No. 17-15533

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITIZENS FOR A BETTER WAY, *et al.*,

Plaintiffs-Appellants

v.

RYAN ZINKE, Secretary of the Interior, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (NO. 2:12-CV-03021-TLN-AC)

RESPONSE BRIEF OF THE FEDERAL APPELLEES

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INTRODUCTION

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, a federally recognized tribe ("Enterprise Rancheria" or "Tribe"), asked the Secretary of the Department of the Interior ("Interior" or "Department") to acquire in trust a 40-acre parcel in Yuba County, California (the "Yuba Site") for use as a casino and hotel. Citizens for a Better Way and the other plaintiffs (collectively "Citizens") are nonprofit groups and individuals who oppose the project based on their belief that it will be detrimental to the surrounding community.

Citizens challenges Interior's authority under the Indian Reorganization Act ("IRA") to take the Yuba Site into trust, arguing that Interior's 2012 Record of Decision ("IRA ROD") failed to explain sufficiently the determination that Enterprise Rancheria was a "tribe" that was "under Federal jurisdiction" in 1934 as required by *Carcieri v. Salazar*, 555 U.S. 379 (2009). Citizens also challenges Interior's decision under Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719, that the proposed gaming establishment would not be detrimental to the surrounding community, arguing that Interior did not sufficiently describe in the 2011 Record of Decision authorizing gaming ("IGRA ROD") an enforcement mechanism for every mitigation measure adopted as a condition of the no-detriment decision.

The district court granted a summary judgment dismissing all of Citizens' claims.[1] As elaborated herein, that judgment should be affirmed.

JURISDICTIONAL STATEMENT

(a) The district court had jurisdiction under 28 U.S.C. § 1331, as Citizens' claims arise under federal law, namely, the aforementioned federal statutes and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. ("APA").

(b) The judgment appealed from is final because it disposed of all claims against all defendants. ER1:8-50.[2] This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court granted summary judgment to all defendants in an Order and a consequent Judgment entered on September 24, 2015. ER1:18-51. On January 23, 2017, the court denied a timely motion for reconsideration filed by plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa"). ER1:8-17. Citizens filed a notice of appeal on March 22, 2017.

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Ryan Zinke is automatically substituted as Secretary of the Interior, Michael Black is automatically substituted as Acting Assistant Secretary-Indian Affairs, and Jason Thompson is automatically substituted as Acting Director of the Bureau of Indian Affairs.

[2] Appellant's Excerpts of Record are referred to herein as "ER" followed by the volume number and then, after a colon, the page numbers. Appellees' Supplemental Excerpts of Record are referred to herein as "SER." "ARN" refers to the "New" version of the Administrative Record which designates each page as "EN_AR_NEW_00000X."

ER1:1-2. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(iii), which affords 60 days to file a notice of appeal in a civil case in which a federal officer is a party.

STATEMENT OF THE ISSUES

1. Whether Interior had authority under the IRA to acquire the Yuba Site in trust for Enterprise Rancheria.

2. Whether Citizens has met its burden to show that Interior's determination under IGRA that the proposed casino-hotel project would not be detrimental to the surrounding community was arbitrary and capricious.

STATEMENT OF THE CASE

A. Statutory Background

1. Indian Reorganization Act

Congress enacted the IRA in 1934 to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). "The 1934 IRA was meant 'to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies.'" *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 556 (D.C. Cir. 2016) (quoting *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008)).

To that end, Section 5 of the IRA authorizes the Secretary of the Interior, "in his discretion, to acquire … any interest in land … , within or without existing reservations, … for the purpose of providing land for Indians." 25 U.S.C. § 5108 (formerly codified at 25 U.S.C. § 465). "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 …." *Id.*

IRA § 19 defines "Indian" to include:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal 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 … [3] all other persons of one-half or more Indian blood.

25 U.S.C. § 5129 (formerly codified at 25 U.S.C. § 479). Section 19 then broadly defines "tribe" to include "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.*[3]

In *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), the Supreme Court held that the phrase "*now* under Federal jurisdiction" (emphasis added) in Section 19's first definition of "Indian" meant that the tribe had to be "under Federal jurisdiction" at the time of the IRA's enactment in 1934.

[3] Rancherias are expressly included in the definition of "tribe" in Interior's regulations implementing IRA § 5: "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." 25 C.F.R. § 151.2(b).

Section 16 of the IRA, 25 U.S.C. § 5123 (formerly codified at 25 U.S.C. § 476), authorized tribes to organize or reorganize with formal constitutions and business structures, but did not require them to do so. Section 18 provided for the Indian residents of a reservation to vote on whether to reject the application of the IRA: "This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 5125 (formerly codified at 25 U.S.C. § 478). Section 18 directed the Secretary to "call such an election" within a year (later extended to two years) of the Act's passage.

Many tribes (including Enterprise Rancheria) chose to opt out of the IRA. *See generally* Cohen's Handbook of Federal Indian Law § 1.05, at 79-84 (2012). Through the Indian Land Consolidation Act of 1983, Congress made clear that the Secretary had authority to acquire land in trust for tribes that had voted against the application of the IRA to their reservation in the 1930s. 25 U.S.C. § 2202. As the Supreme Court explained, "§ 2202 provides additional protections to those who satisfied the definition of 'Indian' in § 479 at the time of the statute's enactment, but opted out of the IRA shortly thereafter." *Carcieri*, 555 U.S. at 395; *see also Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 561 n.5, 577 (2d Cir. 2016), *petitions for cert. filed*, No. 16-1320 (Apr. 26, 2017) and No. 17-8 (June 23, 2017).

2. Indian Gaming Regulatory Act

Congress enacted IGRA, 25 U.S.C. §§ 2701-2721, in 1988 to regulate Indian gaming operations. IGRA's purpose is 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." *Id.* § 2702(1). IGRA prohibits gaming on lands acquired by Interior in trust for the benefit of an Indian tribe after October 17, 1988, unless one of the exemptions or exceptions in Section 20, *id.* § 2719, applies. The relevant exception here is commonly known as the "Secretarial Determination" or "Two-Part Determination," which allows gaming when Interior—

> 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 [Interior's] determination.

Id. § 2719(b)(1)(A).

B. Background History of Enterprise Rancheria

The members of Enterprise Rancheria are Maidu Indians whose aboriginal territory is the Feather River basin in central California. ER2:173. When California became a territory of the United States in 1848, it "was largely occupied by several hundred small autonomous Indian groups" that represented "many

linguistic divisions." *The Indians of California v. United States*, 8 Ind. Cl. Com. 1, 16-17, 31 (1959).

Starting in 1853, the federal government established numerous reservations throughout California by statute and executive order. *See* William Wood, *The Trajectory of Indian Country in California: Rancherías, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies and Rancherias*, 44 Tulsa L. Rev. 317, 345-52 (2008); *see also* S. Rep. 103-340 at 3 (1994) (Senate Indian Affairs Committee summarizing the history of California Indians in connection with legislation to restore federal recognition to the Auburn Band). These reservations were referred to by various names, including "rancheria."[4]

The history of Enterprise Rancheria is documented in a 2007 decision by the Interior Board of Indian Appeals ("IBIA")[5] rejecting a challenge by plaintiff Robert Edwards to the Tribe's governance, *Robert Edwards v. Pacific Regional Director, Bureau of Indian Affairs*, 45 IBIA 42, 43 (May 17, 2007); in the Environmental Impact Statement ("EIS") for the proposed project (SER2:393-394

[4] This Court has repeatedly recognized that "rancherias" are Indian reservations. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 951 n.2 (9th Cir. 2015); *Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 657 (9th Cir. 1976).

[5] The Interior Office of Hearings and Appeals, which includes the IBIA, "is an authorized representative of the Secretary." 43 C.F.R. § 4.1. It "may hear, consider, and decide [matters within its jurisdiction] as fully and finally as might the Secretary." *Id*.

[ARN23560-23561]); and in the IGRA ROD and IRA ROD. Special Indian agent J.J. Terrell visited the community of Enterprise, California in 1915 and completed a census of 51 Indians "in and near Enterprise in Butte County, California" on April 20, 1915. ER3:387; *Robert Edwards*, 45 IBIA at 43; SER2:393-394 [ARN23560-23561]. Later that year, the United States purchased two 40-acre parcels for these Indians: (1) "Enterprise 1" located about 10 miles northeast of Oroville, and (2) "Enterprise 2" located closer to Oroville. ER2:115 (IRA ROD); *Robert Edwards*, 45 IBIA at 43-44; SER2:394 [ARN23561]. The United States still holds Enterprise 1 in trust. But in 1965, pursuant to Congressional authorization, the State of California purchased Enterprise 2 when creating Lake Oroville, and that parcel is now submerged. ER2:115.

Following Congress's enactment of the IRA in 1934, Interior's Bureau of Indian Affairs ("BIA") held Section 18 elections throughout California, including at many rancherias. ER3:337-339 (Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A., U.S. Indian Service Tribal Relations Pamphlets-1* 14-16 (1947) ("Haas Report")). BIA visited Enterprise in 1935 to compile a list of voters, including Indians with ties to Enterprise 1 and Enterprise 2, and conducted an election on June 16, 1935. ER3:369-72; *Robert Edwards*, 45 IBIA at 44. A majority of voters rejected application of the IRA. *Id*.

Interior commenced publishing a list of federally recognized tribes in the Federal Register in 1979. 44 Fed. Reg. 7235 (Feb. 6, 1979). Congress required the annual publication of that list in 1994. *See* Federally Recognized Indian Tribe List Act of 1994 (the "List Act"), Pub. L. No. 103-454, 108 Stat. 4791, 25 U.S.C. §§ 5130-31.[6] The "Enterprise Rancheria of Maidu Indians" has appeared on each list from 1979 to present.

C. Administrative Proceedings

1. Enterprise Rancheria's Applications

By application dated August 13, 2002, Enterprise Rancheria requested that Interior take title to the Yuba Site, a 40-acre parcel in Yuba County located south of Marysville near Highway 65, for the purpose of building a casino-hotel project with its development partner Yuba County Entertainment. SER1:5-239 [ARN516-750]. The Yuba Site is within the Yuba County Sports Entertainment Zone created by the County in 1998. SER1:10 [ARN521].

Enterprise Rancheria entered into a Memorandum of Understanding ("MOU") with Yuba County, dated December 17, 2002. ER3:277-291. The MOU recited that "the County is prepared to support the Tribe's trust acquisition

[6] The List Act broadly defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 5130(2).

application only if the County is assured that anticipated detrimental impacts to the County and the surrounding communities can be mitigated through a binding and enforceable agreement between the County and the Tribe, and the Tribe is willing to enter into such a binding and enforceable agreement." ER3:277-278. The Tribe agreed to make a one-time payment of $697,120 in lieu of ordinary development fees; to make annual contributions starting at $800,000 and increasing to $5,000,000 (and to be further adjusted for inflation); to make annual contributions of at least $60,000 for the treatment and prevention of gambling disorders; and to adopt and comply with numerous standards designed to ensure public health and safety, fair employment practices, and worker health and safety. *See* SER2:377-380 [ARN23352-23355] (Final EIS summary). Section 12 of the MOU provides that disputes are subject to arbitration under the Commercial Arbitration Rules of the American Arbitration Association. ER3:285-86.

The Yuba Site is located within unincorporated Yuba County, not within the City of Marysville. Nevertheless, Enterprise Rancheria entered into a Memorandum of Agreement with the City, dated August 16, 2005. SER1:240-257 [ARN2755-2772]. Although the "Tribe [was] not legally required to enter into this Agreement," "the City and the Tribe desire[d] to establish a cooperative and mutually respectful government-to-government relationship." SER1:242 [ARN2757]. The Tribe agreed to make an initial contribution of $100,000 and

annual contributions starting at $250,000 and increasing by 4% per year, and it also agreed to many of the non-monetary provisions included in the Yuba County MOU. *See* SER2:381 [ARN23356] (Final EIS summary). This agreement included similar dispute resolution procedures. SER2:248-250 [ARN2763-2765].

In both agreements, the Tribe agreed to enter into a binding agreement for fire protection and emergency medical services with a County fire protection district or to make analogous private arrangements. ER3:281-82; SER1:247-248 [ARN2762-2763].

On April 13, 2006, Enterprise Rancheria requested a Secretarial Determination under IGRA, 25 U.S.C. § 2719(b)(1)(A), that gaming on the Yuba Site would be in the best interest of the Tribe and would not be detrimental to the surrounding community. SER1:267-286 [ARN3344-3363]. The Tribe amended its request on March 17, 2009 following Interior's specification of the contents of such applications, 25 C.F.R. §§ 292.16, 292.17, 292.18. SER2:301-335 [ARN22964-22998].

2. The National Environmental Policy Act Proceedings

BIA determined that it would prepare an EIS on Enterprise Rancheria's application under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C).

Scoping. BIA undertook a "scoping" process to solicit public input on the issues to be addressed in the EIS. *See* 40 C.F.R. § 1501.7. Citizens for a Better Way offered comments on a range of issues. SER1:258-263 [ARN3186-3191]. Robert Edwards identified himself as Chairman of "Indians of Enterprise No. 1," and argued in his comments that BIA should not proceed with the land-into-trust application because of his then-pending appeal before the IBIA in which he claimed that the tribal government of Enterprise Rancheria, the entity that submitted the application, was not "the real tribe." SER1:264-266 [ARN3205-3207].[7]

Draft EIS. BIA then prepared a Draft EIS ("DEIS") for Enterprise Rancheria's proposed casino-hotel facility on the Yuba Site. The 3,414-page DEIS, dated February 2008 (ARN11782-15195), analyzed the potential impacts of five alternatives, including the proposed action and the construction of a smaller casino on Enterprise 1. Of relevance to this appeal, Section 5 presented measures to mitigate the adverse effects identified in the EIS where feasible (ARN12526-12588). The agreements with Yuba County and Marysville were included as Appendix B. BIA made the DEIS available for public review and provided a 45-

[7] The IBIA rejected Mr. Edwards' challenge in 2007, holding that the federal government in 1915 established a single reservation consisting of two parcels, and that there is only one federally recognized tribe derived from the Indians who lived on and near the reservation—the Enterprise Rancheria of Maidu Indians. *Robert Edwards*, 45 IBIA at 53.

day comment period. 73 Fed. Reg. 15191 (Mar. 21, 2008); ER2:131 (noting newspaper notices). Numerous government agencies, organizations and individuals commented. ER2:131.

Final EIS. BIA revised the EIS in light of these comments. The 3,554-page Final EIS ("FEIS") (ARN23208-26761) included some revisions to the mitigation measures in Section 5. SER2:395-444 [ARN23836-23884]. The FEIS included a new Appendix T, which presented all comments on the DEIS (including from plaintiffs Citizens for a Better Way, Robert Edwards, and James Gallagher) and BIA's responses thereto. SER2:463-499 [ARN26411-26415, 26499-26502, 26544-26548, 26639-26642, 26667-26673, 26681-26683, 26685-26687, 26697-26698].

The FEIS also added Appendix U, a Mitigation Monitoring and Enforcement Program ("MMEP"), which identified for each mitigation measure in Section 5 the entity responsible for monitoring and/or reporting on the mitigation and the timing of the mitigation. SER3:500-560 [ARN26701-26761]. These entities include federal agencies (National Indian Gaming Commission, Army Corps of Engineers, Fish and Wildlife Service, Environmental Protection Agency), state and local entities (Yuba County, Feather River Air Quality Management District, California Highway Patrol, California Department of Transportation, and City of Wheatland), and the Tribe. The MMEP explained that "[w]here applicable, mitigation

measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as the ROD." SER3:501 [ARN26702].

BIA made the FEIS available for public review and comment in August 2010. 75 Fed. Reg. 47618 (Aug. 6, 2010); ER2:131 (noting newspaper notices).

3. IGRA Record of Decision

On September 1, 2011, Interior issued the IGRA ROD under Section 20 of IGRA. The IGRA ROD determined that the proposed action "is the alternative that best meets the purpose and need of the Tribe and BIA while preserving the natural resources of the Yuba Site." ER2:147. The decision further concluded that the proposed casino-hotel project on the Yuba Site "is in the best interest of the Tribe and its members," and "would not be detrimental to the surrounding community, including nearby Indian tribes." ER2:188-193.

The IGRA ROD referenced the 1915 census of "the Tribe's 51 citizens" (ER2:173), and stated that the "Tribe has been recognized by the United States since at least April 20, 1915" (ER2:174), which was the date of the census. The decision also noted that the "United States subsequently purchased two 40-acre parcels for the Tribe." ER2:174.

The IGRA ROD detailed each mitigation measure identified in the FEIS (ER2:148-167) and "adopted" all mitigation measures and related enforcement and

monitoring programs "as part of the decision" (ER2:147). The decision reiterated that "[w]here applicable, mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as this decision." ER2:147-48.

The IGRA ROD included as an attachment the letters commenting on the FEIS (including letters from plaintiffs Grass Valley Neighbors and Stand Up for California! ("Stand Up")) and BIA's responses thereto. ER2:131; SER3:672-714.

That same day, Interior requested the concurrence of California Governor Jerry Brown. SER3:638-671 [ARN29992-30025]. Governor Brown concurred by letter dated August 30, 2012. ER2:122-23.

4. IRA Record of Decision

On November 21, 2012, pursuant to Section 5 of the IRA (now 25 U.S.C. § 5108), Interior issued a Record of Decision under the IRA ("IRA ROD'), deciding to take the 40-acre Yuba Site into trust for the purpose of gaming for the benefit of Enterprise Rancheria. ER2:67-121. The IRA ROD determined that Interior had authority to take land into trust for Enterprise Rancheria. ER2:114-115. The decision explained that Interior had evaluated "the applicability of *Carcieri* to the Tribe's application," and discussed the IRA's opt-out provision, Section 18 (now 25 U.S.C. § 5125), which provides that a majority vote of Indians

of a reservation voting at an election called by the Secretary could opt out of the Act. ER2:114. The IRA ROD concluded:

> As indicated in the report prepared in 1947 by Theodore H. Haas, Chief Counsel for the United States Indian Service, a majority of adult Indians residing at the Tribe's Reservation voted to reject the IRA at a special election duly held by the Secretary on June 12, 1935. The calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under federal jurisdiction for *Carcieri* purposes.

ER2:115. The decision added that "[d]espite the vote to reject the IRA at such election, the later-enacted amendment to the IRA makes clear that Section 5 applies to Indian tribes whose members voted to reject the IRA." *Id*.

The IRA ROD similarly adopted all the mitigation measures identified in the FEIS. ER2:90-110. The decision concluded that acquisition of the Yuba Site for the proposed action "would allow the Tribe to implement the highest and best use of the property," that it better meets the purpose and need for the proposed action than the other alternatives, and that the environmental impacts of the proposed action "are adequately addressed by the mitigation measures adopted in this ROD." ER2:90.

D. District Court Proceedings

Citizens for a Better Way and other plaintiffs filed their complaint in the United States District Court for the District of Columbia on December 20, 2012, seeking declaratory and injunctive relief under the APA. SER3:715-750 (Case No.

12-cv-2052 (D.D.C.), Doc. 1 (filed Dec. 20, 2012)). They claimed that Interior had no authority under the IRA to take the Yuba Site into trust because Enterprise Rancheria "was neither federally recognized, nor under federal jurisdiction in June 1934." SER3:742 (Complaint ¶ 93). They also claimed that the IGRA ROD violated IGRA § 20 in several respects, including that Interior "failed to consider and address … concerns regarding the enforceability of the MOUs on which [Interior] almost exclusively relied." SER3:744 (Complaint ¶ 99). Citizens also asserted claims under NEPA and the Clean Air Act which were rejected by the district court and which Citizens has abandoned in this appeal.

Citizens' action was transferred to the Eastern District of California and consolidated with actions filed by Colusa and by the United Auburn Indian Community. The district court denied Citizens' motion for preliminary relief along with motions filed by the other plaintiffs. D.Ct. Doc. 57 (filed Jan. 30, 2013). Interior took the Yuba Site into trust on May 15, 2013.

All parties then filed cross-motions for summary judgment. In a 33-page order issued on September 24, 2015, the district court granted summary judgment to all defendants, denied plaintiffs' motions for summary judgment, and entered judgment. ER1:18-50. On January 23, 2017, the district court denied Colusa's motion for reconsideration. ER1:8-17.

SUMMARY OF ARGUMENT

1. Interior acted within its authority under the IRA when taking the Yuba Site into trust for Enterprise Rancheria. Citizens argues that the community of Indians connected to Enterprise Rancheria was not a "tribe" in 1934. That argument should be rejected outright as waived. None of the plaintiffs (or anyone else) adequately presented this argument to Interior during the administrative proceedings.

Citizens purports to offer this Court a "plain language" interpretation of the IRA but does not even mention the IRA's operative definition of "tribe" in Section 19, which includes "Indians residing on one reservation." Citizens' asserted plain-language argument fails because the Indians of Enterprise Rancheria were a "tribe" in 1934, as "the Indians residing on one reservation."

After taking a census in 1915 of the "Indians in and near Enterprise in Butte County, California," the United States acquired two 40-acre parcels of land for them, referred to collectively as Enterprise Rancheria. Then, following the IRA's enactment, Interior held a Section 18 election in 1935 to allow the Indians of Enterprise Rancheria (consisting of the two parcels) to decide whether to opt out of the IRA's provisions. The holding of a single Section 18 election for the Indians of both parcels demonstrates that Interior considered the two parcels to be one reservation referred to as Enterprise Rancheria, and Section 19 broadly defines

"tribe" to include "the Indians residing on one reservation." Thus, as of the IRA's enactment, if not earlier, Enterprise Rancheria was a "tribe" because its members were "Indians residing on one reservation."

Recognizing the diverse circumstances of Indians throughout the country in 1934, Congress defined "tribe" broadly to include both (1) groups recognized as tribes outside the context of the IRA, and (2) tribes newly recognized under Section 19's definition of "tribe" as "Indians residing on one reservation." The latter definition requires no determination of the tribal affiliation of the Indians' ancestors. In arguing that the tribal affiliation of the Indians' ancestors must always be examined before determining that a group of Indians qualifies as a "tribe" under the IRA, Citizens completely ignores Section 19's expansive definition of "tribe."

Citizens has offered no other persuasive basis for concluding that the IRA ROD is arbitrary or capricious. Interior reasonably concluded that Enterprise Rancheria was a "tribe" "under Federal jurisdiction" in 1934 for purposes of taking land into trust for it.

2. Interior reasonably determined under IGRA § 20 that Enterprise Rancheria's casino-hotel project would not be detrimental to the surrounding community. BIA recommended a variety of measures in the FEIS to mitigate the adverse impacts that had been identified. Interior expressly adopted these

mitigation measures in making its determination in the IGRA ROD that the proposed project will not be detrimental to the surrounding community, and it explained that the measures will be monitored and enforced through a variety of mechanisms. In addition, Interior appropriately relied on the Tribe's agreements with Yuba County and with Marysville, which have their own dispute resolution procedures.

The nub of Citizens' argument is that the no-detriment determination required a more detailed discussion of the enforcement mechanisms that would be deployed in the event the Tribe failed to comply with its obligations. But the prospect that the Tribe will not comply with these conditions is pure speculation. And Interior reasonably evaluated the legal authority and resources available to implement, monitor, and enforce the mitigation measures. The IGRA ROD provides an adequate degree of specificity as to monitoring and enforcement.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Aguayo v. Jewell*, 827 F.3d 1213, 1221 (9th Cir. 2016).

Agency compliance with IGRA and the IRA is reviewed under the APA's judicial review provisions, 5 U.S.C. §§ 701-06. *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 962 (9th Cir. 2016) (IGRA); *Aguayo*, 827 F.3d at 1223 (IRA). Agency decisions may be set aside only if they are "arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision will be overturned "only if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (citation and internal quotation marks omitted). This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation and internal quotation marks omitted).

ARGUMENT

I. The IRA Authorized Interior to Take the Yuba Parcel into Trust for Enterprise Rancheria

Interior took land into trust for Enterprise Rancheria under Section 5 of the IRA, 25 U.S.C. § 5108, which authorizes taking land into trust for "Indians." Section 19 of the IRA, 25 U.S.C. § 5129, provides three definitions of "Indian." Interior relied on the first of the three definitions: "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."

Citizens does not dispute the first part of this definition, *i.e.*, that the members of Enterprise Rancheria—both in 1934 and at present—are "persons of Indian descent." Nor does Citizens dispute the last part of this definition, expressly acknowledging (Brief 3 n.1) that this appeal "does not involve any dispute over the meaning of 'now under Federal jurisdiction.'" Instead, Citizens focuses on the requirement that the persons of Indian descent be members of a "tribe" at the time the IRA was enacted, arguing that Interior was required to make a separate determination that Enterprise Rancheria existed as a "tribe" in 1934, but did not do so. Brief 23; *see also*, *e.g.*, *id*. at 36 (arguing that "[t]here is no evidence that the Indians living on the Enterprise Rancheria in 1934 constituted an Indian tribe"). We demonstrate below that Citizens' argument is based on a misinterpretation of the IRA and ignores the relevant facts in the record.

A. Citizens Waived Its IRA Arguments by Failing to Adequately Present Them During the Administrative Process

Citizens did not present its arguments challenging Interior's authority to take land into trust for Enterprise Rancheria during the administrative process "with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002). Failure to raise an issue with an agency waives that issue and precludes judicial review thereof. *Department of Transp. v. Pub. Citizen*, 541 U.S. 752, 763–65 (2004).

In a March 6, 2009, letter to BIA, plaintiff Stand Up made three arguments against taking land into trust for gaming on the Yuba Site, including that BIA misconstrued the 1994 List Act by "administratively elevat[ing]" "land based Rancheria tribes" to the list of federally recognized tribes in 1994. SER1:289 [ARN22882]. Stand Up then asserted that "[a]s a result the Enterprise Tribe and several others are vulnerable to the recent *Carcieri v. Salazar* ruling." *Id*.

In a March 13, 2009 letter to BIA, Citizens for a Better Way expressed its opposition to the gaming project on the Yuba Site by presenting a chronology of events, including the recent *Carcieri* decision: "On February 24, 2009 the Supreme Court Carcieri decision put even further concern over the validity of Enterprise Rancheria attempt for a casino." SER1:299 [ARN22948].

The mere reference to *Carcieri* in these letters, without more, did not adequately alert Interior to the arguments Citizens presents in this appeal that Enterprise Rancheria was not a "tribe" in 1934. And the reference to the List Act is irrelevant because a List Act argument was not pursued in this action.[8] This Court has allowed some leeway to a party that did "not comprehensively or artfully present[] [its claims] in the early stages of the administrative process" if they "are

[8] The federal defendants argued in the district court that Citizens had waived its challenge to the Secretary's authority by failing to present it to Interior. D.Ct. Doc. 116-1 at 11 (filed July 24, 2014). The district court chose to reject Citizens' claim on the merits without addressing waiver.

presented fully before the process ends." *SSA Terminals v. Carrion*, 821 F.3d 1168, 1174 (9th Cir. 2016). But here, no plaintiff, or any other person, ever presented developed arguments challenging the Secretary's authority to take land into trust for Enterprise Rancheria during the subsequent three years before the IRA ROD was issued.

Citizens argues in this appeal that the IRA ROD's discussion of Interior's authority to take land into trust for Enterprise Rancheria is inadequate because the Secretary did not in 2012 anticipate and address in detail all of the arguments Citizens would subsequently make in this litigation. But "[a]dministrative proceedings should not be a game." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978). This Court should affirm the district court's dismissal of Citizens' IRA claim on the ground of waiver.

B. The Indians of Enterprise Rancheria Were a "Tribe" in 1934

In the event that this Court decides to address the substance of Citizens' IRA claim, that claim lacks merit. To begin, Citizens' assertion that Interior did not find that the Indians of Enterprise Rancheria were a tribe in 1934 is incorrect. The IRA ROD implicitly so finds by referring to the voters in Section 18 elections, including the Section 18 election held at Enterprise Rancheria, as "members" of "Indian tribes." ER2:115. The decision also explained that Section 18 required the Secretary to hold an election for the "Indians" of a "reservation" to decide whether

to opt out of the IRA, and then quoted the Supreme Court's statement in *Carcieri* characterizing Section 18 as "'allow[ing] *tribal members* to reject application of the IRA to their *tribe*.'" ER2:114 (quoting *Carcieri*, 555 U.S. at 394-95) (emphasis added).

Contrary to Citizens' insinuation (Brief 23), the Secretary viewed those voters as members of an Indian tribe, not some "unidentified group of 'Indians.'" *Carcieri* and Interior could rightly characterize the "Indians" voting on the application of the IRA to their "reservation" as "tribal members" voting on the application of the IRA to their "tribe" because of the IRA's broad definition of "tribe." Congress defined "tribe" expansively in Section 19, 25 U.S.C. § 5129, to include "the Indians residing on one reservation." As the Solicitor of the Interior explained in 1934, the IRA covered two kinds of tribes: groups recognized as tribes outside the context of the IRA, and tribes newly recognized under Section 19's definition. ER3:376 (Solicitor's Opinion M-27810, Wheeler-Howard Act—Interpretation (Dec. 13, 1934)). The Solicitor explained that tribes could organize under the IRA "whether the organization is effected by a recognized tribe *or* by the residents of the reservation, first recognized as a tribe under the [IRA]." *Id*. (emphasis added).

There can be no doubt that Enterprise Rancheria was properly characterized as a "tribe" in 1934 under the second concept. Moreover, the IGRA ROD had

previously stated that "[t]he Tribe has been recognized by the United States at least since April 20, 1915" (ER2:174), the date of the 1915 census which listed a tribe of 51 members for whose benefit the reservation was established later that year (SER393-394 [ARN23560-61]). It is a reasonable conclusion that Enterprise Rancheria was a tribe under the first concept as well.

Citizens purports to offer this Court a "plain language" interpretation of the IRA (Brief 24), but Citizens does not even mention (much less address) Section 19's broad definition of "tribe," which includes "Indians residing on one reservation." A plain language interpretation must at least consider a statute's definitions. *Burgess v. United States*, 553 U.S. 124, 130 (2008). And Citizens concedes that California rancherias are considered "Indian Reservation[s]." Brief 24 n.3 (quoting *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1012 (9th Cir. 2007)). It thus follows that the Indians of Enterprise Rancheria constituted a "tribe" upon the enactment of the IRA for purposes of that statute.

Citizens' fundamental premise appears to be that the IRA requires a determination of the members' tribal ancestry under all concepts of "tribe." But that premise misinterprets the IRA because it ignores the definition of "tribe" in Section 19. That provision does not provide that the "Indians residing on one reservation" may be a "tribe" only if they had the same ancestors. Regardless of

prior tribal affiliation, the Indians who had a right to live together on a reservation were considered a "tribe" upon the IRA's enactment.

Citizens notes (Brief 25) that Indians whose ancestors had different tribal affiliations were permitted to live together on a rancheria. That is true. S*ee, e.g.*, *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (explaining that the Auburn Band, a federally recognized Indian tribe located near Sacramento, was formed from families of the Maidu and Miwok Tribes who managed to survive "the depredation that came with the settlement of California"). But Citizens' suggestion that they were not tribes for that reason is simply wrong. Although many California Indians suffered dislocation in the 19th and early 20th centuries, Congress did not believe that rendered them ineligible for the IRA's benefits.

Citizens relies (Brief 28-29) on the above-discussed Solicitor's Opinion M-27810 of 1934, but that opinion does not help Citizens. The opinion explained that "the act contemplates two distinct and alternative types of tribal organization," the first authorizing organization based on tribal affiliation without regard to residence, and the second authorizing organization based on residence on a reservation without regard to tribal affiliation. ER3:376. Accordingly, Section 19 "authorizes the residents of a single reservation (*who may be considered a tribe for purposes of this act, under section 19*) to organize without regard to past tribal affiliations." ER3:376 (emphasis added).

Nor is Citizens assisted by relying (Brief 26) on Section 16 of the IRA, 25 U.S.C. § 5123, the organization provision. That provision enables a tribe to formally organize or reorganize its government with a constitution and bylaws, but nothing in the IRA requires a tribe to formally organize. Government organization was not a prerequisite to the establishment of a "tribe." Section 16 does not speak to the existence of a "tribe"; it merely provides an opportunity to formally organize where a tribe exists. Section 16 refers to a majority vote "of the adult members of the tribe, *or of the adult Indians residing on such reservation, as the case may be*" (emphasis added). Citizens argues (Brief 26-27) that the emphasized phrase would be superfluous if the Indians residing on a reservation always constituted a tribe. Citizens is incorrect. Once again it fails to acknowledge that there are two options for organizing a tribal government—by tribal affiliation and by residence on a reservation.

Solicitor's Opinion M-27796 (Nov. 7, 1934), discussed for the first time in this case at Brief 29-31, does not help Citizens either. Citizens insists that it cannot be determined that the Indians of Enterprise Rancheria existed as a tribe in 1934 without a determination of their tribal affiliation, meaning the tribal affiliation of their ancestors. But this opinion is clearly at odds with Citizens' view, explaining that a "group of Indians residing on a single reservation … may be recognized as a

'tribe' for purposes of the [IRA] *regardless of former affiliations*." Brief 30 (emphasis added).

Citizens dismisses (Brief 31-33) the evidence of the Section 18 election at Enterprise Rancheria—the Haas Report—based on Citizens' misunderstanding that the "former affiliations" of the voters must be demonstrated. But as we have explained, multiple authorities demonstrate that there was no need to document each voter's ancestry in order to conclude that the Indians of Enterprise Rancheria constituted a tribe as "Indians residing on one reservation."

Citizens observes (Brief 32-33) that multiple tribes can share a reservation, mentioning the Confederated Tribes of the Grand Ronde Community of Oregon and the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana. That is possible because Section 19's definition of "tribe" includes "any Indian tribe, organized band, [or] pueblo," permitting multiple tribes on the same reservation. But that observation is not relevant here because the IBIA's decision in *Robert Edwards*, 45 IBIA at 53, shows that there were not multiple tribes on the 80-acre Enterprise Rancheria, as explained below.

Similarly unavailing is Citizens' effort (Brief 33-34) to draw a parallel between Enterprise Rancheria and the complex circumstances of the Quinault Reservation. The Quinault Tribe had formally organized before the IRA's enactment and had adopted bylaws specifying membership requirements. *See*

Brown v. Commissioner of Indian Affairs, 8 IBIA 183, 188 (1980). Indians who had been allotted land on the Quinault Reservation (including Cowlitz Indians) but were not members of the Quinault Tribe voted together with Quinault members in the Section 18 election for the Quinault Reservation. But that did not foreclose the Quinault Tribe's ability to organize, or reorganize, under the IRA as a tribe that did not include the non-Quinault allottees. No such complex circumstances existed on Enterprise Rancheria in 1934.

Citizens argues (Brief 34-35) that the federal defendants' position in this case is inconsistent with the argument that they advanced in *Confederated Tribes*. That argument was that the Cowlitz Tribe was properly treated as a tribe under the IRA even though a Section 18 election had not been held for the Cowlitz Tribe because it had no reservation (and some Cowlitz Indians had voted in the Section 18 election for the Quinault Reservation where they had allotments). There is no inconsistency: Cowlitz was considered a tribe under federal jurisdiction in 1934 based on other evidence. Again, the IRA does not define "tribe" to mean only the residents of one reservation. The fact that there may be a "tribe" "under Federal jurisdiction" that did not vote to accept the IRA's applicability to a reservation under Section 18 does not mean that the Secretary may not rely on a Section 18 vote to conclude that there existed a tribe under federal jurisdiction.

Asserting that the relevance of a Section 18 election depends on "specific facts" (Brief 35), Citizens incorrectly suggests that Interior does not know the relevant facts for Enterprise Rancheria. A Section 18 election at a particular reservation is relevant to the *Carcieri* inquiry where there is a connection between that reservation and the tribe that is asking Interior to take land into trust. That connection is obvious in most circumstances, as it is here. In the IBIA *Robert Edwards* appeal, plaintiff Edwards had challenged the legitimacy of the tribal government that had submitted the application, arguing that there had been two reservations and two tribes and that the tribe based on Enterprise 2 ceased to exist after that parcel was inundated. The IBIA rejected these arguments in 2007.

The IBIA concluded that a single tribe, the currently-recognized Enterprise Rancheria, is derived from the Indians of a single reservation Interior had established in 1915: "[T]he Superintendent and the Regional Director correctly determined that there is only one Federally recognized tribe for the Indians of Enterprise, California. This tribe is derived from the Indians on and near both E.R. No. 1 and E.R. No. 2, and had one reservation originally composed of two parcels known as E.R. No. 1 and E.R. No. 2." 45 IBIA at 53. The IBIA reviewed the facts of both the reservation's establishment in 1915 (the 1915 census and purchase of the two parcels) and the Section 18 election in 1935. *Id*. at 42-44. In particular, the IBIA found that "BIA compiled a single 'approved list of voters for the [IRA]

on Enterprise Rancheria'" which included Indians with ties to both Enterprise 1 and Enterprise 2. *Id*. at 44.[9] The IBIA's decision thus makes clear that the residents of the reservation voting in the Section 18 election were also the members of a single tribe, Enterprise Rancheria. Thus, Citizens' concerns about potential complications arising from more than one tribe occupying a reservation, or from a tribe not having a reservation, are not relevant here.

Citizens was aware of the IBIA's decision, and actually discussed it in its district court briefing. D.Ct. Doc. 99-1, at 4, 9 (filed June 24, 2014). But Citizens' opening brief in this Court is less than forthcoming. Citizens ignores that IBIA decision and instead discusses (Brief 36-37) only a few documents regarding the establishment of the reservation (ER3:384-87), which Citizens inserted into the district court record through a motion for judicial notice. Its characterization of these selected documents as "[t]he record facts" (Brief 36-67) is thus misleading.

Citizens disingenuously suggests (Brief 38) that the IRA ROD affirmatively rejected the federal government's purchase of the reservation parcels in 1915 as evidence supporting its trust authority by not expressly mentioning it in the four paragraphs specifically devoted to the discussion of trust authority. ER2:114-15.

[9] The FEIS referenced this decision: "A recent decision of the Interior Board of Indian Appeals has confirmed that, even though two non-contiguous parcels were purchased for the Enterprise Indians, there is only one Enterprise Tribe." SER2:394 [ARN23561].

The decision did not reject this evidence, which is mentioned in the immediately following paragraph. ER2:115. The decision's discussion of Interior's authority adequately addressed the application of the *Carcieri* decision. The IRA ROD did not need to discuss additional facts and bolstering legal precedent. Even where a party timely makes an argument that is rejected by an agency, a "curt" explanation may suffice. *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *see also* 5 U.S.C. § 555(e) (requiring only a "brief statement of the grounds for denial"). The IRA ROD's explanation of Interior's authority was certainly adequate given that Mr. Edwards' challenge to the Tribe's governance had been conclusively resolved and specific arguments challenging Interior's Section 5 authority had not been presented during the administrative process.

C. Citizens' Attacks on the District Court's Analysis Lack Merit

Citizens' arguments (Brief 39-42) for why this Court should reverse the district court's conclusion that Interior had authority to take land into trust for Enterprise Rancheria are unpersuasive. As the district court explained, Interior's reliance on the Section 18 election for its conclusion that Enterprise Rancheria was under federal jurisdiction in 1934 is "consistent with the Department's practice." ER1:45 (citing *Shawano County, Wisconsin v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 53 IBIA 62 (Feb. 28, 2011), and Solicitor's Opinion M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian

Reorganization Act (Mar. 12, 2014)). The district court appropriately found "no reason to stray from the Department of the Interior's practice." ER1:46.[10]

Citizens points out (Brief 41) that *Shawano* involved the unique situation of a Section 18 election for a tribe that then had no reservation. But in subsequent decisions to take land into trust, Interior also relied on Section 18 elections for tribes with reservations. *See Stand Up for California! v. U.S. Dept. of the Interior*, 204 F.Supp.3d 212, 276-87 (D.D.C. 2016), *appeal docketed*, Nos. 16-5327 & 16-5328 (D.C. Cir. Nov. 15, 2016) (upholding Interior's authority to take land into trust for the North Fork Rancheria of Mono Indians); *Thurston County, Nebraska v. Acting Great Plains Regional Director, Bureau of Indian Affairs*, 56 IBIA 62, 70-71 & n.11 (Dec. 18, 2012) (affirming Interior's authority to take land into trust for the Winnebago Tribe of Nebraska); *Village of Hobart, Wisconsin v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 57 IBIA 4, 24 (May 9, 2013)

[10] The district court concluded that the United States' establishment of the Enterprise Rancheria reservation in 1915 "further demonstrates federal jurisdiction over the Tribe," citing *Stand Up for California! v. U.S. Dept. of the Interior*, 919 F.Supp.2d 51, 68 (D.D.C. 2013) (concluding that the United States' acquisition of land for the North Fork band was evidence of the band's status as a tribe). ER1:44-45. *Stand Up*, in turn, relied on Justice Breyer's statement in his concurrence in *Carcieri* that "a (pre-1934) congressional appropriation" is one ground "impl[ying] a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional," 555 U.S. at 399.

(holding that "the Secretary's action in calling an IRA election in 1934 for the Wisconsin Oneidas is dispositive").

Given the importance and frequency of the issue, Interior issued in 2014 Solicitor's Opinion M-37029 (included in the Addendum).[11] The opinion explained that the IRA does not define the phrase "under Federal jurisdiction" and that there is not "one clear and unambiguous meaning of the phrase." *Id*. at 9. It reviewed the IRA's legislative history and 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." *Id*. at 16. The opinion concluded that, while a Section 18 election was not necessary for an "under Federal jurisdiction" determination, the act of calling for a Section 18 election "unambiguously and conclusively" establishes that a tribe seeking to have land taken into trust for it was "under Federal jurisdiction" in 1934, regardless of the election's outcome. *Id*. at 20-21. Citizens asserts (Brief 40) that the opinion is "inconsistent with the Department's prior interpretations," discussed in Part I.B above, which Citizens argues require evidence that the voters had common ancestry. But as demonstrated above, Citizens ignores Section 19's definition of "tribe" and misinterprets the

[11] As the district court explained, "[a]n M-Opinion is a legal opinion issued by the Solicitor that formally institutionalizes Interior's position on a particular legal issue." ER1:45 (citing Department of the Interior 209 Department Manual 3.2A(11)). It is binding precedent on the Department that may only be overturned by the Solicitor, the Deputy Secretary, or the Secretary. *Id*.

precedent it cites. The residents of a reservation voting in a Section 18 election are a "tribe" through the application of Section 19's definition of "tribe" for IRA purposes as "Indians residing on one reservation."

While the Supreme Court's decision in *Carcieri* requires Interior to examine the jurisdictional relationship between a tribe and the federal government in 1934, the majority opinion did not address the type of evidence that would show that a tribe was "under Federal jurisdiction" in 1934 (because the United States and the Narragansett Tribe in that case did not contest Rhode Island's assertion that the Narragansett Tribe was under state jurisdiction in 1934). The D.C. Circuit recently upheld Interior's application of *Carcieri* in *Confederated Tribes of Grand Ronde Community v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016) (upholding Interior's decision to take land into trust for the Cowlitz Tribe based on evidence other than a Section 18 election). The D.C. Circuit held that Interior's interpretation of the phrase "any recognized Indian tribe now under Federal jurisdiction" is entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the phrase is ambiguous. *Confederated Tribes*, 830 F.3d at 558-61, 563-64. Proceeding to "Step Two" of *Chevron*, the Court concluded that the Secretary's interpretations of both "recognized" and "under Federal jurisdiction" were reasonable. *Id*. at 563, 564-65. The Court further explained that Interior's interpretation was entitled to deference under the canon of construction

requiring ambiguous statutory provisions to be interpreted to the benefit of Indians, and because an agency's interpretation of its own regulations is entitled to substantial deference. *Id*. 558-59. While we believe that the IRA's definition of "tribe" is unambiguous, this Court should give deference to the Secretary's interpretation to the extent this Court finds any ambiguity.

Citizens also argued in the district court that Interior needed to determine that Enterprise Rancheria was a "recognized" tribe in 1934. The district court rejected Citizens' argument that the word "now" in the first definition of "Indian" modifies "recognized tribe" as well as "under Federal jurisdiction." ER1:43-44. The district court went on to agree with the federal defendants that the IRA used that phrase in the "'cognitive or quasi-anthropological sense,'" although it concluded that Enterprise Rancheria was federally recognized in the modern sense on or before 1934. ER1:46 (quoting the 2014 Solicitor's Opinion M-37209).[12] Citizens has abandoned that argument on appeal. Citizens concedes (Brief 3 &

[12] Interior explained that "recognized" has been used historically in at least two different senses: (1) a "cognitive or quasi-anthropological sense," and (2) a more formal legal sense. Solicitor's Opinion M-37209 at 24-25; *see Confederated Tribes*, 830 F.3d at 564. Interior has noted that the members of the Senate debating the IRA appeared to use "recognized" in the "cognitive or quasi-anthropological sense." Solicitor's Opinion M-37209 at 25. But even if "recognized" in IRA § 19 meant the same thing as the modern notion of "federal recognition," the evidence of the relationships between the federal government and the Indians of Enterprise Rancheria support recognition, as Interior stated in the IGRA ROD.

n.1) that *Confederated Tribes*, 830 F.3d at 563, held that a tribe could satisfy the relevant definition even if it were "recognized" long after 1934 (*i.e.*, in 2002). Citizens asserts (Brief 3 n.1) that "*Confederated Tribes* is wrongly decided," but its opening brief does not develop that argument, nor does it otherwise argue the significance of the word "recognized." A "bare assertion does not preserve a claim"; to the contrary, that claim is "waived." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

Finally, Citizens is mistaken in attempting to dismiss (Brief 39) the district court's analysis as *post hoc* rationale. An agency may permissibly offer an argument "in support of its administrative position which bolsters rather than duplicates the consistent position upon which its decision was made." *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 836 (D.C. Cir. 2000). The district court did not create a new *post hoc* rationale for concluding that Enterprise Rancheria was a tribe under federal jurisdiction in 1934. It simply noted that the weight Interior placed here on the Section 18 vote was consistent with broader Department practice. The district court permissibly considered the 2014 Solicitor's Opinion, which is precedent for the Department, even though it postdated the decision in this case. Had the Solicitor reached an interpretation contrary to the IRA ROD, Citizens no doubt would have brought the opinion to the district court's attention.

And the relevant federal court precedent the district court cited simply made clear why such reliance on the calling of a Section 18 election is reasonable.

Citizens' *post hoc* argument is particularly inappropriate given its failure to present its arguments to Interior before the IRA ROD was drafted. It was not possible for Interior to respond to Citizens' arguments before Citizens presented them in the district court. The explanation in the IRA ROD adequately explained Interior's rationale for concluding that it had authority to take land into trust for Enterprise Rancheria.

II. Interior's No-Detriment Determination Complied with IGRA

The IGRA ROD concluded that "[a]ll practicable means to avoid or minimize environmental harm from the [proposed project] have been identified and adopted," and that "the environmental impacts of the [proposed project] are adequately addressed by the mitigation measures adopted in this ROD." ER2:147. Interior stated that it was "adopt[ing] as a part of this decision" the "following mitigation measures and related enforcement and monitoring programs." *Id*. In the subsequent 20 pages, the decision detailed a host of mitigation measures covering water resources, air quality, biological resources, cultural resources, socioeconomic conditions, transportation, public services, noise, hazardous materials, and visual resources. ER2:148-167. After referencing his analysis of the mitigation provisions in the Tribe's agreements with Yuba County and the City

of Marysville (ER2:190) as well as the mitigation identified in the FEIS (ER2:191), the IGRA ROD made the determination required to authorize gaming under 25 U.S.C. § 2719(b)(1)(A): "The weight of the evidence in the record strongly indicates that the Tribe's proposed gaming facility in Yuba County would not result in detrimental impact on the surrounding community." ER2:192.

Citizens does not challenge in this appeal the adequacy of the mitigation measures developed through the NEPA process and incorporated into the IGRA ROD. That is, Citizens does not question whether the mitigation measures, *if implemented*, would adequately address the identified impacts on the surrounding community. Citizens instead speculates that the Tribe might not actually implement the mitigation measures, and it argues that the IGRA ROD does not sufficiently discuss how the measures would be monitored and enforced if the Tribe fails to comply with these obligations. Brief 43-57. But as explained below, Citizens has not demonstrated that there is any deficiency in the IGRA ROD that renders its no-detriment decision arbitrary or capricious.

First, the Tribe has represented that it will implement the mitigation measures, and there is no reason to believe that the Tribe will not implement them. "BIA is permitted to rely on the Tribe's representations that it would undertake mitigation measures." *City of Lincoln City v. DOI*, 229 F.Supp.2d 1109, 1127 (D. Or. 2002) (upholding decision to take land into trust). The Tribe fully complied

with Interior's regulations implementing IGRA § 20, 25 C.F.R. Part 292, Subpart C, by submitting information "regarding environmental impacts and plans for mitigating adverse impacts," 25 C.F.R. § 292.18(a); by submitting information about other impacts, *id.* §292.18(b)-(c); and by estimating the "costs of impacts to the surrounding community," including the cost of "treatment programs for compulsive gambling," and identifying the "sources of revenue to mitigate them," *id.* § 292.18(d)-(e). Consistent with 25 C.F.R. § 292.18(g), the Tribe entered into "agreements with affected local governments." SER2:316-335 [ARN22979-22998]. The Tribe also submitted financial information (SER2:336-358 [ARN23096-23118]), which allowed the Secretary to conclude that the Tribe would have a "sustainable revenue stream … to fund necessary mitigation" (ER2:193).[13]

Moreover, it is in the Tribe's own interest to fulfill its obligations. In order to operate a successful enterprise, which is the point of the casino-hotel project, the Tribe must provide a healthy, safe, and welcoming environment for both its

[13] Citizens incorrectly reads (Brief 43-44) the word "necessary" in this sentence to constitute Interior's conclusion that every single mitigation measure in the FEIS and every single provision of the Tribe's agreements with Yuba County and Marysville was necessary to preclude a finding of detrimental impact. Interior chose to adopt all the mitigation measures recommended in the FEIS but made no determination about what the bare minimum would have been to make a no-detriment determination. Nor did Interior make any determination that all the provisions the Tribe agreed to in its agreements with Yuba County and Marysville were the minimum needed to address the project's impacts on them.

employees and its patrons. The Tribe must cooperate with nearby local governments for critical law-enforcement, fire-protection, and emergency-medical services. ER2:165. There is no reason to believe that the Tribe will not work in good faith to establish and maintain the effective government-to-government relationships that will benefit the project. Citizens expresses particular concern that the Tribe will renege on mitigation measures designed to address traffic impacts, but it is similarly in the Tribe's self-interest to facilitate the safe and efficient travel of employees and patrons to and from the proposed casino.

Second, the IGRA ROD expressly identifies the range of monitoring and enforcement mechanisms that will be deployed for the varied mitigation measures: "Where applicable, mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as this decision." ER2:147-48. This reference is consistent with the explanation in the FEIS: "Mitigation measures are enforceable because: they are incorporated into the project plan; they are required under the terms of a Memorandum of Understanding (MOU); and through various provisions of federal and state laws, and/or city, county, or tribal ordinances." SER2:396 [ARN23837].

Citizens characterizes the adopted mitigation measures as "theoretical" (Brief 47) and "speculative" (Brief 48), but that characterization is unwarranted in

light of the detailed description of the mitigation measures and Interior's assurances about monitoring and enforcement discussed above. This Court has noted that an "agency must implement the measures it chooses to adopt in its decision." *Pacific Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1104 n.16 (9th Cir. 2012) (citing 40 C.F.R. § 1505.3). To the extent Citizens is arguing that the mitigation section of the IGRA ROD should have been drafted with a greater degree of specificity about monitoring and enforcement, it has provided no basis for concern that the measures will not be implemented.

Citizens points (Brief 53-54) to Council on Environmental Quality guidance, 76 Fed. Reg. 3843, 3847 (Jan. 21, 2011), directing agencies to consider the available resources and the legal authorities for mitigation. As noted above, the IGRA ROD expressly found that the proposed casino would generate sufficient revenue to pay for the mitigation. And the agencies with legal authority for each measure have been identified. In response to comments that the mitigation measures recommended in the DEIS needed to be implemented and enforceable, BIA developed the MMEP, which specifically identifies the entities that will keep track of each mitigation measure. SER3:500-560 [ARN26701-26761]. The IGRA ROD expressly references and incorporates the FEIS's MMEP. ER2:148. Different federal agencies have authority with respect to different measures, including the U.S. Fish and Wildlife Service for federally listed species (SER3:530

[ARN26731]) and the U.S. Army Corps of Engineers for waters of the United States (SER3:538 [ARN26739]). In addition, Interior, the decision-maker in this matter, also has broad authority over Indian affairs. *See, e.g.*, 25 U.S.C. § 2. There is simply no one universal monitoring/enforcement mechanism that is available and appropriate for all of the mitigation measures.

State agencies have authority with respect to certain mitigation measures. For example, the IGRA ROD requires the Tribe to pay its fair share if and when Caltrans decides to widen State Highway 65 through Wheatland or to build a bypass around Wheatland. ER2:163. Caltrans is the government agency with responsibility for State Highway 65, not the Tribe or Interior. Contrary to Citizens' suggestion (Brief 48), the fact that implementation of this mitigation measure depends on Caltrans' decision does not call the no-detriment determination into question. Where, as here, congestion exists independent of a proposed project but may be exacerbated by a project, it is a standard practice to require a project proponent to pay a fair share of a future highway improvement. Citizens raises the specter (Brief 50-51) that the Tribe will not comply with this mitigation condition, but Caltrans itself has expressed no such concern. To the contrary, in a letter dated September 2, 2010, Caltrans simply stated that "we look forward to and anticipate working with Enterprise Rancheria on implementing the

appropriate mitigations for the impacts to the State Highway System as a result of this project." SER3:676.

Moreover, government agencies are afforded considerable discretion with respect to the exercise of their enforcement authority. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985). It would accordingly be inappropriate for Interior to purport to dictate in advance the specific enforcement action a government agency should undertake in the event of the Tribe's noncompliance with any mitigation measure.

In addition to relying on the mitigation measures recommended in the FEIS, the IGRA ROD also relies on the Tribe's agreements with Yuba County and Marysville. The mitigation measures encompassed in those agreements may be enforced, if necessary, through the dispute resolution provisions therein. Citizens notes that tribes enjoy immunity from suit (Brief 48), but fails to acknowledge that the Tribe provided a limited waiver of its immunity in its agreements with Yuba County and Marysville. ER3:286; SER1:250-251 [ARN2765-2766].[14] Citizens also notes (Brief 49) that the IGRA ROD requires the Tribe to "pay the County traffic impact fee, to the extent that equivalent fees are not paid for under a MOU

[14] Tribes do not enjoy sovereign immunity from suits by the federal government. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986).

with the County" (ER2:162). Yuba County has not expressed any concerns with this approach and has not challenged Interior's no-detriment determination.

Moreover, Citizens' particular concern about the enforceability of mitigation within the City of Wheatland and Sutter County is wholly unwarranted. The only impact within the City found to require mitigation involves State Highway 65, addressed above. *See* SER2:486 [ARN26668] ("No significant and unavoidable City of Wheatland traffic impacts were identified."); SER2:487 [ARN26669] ("The project-generated volumes on local Wheatland roadways would be minimal …."). The FEIS did not identify any significant impacts, and thus the IGRA ROD did not require any mitigation, within Sutter County. *See* SER2:493 [ARN26682] (traffic study estimates approximately six percent of project-generated traffic would be distributed to points south on Forty Mile Road (which becomes Pleasant Grove Road)); SER2:499 [ARN26698] ("Pleasant Grove Road is not included in the study area due to the small percentage of project trips that would travel in this area. The study area scope was developed in consultation with Caltrans and Yuba County."). Neither the City of Wheatland nor Sutter County has challenged the IGRA ROD.

For all of these reasons, Citizens has not demonstrated that Interior's determination in the IGRA ROD was arbitrary or capricious.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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s/ Mary Gabrielle Sprague
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SEPTEMBER 27, 2017
90-2-4-13879

STATEMENT OF RELATED CASES

A second appeal from the same district court decision is pending in this Court: *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke, et al.*, 9th Cir. No. 17-15245.

s/ Mary Gabrielle Sprague

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 10,654 words in 14-point Times New Roman font (excluding the parts of the brief exempted by Rule 32(a)(7)).

s/ Mary Gabrielle Sprague

ADDENDUM

ADDENDUM TABLE OF CONTENTS

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 5108 and 5110 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.)

25 U.S.C.A. § 2719, 25 USCA § 2719
Current through P.L. 115-43. Also includes P.L. 115-45. Title 26 current through 115-45.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5108
Formerly cited as 25 USCA § 465

§ 5108. 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.)

25 U.S.C.A. § 5108, 25 USCA § 5108
Current through P.L. 115-43. Also includes P.L. 115-45. Title 26 current through 115-45.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5123
Formerly cited as 25 USCA § 476

§ 5123. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

Currentness

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

CREDIT(S)

(June 18, 1934, c. 576, § 16, 48 Stat. 987; 1970 Reorg.Plan No. 2, § 102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Nov. 1, 1988, Pub.L. 100-581, Title I, § 101, 102 Stat. 2938; May 31, 1994, Pub.L. 103-263, § 5(b), 108 Stat. 709; Mar. 14, 2000, Pub.L. 106-179, § 3, 114 Stat. 47; Mar. 2, 2004, Pub.L. 108-204, Title I, § 103, 118 Stat. 543.)

25 U.S.C.A. § 5123, 25 USCA § 5123
Current through P.L. 115-51. Also includes P.L. 115-53 through 115-60. Title 26 current through 115-60.

End of Document

Add. 7

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5125
Formerly cited as 25 USCA § 478

§ 5125. Acceptance optional

Currentness

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

CREDIT(S)

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

25 U.S.C.A. § 5125, 25 USCA § 5125
Current through P.L. 115-51. Also includes P.L. 115-53 through 115-60. Title 26 current through 115-60.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5129
Formerly cited as 25 USCA § 479

§ 5129. 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.)

25 U.S.C.A. § 5129, 25 USCA § 5129
Current through P.L. 115-51. Also includes P.L. 115-53 through 115-60. Title 26 current through 115-60.

End of Document

Titles and Records Offices are designated as Certifying Officers for this purpose. When a copy or reproduction of a title document is authenticated by the official seal and certified by a Manager, Land Titles and Records Office, the copy or reproduction shall be admitted into evidence the same as the original from which it was made. The fees for furnishing such certified copies are established by a uniform fee schedule applicable to all constituent units of the Department of the Interior and published in 43 CFR part 2, appendix A.

§ 150.11 Disclosure of land records, title documents, and title reports.

(a) The usefulness of a Land Titles and Records Office depends in large measure on the ability of the public to consult the records contained therein. It is therefore, the policy of the Bureau of Indian Affairs to allow access to land records and title documents unless such access would violate the Privacy Act, 5 U.S.C. 552a or other law restricting access to such records, or there are strong policy grounds for denying access where such access is not required by the Freedom of Information Act, 5 U.S.C. 552. It shall be the policy of the Bureau of Indian Affairs that, unless specifically authorized, monetary considerations will not be disclosed insofar as leases of tribal land are concerned.

(b) Before disclosing information concerning any living individual, the Manager, Land Titles and Records Office, shall consult 5 U.S.C. 552a(b) and the notice of routine users then in effect to determine whether the information may be released without the written consent of the person to whom it pertains.

PART 151—LAND ACQUISITIONS

Sec.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

CROSS REFERENCE: For regulations pertaining to: The inheritance of interests in trust or restricted land, see parts 15, 16, and 17 of this title and 43 CFR part 4; the purchase of lands under the BIA Loan Guaranty, Insurance and Interest Subsidy program, see part 103 of this title; the exchange and partition of trust or restricted lands, see part 152 of this title; land acquisitions authorized by the Indian Self-Determination and Education Assistance Act, see parts 900 and 276 of this title; the acquisition of allotments on the public domain or in national forests, see 43 CFR part 2530; the acquisition of Native allotments and Native townsite lots in Alaska, see 43 CFR parts 2561 and 2564; the acquisition of lands by Indians with funds borrowed from the Farmers Home Administration, see 7 CFR part 1823, subpart N; the acquisition of land by purchase or exchange for members of the Osage Tribe not having certificates of competency, see §§117.8 and 158.54 of this title.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 151.1 Purpose and scope.

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations.

[79 FR 76897, Dec. 23, 2014]

§ 151.2 Definitions.

(a) *Secretary* means the Secretary of the Interior or authorized representative.

(b) *Tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, ''Tribe'' also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) *Individual Indian* means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where ''Tribe'' includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) *Trust land* or *land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) *Restricted land* or *land in restricted status* means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) *Land* means real property or any interest therein.

(h) *Tribal consolidation area* means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§ 151.3 Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, 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; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

§ 151.4 Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

§ 151.5 Trust acquisitions in Oklahoma under section 5 of the I.R.A.

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

§ 151.6 Exchanges.

An individual Indian or tribe may acquire land in trust status by exchange if the acquisition comes within the terms of this part. The disposal aspects of an exchange are governed by part 152 of this title.

§ 151.7 Acquisition of fractional interests.

Acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if:

(a) The buyer already owns a fractional interest in the same parcel of land; or

(b) The interest being acquired by the buyer is in fee status; or

(c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or

(d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or

(e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

§ 151.8 Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

§ 151.9 Requests for approval of acquisitions.

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

§ 151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(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 the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§ 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

[60 FR 32879, June 23, 1995, as amended at 60 FR 48894, Sept. 21, 1995]

§ 151.12 Action on requests.

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Secretary, or the Assistant Secretary—Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly publish in the FEDERAL REGISTER a notice of the decision to acquire land in trust under this part; and

(iii) Immediately acquire the land in trust under § 151.14 on or after the date

such decision is issued and upon fulfillment of the requirements of §151.13 and any other Departmental requirements.

(d) A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of any right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to part 2 of this chapter, by mail or personal delivery to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made; and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust under §151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of §151.13 and any other Departmental requirements.

(3) The administrative appeal period under part 2 of this chapter begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section;

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2.

[78 FR 67937, Nov. 13, 2013]

§151.13 Title review.

(a) If the Secretary determines that she will approve a request for the acquisition of land from unrestricted fee status to trust status, she shall require the applicant to furnish title evidence as follows:

(1) The deed or other conveyance instrument providing evidence of the applicant's title or, if the applicant does not yet have title, the deed providing evidence of the transferor's title and a written agreement or affidavit from the transferor, that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust; and

(2) Either:

(i) A current title insurance commitment; or

(ii) The policy of title insurance issued to the applicant or current owner and an abstract of title dating from the time the policy of title insurance was issued to the applicant or current owner to the present.

(3) The applicant may choose to provide title evidence meeting the title standards issued by the U.S. Department of Justice, in lieu of the evidence required by paragraph (a)(2) of this section.

(b) After reviewing submitted title evidence, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities that the Secretary identified and may seek additional information from the applicant needed to address such issues. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and she shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable.

[81 FR 30177, May 16, 2016]

§ 151.14 Formalization of acceptance.

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

[45 FR 62036, Sept. 18, 1980. Redesignated at 60 FR 32879, June 23, 1995]

§ 151.15 Information collection.

(a) The information collection requirements contained in §§151.9; 151.10; 151.11(c), and 151.13 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076–0100. This information is being collected to acquire land into trust on behalf of the Indian tribes and individuals, and will be used to assist the Secretary in making a determination. Response to this request is required to obtain a benefit.

(b) Public reporting for this information collection is estimated to average 4 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 337–SIB, 18th and C Streets, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs [Project 1076–0100], Office of Management and Budget, Washington, DC 20502.

[60 FR 32879, June 23, 1995; 64 FR 13895, Mar. 23, 1999]

PART 152—ISSUANCE OF PATENTS IN FEE, CERTIFICATES OF COMPETENCY, REMOVAL OF RESTRICTIONS, AND SALE OF CERTAIN INDIAN LANDS

Sec.

§ 291.12 Who will monitor and enforce tribal compliance with the Class III gaming procedures?

The Indian tribe and the State may have an agreement regarding monitoring and enforcement of tribal compliance with the Indian tribe's Class III gaming procedures. In addition, under existing law, the NIGC will monitor and enforce tribal compliance with the Indian tribe's Class III gaming procedures.

§ 291.13 When do Class III gaming procedures for an Indian tribe become effective?

Upon approval of Class III gaming procedures for the Indian tribe under either § 291.8(b), § 291.8(c), or § 291.11(a), the Indian tribe shall have 90 days in which to approve and execute the Secretarial procedures and forward its approval and execution to the Secretary, who shall publish notice of their approval in the FEDERAL REGISTER. The procedures take effect upon their publication in the FEDERAL REGISTER.

§ 291.14 How can Class III gaming procedures approved by the Secretary be amended?

An Indian tribe may ask the Secretary to amend approved Class III gaming procedures by submitting an amendment proposal to the Secretary. The Secretary must review the proposal by following the approval process for initial tribal proposals, except that the requirements of § 291.3 are not applicable and he/she may waive the requirements of § 291.4 to the extent they do not apply to the amendment request.

§ 291.15 How long do Class III gaming procedures remain in effect?

Class III gaming procedures remain in effect for the duration specified in the procedures or until amended pursuant to § 291.14.

PART 292—GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988

Subpart A—General Provisions

Sec.

Subpart B—Exceptions to Prohibition on Gaming on Newly Acquired Lands

Subpart C—Secretarial Determination and Governor's Concurrence

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

SOURCE: 73 FR 29375, May 20, 2008, unless otherwise noted.

Subpart A—General Provisions

§ 292.1 What is the purpose of this part?

The Indian Gaming Regulatory Act of 1988 (IGRA) contains several exceptions under which class II or class III gaming may occur on lands acquired by the United States in trust for an Indian tribe after October 17, 1988, if other applicable requirements of IGRA are met. This part contains procedures that the Department of the Interior will use to determine whether these exceptions apply.

§ 292.2 How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701–2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a–1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe

by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary-Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

Subpart B—Exceptions to Prohibitions on Gaming on Newly Acquired Lands

§ 292.3 How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?

(a) If the newly acquired lands are already in trust and the request does not concern whether a specific area of land is a ''reservation,'' the tribe may submit a request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming.

(b) If the tribe seeks to game on newly acquired lands that require a land-into-trust application or the request concerns whether a specific area of land is a ''reservation,'' the tribe must submit a request for an opinion to the Office of Indian Gaming.

§ 292.4 What criteria must newly acquired lands meet under the exceptions regarding tribes with and without a reservation?

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

(a) If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation.

(b) If the tribe had no reservation on October 17, 1988, the lands must be either:

(1) Located in Oklahoma and within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma; or

(2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.

SETTLEMENT OF A LAND CLAIM'' EXCEPTION

§ 292.5 When can gaming occur on newly acquired lands under a settlement of a land claim?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(i), known as the ''settlement of a land claim'' exception. Gaming may occur on newly acquired lands if the land at issue is either:

(a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or

(b) Acquired under a settlement of a land claim that:

(1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or

(2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.

INITIAL RESERVATION'' EXCEPTION

§ 292.6 What must be demonstrated to meet the "initial reservation" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(ii), known as the ''initial reservation'' exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe has been acknowledged (federally recognized) through the administrative process under part 83 of this chapter.

(b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.

(c) The land has been proclaimed to be a reservation under 25 U.S.C. 467 and is the first proclaimed reservation of the tribe following acknowledgment.

(d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has significant historical connections and one or more of the following modern connections to the land:

(1) The land is near where a significant number of tribal members reside; or

(2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

RESTORED LANDS'' EXCEPTION

§ 292.7 What must be demonstrated to meet the "restored lands" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(iii), known as the ''restored lands'' exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;

(b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

(c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and

(d) The newly acquired lands meet the criteria of ''restored lands'' in § 292.11.

§ 292.8 How does a tribe qualify as having been federally recognized?

For a tribe to qualify as having been at one time federally recognized for purposes of § 292.7, one of the following must be true:

(a) The United States at one time entered into treaty negotiations with the tribe;

(b) The Department determined that the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;

(c) Congress enacted legislation specific to, or naming, the tribe indicating that a government-to-government relationship existed;

(d) The United States at one time acquired land for the tribe's benefit; or

(e) Some other evidence demonstrates the existence of a government-to-government relationship between the tribe and the United States.

§ 292.9 How does a tribe show that it lost its government-to-government relationship?

For a tribe to qualify as having lost its government-to-government relationship for purposes of § 292.7, it must show that its government-to-government relationship was terminated by one of the following means:

(a) Legislative termination;

(b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship; or

(c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

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

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.

§ 292.11 What are "restored lands"?

For newly acquired lands to qualify as ''restored lands'' for purposes of § 292.7, the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section.

(a) If the tribe was restored by a Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe, the tribe must show that either:

(1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or

(2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12.

(b) If the tribe is acknowledged under § 83.8 of this chapter, it must show that it:

(1) Meets the requirements of § 292.12; and

(2) Does not already have an initial reservation proclaimed after October 17, 1988.

(c) If the tribe was restored by a Federal court determination in which the United States is a party or by a court-approved settlement agreement entered into by the United States, it must meet the requirements of § 292.12.

§ 292.12 How does a tribe establish connections to newly acquired lands for the purposes of the "restored lands" exception?

To establish a connection to the newly acquired lands for purposes of § 292.11, the tribe must meet the criteria in this section.

(a) The newly acquired lands must be located within the State or States

where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

(1) The land is within reasonable commuting distance of the tribe's existing reservation;

(2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;

(3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(4) Other factors demonstrate the tribe's current connection to the land.

(b) The tribe must demonstrate a significant historical connection to the land.

(c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:

(1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

Subpart C—Secretarial Determination and Governor's Concurrence

§ 292.13 When can a tribe conduct gaming activities on newly acquired lands that do not qualify under one of the exceptions in subpart B of this part?

A tribe may conduct gaming on newly acquired lands that do not meet the criteria in subpart B of this part only after all of the following occur:

(a) The tribe asks the Secretary in writing to make a Secretarial Determination that a gaming establishment on land subject to this part is in the best interest of the tribe and its members and not detrimental to the surrounding community;

(b) The Secretary consults with the tribe and appropriate State and local officials, including officials of other nearby Indian tribes;

(c) The Secretary makes a determination that a gaming establishment on newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and

(d) The Governor of the State in which the gaming establishment is located concurs in the Secretary's Determination (25 U.S.C. 2719(b)(1)(A)).

§ 292.14 Where must a tribe file an application for a Secretarial Determination?

A tribe must file its application for a Secretarial Determination with the Regional Director of the BIA Regional Office having responsibility over the land where the gaming establishment is to be located.

§ 292.15 May a tribe apply for a Secretarial Determination for lands not yet held in trust?

Yes. A tribe can apply for a Secretarial Determination under § 292.13 for land not yet held in trust at the same time that it applies under part 151 of this chapter to have the land taken into trust.

APPLICATION CONTENTS

§ 292.16 What must an application for a Secretarial Determination contain?

A tribe's application requesting a Secretarial Determination under § 292.13 must include the following information:

(a) The full name, address, and telephone number of the tribe submitting the application;

(b) A description of the location of the land, including a legal description supported by a survey or other document;

(c) Proof of identity of present ownership and title status of the land;

(d) Distance of the land from the tribe's reservation or trust lands, if any, and tribal government headquarters;

(e) Information required by § 292.17 to assist the Secretary in determining

whether the proposed gaming establishment will be in the best interest of the tribe and its members;

(f) Information required by § 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community;

(g) The authorizing resolution from the tribe submitting the application;

(h) The tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with 25 U.S.C. 2710, if any;

(i) The tribe's organic documents, if any;

(j) The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated;

(k) If the tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment; and

(l) A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. 2711 and part 533 of this title, if any.

§ 292.17 How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members?

To satisfy the requirements of § 292.16(e), an application must contain:

(a) Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;

(b) Projected tribal employment, job training, and career development;

(c) Projected benefits to the tribe and its members from tourism;

(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

(e) Projected benefits to the relationship between the tribe and non-Indian communities;

(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;

(g) Distance of the land from the location where the tribe maintains core governmental functions;

(h) Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States;

(i) Evidence of significant historical connections, if any, to the land; and

(j) Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

(1) Consulting agreements relating to the proposed gaming establishment;

(2) Financial and loan agreements relating to the proposed gaming establishment; and

(3) Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.

§ 292.18 What information must an application contain on detrimental impacts to the surrounding community?

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);

(b) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(c) Anticipated impacts on the economic development, income, and employment of the surrounding community;

(d) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(e) Anticipated cost, if any, to the surrounding community of treatment

programs for compulsive gambling attributable to the proposed gaming establishment;

(f) If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and

(g) Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

CONSULTATION

§ 292.19 How will the Regional Director conduct the consultation process?

(a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60-day period from:

(1) Appropriate State and local officials; and

(2) Officials of nearby Indian tribes.

(b) Upon written request, the Regional Director may extend the 60-day comment period for an additional 30 days.

(c) After the close of the consultation period, the Regional Director must:

(1) Provide a copy of all comments received during the consultation process to the applicant tribe; and

(2) Allow the tribe to address or resolve any issues raised in the comments.

(d) The applicant tribe must submit written responses, if any, to the Regional Director within 60 days of receipt of the consultation comments.

(e) On written request from the applicant tribe, the Regional Director may extend the 60-day comment period in paragraph (d) of this section for an additional 30 days.

§ 292.20 What information must the consultation letter include?

(a) The consultation letter required by § 292.19(a) must:

(1) Describe or show the location of the proposed gaming establishment;

(2) Provide information on the proposed scope of gaming; and

(3) Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

(b) The consultation letter must include a request to the recipients to submit comments, if any, on the following areas within 60 days of receiving the letter:

(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

(2) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(3) Anticipated impact on the economic development, income, and employment of the surrounding community;

(4) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

(6) Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

EVALUATION AND CONCURRENCE

§ 292.21 How will the Secretary evaluate a proposed gaming establishment?

(a) The Secretary will consider all the information submitted under §§ 292.16–292.19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be detrimental to the surrounding community.

(b) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.

(c) If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

§ 292.22 How does the Secretary request the Governor's concurrence?

If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor of the State:

(a) A written notification of the Secretarial Determination and Findings of Fact supporting the determination;

(b) A copy of the entire application record; and

(c) A request for the Governor's concurrence in the Secretarial Determination.

§ 292.23 What happens if the Governor does not affirmatively concur with the Secretarial Determination?

(a) If the Governor provides a written non-concurrence with the Secretarial Determination:

(1) The applicant tribe may use the newly acquired lands only for non-gaming purposes; and

(2) If a notice of intent to take the land into trust has been issued, then the Secretary will withdraw that notice pending a revised application for a non-gaming purpose.

(b) If the Governor does not affirmatively concur in the Secretarial Determination within one year of the date of the request, the Secretary may, at the request of the applicant tribe or the Governor, grant an extension of up to 180 days.

(c) If no extension is granted or if the Governor does not respond during the extension period, the Secretarial Determination will no longer be valid.

§ 292.24 Can the public review the Secretarial Determination?

Subject to restrictions on disclosure required by the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and the Trade Secrets Act (18 U.S.C. 1905), the Secretarial Determination and the supporting documents will be available for review at the local BIA agency or Regional Office having administrative jurisdiction over the land.

INFORMATION COLLECTION

§ 292.25 Do information collections in this part have Office of Management and Budget approval?

The information collection requirements in §§ 292.16, 292.17, and 292.18 have been approved by the Office of Management and Budget (OMB). The information collection control number is 1076–0158. A Federal agency may not collect or sponsor and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control.

Subpart D—Effect of Regulations

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

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.

PART 293—CLASS III TRIBAL STATE GAMING COMPACT PROCESS

Sec.

not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement,

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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> 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.

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ECF system and that all participants in this case were served through that system.

s/ Mary Gabrielle Sprague