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OFFICE OF THE SOLICITOR

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Memorandum

To: Regional Solicitors
Field Solicitors
SOL-Division of Indian Affairs

From: Daniel H. Jorjani, Solicitor 

Subject: Procedure for Determining Eligibility for Land ~~into Trust~~ under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act

On March 9, 2020, I withdrew¹ Solicitor's Opinion M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("Sol. Op. M-37029"), after concluding that its interpretation of Category 1 of Section 19 of the Indian Reorganization Act ("IRA") was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction." Following the United States Supreme Court's decision in *Carcieri v. Salazar*,² the Department of the Interior ("Department") memorialized its procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934. Having withdrawn Sol. Op. M-37029, this memorandum provides a four-step procedure for determining tribal eligibility under Category 1. It derives from an interpretation of Category 1's terms that is more consistent with how Congress and the Department would have understood them in 1934. Attorneys in the Solicitor's Office shall adhere to this procedure going forward. A copy of the memorandum setting forth this interpretive analysis is attached to provide additional guidance and understanding.³

The procedure consists of up to four steps. As explained below, it will often not be necessary to proceed through each of the procedure's steps. To aid in this determination, the procedure identifies forms of evidence that presumptively satisfy each of the first three steps. Only in the absence of presumptive evidence should the inquiry proceed to Step Four, which requires the Department to weigh the totality of an applicant tribe's evidence. This guidance does not eliminate the need for a fact-specific inquiry for each applicant tribe. Nor does it provide an exhaustive list of the forms of evidence that may be relevant, which necessarily vary by tribe, by region, and by the relevant federal policy era at issue. However, by identifying certain forms of

¹ Sol. Op. M-37055, *Withdrawal of Solicitor's Opinion, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act"* (Mar. 9, 2020).

² 555 U.S. 379 (2009).

³ *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum, Deputy Solicitor for Indian Affairs, to the Solicitor (Mar. 5, 2020).

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evidence that may satisfy its steps, this guidance should reduce the amount of evidence that applicants must submit in some cases. Eligibility determinations rendered under Sol. Op. M-37029 remain in effect and need not be revisited.

Step 1. Post-1934 Legislation Making the IRA Applicable.

Step One determines whether or not Congress enacted legislation after 1934 making the IRA applicable to a particular tribe. Writing for the majority in *Carcieri*, Justice Thomas observed that Congress has enacted such legislation to make tribes eligible for the IRA's benefits who might not otherwise come within Section 19's definitions.⁴ *Carcieri* included several examples of such authority,⁵ and the Department has since identified others.⁶ Because the existence of such legislation effectively moots any need to determine a tribal applicant's eligibility under Category 1, the Solicitor's Office should determine whether such authority exists for an applicant tribe at the outset. In the absence of such authority, the Solicitor's Office should proceed to Step Two.

Step 2. "Under Federal Jurisdiction" In 1934.

Step Two determines whether an applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such. This criterion derives from understanding the meaning of the phrase "under federal jurisdiction" as referring to the federal government's administration of its Indian affairs authority with respect to particular groups of Indians, as described above. The following forms of evidence may demonstrate such administration in and immediately around 1934, for which reason they may be presumed to show that the applicant tribe was "under federal jurisdiction" in 1934. In the absence of a form of evidence that presumptively demonstrates that the tribal applicant was under federal jurisdiction in 1934, the analysis should proceed to Step Three.

A. Section 18 Elections.

Section 18 of the IRA, as amended, directed the Secretary to conduct votes to allow Indians residing on a reservation to vote on whether to reject the application of the IRA.⁷ During

⁴ *Carcieri*, 555 U.S. at 391-92; M-37029 at 20, n. 124. In rejecting the claim that the definitions of "Indian" in Section 19 of the IRA were not exclusive, Justice Thomas reasoned it would not otherwise have been necessary for Congress later to enact legislation expanding the Secretary's authority to particular tribes "not necessarily encompassed" within Section 19.

⁵ See *Carcieri*, 555 U.S. at 392, n. 6 (citing 25 U.S.C. § 473a (Territory of Alaska); § 1041e(a) (Shawnee Tribe); § 1300b-14(a) (Texas Band of Kickapoo Indians); and § 1300g-2(a) (Ysleta del Sur Pueblo). In 2016, the U.S. House of Representatives Office of Law Revision Counsel reclassified certain chapters of Title 25, resulting in the renumbering or omission of these provisions from Title 25.

⁶ See, e.g., Oklahoma Indian Welfare Act, § 13, 49 Stat. 1967 (1936); Pub. L. 93-375, 92 Stat. 712 (Sep. 18, 1978) (Pascua Yaqui Tribe); Pub. L. 92-470, 86 Stat. 783 (Oct. 6, 1972) (Tonto Apache Tribe); Pub. L. 97-391, 96 Stat. 1960 (Dec. 29, 1982), as amended, Pub. L. 100-139, 101 Stat. 827 (Oct. 26, 1987) (Cow Creek Band of Umpqua Tribe of Indians); Pub. L. 98-134, 97 Stat. 855 (Oct. 18, 1983) (Mashantucket Pequot Tribe); Pub. L. 100-411, 102 Stat. 1097 (Aug. 22, 1988) (Coushatta Tribe of Louisiana); Pub. L. 101-42, 103 Stat. 91 (Jun. 28, 1989) (Coquille Indian Tribe); Pub. L. 103-116, 107 Stat. 1118 (Oct. 27, 1993) (Catawba Tribe of South Carolina).

⁷ IRA, § 18 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application").

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the period during which Section 18 votes were taken, 258 elections were held.⁸ The Department compiled a list of these elections in what later became known as the Haas Report.⁹ The federal courts and the Interior Board of Indian Appeals have repeatedly held that Section 18 elections constitute unambiguous evidence that the elections demonstrated the jurisdictional status in 1934 of the tribes who participated in such elections. The calling of such elections confirmed the finding of the Secretary that those who voted were “Indians” within the meaning of the IRA. This is true irrespective of whether the Section 18 election resulted in the adoption or rejection of the IRA.¹⁰ Moreover, the calling of such an election by the Secretary is “certainly an acknowledgment of federal power and responsibility (*i.e.*, federal jurisdiction)” toward the Indians for whom the election was called.¹¹ This, and a footnote addressing enduring treaty obligations, are the only examples of unambiguous federal jurisdiction in 1934 discussed in Sol. Op. M-37029. We have identified additional dispositive evidence demonstrating federal jurisdiction in 1934 below.

B. Section 16 Constitutions.

Section 16 of the IRA authorized the Secretary to call a special election of a tribe’s members to vote to approve a tribal constitution and bylaws.¹² By the same rationale as Section 18 votes, Secretarial approval of a tribal constitution under the IRA during the period of the Act’s early implementation constitutes an acknowledgment of federal power and responsibility toward the tribe, thus presumptively demonstrating that the tribe was under federal jurisdiction within the meaning of Category 1.

C. Section 17 Charters.

Section 17 of the IRA authorized the Secretary to approve and issue a charter of incorporation to a tribe upon a petition by at least one-third of the applicant tribe’s adult Indians.¹³ For the same reasons described above regarding Section 18 elections and approval of Section 16 constitutions, the approval by the Secretary of a Section 17 charter under the IRA

⁸ Theodore Haas, *Ten Years of Tribal Government Under the I.R.A.* at 3 (U.S. Indian Service Tribal Relations Pamphlets 1947) (hereafter “Haas Report”). See also, *Stand Up for California! v. U.S. Dept. of the Interior*, 919 F. Supp.2d 51, 67-68 (D.D.C. 2013) (Section 18 elections conclusive evidence of being under federal jurisdiction); *Stand Up for California! v. United States Dep’t of Interior*, 879 F.3d 1177 (D.C. Cir. 2018), *cert denied*, 139 S. Ct. 786 (Jan. 7, 2019); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 596 (9th Cir. 2018); *Village of Hobart, Wisc. v. Acting Midwest Reg. Dir., Bureau of Indian Affairs*, 57 IBIA 4, 21 (2013) (Sec. 18 election provides “brightline test” for determining UFJ); *Shawano County, Wisc. v. Acting Midwest Reg. Dir., Bureau of Indian Affairs*, 53 IBIA 62, 74 (2011) (Sec. 18 vote necessarily recognized and determined that a tribe was under federal jurisdiction, “notwithstanding the Department of the Interior’s admittedly inconsistent dealings with the Tribe in previous years.”). Although not accounted for in the Haas Report, at least one additional Section 18 election was held at the reservation for the Oneida Indian Nation in 1936. *Upstate Citizens for Equal. v. United States*, 841 F.3d 556, 572 (2d Cir. 2016).

⁹ Haas Report, Table A at 13-20 (listing Section 18 elections conducted). See also M-37029 at 19 (citing same).

¹⁰ *Carcieri*, 555 U.S. at 394-95. The *Carcieri* majority confirmed that the Indian Land Consolidation Act’s amendments to the IRA in 1983 allowed tribes that rejected the IRA pursuant to a Section 18 election to benefit from Section 5.

¹¹ *Stand Up for California! v. U.S. Department of the Interior*, 204 F. Supp.3d 212, 289 (D.D.C. 2016), *aff’d*, 879 F.3d 1177 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (Jan. 7, 2019); see also M-37029 at 20-21.

¹² IRA, § 16. See Haas Report, Table B at 21-27 (listing constitutions and charters approved by the Secretary).

¹³ IRA, § 17.

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during the period of the Act's early implementation constitutes an acknowledgment of federal power and responsibility toward the tribe, thus presumptively demonstrating that the tribe was under jurisdiction within the meaning of Category 1.

D. Treaty Rights.

The continuing existence of treaty rights guaranteed by a treaty entered into by the United States and ratified before the era of treaty-making ended in 1871 may also constitute presumptive evidence that a tribe remains under federal jurisdiction in 1934.¹⁴ Where there is any doubt about continuing treaty obligations, the Solicitor's Office may rely on post-1934 adjudications confirming the continuous existence of such obligations.

E. 1934 Indian Population Report.

The listing of a tribe in the Department's 1934 Indian Population Report is presumptive evidence that the Department considered the tribe under federal supervision and authority in 1934. In 1884, Congress enacted legislation requiring every Indian agent to submit a census of the Indians at his agency or upon the agency under his charge in an annual report,¹⁵ which were later compiled in the Commissioner of Indian Affairs' Annual Report to the Secretary. These census rolls generally provided the basis for determining the property rights of the Indians enrolled, including allotments and inheritances,¹⁶ and could also be used to determine, for example, the distribution of treaty annuities.¹⁷ Circulars issued by the Commissioner of Indian Affairs refer to the Indians so enrolled as being within an agency's "jurisdiction,"¹⁸ which was

¹⁴ See *Carciari*, 555 U.S. at 398 (Breyer, J., concurring) (describing Department's determination to take land into trust for Stillaguamish Tribe based on maintenance of treaty rights since 1855); see also *Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe*, Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs (Oct. 1, 1980) ("Stillaguamish Memo").

¹⁵ Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76, 98.

¹⁶ Indian Census Rolls, 1885-1940, National Archives and Records Administration – Washington, D.C. (updated Oct. 9, 2014), <https://www.archives.gov/research/census/native-americans/1885-1940.html> ("Indian Census Rolls") (citing U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1671, Annual Report and Census, 1921 (Apr. 18, 1921)). See also *id.* (citing U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 2653, Census Roll (Jan. 10, 1930) (instructing agencies to drop from their annual census rolls "names of Indians whose whereabouts have been unknown for a considerable number of years are to be dropped from the rolls with the approval of the Department. The same pertains to bands of Indians of whom no census has been made for an extended time and who have no contact with the [Indian] Service."))).

¹⁷ U.S. Dept. of the Interior, Office of the Solicitor, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 54 (1942) ("Cohen 1942") (describing Cherokee treaty provision for census of Indians emigrating and remaining behind for purpose of distributing annuities) (citing Treaty with the Cherokees, 7 Stat. 195 (1819)); *id.* at 98-99 (federal government's power to distribute tribal funds and land among individual tribal members required preparation of census rolls).

¹⁸ See, e.g., U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census, 1919 (May 7, 1919) (directing agents to submit census "of all Indians under their charge" and to distinguish Indians "not attached to your jurisdiction"); Circ. No. 2977, Census Rolls, Supplemental Rolls, and Annual Statistical Report, pages 18 to 22, inclusive, 1934 (Feb. 6, 1934) (discussing census procedures, including enrolling members of Indian families "not enrolled at the same jurisdiction," Indians residing "at jurisdiction where enrolled"); Circ. No. 3022, Information on Non-enrolled Landless Indians of one-half or more Indian Blood, pursuant to Section 19 of the Wheeler-Howard Act (Sep. 7, 1934) (requesting information on "Indians...not enrolled at your jurisdiction or any other" but residing "at [or near] your jurisdiction"); Circ. No. 3331, Qualifying Examination for Appointment under

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defined to include “Government rancherias and public domain allotments as well as reservations.”¹⁹ As the Indian Population Report included in Commissioner Collier’s 1934 Annual Report explains, censuses prepared by the Office of Indian Affairs (“OIA”) differ from the general federal censuses prepared by the Census Bureau, then a bureau within the Department of Commerce and Labor.²⁰ For example, the Department defined “Indian” for the purpose of producing Indian Population Reports as any person of Indian blood who acquired certain rights by virtue of wardship, treaty, or inheritance.²¹ The Census Bureau, by contrast, looked instead to whether a person was recognized in his community as an Indian.²² Of further note, the Department’s Indian Population Reports distinguish between Indians “under federal jurisdiction” and those who did not meet this criterion.²³ For these reasons, the Department will consider a tribe’s unambiguous inclusion on the Department’s 1934 Indian Population Report as presumptively demonstrating that the Department considered the tribe “recognized” in 1934 for purposes of Category 1.

F. Federal Land Acquisitions.

Clear evidence that the United States took efforts to acquire lands on behalf of an applicant tribe in the years leading up to 1934 also constitutes presumptive evidence that the United States “recognized” the tribe and treated it as under federal jurisdiction. Given the range of such efforts and the diverse nature of statutes authorizing such activities, reference should be made to the Department’s analysis of such circumstances in prior cases.²⁴

Schedule A-VIII-5 (Dec. 14, 1939) (requiring specified statement “from an authorized official of the jurisdiction at which the [Indian] applicant is enrolled”); Circ. No. 3366, Adoption (Aug. 17, 1940) (referring to agencies “have jurisdiction over the tribe” in which the adoptive parent or adopted child is a member). *See also* Circ. No. 3004, Wheeler-Howard Act (Jul. 6, 1934) (requesting information from OIA personnel of “the several jurisdictions”); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934) (discussing organization and operation of Central Office related to “jurisdiction administrations,” *i.e.*, field operations).

¹⁹ Indian Census Rolls, citing Circ. No. 2897, Census Rolls, Supplemental Rolls, and Annual Statistical Report, pages 15 to 19, inclusive, 1933 (Dec. 5, 1932).

²⁰ For the period beginning in 1884, the Census Office was an independent federal agency. In 1902 it was temporarily housed under the Department of the Interior before moving in 1903 to the newly established Department of Commerce and Labor. *See* Act of March 3, 1899, ch. 419, 30 Stat. 1014 (establishing Census Office in Department of the Interior); Act of March 6, 1902, ch. 139, 32 Stat. 51 (Permanent Census Act); www.census.gov/history/www/census_then_now/ (last accessed Dec. 19, 2019).

²¹ ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (hereafter “ARCIA”) for 1934 at 121 (1934).

²² *Ibid.*

²³ *See* ARCIA 1934 at 122. Of the Indians appearing on the OIA’s 1934 enumeration, 85.5% “resided at a Federal jurisdiction where enrolled”; 2.1% resided at “another jurisdiction”; and 12.4% “resided elsewhere; that is, outside of any Federal jurisdiction.”

²⁴ *See, e.g.*, U.S. Dept. of the Interior, Bureau of Indian Affairs, *Trust Acquisition of 35.92 +/- acres in the City of Elk Grove, California, for the Wilton Rancheria* at 72 (Jan. 19, 2017); Office of the Solicitor, *Federal Jurisdiction Status of Tejon Indian Tribe in 1934* at 13-18 (Feb. 14, 2019) (describing federal efforts to secure lands for Tribe’s benefit); Bureau of Indian Affairs, *Trust Acquisition of the 228.04-acre Plymouth Site in Amador County, California, for the Lone Band of Miwok Indians* at 53-56 (May 24, 2012) (describing consistent efforts of United States to acquire land to establish reservation for Band); Office of the Solicitor, *Determination Whether the Mechoopda Indian Tribe of Chico Rancheria was Under Federal Jurisdiction in 1934* at 11-13 (Dec. 7, 2012) (describing federal efforts to acquire title to lands for Tribe’s benefit and to conduct vote under IRA Section 18). *See also Stand Up for California! v. United States DOI*, 204 F. Supp.3d 212, 283, 289 (D.D.C. 2016), *aff’d*, 879 F.3d 1177 (D.C. Cir. 2017) (discussing significance of land purchase in confirming eligibility of North Fork Rancheria

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G. Kappler's *Indian Affairs, Laws and Treaties*

A final source of evidence that may provide presumptive evidence that an applicant tribe was under federal jurisdiction in and immediately around 1934 is inclusion in Volume V of Charles J. Kappler's *Indian Affairs, Laws and Treaties*.²⁵ Beginning in 1903, the United States began publishing a multivolume work by Mr. Kappler of the Senate Committee on Indian Affairs, which compiled the treaties, laws, Executive Orders, and other federal materials relating to Indian affairs dating from the United States' founding. In 1925, Hubert Work, Secretary of the Interior, declared that Kappler's "compilation of Indian laws and treaties is constantly used and referred to in this department and the Office of Indian Affairs, as well as at the several Indian agencies, where the Statutes at Large are not always available."²⁶ Volume V of *Kappler's* compiles legislative and executive materials relating to Indian affairs for the period between 1927 and 1938, which coincides with the period immediately preceding the IRA's enactment and its early implementation.²⁷ Given its use by the Department in and before 1934 and its compilation of legislative and executive materials from that time, *Kappler's* Volume V may provide evidence that presumptively demonstrates an applicant tribe's eligibility in 1934.

As noted, in the absence of a form of evidence that presumptively demonstrates that the tribal applicant was under federal jurisdiction in 1934, the analysis should proceed to Step Three.

Step 3. "Recognized" Before 1934.

Step 3 determines whether an applicant tribe's evidence sufficiently demonstrates that it was "recognized" in or before 1934 *and* remained under jurisdiction in 1934. Here it is crucial to note that the phrase "recognized Indian tribe" as used in Category 1 does *not* have the same meaning as the modern concept of a "federally recognized" (or "federally acknowledged") tribe. This concept did not evolve until the 1970s, after which it was incorporated in the Department's federal acknowledgment procedures.²⁸ Today's understanding of "federally recognized tribe" merges the political-legal sense that connotes a government-to-government relationship and the cognitive sense that, as a factual matter, a tribe has and continues to exist as a cultural entity. To the extent today's understanding of "federal recognition" (or "federal acknowledgment") implies

under Category 1), *reh'g. en banc denied* (Apr. 10, 2018), *cert. denied*, 139 S. Ct. 786 (2019); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 889 F.3d 584, 594 (9th Cir. 2018) (Enterprise Rancheria under federal jurisdiction based on 1916 purchase of land for homeless Indians); *County of Amador v. United States Department of the Interior*, 872 F.3d 1012 (9th Cir. 2017) (finding federal jurisdiction based on continuous federal efforts from 1915 until after 1934 to acquire lands for reservation for Ione Band of Miwok Indians), *cert. denied*, 139 S. Ct. 64 (2018).

²⁵ See CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES, vols. I (1903) -V (1941) (hereafter *Kappler's*). In 1968, Congress authorized and directed the Secretary to revise and extend Kappler's compilation to include all treaties, laws, Executive Orders and regulations relating to Indian affairs, which extended the work through the 91st Congress, 1970. *Id.*, vol. VI at v (1974).

²⁶ See *Printing of Manuscripts Relating To Indian Affairs*, S. Rep. 70-200 at 2 (1928).

²⁷ S. Doc. 76-194, *Indian Affairs, Laws and Treaties, Vol. V (Laws), Compiled from December 22, 1927, to June 29, 1938* (1941) (hereafter "Vol. V"). In 1968, Congress directed the Secretary to revise and extend Kappler's compilation to include all treaties, laws, Executive Orders and regulations relating to Indian affairs in force on September 1, 1967. See Pub. L. No. 90-284, tit. VII, § 701 (1968), *codified as* 25 U.S.C. § 1341.

²⁸ 25 C.F.R. Part 83.

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being “under federal jurisdiction,” it may be seen as overlapping with the meaning of “under federal jurisdiction.”

In 1941, Assistant Solicitor Felix S. Cohen explained that the term “tribe,” when used in a political-legal sense, meant Indian groups that had been recognized “for administrative and political purposes.”²⁹ Solicitor Nathan Margold similarly interpreted the term “recognized” as used in the Oklahoma Indian Welfare Act of 1936 as referring to recognition of a group’s activities “by *specific actions* of the Indian Office, the Department, or by Congress.”³⁰ In 1980, Associate Solicitor Hans Walker, Jr. interpreted the term “recognized” in Section 19 as referring to tribes with whom 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.*”³¹ And in 1975, Alan Palmer, the Acting Associate Solicitor for Indian Affairs, prepared a wide-ranging analysis of how Congress, the courts, and the Department had historically interpreted the meaning of “recognition.” Acting Associate Solicitor Palmer concluded that “recognition” referred to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy.³²

The Solicitor’s Office identified general indicia including treaties;³³ the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a “tribe.”³⁴ Specific indicia of Congressional “recognition” included enactments specifically referring to a tribe as an existing entity; authorizing appropriations to be expended for the benefit of a tribe;³⁵ authorizing tribal funds to be held in the federal treasury; directing officials of the Government to exercise supervisory authority over a tribe; and prohibiting state taxation of a tribe. Specific indicia of Executive or administrative “recognition” before 1934 included the setting aside or acquisition of lands for Indians by Executive Order;³⁶ the presence of an Indian agent on a reservation; denomination of a tribe in an Executive Order;³⁷ the establishment of schools and other service institutions for the benefit of a tribe; the supervision of tribal contracts; the establishment by the Department of an agency office or Superintendent for

²⁹ Cohen 1942 at 268.

³⁰ I OP. SOL. INT. 864 (Memorandum from Solicitor Nathan M. Margold to the Commissioner of Indian Affairs, Oklahoma – Recognized Tribes (Dec. 13, 1938)); Cohen 1942 at 271.

³¹ Stillaguamish Memo at 2 (emphasis added).

³² Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal “Recognition” of Indian Tribes at 2014 (Jul. 17, 1975) (hereafter “Palmer Memo”).

³³ Butler Letter at 6; Palmer Memo at 3 (executed treaties a “prime indicia” of “federal recognition” of tribe as distinct political body).

³⁴ Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memo at 19.

³⁵ Butler Letter at 5; Palmer Memo at 6-8 (citing *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913), *United States v. Nice*, 241 U.S. 591, 601 (1916), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920)); *id.* at 8-10 (citing *United States v. Nice*, 241 U.S. 591, 601 (1916); *Tully v. United States*, 32 Ct. Cl. 1 (1896) (recognition for purposes of Depredations Act by federal officers charged with responsibility for reporting thereon)).

³⁶ Palmer Memo at 19 (citing Cohen 1942 at 271); Butler letter at 4.

³⁷ Palmer Memo at 19 (citing Cohen 1942 at 271).

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a tribe; the institution of suits on behalf of a tribe;³⁸ and the expenditure of funds appropriated for the use of particular Indian groups.

Based on the Department's understanding of what "recognition" meant in and around the time of the IRA's enactment, attorneys in the Solicitor's Office may treat the following forms of evidence as presumptively demonstrating that an applicant tribe was "recognized" in a political-legal sense before 1934 and remained under federal jurisdiction in 1934:

- ratified treaties still in effect in 1934;
- tribe-specific Executive Orders; and
- tribe-specific legislation, including termination legislation enacted after 1934, which acknowledges the existence of a government-to-government relationship with a tribe at the time it is enacted.

These forms of evidence presumptively demonstrate the establishment of a political-legal relationship with a tribe. Political-legal relationships established by such means may not be revoked absent express action by Congress.³⁹ For these reasons, the submission of one of these forms of evidence may be taken as establishing a rebuttable presumption that the applicant tribe remained under federal supervision or authority through 1934.

In the absence of evidence that presumptively demonstrates that a tribal applicant was recognized before 1934 *and* remained under federal jurisdiction through 1934, the analysis should proceed to Step Four.

Step 4. Cumulative Weight of an Applicant's Evidence.

Step 4 assesses the totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934. Given the historical changes in federal Indian policy over time, and the corresponding evolution of the OIA's responsibilities, a one-size-fits-all approach for evaluating the totality of a tribal applicant's evidence is not possible or desirable. Thus, a fact-specific inquiry will be necessary in each such case. However, the following general considerations should be borne in mind.

Evidence that demonstrates a continuing course of dealings between a tribe and the federal government may carry greater weight than evidence of dealings that are limited in time. Where the totality of evidence supports a conclusion that an applicant tribe was "recognized"

³⁸ *Id.* at 6, 8 (citing *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920) (suit brought on behalf of Oneida Indians)).

³⁹ See *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1084 (2d Cir. 1982) (once established under federal law, the trust relationship may only be terminated by federal law); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975) ("[O]nce Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease"); *United States v. Nice*, 241 U.S. 591, 598 (1916); *Tiger v. W. Investment Co.*, 221 U.S. 286, 315 (1911). See also List Act, § 103(4). Evidence that Executive officials disavowed legal responsibilities for a tribe cannot, in itself, terminate a tribe's jurisdictional status without supporting Congressional authority. See *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 (6th Cir. 2004).

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before 1934, subsequent gaps in the historical record should not necessarily be interpreted to indicate that the tribe lost its jurisdictional status. Gaps such as these may result from changes in federal policy or in its implementation by federal officials, and federal actions taken later in time may, in some instances, demonstrate that the federal government considered a tribe's jurisdictional status to have continued notwithstanding gaps in the historical record or disclaimers by federal officials. As this suggests, attorneys in the Solicitor's Office must evaluate the evidence on a case-by-case basis within the context of a tribe's unique circumstances, and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

Next, evidence showing that an applicant tribe was federally recognized or reaffirmed after 1934 does not in itself preclude a finding that the tribe was under federal jurisdiction in 1934. As noted above, in some instances federal officials may have neglected or disavowed responsibilities toward tribes that nevertheless remained under federal jurisdiction in and before 1934.⁴⁰ Further, in some cases Congress later restored federal recognition to tribes that were legislatively terminated after 1934.⁴¹

Additionally, there may be tribes that were federally acknowledged after 1978 under the administrative procedures at Part 83 who may nevertheless be able to demonstrate they were "under federal jurisdiction" in 1934.⁴² In 1994, Part 83 was amended to permit tribes that were previously federally recognized to petition for federal acknowledgment.⁴³ Evidence that may demonstrate prior federal acknowledgment under Part 83 includes treaty relations; denomination as a tribe in Congressional act or Executive Order; treatment by the Federal government as having collective rights in lands or funds under the supervision of the federal government; and the existence of lands held for the tribe or its ancestors by the United States.⁴⁴ Because such

⁴⁰ See *Carciari*, 555 U.S. at 399 (Breyer, J., concurring). Justice Breyer gave as examples the Stillaguamish Tribe, which was not federally recognized until 1976, but which had nonetheless retained treaty rights against the United States since 1855, and the Mole Lake Tribe, which the Department considered no longer existed before correcting course and recognizing the tribe in 1937. *Ibid.* (citing Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe 6-7 (Oct. 1, 1980); Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758; 2762-63 (Feb. 8, 1937)).

⁴¹ See, e.g., Shawnee Tribe Status Act, Pub. L. 106-568, 114 Stat. 2913 (2000); Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. 97-391, 96 Stat. 1960 (1982), *as amended*; Klamath Indian Tribe Restoration Act, Pub. L. 99-398, 100 Stat. 849 (1986).

⁴² The regulations were first promulgated as 25 C.F.R. Part 54. 43 Fed. Reg. 39,361 (Aug. 24, 1978). The procedures were intended to address Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which were not currently acknowledged as Indian tribes by the Department. 25 C.F.R. §§ 54.3(a); 54.6(a) (1978). Part 83 does not apply to groups, bands, or tribes that Congress had terminated. 25 C.F.R. § 83.12(g) (2019).

⁴³ 59 Fed. Reg. 9280, 9296 (Feb. 25, 1994) (then codified at 25 C.F.R. § 83.8). In 2015, the Department amended the acknowledgment regulations again to allow petitioning groups that were previously acknowledged to satisfy the mandatory criteria either from the later of time of previous acknowledgment or the year 1900. 80 Fed. Reg. 37862 (Jul. 1, 2015).

⁴⁴ 25 C.F.R. § 83.12(a) (2019).

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CATEGORY 1 OF THE INDIAN REORGANIZATION ACT OF 1934.

evidence constitutes indicia of political-legal “recognition” in or before 1934, it may also be relevant for determining eligibility under Category 1.⁴⁵

Prior to 2015, the Department on occasion reaffirmed the federally acknowledged status of tribes through administrative means other than Part 83. This may have occurred, for example, in settlement of claims against the United States over a tribe’s status,⁴⁶ or through corrections to the Department’s list of Indian entities recognized and eligible to receive services from the Bureau of Indian Affairs.⁴⁷ Consistent with the analysis presented herein, the Solicitor’s Office should determine the eligibility under Category 1 of any applicant tribe that was administratively restored or reaffirmed outside Part 83 based on the specific facts of each case and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

Conclusion

The Solicitor’s Office must prepare eligibility determinations under Category 1 in a consistent and timely manner. For this reason, attorneys in the Solicitor’s Office shall adhere to the procedures set forth in this guidance memorandum when doing so. Questions that arise in particular cases shall be referred to the Associate Solicitor, Division of Indian Affairs, who must also review and approve each Category 1 eligibility determination.

Att.: *Determining Eligibility under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act of 1934*, Memorandum, Deputy Solicitor for Indian Affairs, to the Solicitor (Mar. 5, 2020).

⁴⁵ Cf. M-37029 at 25 (describing utility of evidence submitted for federal acknowledgment procedure for the two-part inquiry).

⁴⁶ See, e.g., Stipulation for Entry of Judgment, *Tillie Hardwick, et al. v. United States of America, et al.*, Case No. C-79-1710-SW (N.D. Cal.) (Dec. 22, 1983) (reaffirming acknowledged status of 17 California rancherias); Stipulation for Entry of Judgment, *Upper Lake Pomo Association, et al. v. Andrus, et al.*, Case No. C-75-0181-SW (N.D. Cal.) (Feb. 21, 1979); Stipulation for Entry of Judgment, *Wilton Miwok Rancheria, et al. v. Salazar*, Case No. C-07-5706 (N.D. Cal.) (Jun. 4, 2009) (same).

⁴⁷ See, e.g., Letter from Assistant Secretary, Indian Affairs to Ione Band of Miwok Indians (Mar. 22, 1994) (reaffirming federally acknowledged status). See also 67 Fed. Reg. 46328 (Jul. 12, 2002) (reaffirming federal acknowledgment of certain tribes omitted from federal list by administrative oversight). As of 2015, however, all requests for federal acknowledgment by reaffirmation or other alternative basis must be made under Part 83. See 80 Fed. Reg. 37538 (Jul. 1, 2015).