



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

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**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*.<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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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<sup>1</sup> 555 U.S. 379 (2009).

<sup>2</sup> See 25 U.S.C. § 479.

<sup>3</sup> 48 Fed. Reg. 6177 (Feb. 10, 1983).

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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."<sup>9</sup>

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.<sup>10</sup> The Court analyzed the ordinary meaning of the word "now" in 1934,<sup>11</sup> within the context of the IRA,<sup>12</sup> as well as contemporaneous departmental

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<sup>5</sup> *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 18 IBIA 67 (Dec. 5, 1989).

<sup>6</sup> 25 U.S.C. § 1708.

<sup>7</sup> *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (June 29, 2000).

<sup>8</sup> *Carcieri v. Kempthorne*, 497 F.3d 15, 30-31 (1st Cir. 2007)

<sup>9</sup> *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.

<sup>10</sup> *Carcieri*, 555 U.S. at 388.

<sup>11</sup> 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,<sup>13</sup> 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.”<sup>14</sup> 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.<sup>15</sup>

## 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.”<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup>

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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<sup>12</sup> 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.

<sup>13</sup> 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).

<sup>14</sup> *Id.* at 395.

<sup>15</sup> *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.

<sup>16</sup> *Carcieri*, 555 U.S. at 397 (Breyer, J., concurring).

<sup>17</sup> *Id.* at 398.

<sup>18</sup> *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.<sup>19</sup> 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."<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Justice Stevens dissented, finding that the IRA placed no temporal limit on the definition of an Indian tribe,<sup>25</sup> and criticizing the majority for adopting a "cramped reading" of the IRA.<sup>26</sup>

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."<sup>27</sup> 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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<sup>19</sup> *Id.* at 398.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 399.

<sup>22</sup> *Id.*

<sup>23</sup> *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.

<sup>24</sup> *Id.* at 401 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part).

<sup>25</sup> *Id.* (Stevens, J., dissenting).

<sup>26</sup> *Id.* at 413-14.

<sup>27</sup> 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.”<sup>28</sup> If the language of the statute is clear, the court and the agency must give effect to “the unambiguously expressed intent of Congress.”<sup>29</sup> If, however, the statute is “silent or ambiguous,”<sup>30</sup> pursuant to the second step, the agency must base its interpretation on a “reasonable construction” of the statute.<sup>31</sup> 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.<sup>32</sup>

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.”<sup>33</sup> *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.”<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

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<sup>28</sup> *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

<sup>29</sup> *Id.* at 843.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 840.

<sup>32</sup> 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 Servs.*, 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.’”).

<sup>33</sup> *Skidmore*, 323 U.S. at 139.

<sup>34</sup> *Id.* at 140.

<sup>35</sup> *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 (9<sup>th</sup> Cir. 2008); *Wilderness Soc’y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1069 (9<sup>th</sup> Cir. 2003) (en banc).

<sup>36</sup> *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).

<sup>37</sup> *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."<sup>38</sup> 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."<sup>39</sup>

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."<sup>40</sup> 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."<sup>41</sup> During the time of the IRA's passage, Tribes' economic conditions were unconscionable and Congress had sought to disband and dismantle tribal governance structures.<sup>42</sup> The BIA administratively controlled reservation life, which included the establishment and imposition of governance systems on the tribes.<sup>43</sup> After the publication of the Meriam Report documenting the conditions of Indians and tribes,<sup>44</sup> a concerted effort was made to reverse course. The IRA was enacted to help achieve this shift.<sup>45</sup>

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<sup>38</sup> *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

<sup>39</sup> *United States v. Celestine*, 215 U.S. 278, 290 (1909).

<sup>40</sup> *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.

<sup>41</sup> 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").

<sup>42</sup> *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.).

<sup>43</sup> 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.").

<sup>44</sup> See *supra* note 40 ("Meriam Report").

<sup>45</sup> 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.<sup>46</sup>

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<sup>47</sup> and to incorporate.<sup>48</sup> It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application.<sup>49</sup> 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.<sup>50</sup> 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."<sup>51</sup> 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.<sup>52</sup>

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."<sup>53</sup> 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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<sup>46</sup> Pub. L. No. 73-383, 48 Stat. 984 (1934).

<sup>47</sup> Section 16, 25 U.S.C. § 476,

<sup>48</sup> Section 17, 25 U.S.C. § 477.

<sup>49</sup> Section 18, 25 U.S.C. § 478.

<sup>50</sup> 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 . . .")

<sup>51</sup> *Mescalero*, 411 U.S. at 151.

<sup>52</sup> 25 U.S.C. § 465.

<sup>53</sup> 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.<sup>54</sup>

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.<sup>55</sup>

## 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.<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup>

The entry in Black's includes the following quotation: “The authority of a court as distinguished from the other departments; . . .”<sup>59</sup> 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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<sup>54</sup> *Id.*

<sup>55</sup> *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).

<sup>56</sup> 25 U.S.C. § 479.

<sup>57</sup> *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.”).

<sup>58</sup> *Black's Law Dictionary* at 1038 (3d ed. 1933).

<sup>59</sup> *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.<sup>60</sup>

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.<sup>61</sup> 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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<sup>60</sup> *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.).

<sup>61</sup> 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.<sup>62</sup>

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.”<sup>63</sup> 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?<sup>64</sup>

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.”<sup>65</sup> 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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<sup>62</sup> House Hearings at 6 (emphasis added).

<sup>63</sup> 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”).

<sup>64</sup> *Id.* at 263.

<sup>65</sup> *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.<sup>66</sup>

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,”<sup>67</sup> rather than those of one-quarter blood.<sup>68</sup> 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.”<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> Although there was significant confusion over the definition of

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<sup>66</sup> *Id.* at 263-64.

<sup>67</sup> 25 U.S.C. § 479.

<sup>68</sup> 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.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 266.

<sup>71</sup> 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,<sup>72</sup> 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.<sup>73</sup>

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.*”<sup>74</sup> 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.”<sup>75</sup> 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.<sup>76</sup>

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).

<sup>72</sup> 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.”

<sup>73</sup> *Id.*

<sup>74</sup> 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).

<sup>75</sup> *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).

<sup>76</sup> 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,”<sup>77</sup> and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate.<sup>78</sup> 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.’”<sup>79</sup>

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.”<sup>80</sup> 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 . . . .”<sup>81</sup> In order to protect Indian lands from alienation and third party claims, Congress enacted a series of Indian Trade and Intercourse Acts (“Nonintercourse Acts”)<sup>82</sup> 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.<sup>83</sup>

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.”<sup>84</sup> As a result, title to Indian lands could only be extinguished by the Sovereign.<sup>85</sup>

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<sup>77</sup> U.S. CONST., art. I, § 8, cl. 3.

<sup>78</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>79</sup> *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.”).

<sup>80</sup> *Lara*, 541 U.S. at 201 (internal citations and quotation marks omitted).

<sup>81</sup> *Mancari*, 417 U.S. at 552 (citation omitted).

<sup>82</sup> 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.

<sup>83</sup> Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729, codified at 25 U.S.C. § 177.

<sup>84</sup> 21 U.S. 543, 574 (1823).

<sup>85</sup> 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 . . . .”<sup>86</sup> Once a federal relationship is established with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease.<sup>87</sup> And Congress must authorize the transfer of tribal interests in land.

Lastly, the Supremacy Clause<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup>

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,<sup>91</sup> Congress first established the rules for conducting commerce with the Indian tribes. The

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<sup>86</sup> *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 . . . .”).

<sup>87</sup> *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).

<sup>88</sup> U.S. CONST., art. VI, §1, cl. 2.

<sup>89</sup> Because this authority lies in the Constitution, it cannot be divested except by Constitutional amendment.

<sup>90</sup> *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).

<sup>91</sup> Act of July 22, 1790, 1 Stat. 137.

Trade and Intercourse Act (sometimes referred to as the Non-Intercourse Act), last amended in 1834,<sup>92</sup> 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.<sup>93</sup> The Indian Contracting Act required the Secretary of the Interior to approve all contracts between non-Indians and Indian tribes or individuals.<sup>94</sup> 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.<sup>95</sup> Bolstered by the Supreme Court decision in *United States v. Kagama*,<sup>96</sup> 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.<sup>97</sup> Additionally, annual appropriations bills listed appropriations for some individually named tribes and reservations.<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> Congress subsequently enacted specific allotment acts for many tribes.<sup>101</sup> 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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<sup>92</sup> Act of June 30, 1834, 4 Stat. 729.

<sup>93</sup> 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 (1<sup>st</sup> Cir. 1975).

<sup>94</sup> Act of March 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71.

<sup>95</sup> 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).

<sup>96</sup> 118 U.S. 375 (1886).

<sup>97</sup> See Comment, *supra* note 45 at 956-60.

<sup>98</sup> 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).

<sup>99</sup> Act of Nov. 2, 1921, 42 Stat. 208.

<sup>100</sup> Act of Feb. 8, 1887, 24 Stat. 388 (“Dawes Act”).

<sup>101</sup> 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.<sup>102</sup>

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 . . . ."<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> The Office of Indian Affairs became responsible, for example, for the administration of Indian reservations, in addition to implementing legislation.<sup>106</sup> 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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<sup>102</sup> 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.

<sup>103</sup> Act of July 9, 1832, 4 Stat. 564.

<sup>104</sup> Act of March 3, 1849, 9 Stat. 395.

<sup>105</sup> 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.").

<sup>106</sup> See generally 25 U.S.C. §§ 2, 9.

contest.<sup>107</sup> 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 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.<sup>108</sup> He also noted that “several so-called ‘tribes’ . . . They are no more Indians than you or I, perhaps.”<sup>109</sup> 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.”<sup>110</sup> 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.”<sup>111</sup> 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*.<sup>112</sup> There the Supreme Court interpreted the term “jurisdiction” as used in a federal criminal code amendment

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<sup>107</sup> 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).

<sup>108</sup> Senate Hearing at 266 (Statement of Chairman Wheeler).

<sup>109</sup> *Id.*

<sup>110</sup> *Carcieri*, 555 U.S. at 396-97 (Breyer, J. concurring).

<sup>111</sup> See *supra* notes 28-32 and corresponding text (discussing *Chevron*).

<sup>112</sup> 466 U.S. 475, 479 (1984).

enacted the same day as the IRA.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup>

Accordingly, I believe that the Supreme Court’s ruling in *Carciere* 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.<sup>116</sup> While the unique circumstances of the *Carciere* decision did not require the Court to address Congress’s plenary authority,<sup>117</sup> 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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<sup>113</sup> *Id.* at 478.

<sup>114</sup> *Id.* at 479 (internal citations and quotation marks omitted).

<sup>115</sup> 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

<sup>116</sup> 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, *Carciere v. Salazar*, 555 U.S. 379, No. 07-526 (Nov. 3, 2008).

<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup>

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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<sup>118</sup> 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.

<sup>119</sup> See *supra* Section II.B (discussing Justice Breyer's concurring opinion in *Carciari*).

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.<sup>120</sup> 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.<sup>121</sup> And evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action.<sup>122</sup> Indeed, there may be periods where federal jurisdiction exists but is dormant.<sup>123</sup> 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.<sup>124</sup>

#### 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.<sup>125</sup> 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.<sup>126</sup> If "a majority of the adult Indians on a reservation . . . vote against its

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<sup>120</sup> 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).

<sup>121</sup> See Stillaguamish Memorandum.

<sup>122</sup> 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)).

<sup>123</sup> 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).

<sup>124</sup> 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 *Carciere* decision applies to that tribe's particular request.

<sup>125</sup> See *supra* Part III.C.

<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> 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).<sup>129</sup> 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.<sup>130</sup> 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.”<sup>131</sup> 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.<sup>132</sup>

#### 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.”<sup>133</sup> 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.<sup>134</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378.

<sup>129</sup> Act of Jan. 12, 1983, 96 Stat. 2515, 2517-19 (codified at 25 U.S.C. § 2201 *et seq.*).

<sup>130</sup> 25 U.S.C. § 2517.

<sup>131</sup> *Carcieri*, 555 U.S. at 394-95.

<sup>132</sup> *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).

<sup>133</sup> Circular No. 3134, Enrollment Under the IRA (1936 Circular) 1 (March 7, 1936).

<sup>134</sup> *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.<sup>135</sup> Because those opinions "arise . . . out of requests to organize and petitions to have land taken in trust for a tribe,"<sup>136</sup> both of which require status as a "recognized tribe now under federal jurisdiction" as a "prerequisite,"<sup>137</sup> they are instructive in our analysis.<sup>138</sup> 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."<sup>139</sup>

For example, beginning with the Mole Lake Band of Chippewas,<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> 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."<sup>143</sup> 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."<sup>144</sup> Similarly, in finding that the Wisconsin Winnebago could organize separately, the Solicitor

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<sup>135</sup> 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").

<sup>136</sup> Stillaguamish Memorandum at 6, note 1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 7.

<sup>140</sup> Memorandum from the Solicitor of the Interior to the Comm'r of Indian Affairs, Feb. 8, 1937.

<sup>141</sup> *Id.* at 2-3.

<sup>142</sup> *Id.*

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

<sup>144</sup> *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.<sup>145</sup>

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.<sup>146</sup> 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."<sup>147</sup>

Admittedly, the Department made errors in its implementation of the IRA.<sup>148</sup> 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."<sup>149</sup>

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.<sup>150</sup>

#### 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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<sup>145</sup> Memorandum from Nathan R. Margold, Solicitor, to the Comm'r on Indian Affairs, Mar. 6, 1937.

<sup>146</sup> 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).

<sup>147</sup> Stillaguamish Memorandum at 7-8 (citing various decisions by the Department).

<sup>148</sup> See *Indian Affairs and the Indian Reorganization Act: The Twenty Year Record* (W. Kelly ed. 1954).

<sup>149</sup> *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>150</sup> 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.”<sup>151</sup> 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.<sup>152</sup> 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.”<sup>153</sup> 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.”<sup>154</sup>

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.’”<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> 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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<sup>151</sup> 25 U.S.C. § 479. Notably, the definition not only refers to “recognized Indian tribe,” but also to “members” and “persons.”

<sup>152</sup> 555 U.S. at 382-83.

<sup>153</sup> *Id.* at 397-398.

<sup>154</sup> *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.

<sup>155</sup> 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.”).

<sup>156</sup> *Id.*

<sup>157</sup> 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.”<sup>158</sup> 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.”<sup>159</sup> In fact, the Senate Committee’s concern about the breadth of the term “recognized Indian tribe” arguably contributed to Congress’ adoption of 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).<sup>160</sup> 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.”<sup>161</sup> 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.”<sup>162</sup> By regulation, therefore, the Department only acquires land in trust for tribes that are federally recognized at the time of acquisition.<sup>163</sup>

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<sup>158</sup> 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.”).

<sup>159</sup> 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.

<sup>160</sup> 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.

<sup>161</sup> 25 C.F.R. Part 151.

<sup>162</sup> 25 C.F.R. § 151.2.

<sup>163</sup> 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."<sup>164</sup>



Hilary C. Tompkins

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<sup>164</sup> 25 U.S.C. § 465.