal Government did not" realize it "at the time." [154]

To the extent that the courts (contrary to the views expressed here) deem the term "recognized Indian tribe" in the IRA to require recognition on or before 1934, it is important to understand that the term has been used historically in at least two distinct senses. First, "recognized Indian tribe" has been used in what has been termed the "cognitive" or quasi-anthropological sense. Pursuant to this sense, "federal officials simply 'knew' or 'realized' that an Indian tribe existed, as one would 'recognize.'"[155] Second, the term has sometimes been used in a more formal legal sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States.[156]

The political or legal sense of the term "recognized Indian tribe" evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s. In 1978, the Department promulgated regulations establishing procedures pursuant to which tribal entities could demonstrate their status as Indian tribes.[157] Prior to the adoption of these regulations, there was no formal process or method for recognizing an Indian tribe, and such determinations were made on a case-by-case basis using standards that were developed in the decades after the IRA's enactment. The federal acknowledgment regulations, as amended in 1994, require that a petitioning entity satisfy seven mandatory requirements, including the following: that the entity "has been identified as an American Indian entity on a substantially continuous basis since 1900"; the "group comprises a distinct community and has existed as a community from

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[151] 25 U.S.C. § 479. Notably, the definition not only refers to "recognized Indian tribe," but also to "members" and "persons."
[152] 555 U.S. at 382-83.
[153] *Id.* at 397-398.
[154] *Id.* at 397. Justice Souter's dissent acknowledged this reality as well: "Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon the recognition, and in the past, the Department has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time." 555 U.S. at 400.
[155] Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW, 268 (1942 ed.) ("The term 'tribe' is commonly used in two senses, "an ethnological sense and a political sense.").
[156] *Id.*
[157] 25 C.F.R. Part 83.

historical times to the present"; and the entity "has maintained political influence or authority over its members as an autonomous entity from historic times to the present."[158] Evidence submitted during the regulatory acknowledgment process thus may be highly relevant and may be relied on to demonstrate that a tribe was under federal jurisdiction in 1934.

The members of the Senate Committee on Indian Affairs debating the IRA appeared to use the term "recognized Indian tribe" in the cognitive or quasi-anthropological sense. For example, Senator O'Mahoney noted that the Catawba would satisfy the term "recognized Indian tribe," even though" [t]he Government has not found out that they live yet, apparently."[159] In fact, the Senate Committee's concern about the breadth of the term "recognized Indian tribe" arguably contributed to Congress' adoption the phrase "under federal jurisdiction" in order to clarify and narrow that term.

As explained above, the IRA does not require that the agency determine whether a tribe was a "recognized Indian tribe" in 1934; a tribe need only be "recognized" at the time the statute is applied (e.g., at the time the Secretary decides to take land into trust).[160] The Secretary has issued regulations governing the implementation of her authority to take land into trust, which includes the Secretary's interpretation of "recognized Indian tribe."[161] Those regulations define "tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."[162] By regulation, therefore, the Department only acquires land in trust for tribes that are federally recognized at the time of acquisition.[163]

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[158] 25 C.F.R. § 83.7(a), (b), (c). Moreover, in 1979, the Bureau of Indian Affairs for the first time published in the *Federal Register* a list of federally acknowledged Indian tribes. "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 44 Fed. Reg. 7235 (Feb. 6, 1979). Based on our research, the Department's first efforts to compile and publish a comprehensive list of federally recognized tribes (other than eligible Alaskan tribal entities) did not begin to occur until the 1970s. Although one commenter refers to a post-IRA list of tribes, *see* W. Quinn, *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 334 n.10 (1990), no such list appears to exist. The only list during this time period appears to be a report issued 10 years after the IRA and did not purport to list all recognized or federally recognized tribes. Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report"). The Haas Report listed reservations where Indian residents voted to accept or reject the IRA, Haas Report at 13 (table A), tribes that reorganized under the IRA, *id.* at 21 (table B), tribes that accepted the IRA with pre-IRA constitutions, *id.* at 31 (table C), and tribes not under the IRA with constitutions, *id.* at 33 (table D). Prior to the list published in 1979, the Department made determinations of tribal status on an ad hoc basis. *See* Stillaguamish Memorandum at 7 (stating "It is very clear from the early administration of the Act that there was no established list of 'recognized tribes now under Federal jurisdiction' in existence in 1934 and that determination would have to be made on a case by case basis for a large number of Indian groups.").

[159] *See* Senate Hearing at 266. *See also* Senate Hearing at 80 (Sen. Thomas). Based on this legislative history, the Associate Solicitor concluded that "formal acknowledgment in 1934 is [not] a prerequisite to IRA land benefits." Stillaguamish Memorandum at 1; *id.* at 3.

[160] The misguided interpretation that a tribe must demonstrate recognition in 1934 could lead to an absurd result whereby a tribe that subsequently was terminated by the United States could petition to have land taken into trust on its behalf, but tribes recognized after 1934 could not.

[161] 25 C.F.R. Part 151.

[162] 25 C.F.R. § 151.2.

[163] In 1994, Congress enacted legislation requiring the Secretary to publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a-1).

Moreover, if a tribe is federally recognized, by definition it satisfies the IRA's term "recognized Indian tribe" in both the cognitive and legal senses of that term. Once again, as explained above, pursuant to a correct interpretation of the IRA, the fact that the tribe is federally recognized at the time of the acquisition satisfies the "recognized" requirement of Section 19 of the IRA, and should end the inquiry.

IV. CONCLUSION

The Department will continue to take land into trust on behalf of tribes under the test set forth herein to advance Congress' stated goals of the IRA to "provid[e] land for Indians."[164]

Hilary C. Tompkins

[164] 25 U.S.C. § 465.

Record of Decision

Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe

U.S. Department of the Interior
Bureau of Indian Affairs
December 2010

U.S. Department of the Interior

Agency: Bureau of Indian Affairs

Action: Record of Decision for the Trust Acquisition of, and Reservation Proclamation for the 151.87-acre La Center Interchange Site in Clark County, Washington, for the Cowlitz Indian Tribe

Summary: On January 4, 2002, the Cowlitz Indian Tribe (Tribe) was federally recognized through the BIA's administrative acknowledgment process. On that same date, the Tribe, which is landless, submitted a fee-to-trust application to the Bureau of Indian Affairs (BIA), requesting that the Department of the Interior accept trust title to land totaling 151.87 acres in Clark County, Washington (the "Cowlitz Parcel"). The Tribe requested that the Cowlitz Parcel be proclaimed its "initial reservation", and plans to construct Tribal government buildings, Tribal elder housing, a Tribal cultural center, a casino-resort complex, parking facilities, a recreational vehicle park, and a wastewater treatment plant. The Proposed Action (the Tribe's proposed trust acquisition and reservation proclamation) was analyzed as Alternative A in an Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act (NEPA), under the direction and supervision of the BIA Northwest Regional Office. The Draft EIS was issued for public review and comment on April 12, 2006. After an extended comment period, two public hearings, and consideration and incorporation of comments received on the Draft EIS, BIA issued the final EIS on May 30, 2008. The Draft and Final EIS considered a reasonable range of alternatives that would meet the purpose and need for the proposal, and analyzed the potential effects of those alternatives, as well as feasible mitigation measures.

With the issuance of this Record of Decision (ROD), the Department announces that the action to be implemented is the Preferred Alternative (Alternative A in the FEIS), which includes acquisition in trust of the 151.87-acre Cowlitz Parcel, proclamation of the parcel as the Cowlitz Indian Tribe's reservation, and construction of Tribal government headquarters, Tribal elder housing, a Tribal cultural center and a gaming-resort complex including a 134,150 square foot casino, 250-room hotel, recreational vehicle park, parking facilities, and a wastewater treatment plant. The Department has determined that this Preferred Alternative will best meet the purpose and need for the Proposed Action, in promoting the long-term economic self-sufficiency, self-determination and self-governance of the Cowlitz Tribe. Implementing this action will provide the Tribe with a long-deferred reservation land base and the best opportunity for attracting and maintaining a significant, stable, long-term source of governmental revenue, and accordingly, the best prospects for maintaining and expanding tribal governmental programs to provide a wide range of health, education, housing, social, cultural, environmental and other programs, as well as employment and career development opportunities for its

members. The Department has considered potential effects to the environment, including potential impacts to local governments and other tribes, has adopted all practicable means to avoid or minimize environmental harm, and has determined that potentially significant effects will be adequately addressed by these mitigation measures, as described in this ROD. The Department also has determined that the Cowlitz Parcel is eligible for gaming because it qualifies as the Tribe's "initial reservation" under Section 20 of the Indian Gaming Regulatory Act.

The decision is based on thorough review and consideration of the Tribe's fee-to-trust application, the Tribe's request for a reservation proclamation, and materials submitted therewith; the applicable statutory and regulatory authorities governing acquisition of trust title to land, issuance of reservation proclamations, and eligibility of land for gaming; the Draft EIS; the Final EIS; the administrative record; and comments received from the public; federal, state and local governmental agencies; and potentially affected Indian tribes.

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Part 151. The BIA's evaluation of the Tribe's fee-to-trust request based on the applicable criteria is provided in **Sections 8.1** through **8.11** of this ROD, below.

8.1 25 C.F.R. 151.3 Land Acquisition Policy.

The Tribe's fee-to-trust request meets the two threshold requirements of the Secretary's land acquisition policy in 25 C.F.R. § 151.3. First, land may be acquired in trust status for an Indian tribe or individual. A "tribe" includes any Indian tribe or nation "which is recognized by the Secretary as eligible to receive the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. § 151.2(b). The Cowlitz Indian Tribe is a federally recognized Indian tribe and is eligible to receive services from the BIA. See Department of the Interior, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13648, 13650 (Mar. 22, 2007) (listing the Cowlitz Indian Tribe as an eligible entity).

Second, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
(2) When the tribe already owns an interest in the land [i.e., the tribe owns an interest in an off-reservation asset and seeks to consolidate that interest]; or
(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

As described in detail in the Tribe's amended fee-to-trust application and the Final EIS, the Tribe wishes to use the Cowlitz Parcel as its initial reservation for the development of Tribal governmental facilities, elder housing, a cultural center, a casino, a hotel and resort. The establishment of a land base and a source of revenue to fund tribal government infrastructure and programs, provide employment opportunities for Tribal members, and create other economic development opportunities that will facilitate tribal self-determination, economic development, and Indian housing, is particularly important given that the Cowlitz Tribe was restored to recognition in 2002 and is still without any trust land or a reservation. Therefore, the BIA has determined that the acquisition of the 151.87 acre area of land in trust is necessary to facilitate tribal self-determination, economic development, and Indian housing, and that the acquisition satisfies 25 C.F.R. § 151.3(a)(3).

8.2 25 C.F.R. 151.10(a). Statutory Authority For The Acquisition

Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations on such authority.

Section 5 of the IRA is the primary general statutory authority for the Secretary to acquire lands in trust for Indian tribes and individual Indians. It provides in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted

> allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians . . . .
>
> Title to any lands or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

As a result of the Supreme Court's February 2009 decision in *Carcieri v. Salazar,*[7] the application by the Cowlitz Tribe to have land taken into trust by the Secretary pursuant to the Indian Reorganization Act (IRA),[8] requires that the Secretary first determine whether the tribe was "under federal jurisdiction" at the time of the passage of the IRA. This analysis is highly fact specific. As a result, much of this decision is limited to evaluating the Secretary's authority with respect to the Cowlitz Tribe.

Background on the Tribe's Application

A Tribal member of the Cowlitz Tribe acquired certain parcels of the 151.87 acres in rural Clark County, Washington. The tribal member and other non-Indians sold their parcels to Salishan-Mohegan, a gaming development entity. Salishan-Mohegan has agreed to transfer ownership of the parcels to the Tribe or directly to the United States if the fee-to-trust application is approved. Purposes of the transfer into trust include re-establishing a tribal land base for this landless Tribe, and developing Tribal government buildings, Tribal elder housing, a Tribal cultural center, a wastewater treatment plant, and a casino-resort gaming facility. The land is located approximately 24 miles from the Tribe's headquarters in Longview, Washington in Cowlitz County. The land is about 30 minutes from Portland, Oregon and about 20 minutes from Vancouver, Washington. The closest town to the proposed gaming site is La Center, Washington.

In 2004, the Tribe submitted its fee to trust application, invoking the Secretary's authority under Section 5 of the IRA, 25 U.S.C. § 465, to take land into trust for tribes. The stated purposes for the trust land include gaming, other economic development, and governmental purposes. In February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*.[9] The *Carcieri* decision requires that in order for the Secretary to exercise his authority under the IRA) to take land into trust for an Indian tribe,[10] the Secretary must first establish that the tribe was "under federal jurisdiction" at the time of the passage of the IRA. In June 2009, after the Supreme Court issued *Carcieri*, the Cowlitz Tribe submitted a supplement to its trust acquisition request that addressed the *Carcieri* decision. The June 2009 document included

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[7] 129 S. Ct. 1058 (2009).

[8] The *Carcieri* decision addresses the Secretary's authority to take land into trust for "persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the Secretary's authority to take land into trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

[9] 129 S. Ct. 1058 (2009).

[10] The *Carcieri* decision addresses the authority to take land into trust for "persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the authority to take land into trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

both an analysis of the decision and copies of documents that it asserted demonstrated that the Tribe was under federal jurisdiction in 1934. The Tribe submitted a supplement to that latter document on August 17, 2010.

Brief History of the Cowlitz Tribe

The Cowlitz Tribe is located in southwest Washington. The Tribe descends from the Lower Cowlitz and Upper Cowlitz bands, with its aboriginal territory along the Cowlitz River. As discussed in more detail below, the Lower Cowlitz Band participated in treaty negotiations with the United States in 1855 at the Chehalis River. Although the Band refused to sign the treaty and the treaty was never completed, these facts demonstrate that the Federal Government clearly regarded the Band as a sovereign entity capable of engaging in a formal treaty relationship with the United States. After 1855, the Upper and Lower Cowlitz Indians remained in the Cowlitz River valley, and over time, the two bands were amalgamated into one Tribe. By the early 1900's, the Office of Indian Affairs regarded the Cowlitz Indians as one Tribe. The Cowlitz Indians were regularly listed in the BIA's records, and identified as a tribal entity from the 1860s through the 1890s, from 1904 through the 1930s, and after 1950. The BIA regularly provided services to the Cowlitz Indians, including supervising allotments, adjudicating probate proceedings, providing education services, assistance in protecting fishing activities, investigating tribal claims to aboriginal lands, and approving attorney contracts.

The Tribe was administratively recognized under the federal acknowledgment process (FAP) (25 C.F.R. Part 83) in 2000.[11] The FAP process, among other things, required the Tribe to show – and the Department to find – that the Tribe had a continuous political and community existence which commenced from at least the time of the 1855 Chehalis River treaty negotiations. The extensive factual and historical record developed by the Department as part of the FAP process is incorporated by reference herein. The extensive record developed during the FAP process establishes significant factual underpinnings relevant to this determination that the Cowlitz Tribe was under federal jurisdiction in 1934.

Statutory Interpretation of the IRA

A. Supreme Court Decision in Carcieri v. Salazar, 129 S. Ct. 1058 (2009)

In 1983, the Narragansett Indian Tribe of Rhode Island (Narragansett) was acknowledged as a federally recognized tribe.[12] In 1978, the Narragansett filed two lawsuits to recover possession of approximately 3,200 acres of land comprising its aboriginal territory that were alienated by Rhode Island in 1880 in violation of the Indian Non-Intercourse Act. The parties

[11] The final determination to acknowledge the Cowlitz Indian Tribe was issued in February 2000. 62 Fed. Reg. 8436 (Feb. 18, 2000). The Quinault Indian Nation requested reconsideration of the decision before the Interior Board of Indian Appeals (IBIA). *See* 36 IBIA 140 (May 29, 2001). The IBIA affirmed the final determination but referred three issues back to the Secretary for further consideration. *Id.* In December 2001, the Assistant Secretary-Indian Affairs issued a Reconsidered Final Determination reaffirming the initial ruling and addressing the concerns outlined by the IBIA, which became effective on publication in the Federal Register, 67 Fed. Reg. 607 (Jan. 4, 2002). The reconsidered final determination supplements the final determination and supersedes it to the extent it is inconsistent.

[12] 48 Fed. Reg. 6177 (Feb. 10, 1983).

settled the lawsuit which was incorporated into federal implementing legislation known as the Rhode Island Indian Claims Settlement Act.[13] In exchange for relinquishing its aboriginal title claims, the Narragansett agreed to accept possession of 1,800 acres within the claim area.

In 1985, after the Narragansett had achieved federal recognition, the Rhode Island Legislature transferred the settlement lands to the Narragansett. Subsequently, the Narragansett requested that its settlement lands be taken into trust by the Federal Government pursuant to section 5 of the IRA. The Narragansett's application was approved by the BIA and upheld by the IBIA notwithstanding a challenge by the Town of Charlestown.[14] The settlement lands were taken into trust with the restriction contained in the Settlement Act that the lands were subject to state criminal and civil jurisdiction, 25 U.S.C. § 1708.

In 1998, the Bureau approved, pursuant to Section 5 of the IRA, the Narragansett's application to acquire approximately 32 acres into trust for low income housing for its elderly members.

The State and local town filed an action in district court claiming that the decision to acquire 32 acres into trust violated the Administrative Procedure Act; that the Rhode Island Indian Claims Settlement Act precludes the acquisition; and that the IRA is unconstitutional and does not apply to the Narragansett. In 2007, the First Circuit, *en banc*, rejected the State's argument that Section 5 did not authorize the BIA to acquire land for a tribe who first received federal recognition after the date the IRA was enacted. The State sought review in the Supreme Court.

1. Majority Opinion

The Supreme Court in a 6-3 ruling (J. Breyer concurring, J.J. Souter and Ginsburg concurring in part and dissenting in part, J. Stevens dissenting) reversed the First Circuit holding that the Secretary did not have authority to take land into trust for the Narragansett because the Narragansett was not under federal jurisdiction at the time the IRA was enacted in 1934. Justice Thomas, writing for the majority, determined that the Court's task was to interpret the term "now" in the statutory phrase "now under federal jurisdiction" in Section 19 of the IRA.[15]

Interpreting Section 19, in concert with Section 5, the Supreme Court applied a strict statutory construction analysis to determine whether the term "now" in the definition of Indian in Section 19 referred to 1998 when the Secretary made the decision to accept the parcel into trust or referred to 1934 when the IRA was enacted.[16] The Court analyzed the ordinary

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[13] 25 U.S.C. §§ 1701-1716.

[14] *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs,* 18 IBIA 67 (Dec. 5, 1989).

[15] *Carcieri*, 129 S. Ct. at 1061. Furthermore, while the definition of Indian includes members of "any recognized Indian tribe now under federal jurisdiction," the Supreme Court did not suggest that the term "recognized" is encompassed within the phrase "now under federal jurisdiction." Consistent with the grammatical structure of the sentence – in which "now" qualifies "under federal jurisdiction" and does not qualify "recognized" – and consistent with Justice Breyer's concurring opinion, I construe "recognized " and "under federal jurisdiction" as necessitating separate inquiries. *See* discussion Section IV(D)(2).

[16] *Carcieri,* at 1064.

meaning of the word "now" in 1934,[17] within the context of the IRA,[18] as well as contemporaneous departmental correspondence,[19] concluding that "the term 'now under the federal jurisdiction' in Section 19 unambiguously refers to those tribes that were under [f]ederal jurisdiction of the United States when the IRA was enacted in 1934."[20] The majority, however, did not address the meaning of the phrase "under federal jurisdiction" in Section 19, concluding that the parties had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934.[21]

2. Justice Breyer's Concurring Opinion

Justice Breyer wrote separately concurring in the majority opinion with a number of qualifications. One of these qualifications is significant for the Department's implementation of the Court's decision. He stated that an interpretation that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it first appears. That is because a tribe may have been "under federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time.[22] [Justice Breyer cited to a list of tribes that was compiled as part of a report issued 13 years after the IRA (the so-called Haas Report)[23] and noted that some tribes were erroneously left off that list – because they were not recognized as tribes by federal officials at the time – but whose status was later recognized by the Federal Government. Justice Breyer further suggested that these later-recognized tribes could nonetheless have been "under federal jurisdiction" in 1934. In support of these propositions, Justice Breyer cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under federal jurisdiction in 1934, but which nevertheless exhibited a "1934 relationship between the tribe and Federal Government that could be described as jurisdictional."[24] Justice Breyer specifically cited to the Stillaguamish Tribe as an example in which the tribe had treaty fishing rights as of 1934, even though the tribe was not formally recognized by the United States until 1976. The concurring opinion of Justice Breyer also cited Interior's erroneous 1934 determination that the Grand Traverse Band of Ottawa and Chippewa Indians

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[17] The Court examined dictionaries from 1934 and found that "now" meant "at the present time" and concluded that such an interpretation was consistent with the Court's decisions both before and after 1934. *Id.* at 1064.

[18] The Court also noted that in other sections of the IRA, Congress had used "now or hereafter" to refer to contemporaneous and future events and could have explicitly done so in Section 19 if that was Congress' intent in the definition.

[19] The Court noted that in a letter sent by Commissioner Collier to BIA Superintendents, he defined Indian as member of any recognized tribe "that was under [f]ederal jurisdiction at the date of the Act." *Id.* at 1065, quoting from *Letter from John Collier, Commissioner to Superintendents*, dated March 7, 1936.

[20] *Id.* at 1068.

[21] *Id.* at 1061, 1068. The issue of whether the Narragansett Tribe was "under federal jurisdiction in 1934" was not considered by the BIA in its decision, nor was evidence concerning that issue included in the administrative record. When the BIA issued its decision, the Department's position was that the IRA applied to all federally recognized tribes. Because the Narragansett Tribe was federally recognized, the administrative record assembled pertained solely to the Bureau's compliance with the Part 151 regulatory factors.

[22] *Id.* at 1069.

[23] *See infra* note 53 (discussing lists of federally recognized tribes).

[24] *Id.* at 1070. Justice Breyer concurred with Justices Souter and Ginsburg that "recognized" was a distinct concept from "now under federal jurisdiction." However, in his analysis he appears to use the term "recognition" in the sense of "federally recognized" as that term is currently used today in its formalized political sense (i.e., as the label given to Indian tribes that are in a political, government-to-government relationship with the United States), without discussing or explaining the meaning of the term in 1934. *See infra* discussion Section IV(D)(2).

had been "dissolved," a view that was later repudiated by Interior's 1980 correction concluding that the Band had "existed continuously since 1675."[25] Finally, Justice Breyer cited the Mole Lake Band as an example, where the Department had erroneously concluded the tribe did not exist, but later determined that the anthropological study upon which that decision had been based was erroneous and recognized the tribe.[26]

Thus, Justice Breyer concluded that, regardless of whether a tribe was formally recognized in 1934, a tribe could have been "under federal jurisdiction" in 1934 as a result, for example, of a treaty with the United States that was in effect in 1934, a pre-1934 congressional appropriation, or enrollment as of 1934 with the Indian Office. Justice Breyer, however, found no similar indicia that the Narragansett were "under federal jurisdiction" in 1934. Indeed, Justice Breyer joined the majority in concluding that the evidence in the record before the Supreme Court indicated that at no point in its history leading up to 1934 had the Narragansett *ever* been either federally recognized or under federal jurisdiction.[27] Justices Souter and Ginsburg, by contrast, would have reversed and remanded to allow the Department an opportunity to show that the Narragansett Tribe was under federal jurisdiction in 1934, contending that the issue was not addressed in the record before the Court.[28] Justice Stevens dissented finding that the IRA places no temporal limit on the definition of an Indian tribe,[29] and criticized the majority for adopting a cramped reading of the IRA.[30]

In sum, the Supreme Court's majority opinion instructs that in order for the Secretary to acquire land for a tribe under Section 5 of the IRA, a tribe must have been "under federal jurisdiction" in 1934. While the Court's review provides at least some indication of the type of evidence that would support a finding that a tribe was not under federal jurisdiction in 1934, the majority opinion did not identify what types of evidence would demonstrate that a tribe was under federal jurisdiction. Nor, in 1934, was there a definitive list of "tribes under federal jurisdiction."[31] Therefore, to interpret the phrase "now under federal jurisdiction" in accordance with the holding in *Carcieri*, I must interpret the phrase "under federal jurisdiction."

B. History of the IRA

The IRA was the culmination of many years of effort to change the Federal Government's Indian policy. The allotment and assimilation policies were dismal failures.[32] After the

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[25] *Carcieri*, at 1069.
[26] *Id.*
[27] *But see supra* note 15.
[28] *Carcieri*, at 1071.
[29] *Id.* at 1072.
[30] *Id.*
[31] Memo. from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, at 7 (Stillaguamish Memorandum); *see also* note 53 (discussing lists of federally recognized tribes).

[32] The Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (1928) (Meriam Report) (detailing the deplorable status of health, id. 3-4, 189-345, poverty, 4-8, 430-60, 677-701, education, 346-48, and loss of land, 460-79).

allotment of tribal lands, tribes and individual Indians lost millions of acres. The IRA was enacted to help achieve a shift in policy away from allotment and assimilation.[33]

To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-government. Congress authorized Indian tribes to adopt their own constitutions and bylaws (Section 16, 25 U.S.C. § 476), and to incorporate (Section 17, 25 U.S.C. § 477). It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application (Section 18, 25 U.S.C. § 478). In service of the broader goal of "recogn[izing] [] the separate cultural identity of Indians," the IRA encouraged Indian tribes to revitalize their self-government and to take control of their business and economic affairs.[34] Congress also sought to assure a solid territorial base by, among other things, "put[ting] a halt to the loss of tribal lands through allotment."[35] Of particular relevance here, Section 5 of the IRA authorizes the Secretary of the Interior "in his discretion," to "acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians."[36] The acquired lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian . . ."[37] The IRA thus repudiated the previous land policies of the General Allotment Act.

Section 19 of the IRA defines those who are eligible for its benefits. That section provides that the term "tribe" "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[38] Section 19 further provides as follows:

> The term "Indian" . . . shall include all persons of Indian descent who are [1] members of any recognized Indian tribe now under [f]ederal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.[39]

With a few amendments, the IRA has remained largely unchanged since 1934.

C. Meaning of the Phrase "Under Federal Jurisdiction"

In examining the statute, the first inquiry is to determine whether there is a plain meaning of the phrase "under federal jurisdiction." The IRA does not define the phrase, and as shown below, the apparent author of the phrase, John Collier, did not provide a definition either. In discerning the meaning of the phrase since Congress has not spoken directly on this issue, one option is to look to the dictionary definitions of the word "jurisdiction."[40] In 1933, Black's Law Dictionary defined the word "jurisdiction" as:

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[33] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972).
[34] Graham Taylor, *The New Deal and American Indian Tribalism,* 39 (1980). *See also* 48 Stat. 984 ("An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses . . . .")
[35] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973).
[36] 25 U.S.C. § 465.
[37] *Id.*
[38] 48 Stat. 988; (codified at 25 U.S.C. § 479).
[39] *Id.*
[40] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (when a term is not defined in statute, the court's "task is to construe it in accord with its ordinary or natural

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.[41]

The entry in Black's includes the following quotation: "The authority of a court as distinguished from the other departments; . . ."[42] Since the issue before us concerns an "other department" rather than a court, I turn to the contemporaneous Webster's Dictionary for assistance. Webster's definition of "jurisdiction" provides a broader illustration of this concept as it pertains to governmental authority:

> 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.[43]

These definitions, however, while casting light on the broad scope of "jurisdiction," fall short of providing a clear and discrete meaning of the specific statutory phrase "under federal jurisdiction" that could be considered unambiguous. For example, these definitions do not establish whether in context of the IRA, "under federal jurisdiction" refers to the outer limits of the constitutional scope of federal authority over the tribe at issue or to whether the United States exercised jurisdiction in fact over that tribe. I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction."

D. Legislative History of the IRA

The Department of the Interior drafted the proposed legislation that subsequently was enacted as the IRA. The Interior Solicitor's Office took charge of the legislative drafting, with much of the work undertaken by the Assistant Solicitor, Felix S. Cohen.[44] In February 1934, the initial version of the bill was introduced in both the House of Representatives and the Senate. The Indian Affairs Committees in both bodies held hearings on the bill over the next several

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meaning"), *id.* at 275 (with a legal term the court "presume[s] Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment.").

[41] *Black's Law Dictionary* at 1038 (3d ed. 1933).

[42] *Id.*

[43] *Merriam-Webster's New International Dictionary* (2d ed. 1935). *See, e.g., Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000) (the plain meaning of a statutory term can sometimes be ascertained by looking to the word's ordinary dictionary definition).

[44] Elmer Rusco, *A Fateful Time*, 192-93 (2000); *Id.* at 207 ("In a memorandum to Collier on January 17, 1934, Felix Cohen reported that drafts of the proposed legislation . . . are now ready . . . . On January 22, Cohen sent the commissioner drafts of two bills . . . .") (internal quotations and citations omitted); John Collier, *From Every Zenith; A Memoir; And Some Essays on Life and Thought*, 229-30 (1964).

months, which led to significant amendments to the bills. These amendments included the addition of the phrase "now under federal jurisdiction" to the definition of the term "Indian."

1. The Hearings

In the initial version of the Senate bill, the term "Indian" was defined as follows:

> Section 13 (b) The term 'Indian' as used in this title to specify the person to whom charters may be issued, shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood, but nothing in this definition or in this Act shall prevent the Secretary of the Interior or the constituted authorities of a chartered community from prescribing, by provision of charter or pursuant thereto, additional qualifications or conditions for membership in any chartered community, or from offering the privileges of membership therein to nonresidents of a community who are members of any tribe, wholly or partly comprised within the chartered community.[45]

Thus, the amended definition of "Indian" in Section 19 of the version of the bill that was before the Senate Committee during the Committee hearing on May 17, 1934 included "all persons of Indian descent who are members of any recognized tribe."[46] This definition was further amended following the Senate Committee hearings on May 17, 1934. At one point in that hearing Senators Thomas and Frazier raised questions regarding the bill's treatment of Indians who were not members of tribes and were not enrolled, supervised, or living on a reservation. : Senator Thomas then brought up the deplorable conditions of the Catawbas of South Carolina and the Seminoles of Florida, stating that they "should be taken care of."[47] Chairman Wheeler responded one concern with the definition of "Indian" in the IRA draft under consideration:

> I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done.[48]

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[45] Readjustment of Indian Affairs Part 1, H.R. 7902, 73rd Cong., 2d Sess. (Feb. 22, 1934), page 6, Title I–Indian Self-Government, Section 13.
[46] To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., at 234 (May 17, 1934) ("Senate Hearing).
[47] *Id.* at 263.
[48] *Id.* at 263-64

To address this concern, the Committee proposed amending the third definition of "Indian" in the IRA to include "all other persons of one-half or more Indian blood," rather than those of one-quarter blood. Thus, the Committee understood that Indians that were neither members of existing tribes or descendants of members living on reservations came within the IRA only if they satisfied the blood-quantum requirement.[49] In other words, the blood-quantum requirement was not imposed on the other two definitions of "Indian" included in the Act. In response to statements by Chairman Wheeler that the term "recognized Indian tribe" was over-inclusive in the first definition of "Indian" and included "Indians" who were essentially "white people," and Senators O'Mahoney's and Thomas' interest in including landless tribes such as the Catawba, Commissioner Collier at the close of the hearing on May 17, 1934, suggested that the language "now under federal jurisdiction" be added after "recognized Indian tribe."[50] Although there was significant confusion over the definition of "Indian" during the hearing,[51] which renders difficult a precise understanding of the colloquy, Commissioner Collier's suggested language arguably sought to strike a compromise that addressed both Senators O'Mahoney's and Thomas' desire to include tribes like the Catawba that maintained tribal identity and Chairman Wheeler's concern that groups of Indians who have abandoned tribal relations and connections be excluded.[52]

Almost immediately after Commissioner Collier offered this proposal, the hearing concluded without any explanation of the phrase's meaning. Nor did subsequent hearings take up the meaning of the phrase "under federal jurisdiction," which does not appear anywhere else in the statute or legislative history.[53]

Concerns about the ambiguity of the phrase "under federal jurisdiction" surfaced in an undated memorandum from Assistant Solicitor Felix Cohen, who was one of the primary drafters of the initial proposal for the legislation. In that memorandum, which compared the House and Senate bills, Cohen stated that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' *whatever that may mean.*"[54] Based on Cohen's analysis, the Solicitor's Office prepared a second memorandum recommending deletion of the phrase "under federal jurisdiction" because it was likely to "provoke interminable questions of interpretation."[55] The phrase, however, remained in the bill; and Cohen's prediction that the phrase would trigger "interminable questions of interpretation" is remarkably prescient.

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[49] *Id.*
[50] *Id.* at 265-66.
[51] During the crucial discussion in which "under federal jurisdiction" was proposed, Senate Hearing at 265-66, the Senators are not clear whether they are discussing the Catawba or the Miami Tribe; whether the first definition of "Indian" – members of recognized tribes – or the second definition – descendants of tribal members living on a reservation – is at issue; whether the Catawba were understood to have land; or the meaning of the term "member." In addition, Chairman Wheeler appears to have misunderstood the interplay between the three definitions of the term "Indian," seeming to believe (incorrectly) that the blood quantum limitation applied to all definitions.
[52] *Id.*
[53] The legislative history refers elsewhere to terms such as "federal supervision," "federal guardianship," and "federal tutelage." Yet Congress opted not to rely on one of those terms.
[54] *Differences Between House Bill and Senate Bill*, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 2, Memo of Felix Cohen (National Archives Records) (emphasis added).
[55] *Analysis of Differences Between House Bill and Senate Bill*. Box 11, Records Concerning the Wheeler-Howard Act, 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4).

On June 18, 1934, the IRA was enacted into law. Section 19 of the IRA requires that, in order to be eligible for the benefits of the Indian Reorganization Act, an individual must qualify as an Indian as defined in Section 19 of the Act, which reads in part as follows:

> Section 19. The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Using this definition, the Department immediately began the process of implementing the IRA and its provisions.

2. "Recognition" versus "Under Federal Jurisdiction"

The first portion of the IRA's definition of "Indian" includes the terms "recognized Indian tribe" and "under federal jurisdiction." Interpreting the phrase "under federal jurisdiction," is complicated by confusion over the meaning of the term "recognized Indian tribe" as used in the IRA. The term "recognized Indian tribe" has been used historically in at least two distinct senses. First, "recognized Indian tribe" has been used in what has been termed the "cognitive" or quasi-anthropological sense. Pursuant to this sense, "federal officials simply 'knew' or 'realized' that an Indian tribe existed, as one would 'recognize.'"[56] Second, the term has sometimes been used in a more formal or "jurisdictional" sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique relationship with the United States.[57]

The political or jurisdictional sense of the term "recognized Indian tribe" evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s. In 1978, the Department promulgated regulations establishing procedures pursuant to which tribal entities could demonstrate their status as Indian tribes.[58] These regulations, as amended in 1994, require that a petitioning entity satisfy seven mandatory requirements, including the following: that the entity "has been identified as an American Indian entity on a substantially continuous basis since 1900"; the "group comprises a distinct community and has existed as a community from historical times to the present"; and the entity "has maintained political influence or authority over its members as an autonomous entity from historic times to the present."[59]

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[56] W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 333 (1990).

[57] *Id. See also* Felix Cohen, *Handbook of Federal Indian Law* 268 (1942 ed.) ("The term 'tribe' is commonly used in two senses, "an ethnological sense and a political sense.").

[58] 25 C.F.R. pt. 83.

[59] 25 C.F.R. § 83.7(a), (b), (c). Moreover, in 1979, the Bureau of Indian Affairs for the first time published in the Federal Register a list of federally acknowledged Indian tribes. "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 44 Fed. Reg. 7235 (Feb. 6, 1979). Based on our research, the Department's first efforts to publish a comprehensive list of federally recognized tribes, such that entities that did not appear on the list (other than eligible Alaskan tribal entities) were regarded

The members of the Senate Committee on Indian Affairs debating the IRA appeared to use the term "recognized Indian tribe" in the cognitive or quasi-anthropological sense. For example, Senator O'Mahoney noted that the Catawba would satisfy the term "recognized Indian tribe," even though"[t]he Government has not found out that they live yet, apparently."[60] In fact, the Senate Committee's concern about the breadth of the term "recognized Indian tribe" arguably led it to adopt the phrase "under federal jurisdiction" in order to clarify and narrow that term. There would have been little need to insert an undefined and ambiguous phrase such as "under federal jurisdiction," if the IRA had incorporated the rigorous, modern definition of federally recognized Indian tribe.

As the historical record produced during the FAP process demonstrates, the Cowlitz Tribe was a recognized Indian tribe in the cognitive or quasi-anthropological sense of that term in 1934, and it remains so today.[61] Moreover, the Cowlitz Tribe was recognized by the Federal Government in the formal sense of that term at multiple stages in its history, including the late 19th Century, as well as, in conjunction with the FAP determination in 2002.

For purposes of our decision here, I need not reach the question of the precise meaning of "recognized Indian tribe" as used in the IRA, nor need I ascertain whether the Cowlitz Tribe was recognized by the Federal Government in the formal sense in 1934, in order to determine whether land may be acquired in trust for the Cowlitz Tribe. The Secretary has issued regulations governing the implementation of his authority to take land into trust.[62] Those regulations define "tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."[63] The Department, therefore, only takes land into trust for federally recognized Indian tribes.[64] If a tribe is

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as not constituting federally recognized tribes, did not occur until the 1970s. Although some commentators refer to a post-IRA list of tribes, *see* Quinn, 34 Am. J. Leg. Hist. at 334 n.10, this reference appears to be a report issued 10 years after the IRA and did not purport to list all recognized or federally recognized tribes. Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report"). The Haas Report listed reservations where the Indian residents voted to accept or reject the IRA, *id.* at 13 (table A), tribes that reorganized under the IRA, *id.* at 21 (table B), tribes that accepted the IRA with pre-IRA constitutions, *id.* at 31 (table C), and tribes not under the IRA with constitutions, *id.* at 33 (table D). Prior to the list published in 1979, the Department made determinations of tribal status on an ad hoc basis. *See* Stillaguamish Memorandum at 7.

[60] *See* Senate Hearing at 266; *see also* Senate Hearing at 80 (Sen. Thomas). Based on this legislative history, the Associate Solicitor concluded that "formal acknowledgment in 1934 is [not] a prerequisite to IRA land benefits." Stillaguamish Memorandum at 1; *see also id.* at 3.

[61] Although Commissioner Collier posited in an October 1933 letter to an individual seeking enrollment with the Cowlitz Tribe that the Cowlitz Tribe no longer existed as a tribal entity, this statement appears to be discussing the existence of a tribal entity in the political sense – as Collier indicated that the Indian Service was not keeping enrollment information for the Cowlitz Tribe because it had no reservation and no tribal funds were on deposit under government control. *See* HTR at 131 (citing Collier 1933). Moreover, even if Collier were asserting that the Tribe has ceased to exist in a cognitive sense, this letter was specifically considered and rejected as part of the FAP, which concluded that the Cowlitz Tribe continuously existed and that despite Collier's letter, contact between the Indian Affairs Office and Cowlitz tribal members continued on a variety of topics. HTR at 131.

[62] 25 C.F.R. pt. 151.

[63] 25 C.F.R. § 151.2.

[64] In 1994, Congress enacted legislation requiring the Secretary to publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454,

federally recognized, by definition it satisfies the IRA's term "recognized Indian tribe" in both the cognitive and jurisdictional senses of that term. That is because, whatever the precise meaning of the term "recognized Indian tribe," the date of federal recognition does not affect the Secretary's authority under the IRA. In Section 19 of the IRA, the word "now" modifies only the phrase "under federal jurisdiction"; it does not modify the phrase "recognized Indian tribe."[65] As a result, "[t]he IRA imposes no time limit upon recognition";[66] the tribe need only be "recognized" as of the time the Department acquires the land into trust, which clearly would be the case here, under any conception of "recognition." The Cowlitz Tribe's federal acknowledgment in 2002, therefore, satisfies the IRA's requirement that the tribe be "recognized."

3. The Interior Department's Interpretation and Implementation of the IRA

The IRA delegated substantial implementation authority to the Department. For example, under Section 18 of the IRA, the Department was responsible for conducting votes on all Indian reservations within two years of enactment. The Department completed the voting, and the results are reflected in the Haas Report.

If the Department was unsure of whether a particular group of Indians was eligible for IRA benefits—such as taking land into trust and reorganizing a tribal government—the Department sometimes sought the opinion of the Solicitor. Beginning in the first few years after the IRA was enacted, the Solicitor issued several such opinions.[67] These opinions are instructive because various tribes were determined to be tribes and/or under federal jurisdiction, and thus eligible for benefits of the IRA.[68] Moreover, the opinions were of critical importance in the 1930s because "it is very clear from the early administration of the Act that were was no established list of 'recognized tribes now under [f]ederal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups."[69]

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108 Stat. 4791 (25 U.S.C. § 479a-1). The Cowlitz Tribe appears on the most recent list of tribes. 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010). Additionally, in 1994 Congress' amended the IRA, codified at 25 U.S.C. § 476(f), to prohibit the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes.

[65] *Carcieri,* 129 S. Ct. at 1070 (Breyer, J., concurring).

[66] *Id.*

[67] *See* Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion, August 31, 1936, I Op. Sol. on Indian Affairs 668 (U.S.D.I. 1979) ("Purchases Under Wheeler-Howard Act"); Solicitor's Opinion, May 1, 1937, I Op. Sol. on Indian Affairs 747 (U.S.D.I. 1979) ("Status of Nahma and Beaver Indians"); Solicitor's Opinion, February 8, 1937, I Op. Sol. on Indian Affairs 724 (U.S.D.I. 1979) ("Status of St. Croix Chippewas"); Solicitor's Opinion, March 15, 1937, I Op. Sol. on Indian Affairs 735 (U.S.D.I. 1979) ("St Croix Indians – Enrollees of Dr. Wooster"); Solicitor's Opinion, January 4, 1937, I Op. Sol. on Indian Affairs 706 (U.S.D.I. 1979) ("IRA – Acquisition of Land"); Solicitor's Opinion, December 13, 1938, I Op. Sol. on Indian Affairs 864 (U.S.D.I. 1979) ("Oklahoma – Recognized Tribes"). In the ultimate irony, the Solicitor issued an opinion that, contrary to Commissioner Collier's belief that "the Federal Government has not considered these Indians as Federal wards," the Catawba Tribe was eligible to reorganize under the IRA. Solicitor's Opinion, March 20, 1944, II Op. Sol. on Indian Affairs 1255 (U.S.D.I. 1979) ("Catawba Tribe – Recognition Under IRA").

[68] Stillaguamish Memorandum at 6, note 1.

[69] *Id.* at 7.

For example, beginning with the Mole Lake Band of Chippewas,[70] the Solicitor's Office looked at factors such as whether the group ever had a treaty relationship with the United States, whether it had been denominated as a tribe by an act of Congress or executive order, and whether the group had been treated by the United States as having collective rights in tribal lands or funds, even if the group was not expressly designated as a tribe. In the Mole Lake Band opinion, the Solicitor referenced federal actions such as the receipt of annuities from a treaty, education assistance, and other federal forms of support. Likewise, in a later opinion regarding and reassessing the status of the Burns Paiute Indians, the Associate Solicitor noted that "the United States has, over the years, treated the Burns Indians as a distinct entity, placed them under agency jurisdiction, provided them with some degree of economic assistance and school, health and community services and, for the specific purpose of a rehabilitation grant, has designated them as Burns Community, Paiute Tribe, a recognized but unorganized tribe."[71] The opinion also specifically cited an unratified treaty between the United States and predecessors of the Burns Pauite as "showing that they have had treaty relations with the government."[72] Similarly, in finding that the Wisconsin Winnebago could organize separately, the Solicitor pointed to factors such as legislation specific to the tribe and the approval of attorney contracts.[73]

A 1980 memorandum from the Associate Solicitor, Indian Affairs, to the Assistant Secretary, Indian Affairs, regarding a proposed trust acquisition for the Stillaguamish Tribe, also discusses Interior's prior interpretation of Section 19 of the IRA.[74] According to this memorandum, the phrase "'recognized tribe now under [f]ederal jurisdiction' . . . includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time." The Associate Solicitor ultimately concluded that the Secretary could take land into trust for the Stillaguamish, noting that, "[t]he Solicitor's Office was called upon repeatedly in the 1930's to determine the status of groups seeking to organize. . . . None of these opinions expresses surprise that the status of an Indian group should be unclear, nor do they contain any suggestion that it is improper to determine the status of a tribe after 1934 . . . . Thus it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a 'recognized tribe now under [f]ederal jurisdiction' and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability."[75]

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[70] Memo. Solicitor of the Interior, Feb. 8, 1937.
[71] Memo. from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, Nov. 16, 1967 (M-36759).
[72] Felix Cohen, *Handbook of Federal Indian Law*, § 3.02[6][d] at 151 (2005 ed.).
[73] Memo. from Nathan R. Margold, Solicitor, to the Comm'r on Indian Affairs, Mar. 6, 1937.
[74] This memorandum was lodged with the Supreme Court as part of the *Carcieri* case and cited by Justice Breyer in his concurrence. *Carcieri*, 129 S. Ct. at 1070.
[75] Stillaguamish Memorandum at 7-8, citing Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion, August 31, 1936, I Op. Sol. on Indian Affairs 668 (U.S.D.I. 1979) ("Purchases Under Wheeler-Howard Act"); Solicitor's Opinion, May 1, 1937, I Op. Sol. on Indian Affairs 747 (U.S.D.I. 1979) ("Status of Nahma and Beaver Indians"); Solicitor's Opinion, February 8, 1937, I Op. Sol. on Indian Affairs 724 (U.S.D.I. 1979) ("Status of St. Croix Chippewas"); Solicitor's Opinion, March 15, 1937, I Op. Sol. on Indian Affairs 735 (U.S.D.I. 1979) ("St Croix Indians – Enrollees of Dr. Wooster"); Solicitor's Opinion, January 4, 1937, I Op. Sol. on Indian Affairs 706 (U.S.D.I. 1979) ("IRA – Acquisition of Land"); Solicitor's Opinion, December 13, 1938, I Op. Sol. on Indian Affairs 864 (U.S.D.I. 1979) ("Oklahoma – Recognized Tribes").

Admittedly, the Department made errors in its implementation of the IRA. Several groups of Indians were determined not to be tribes—but later found to be tribes; some tribes were neglected in the implementation of the IRA; and some tribes simply chose not to organize despite their lack of reservation or trust lands.[76] As such, as Justice Breyer notes, the lack of action on the part of the Department in implementing the IRA for a particular tribe does not necessarily answer the question whether the tribe was "under federal jurisdiction in 1934."

a. Basic Principles

The discussion of "under federal jurisdiction" should also be understood against the backdrop of basic principles of Indian law, which define the Federal Government's unique and evolving relationship with Indian tribes. The Constitution confers upon the Federal Government broad powers to administer Indian affairs. The Indian Commerce Clause provides the Congress with the authority to regulate commerce "with the Indian tribes." U.S. CONST., art. I, § 8, cl. 3, and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate. U.S. CONST., art. II, § 2, cl. 2. The Supreme Court has long held that "[t]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[77]

The Court has also recognized that "[i]nsofar as [Indian affairs were traditionally an aspect of military and foreign policy], Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.'"[78] In addition, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation . . . ."[79] Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities . . . ."[80]

Lastly, the Supremacy Clause, U.S. CONST., art. VI, §1, cl. 2, ensures that laws regulating Indian Affairs and treaties with tribes supersede conflicting state laws. These constitutional

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[76] *See Indian Affairs and the Indian Reorganization Act: The Twenty Year Record* (W. Kelly ed. 1954).
[77] *United States v. Lara*, 541 U.S. 193, 200 (2004); *Hartford Fire Ins. Co.v. California*, 509 U.S. 764, 813 (1993) (If Congress possesses legislative jurisdiction then the question is whether and to what extent, Congress has exercised that undoubted jurisdiction.); *Morton v. Mancari*, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").
[78] *Lara*, 541 U.S. at 201.
[79] *Morton v. Mancari*, 417 U.S. at 552 (citation omitted).
[80] *United States v. Sandoval*, 231 U.S. at 45-46; *see also United States v. Kagama*, 118 U.S. 375, 384-385 (1886) ("From [the Indians'] very weakness[,] so largely due to the course of dealing of the Federal Government . . . and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . It must exist in that government, because it never has existed anywhere else . . . .").

authorities serve as the continuing underlying legal authority for Congress, as well as the Executive Branch, to exercise jurisdiction over tribes, and thus serve as the backdrop of federal jurisdiction.[81]

Congress exercised its plenary power authority over tribes in a variety of ways from historical times up to 1934.

For example, between 1789 and 1871, over 365 treaties with tribes were negotiated by the President and ratified by the Senate under the Treaty Clause. Many more treaties were negotiated but never ratified. Many treaties established on-going legal obligations of the United States to the treaty tribe(s), including, but not limited to, annuity payments, provisions for teachers, blacksmiths, doctors, usufructury hunting, fishing and gathering rights, housing, and the reservation of land and water rights. Furthermore, treaties themselves implicitly established United States jurisdiction over tribes. Even if the treaty negotiations were unsuccessful, the act of the Executive Branch undertaking such negotiations constitutes, at a minimum, acknowledgment of jurisdiction over those particular tribes.[82]

As Indian policy changed over time — from treaty making to legislation to assimilation and allotment — the types of federal actions that evidenced a tribe was under federal jurisdiction changed as well. Legislative acts abound, the implementation of which demonstrate varying degrees of jurisdiction over Indian tribes. Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137 (1790), Congress first established the rules for conducting commerce with the Indian tribes. The Trade and Intercourse Act (sometimes referred to as the Non-Intercourse Act), last amended in 1834, 4 Stat. 729 (1834), regulated trading houses, liquor sales, land transactions, and other various commercial activities occurring in Indian Country. The Trade and Intercourse Acts also established both civil and criminal jurisdiction over non-Indians who violated the Act. Notably, these Acts did not assert such jurisdiction over the internal affairs of Indian tribes or over individual Indians, but over the interaction between tribes and tribal members and non-Indians.[83] The Indian Contracting Act required the Secretary of the Interior to approve all contracts between non-Indians and Indian tribes or individuals.[84] As a result, any contracts formed between Indian tribes and non-Indians without federal approval were automatically null and void. The Major Crimes Act gave the federal courts jurisdiction for the first time over crimes committed by Indians against Indians in Indian Country.[85] Bolstered by the Supreme Court decision in *United States v. Kagama*, 118 U.S. 375 (1886), which held that Congress has "plenary authority" over Indians, Congress continued passing legislation that reflected jurisdiction over Indians and Indian tribes. Both legislation and significant judicial decisions reflected the move to a more robust "guardian-ward" relationship between the Federal Government and Indian tribes.[86]

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[81] Because this authority lies in the Constitution, it cannot be divested except by Constitutional amendment.
[99] *Worcester v. Georgia,* 31 U.S. 515, 556, 569-60 (1832).
[83] The courts have held that the Non-Intercourse Act created a special relationship between the Federal Government and those Indians covered by the Act. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).
[84] Ch. 120, § 3, 16 Stat. 544, 570-71 (1871).
[85] Act of Mar. 3, 1885, § 9, 23 Stat. 362 (1885). The Major Crimes Act was passed in response to *Ex Parte Crow Dog*, where the Supreme Court held that the federal courts did not have jurisdiction over crimes committed by individual Indians against another Indian. *Ex Parte Crow Dog,* 109 U.S. 556 (1883).
[86] 70 Mich. L. Rev., at 956-60.

Additionally, annual appropriations bills listed appropriations for some individually named tribes and reservations.[87] However, in 1913 Congress passed the Snyder Act, 25 U.S.C. § 13, which granted the Secretary authority to direct congressional appropriations to provide for the general welfare, education, health, and other services for Indians.

In what some would consider the ultimate exercise of Congress' plenary authority, the General Allotment Act was enacted to break up tribally owned lands and allot those lands to individual Indians based on the Federal Government's policy during that time to assimilate Indians into mainstream society.[88] Congress subsequently enacted specific allotment acts for many tribes.[89] Pursuant to these acts, lands were conveyed to individual Indians and the Federal Government retained federal supervision over these lands for a certain period of time. Lands not allotted to individual Indians were held in trust for tribal or government purposes. The remaining lands were considered surplus, and sold to non-Indians. Eventually the Federal Government kept individual allotments in trust or otherwise restricted the alienability of the land. This left federal supervision over Indian lands firmly in place.

The IRA itself, intended to reverse the effects of the allotment acts and the allotment era, was also an exercise in Congress' plenary authority over tribes but which, as discussed above, was intended to have some limiting application to certain tribes and individual Indians.[90]

The Executive Branch has also regularly exercised such authority over tribes. The War Department initially had the responsibility for Indian affairs. In 1832, Congress established the Commissioner of Indian Affairs who was responsible, at the direction of the Secretary of War, for the "direction and management of all Indian affairs, and of all matters arising out of Indian relations . . . ."[91] The Office was thus charged with implementing and executing treaties and other legislation related to tribes and Indians. The Office of Indian Affairs was transferred to the Department of the Interior in 1849.[92] With the allotment and assimilation eras, and at the time the IRA was passed, the Office of Indian Affairs and the agents and

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[87] For example, the same legislation that contained the Indian Contracting Act also appropriated funds for over 100 named tribes and bands. *See* Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 547 550, 551 (for such purposes as assisting a band in operating its village school, paying a tribal chief's salary, and providing general support of a tribal government). *See also* Act of May 31, 1900, ch. 598, 31 Stat. 221, 224 (appropriating funds for a variety of tribal services, such as Indian police and Indian courts).

[88] The Dawes Act, 24 Stat. 388 (Feb. 8, 1887).

[89] *See e.g.,* Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 ("Five Civilized Tribes Act"); Five Civilized Tribes Act; Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act'); Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 ("Nelson Act of 1889").

[90] *See infra* discussion at Section IV(D)(3)(b). In addition, since the IRA, Congress has exercised its constitutional jurisdiction in various ways. For example in the 1940's and 1950's, as the termination era began, Congress reversed the policy of the IRA and terminated the federal supervision over several tribes. *See* Menonimee Indian Termination Act of 1954, 68 Stat. 250 (June 17, 1954), as amended, 25 U.S.C. §§ 891-902, California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (Aug. 18, 1958), Klamath Termination Act, 68 Stat. 718 (Aug. 13, 1954) (codified at 25 U.S.C. § 564 *et seq.*). Then, in the 1970's Congress reversed position again, and restored many of those tribes that had been terminated. And, in a policy consistent with the IRA, in 1975 Congress passed the hallmark Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*

[91] An Act to provide for the appointment of a commission of Indian Affairs, 4 Stat. 564 (codified at 25 U.S.C. § 1).

[92] 9 Stat. 395 (Mar. 3, 1849).

superintendents of the Indian reservations exercised virtually unfettered supervision over tribes and Indians.[93] The Office of Indian Affairs became responsible, for example, for the administration of Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their land. As part of the exercise of this administrative jurisdiction, the Office produced annual reports, surveys, and census reports on many of the tribes and Indians under its jurisdiction.

This summary of the exercise of action by the United States through treaty, legislation, the Executive Branch and the Office of Indian Affairs serves as a non-exclusive representation of the types of actions and jurisdiction that the United States has asserted over Indians over the course of its history.

b. Defining "Under Federal Jurisdiction"

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction." Nor does the legislative history clarify the meaning of the phrase. The only information that can be gleaned from the Senate hearing of May 17, 1934, is that the Senators intended it as a means of attaching some degree of qualification to the term "recognized Indian tribe." The addition of the phrase was proposed at an ambiguous and confused colloquy at the conclusion of the Senate hearing, discussed above. Chairman Wheeler queried whether a "limitation after the description of the tribe" was needed.[94] He also noted that "several so-called 'tribes' . . . . They are no more Indians than you or I, perhaps."[95] Based on his reading of this portion of the Senate hearing, Justice Breyer concluded that the Senate Committee adopted this phrase to "resolve[] a specific underlying difficulty" in the first part of the definition of "Indian."[96]

Having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

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[93] Meriam Report at 140-54 (recommending decentralization of control); Id. at 140-41("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity . . . . Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs.").

[94] Senate Hearing at 266 (Statement of Chairman Wheeler).

[95] *Id.*

[96] *Carcieri*, 129 S. Ct. at 1069.

For example, some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealings with the tribe.[97] Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, the negotiation of and/or entering into treaties, the approval of contracts between a tribe and non-Indians, enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe. Evidence may also consist of actions by the Office of Indian Affairs, which became responsible, for example, for the administration of the Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. There may, of course, be other types of actions not referenced herein that evidence the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe.

Once having identified that the tribe was under federal jurisdiction, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934.[98] For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. It should be noted, however, that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status.[99] Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

This interpretation of the phrase "under federal jurisdiction," including the two-part inquiry outlined above, is consistent with the legislative history, which as discussed elsewhere in this memorandum shows that the phrase was meant to qualify the term "recognized Indian tribe," as well as with Interior's post-enactment practices in implementing the statute, as discussed above.

Below, is a further discussion of the two-part inquiry and a number of facts and federal actions specific to the Cowlitz Tribe that support the conclusion that the Tribe was under federal jurisdiction in 1934.

1. Legal Backdrop of "Under Federal Jurisdiction"

The Cowlitz Tribe and others have asserted that tribes are under federal jurisdiction as a matter of law pursuant to Congress' constitutional plenary authority over tribes. The Tribe

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[97] *See* Stilliguamish Memorandum at 2; *see also United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost 100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

[98] For some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to reorganize under the IRA in the years following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934. For such tribes, there is no need to proceed to the second step of the two-part inquiry.

[99] *See* Stilliguamish Memorandum.

first argues that the phrase "under federal jurisdiction" has a plain meaning,[100] and that meaning is synonymous with Congress' plenary authority over tribes pursuant to the Indian Commerce Clause. For the reasons stated above, I disagree that the phrase has a plain meaning, but rather I conclude that the phrase is ambiguous and requires further inquiry. The Tribe has also posited that Congress's plenary authority—its bare constitutional jurisdiction—cannot be divested absent constitutional amendment and is sufficient to find that a tribe, once recognized, remains under federal jurisdiction until or unless Congress explicitly terminated its jurisdiction or the tribe ceased its tribal relations.

Proponents of the plain meaning interpretation rely on *United States v. Rodgers,* 466 U.S. 475, 479 (1984). There the Supreme Court interpreted the term "jurisdiction" as used in a federal criminal code amendment enacted the same day as the IRA.[101] Since the term "jurisdiction" was not defined in the statute, *Rodgers* relied on dictionary definitions to discern the term's "ordinary meaning":

> "Jurisdiction" is not defined in the statute. I 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.[102]

Based on this interpretation, when the IRA was enacted in 1934, "jurisdiction" meant the sphere of authority; and "under federal jurisdiction" in Section 19 meant that the recognized tribe was subject to the Indian Affairs' authority of the United States. As the Cowlitz Tribe states in its Supplemental Submission:

> Based on the plain meaning of the word "jurisdiction," as well as on a long line of cases that consider the matter, it is clear that Congress' well-established plenary authority is synonymous with plenary legal jurisdiction. . . . [C]ongress' jurisdiction over Indian tribes is, as a legal matter, continuous and uninterruptable unless the tribe itself ceases to exist . . . or unless the Constitution some day is amended to say otherwise. Accordingly, a group of Indians that reasonably can be understood to have existed as a "tribe" that had maintained tribal relations in 1934, was, as a legal matter, a tribe under federal jurisdiction in 1934. [103]

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[100] The Cowlitz Tribe argues that dictionary definitions of the term "jurisdiction" provide a plain meaning for the statutory phrase "under federal jurisdiction." As I discuss below, I disagree with this contention.

[101] 466 U.S. at 478.

[102] *Id.* at 479 (quotations and internal citations omitted).

[103] Cowliz Supplemental Submission at 13 (June 18, 2009).

This plenary authority interpretation in effect presumes that jurisdiction over a tribe is always synonymous with the full extent of Congress' constitutional authority over Indian Affairs. While I agree that Congress's constitutional plenary authority over Indian tribes cannot be divested; I further believe that the Supreme Court's ruling in *Carcieri* calls for us, in addition, to point to some indication that in 1934 the tribe in question was under federal jurisdiction. Reliance solely on the plenary authority interpretation would allow the Secretary to acquire land in trust for "any recognized Indian tribe," which is at odds with the Supreme Court's ruling in *Carcieri*. Rather, after Carcieri, I believe that a tribe must make a further showing that the United States has exercised its jurisdiction, [104] while recognizing that this interpretation may prove somewhat less restrictive than it first appears because a tribe may have been under federal jurisdiction in 1934 even though the United States did not believe so at the time.[105]

Application of Two Part Inquiry to Cowlitz Tribe

Based on our analysis of the entire administrative record, I conclude that the record reflects a course of dealings between the United States and the Cowlitz Tribe during the 1850s and that there is sufficient subsequent evidence that the Tribe remained under federal jurisdiction in 1934.

A. Course of Dealings and Exercise of Jurisdiction

In accordance with step one of our two part inquiry I conclude that the first clear expression that the Cowlitz Tribe (or its predecessors) was under federal jurisdiction is reflected by the United States' treaty negotiations with the Lower Band of Cowlitz Indians. In particular, in February 1855, Governor Stevens engaged in a week of negotiations with the Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets Indians at a location on the Chehalis River just east of Grays Harbor. The proposed treaty presented to the Indians during the negotiations called for them to cede all their claims to territory covering much of southwestern Washington in exchange for a single reservation to be provided later, most likely on the Pacific Ocean. When the Indian negotiators from the inland tribes rejected these provisions due to their location and the Government's insistence on locating all the tribes together, Governor Stevens ended the negotiations.[106] While the negotiations did not result in a treaty, these events, as well as those discussed below, clearly reflect the existence of a relationship with the Tribe (or its predecessors); at a minimum it demonstrates that the Federal Government acknowledged responsibility for the Tribe (or its predecessors). This relationship and responsibility constitutes sufficient evidence of federal jurisdiction as of at least 1855.

The historical record, which is summarized below, provides no clear evidence that the United States terminated the Tribe's jurisdictional status, or that the Tribe otherwise lost that status, at any point between the mid-1850s and 1934. Moreover, the historical record also evidences

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[104] The Court's holding in *Carcieri* requires a further showing regardless of whether the tribe at issue is recognized in the cognitive or political sense *Carcieri*, 129 S. Ct. at 1068.
[105] *See supra* Section IV(A)(2) discussing Justice Breyer's concurring opinion in *Carcieri*.
[106] *Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 167-69 (June 25, 1969) ("Cowlitz").

a continuing jurisdictional relationship between the Tribe and the United States up to and including 1934. The second part of our two-part inquiry, therefore, is satisfied

Notwithstanding the lack of reservation for the Cowlitz and other non-treaty Indians, the Federal Government continued a course of dealings with both the Tribe and its members. During the rest of the 1850's and into the 1860's, officials of the Department continued to recommend that the United States enter into a treaty with the non-treaty Indians, including the Cowlitz, because they recognized that Indian title to the land had never been properly ceded.[107] For example, in his 1862 report, Superintendent C. H. Hale requested that treaties be entered into with the Chehalis, Cowlitz and other tribes. He included the sum of $7500.00 for the expenses of holding a treaty council with these tribes in his estimate of expenses for 1863.[108] Additionally, during the 1860's, Office of Indian Affairs officials in Washington Territory made several efforts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation.[109]

In June of 1868, the local Superintendent attempted to distribute goods and provisions to the non-treaty Indians at a meeting on the Chehalis Reservation. He reported that the Cowlitz Indians obeyed the invitation to be at the distribution, but refused to accept either goods or provisions, believing, as they declared, that the acceptance of presents would be construed into a surrender of their title to lands on the Cowlitz River where they have always lived, and where they desire that the Government would give them a small reservation, which if it would do, they would accept presents, but never until then.[110]

As a result of requests by the non-Indians among whom the Cowlitz were living, in 1878 officials of the Federal Government deemed it necessary to formally acknowledge two individuals to be the "chiefs" of the Lower and Upper Bands of the Cowlitz.[111] Thereafter, until 1912, after both chiefs died, the Federal Government communicated with the Tribe through these individuals as the official representatives of their people.[112] In 1878 and 1880, the local Superintendent also enumerated the members of both bands and then listed them together in that year's statistical tabulation.[113] This action constitutes further unambiguous federal jurisdiction over the amalgamated bands as single entity.

Through the rest of the 19th century, consistent with the then prevailing policy of focusing on individual Indians while minimizing tribal governments, Cowlitz Indians continued to be identified as such by, and provided services from, the Federal Government. For example, although the 1893 annual report described how the Cowlitz Indians were absorbed into their surrounding settlement so that they hardly formed a distinct class, in 1894 the local Superintendent stated that the Federal Government continued to provide for non-reservation Indians via schools and medical needs.[114]

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[107] *Cowlitz*, 25 Ind. Cl. Comm. 442, 454-56 (June 23, 1971).
[108] *Cowlitz*, 25 Ind. Cl. Comm. at 456.
[109] *Cowlitz*, 25 Ind. Cl. Comm. at 454-56.
[110] HTR at 75-76.
[111] HTR at 79, 85.
[112] HTR at 133-39.
[113] HTR at 2.
[114] HTR at 95.

The provision of services to, and actions on behalf of, Cowlitz Indians by the Federal Government continued into the 20th century. Descriptions of these actions and documentary evidence of the actions is provided by the Cowlitz submissions and is found in the federal acknowledgment record. These services included attendance by Cowlitz children at BIA operated schools and authorization of the expenditure of money being held by the Department for health services, funeral expenses, or goods at a local store on behalf of Cowlitz Indians.[115]

The local Indian Agency representatives repeatedly included Cowlitz Indians as among those for whom they believed they had supervisory responsibilities. For example, during the 1920s the Superintendant in the Taholah Agency represented the interests of the Cowlitz Tribe vis a vis state parties for purposes of asserting fishing rights.[116] In January 1927, the Superintendent of the Taholah Agency responding to an inquiry about a possible claim against the Government by the Cowlitz noted that "[t]he Cowlitz band are under the Taholah Agency" not the Tulalip Agency.[117] Later that year, the same Superintendent wrote to the principal of a school on the Yakama Reservation to seek information about certain students who attended school there. He stated that "[m]y jurisdiction includes all those Indians belonging to the Quinaielt, Quileute, Chehalis, Nisqually, Skokomish, Cowlitz, and Squaxin Island Tribes."[118] A later example is the Annual Report for 1937 in which a figure of 500 "unattached Indians largely of Cowlitz tribe" are identified as "Indians under the supervision of the Office of Indian Affairs whose names do not appear on the census rolls at Indian agencies . . . ."[119]

Indeed, some representatives even spoke in terms of a Cowlitz "reservation" although none was ever established for the Tribe. For example, in April 1923, the Superintendent wrote to the Commissioner of Indian Affairs regarding traveling expenses to describe "the reservations under this jurisdiction, also the country inhabited by the detached Indian homesteaders." Included among the reservations is a reference to "the Cowlitz Reservation located in the Cowlitz River Valley." [120]

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[115] Certain statements made by government officials in 1924 does not alter this analysis or conclusion. For example, the record contains a government correspondence that describe the Cowlitz Indians as "scattered all over the northwest," Cowlitz Tribe Document at 000011 (included with Cowlitz Tribe's supplemental submission June 18, 2009), or as "liv[ing] very much as white people do." Cowlitz Tribe Document at 000012-13. Another example is a statement by Interior Secretary Work in 1924 commenting in opposition on proposed legislation that would have allowed the Cowlitz to file a claim against the United States. After describing how he understood the Cowlitz Indians were then living, he concluded that "the Cowlitz Indians are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic." HTR at 126. These statements, however, are not consistent with the wide range of federal actions and activities relating to the Cowlitz Tribe and its predecessors, nor are they consistent with the Tribe's later acknowledgment, which determined that the Cowlitz Tribe continuously existed since at least 1855. The FAP determination belies the notion that the Cowlitz Tribe lacked political integrity.

[116] HTR at 124. Regardless of whether Cowlitz Indians had any actual fishing rights, the Superintendent's actions demonstrate that BIA regarded the Cowlitz as under the protection and jurisdiction of the Agency.

[117] Cowlitz Tribe Document at 000016-17.

[118] Cowlitz Tribe Document at 000018.

[119] 1937 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 250 ("Annual Report").

[120] Cowlitz Tribe Documents at 000002-03 and 000008-09 (duplicates).

In 1904 the Cowlitz began a prolonged effort to obtain legislation to bring a claim against the United States for the taking of their land.[121] Evidence supporting this claim was presented to the Department and in 1910, the Department requested that Special Indian Agent Charles McChesney prepare a report on their claim. McChesney's report concluded that the claim of Cowlitz Indians was a just one, and that they should receive compensation for land they had occupied and never ceded. The local Superintendent supported this report and described Cowlitz as follows:

> These Indians, like the Clallams, have never had any recognition at the hands of the Government and were active allies of the United States during the Indian troubles of the early days. These Indians are industrious and should be accorded recognition. I estimate that there are about 100 members of this tribe. The Clallam and the Cowlitz Tribes are the only two tribes in Southwestern Washington who have preserved their tribal identity who have not had any recognition from the government.[122]

Ultimately, the Tribe was not successful in obtaining special legislation, but was awarded a judgment for its land from the Indian Claims Commission.[123]

As mentioned above, Cowlitz Indians were enumerated in the censuses taken in 1878 and 1880,[124] and during the early 20th century the annual Indian population reports often made mention of the Cowlitz Indians or Cowlitz Tribe, although they were not enumerated in the annual censuses required by the Appropriations Act of July 4, 1884.[125] For example, from 1914 through 1923, the population table at the end of the Annual Report included a figure for "unattached Indians" in southwest Washington State that set forth an estimated number of Cowlitz. From 1930 through 1938, the total population of unenumerated Indians was listed separately from those enumerated, and each year a population of approximately 500, identified as associated with the Taholah Agency, is described as either "scattered bands" or "unattached Indians largely of the Cowlitz Tribe."[126] Although not identified in the census as a "tribe," the inclusion of Cowlitz Indians demonstrates evidence that those Indians were accounted for in official federal records and that while they lacked a land base they were still subject to federal oversight.[127] As a matter of practice at the time, the Indian Service did not

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[121] HTR at 105-09.
[122] HTR at 109.
[123] *See* 25 Ind. Cl. Comm 442.
[124] Final Determination for Federal Acknowledgement decision, 62 Fed. Reg. 8463 (Feb. 18, 2000); Reconsidered Final Determination for Federal Acknowledgment, 67 Fed. Reg. 607 (Jan. 4, 2002).
[125] Although the Cowlitz Tribe was not listed on various annual population censuses for Tribes, individual Cowlitz Indians were listed on some census rolls. Moreover, Cowlitz was a landless tribe and thus it is logical and reasonable to assume that individuals would be listed on the rolls as they were located rather than listing the tribe as a whole.
[126] Indians listed on these annual census lists compiled by the responsible BIA agency establishes that those Indians were under that particular agency regardless of where they resided, which at the time was also referred to as the "jurisdiction" of the particular reporting agency. *See* Solicitor's Opinion, Status of the Ottawa Tribe of Oklahoma as "under federal jurisdiction" on June 18, 1934, at 5 (Oct. 7, 2010). Thus, being listed on such census populations can be sufficient to show that a tribe was "under federal jurisdiction" at the time of the census roll. *Id.* at 5-6.
[127] *See also* Cowlitz Tribe Document 000010: Letter from Superintendant, Taholah Indian Agency to Commissioner of Indian Affairs (July 24, 1904) (reporting that the Cowlitz Tribe "living on the public domain in

enumerate the Cowlitz Indians in the annual censuses because of BIA's administrative practice not to enumerate or compile a membership roll for tribes that lacked a reservation or other federal asset.[128] This practice is reflected in an October 1933 letter from Commissioner Collier to an individual seeking enrollment with the Cowlitz Tribe.

In addition to membership rolls or censuses, BIA also kept separate censuses by reservation that would include all individuals who obtained rights to that reservation's land through allotments. For the roll associated with the Quinault Reservation, individuals were identified as being members of their own tribes, including Cowlitz, not members of the Quinault Tribe. The distinction is explained in a March 16, 1934 instruction to the Taholah Superintendent from Commissioner Collier. Collier explains that receipt of an allotment on the Quinault Reservation by a Chinook, Chehalis or Cowlitz Indian did not mean that such Indian should be included on the tribal roll for Quinault, only that he/she should be included on the census roll for the Quinault Reservation. He continued by stating that "they should be enrolled, if under your jurisdiction, as Chinook, Chehalis, and Cowlitz Indians."[129]

Other evidence of federal jurisdiction and a continuing course of dealings relates to allotments issued to Cowlitz Indians.[130] The first allotment issued to a Cowlitz Indian occurred in 1888, pursuant to the amended Indian Homestead Act, Act of July 4, 1884, 23 Stat. 76, 96.[131] According to information gathered for the acknowledgment decision, approximately 20-30 other off-reservation allotments were ultimately issued to Cowlitz Indians, some of which were granted as homesteads under the Homestead Act and some as Section 4 (public domain) allotments under the General Allotment Act.[132] The Department's view at the time of acknowledgment was that "the law establishing the public domain allotments appears to treat non-reservation groups whose members got such allotments as having the same status as clearly recognized, reservation tribes . . . . There is supporting evidence that the allotment was

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the Cowlitz River Valley" were "under my jurisdiction"); Cowlitz Tribe Document 000022: Letter from Deputy Disbursing Agent, Taholah Indian Agency to Mr. E.G. Potter (June 5, 1929) ("I will state that the Cowlitz Tribe of Indians are within my jurisdiction . . . .").

[128] *But see supra* note 55 and accompanying text, in which Collier in 1933 letter indicated that the Indian Service was not keeping enrollment information for the Cowlitz Tribe because it had no reservation and no tribal funds were on deposit under government control. While Collier also stated that the Cowlitz Tribes was no longer in existence, this conclusion, of course, is not consistent with the Department's acknowledgement determination that the Cowlitz Tribe did exist throughout the 20th century as a continuous political entity. Collier's conclusory and unsupported statement should therefore carry less weight than the thorough analysis of the historical record performed for the acknowledgment decision.

[129] Interestingly, this treatment of Cowlitz Indians differs greatly from that of Collier's just a year earlier and minimizes any suggestion that Collier's characterization of the Tribe in the 1933 letter should have particular weight in a determination of whether the Cowlitz Tribe was under federal jurisdiction in 1934.

[130] *See also* HTR at 92-93 n.78, City of Vancouver AR 6375 ("No documentation has been found which explicitly declares that a public domain allottee's tribe had to have been under Federal jurisdiction at the time the allotment was made. However, the overall context of Indian Service directives and agency documents concerning public domain allotments very strongly indicates that the U.S. sought allotments for tribes for which it had an acknowledged responsibility.") (citing BAR 9/23/96, 51).

[131] HTR at 90. *See also* HTR at 93-94, AR 6376 ("[The public domain allotment] program itself is based on a recognition that there were substantial number of Indians, including entire tribes, for which no reservation had been established by 1887 and for whom the Federal [G]overnment had a responsibility.") (citing BAR 9/23/96, 53).

[132] Appendix III to the Genealogical Technical Report ("GTR") prepared in association with the Summary under the Criteria and Evidence for Proposed Finding, at 111-12 (Feb. 12, 1997).

based on a [f]ederal relationship."[133] Furthermore, at the time the IRA was passed, Indians possessing homestead allotments on the public domain were still eligible to organize.[134] These allotments were issued as trust allotments, and there is substantial evidence that the Indian Service took actions in support of these allotments. For example, the local Superintendent supervised a sale of an Indian allotment for James Satanas,[135] wrote a letter to Lewis County protesting a possible tax sale of an allotment still in trust status,[136] and dealt with probate activity associated with these lands.

Some Cowlitz Indians also received allotments on the Quinault Reservation if they had not received one on another reservation or the public domain. The basis for such allotments is found in the Executive Order creating the Quinault Reservation and a 1911 Act. The November 4, 1873, Executive Order established the Reservation for "the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast." The Act of March 4, 1911 confirmed pre-existing allotment activity by directing the Secretary to make allotments on the Quinault Reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes."

In *Halbert v. United States*,[137] a suit filed by members of various tribes who had been denied allotments, the Court held that "the Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere."[138] As a part of the factual background for the lawsuit, the Court noted that since 1905 members of the affected tribes had been receiving allotments, and that "[t]he record contains a stipulation showing that the applications were rejected but not disclosing the grounds of that ruling." [139] The reference to the "Cowlitz Tribe" in the Halbert decision of 1931, the action by Congress to provide allotments for "other tribes of Indians in Washington" in the 1911 Act and its implementation as to Cowlitz Indians, and the virtually consistent position taken by the Department to grant allotments to eligible Cowlitz Indians during the period from 1905 to 1930 supports a conclusion that the Cowlitz Tribe was under federal jurisdiction during this period of time.[140]

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[133] *Id.*

[134] *See* Solicitor's Opinion, March 6, 1937, I Op. Sol. on Indian Affairs 732 (U.S.D.I. 1979) ("Status of Wisconsin Winnebago"):

> It is my further opinion that these Indians are not denied the benefit of organization or land purchase because of the fact that they are not reservation Indians but possess homestead allotments. Section 8 of the Reorganization act provides that nothing contained in the act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of any Indian reservation. This section applies to those provisions of the act which would affect the allotments and homesteads themselves and not to those provisions which extend privileges to persons who are Indians and who are members of a tribe.

[135] Cowlitz Tribe Document at # 000112.

[136] Cowlitz Tribe Document at # 000123.

[137] *Halbert v. United States*, 283 U.S. 753 (1931).

[138] *Halbert*, 283 U.S. at 760.

[139] *Id.*

[140] *See* 67 Fed. Reg. 607.

Finally, an important action by the Federal Government evidencing the Tribe was under federal jurisdiction in 1934 is the Department's approval of an attorney contract for the Tribe in 1932. In February of that year the local Superintendent from the Taholah Agency attended a meeting of the Cowlitz Tribe during which tribal delegates were chosen to work with attorneys who planned to bring claims on behalf of the Tribe against the United States. The Act of May 21, 1872, Revised Statutes § 2103, required that contracts between Indian tribes and attorneys had to be approved by both the Commissioner of Indian Affairs and the Secretary of the Interior in order to be valid. The Superintendent was present to observe the meeting and provided a report to the Commissioner describing how the tribal delegates were chosen. In April 1932, "in accordance with section 2103 of the United States Revised Statutes" the contract between "the Cowlitz Tribe or Band of Indians" and two attorneys was approved by the Commissioner and the First Assistant Secretary.[141] This action to approve the Cowlitz Tribe's contract in 1932 supports a finding that it was considered a tribe subject to the statutory requirement for Department supervision of its attorney contracts, and thus "under federal jurisdiction."[142]

All of this evidence, taken together, supports our conclusion that prior to and including 1934 the Cowlitz Tribe retained and did not lose its jurisdictional status as a tribe "under federal jurisdiction."[143]

B. Additional Considerations

1. Card Room Submissions

I have carefully reviewed the 2005 submissions to the NIGC arguing that the Cowlitz Tribe was not a restored tribe.[144] I have also reviewed the more recent, October 19, 2010 submission from Perkins Coie entitled: "The Cowlitz Tribe's Ineligibility to have Land Acquired in Trust under the Indian Reorganization Act of 1934." I find these submissions unpersuasive.

In the 2010 Perkins Coie submission on behalf of certain card rooms ("Card Rooms Submission"), they argue that the Cowlitz Tribe could never establish that it was under federal jurisdiction.[145] In this submission it is argued that:

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[141] Cowlitz Tribe Documents at 000060-69.

[142] *See* Solicitor Op. M-35029 (Mar. 17, 1948) (Solicitor contrasted a "tribe" from an "identifiable group of Indians" and noted that only tribes must have their attorney contracts approved under section 2103 of the Revised Statutes).

[143] Although the Cowlitz Tribe did not vote on the IRA, and made no efforts expended to gain land for itself after the IRA, it is important to note that organizing or participating in opportunities under the IRA is not indicative of whether a tribe was under federal jurisdiction. Indeed, many tribes that were clearly under the jurisdiction of the federal government chose not to organize under the IRA. *See* Haas Report, Table D at 33-4; 70 Mich. L. Rev. 955.

[144] Response to the Request of the Cowlitz Indian Tribe For a Restored Lands Determination, Submitted by Perkins Coie (Nov. 15, 2005).

[145] "The Cowlitz Tribe's Ineligibility To Have Land Acquired in Trust Under the Indian Reorganization Act of 1934." Submitted by Perkins Coie on behalf of Dragonslayer, Inc. and Michels Development (Oct. 19, 2010).

> The evidence on which the Tribe relies, however, is not evidence of a federal relationship with the Tribe qua tribe, but rather evidence of interactions between the federal government and individuals of Cowlitz descent. As the Tribe accurately argued in 2005, the federal government held the explicit view that there was no "Cowlitz Tribe" during the 20th century. Consequently, there is no reasonable basis for finding that the Tribe was "under federal jurisdiction" in 1934.[146]

Significantly, the Card Submission is devoid of any factual basis or supporting documentation, that "[i]n the federal government's eyes, the Tribe ceased to exist in 1880, and was not acknowledged to exist again until 2002."[147] Similarly, the submission does not posit any factual basis as to why the Cowlitz Tribe was not under federal jurisdiction in 1934. Moreover, the Card Room's argument conflates modern, more formal, notion of federal recognition with the IRA's reliance on "recognized Indian tribe" and "under federal jurisdiction." And, as I have discussed previously, the concept of "federally recognized tribe" is distinct from the term "recognized Indian tribe" as used in the IRA. The legislative history indicates that Congress most likely used the term "recognized Indian tribe" in the ethnological and cognitive sense. The facts and the record show that the Cowlitz tribe was "recognized" in 1934 as that term was used in the IRA.[148] I note, however, that recognition is not the inquiry before us. Rather it is the concept of "under federal jurisdiction" in 1934 that I am addressing. And as discussed above, because being federally recognized in the political sense today is not synonymous with "under federal jurisdiction," in our view the Tribe's admission that there was no formal government to government relationship (formal federal recognition) in 1934 is not fatal to the conclusion that the Tribe was under federal jurisdiction in 1934. Furthermore, the requirements to satisfy the IGRA Section 20 exceptions are not necessarily in contravention with the jurisdictional analysis and thus the NIGC opinion that the Federal Government did not have a government to government relationship with the Tribe for a certain period of time[149] is also not fatal to the determination that the Tribe was under federal jurisdiction in 1934.

Lastly the Card Rooms argue that the Tribe does satisfy any of the three Breyer examples. But, contrary to this argument and as discussed above, the information provided by the Tribe and the larger record provide sufficient evidence that is consistent with Justice Breyer's reference to types of actions that could constitute evidence of a tribe being under federal jurisdiction, even if BIA officials did not know it at the time.

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[146] *Id.* at 2.
[147] *Id.* at 8.
[148] Even if Congress had used the term "recognized tribe" to mean "federally recognized tribe," Congress did not opt to modify that term with "now." As a result, Congress did not require that the tribe at issue be federally recognized in 1934. The Cowlitz Tribe's subsequent federal recognition, therefore, is sufficient.
[149] In 2005 the National Indian Gaming Commission issued a decision that concluded that the Cowlitz Tribe was restored to recognition such that these lands, if acquired in trust, would be subject to the restored lands exception of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii). This conclusion was based upon a finding that between at least the early 1900s and 2002 the Tribe was not formally recognized by the United States. *But see supra* note 109.

2. Grand Ronde Submission[150]

The Grand Ronde submission to the NIGC was in 2005, before the *Carcieri* decision, and was submitted as part of NIGC's evaluation of the Cowlitz Tribe's request for an Indian lands determination under IGRA. I have reviewed it as part of the record before us on the land into trust decision. In that submission, Grand Ronde argues that IGRA requires "federal recognition" which they argue is a "formal recognition of the tribe by Congress or Executive Order and evidence of a continual political relationship with that entity."[151] They then focus on the Bureau's findings that both the Upper and Lower Cowlitz bands were federally acknowledged. They dismiss these findings by arguing: "[t]hese events show federal officials generally acknowledged the existence of the Upper and Lower Cowlitz as tribal entities, but they do not provide evidence that the Cowlitz Tribe was formally recognized."[152]

Like the Card Room Submission, Grand Ronde is analyzing the concept of "federally recognized tribe," which is a modern concept of the late 20th Century. It is a different concept than "under federal jurisdiction" in 1934. Finally, Grande Ronde argues, and NIGC later relied on, an October 29, 1975, letter from the Commissioner of Indians Affairs to Senator Abourezk stating that there had been no "continuous official contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe of Indians." Again, this confuses the concept of recognition under the IRA in 1934 and federal recognition under the IGRA and its regulations. Further, this letter pre-dates the acknowledgment regulations of 1978. In any event, it does not shed light on the concept of "under federal jurisdiction" in 1934.

Conclusion

Based on this analysis of the Cowlitz Tribe's history, I conclude that (1) the Cowlitz was under federal jurisdiction from at least 1855; and (2) this jurisdiction continued and was in effect in 1934.

The Tribe argues that there is:

> voluminous evidence that the [F]ederal [G]overnment was exercising jurisdiction over the Cowlitz Indian Tribe during the 1934 time period, including explicit statements to that effect, (requiring approval of attorney contracts, administering of allotments and trust land, making heirship determinations and probate proceedings, providing education, health and other services, management of funds, protection of fishing rights against State interference, and the keeping of census and other vital records), . . . makes it difficult to understand how the Department could conclude that the Cowlitz Indian Tribe was not under federal jurisdiction for *Carcieri* purposes.[153]

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[150] Confederated Tribes of the Grand Ronde Community of Oregon's Response in Opposition to the Cowlitz Indian Tribe's Request for a Restored Lands Opinion (Nov. 8, 2005).
[151] *Id.* at 9.
[152] *Id.*
[153] Cowlitz Supplemental Submission at 7 (Aug. 17, 2010).

I agree with the conclusion it draws from the evidence in the record, although I interpret the implications of *Carcieri* differently. The historical record provides no clear evidence that the United States terminated the Tribe's jurisdictional status, or that the Tribe otherwise lost that status, at any point between the mid-1850s and 1934. In fact, the Cowlitz Tribe was federally recognized as a tribe in 2002 based on evidence of a continuous political existence since at least 1855. Moreover, the record as a whole shows that there was a continuous course of dealings that strongly reflects federal supervision of the Tribe and its members prior to, and including, 1934 and into the present day. This course of dealings with Cowlitz existed from at least 1855 in which a band of the Cowlitz Tribe entered Treaty negotiations with the United States. As the record further shows, these course of dealings continued past 1855 to include a diverse array of federal interactions with Cowlitz, including a continued interest in negotiating a treaty, federal appointment of tribal leaders, a Secretarial approved attorney contract for the Cowlitz Tribe in 1932, numerous Indian Service efforts focused on services and responsibilities to the Cowlitz Indians related to land allotments held in trust from the early 1900s and beyond, which included protecting allotted lands, holding income generated by the land, and probating the estates of Indians who had received the homesteads. Additionally, throughout the 20th Century efforts were made to assist with education, health care, and fishing activities of the Cowlitz Indians. Lastly, throughout this time there are regular references in government documents to Cowlitz Indians and the Cowlitz Tribe. The Tribe and its members are repeatedly mentioned in the annual reports of the Indian Service, and are identified in a Congressional act and confirmed by a Supreme Court decision to be a tribe whose members may be eligible for allotments on the Quinault Reservation. This evidence is sufficient to conclude that the jurisdiction relationship between the Tribe and the United States remained intact. Based on this evidence and the lack of clear evidence of termination of the jurisdictional relationship, I conclude that based on the evidence in the record as a whole, the Cowlitz Tribe was under federal jurisdiction in 1934 for purposes of taking land into trust under the IRA.

8.3 25 C.F.R. 151.10(b). The Need Of The Individual Indian Or Tribe For Additional Land.

Section 151.10(b) requires consideration of the "the need of the…tribe for additional land."

As a general matter, the Cowlitz Indian Tribe's need to acquire land is dire because the Tribe currently holds no trust land whatsoever. As a consequence of the United States' historical failure to enter into a treaty with the Cowlitz, and its subsequent opening of Cowlitz lands to non-Indian settlement without compensation, the Tribe lost its lands and became dispersed. Over the course of time, the Tribe's landless status caused the United States to determine that the Tribe's government-to-government relationship with the United States had been terminated. While the Tribe completed the administrative Federal Acknowledgement Process with the U.S. Department of the Interior in 2002, resulting in restoration as a federally-recognized tribe, the Tribe still is not the beneficial owner of any lands held in trust by the United States. Placement of the Cowlitz Parcel into trust will promote tribal self-determination, provide opportunities for economic development, and aid in the construction of Indian housing. The Tribe's Business Plan details the Tribe's unmet needs and its strategy for generating revenue to address those unmet needs, which hinge on the trust acquisition of the proposed property. The proposed trust acquisition will provide a land base from which the Tribe may exercise governmental powers and operate governmental programs to serve its

membership, and will allow the Tribe to operate an enterprise which will provide the revenue for these programs.

The BIA has considered the Tribe's need for lands in trust status and finds that the Tribe has a demonstrable need to acquire the Cowlitz Parcel in trust.

8.4 25 C.F.R. 151.10(c). The Purposes For Which The Land Will Be Used.

Section 151.10(c) requires consideration of the purposes for which the land will be used.

As detailed in the Final EIS, the Tribe proposes to construct –Tribal facilities including a 20,000 square foot Tribal government office building, a 12,000 square foot Tribal cultural center, and approximately 16 Tribal elder housing units. As detailed in the Tribal Business Plan, the Cowlitz Tribe proposes to operate the following programs from the trust land: Tribal Government and Administration, Health Care and Social Services, Hosing, Elder Services, Education, Cultural Preservation, Transportation, and Environment and Natural Resources. In addition, the Tribal plans to construct and operate a Class III gaming casino resort complex, parking facilities, an RV park, and a wastewater treatment plant on the Cowlitz Parcel. The project plans call for 134,150 square feet of gaming floor (including 3,000 VLTs, 135 gaming tables, and 20 poker tables); 355,225 square feet of restaurant and retail facilities and public space; 147,500 square feet of convention and multi-purpose space (with seating for up to 5,000); and a 250 room hotel. The proposed facilities would occupy most of the project site. The BIA finds that the stated purposes for which the land will be used appropriately meet the purpose and need for acquiring the lands in to trust as described in **Section 8.3** of this ROD.

8.5 25 C.F.R. 151.10(e). If The Land To Be Acquired Is In Unrestricted Fee Status, The Impact On The State And Its Political Subdivisions Resulting From The Removal Of Land From The Tax Rolls.

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

By letters dated March 9-10, 2004 and July 11, 2008, in accordance with 25 C.F.R. 151.10, the BIA notified the State of Washington and Clark County that they would have 30 days in which to provide written comments as to the Cowlitz trust acquisition's potential consequence on regulatory jurisdiction, real property taxes, and special assessments. The State and the County submitted comments in response, and the Tribe responded to the substantive comments received. Based on the comments and the responses thereto provided by the Tribe, the BIA has made the determinations below concerning impacts to state and local governments resulting from removal of land from the tax rolls:

State and County Taxes: In the Tribe's EPHS Ordinance, the Tribe has agreed to compensate the County and local districts on a biannual basis in lieu of property taxes for revenues lost as a result of the removal of the Cowlitz Parcel from the tax rolls, consistent with the customary assessment procedures used by the County Assessor and State Constitution. Such compensation is to be paid to the extent not otherwise specifically provided for (a) elsewhere in the Tribal EPHS Ordinance, or (b) in any Class III Gaming Compact subsequently entered into between the Tribe and the State pursuant to the federal

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/*Katherine J. Barton*
KATHERINE J. BARTON