United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
PACIFIC REGIONAL OFFICE
2800 Cottage Way, Room W-2820
Sacramento, CA 95825

IN REPLY REFER TO:
Fee-to-Trust

NOTICE OF DECISION

CERTIFIED MAIL-RETURN RECEIPT REQUESTED – 7020 0090 0001 4596 3112

Honorable Kenneth Khan
Chairperson, Santa Ynez Band
of Chumash Mission Indians
P.O. Box 517
Santa Ynez, CA 93460

Re: County of Santa Barbara, California; No More Slots; and Preservation of Los Olivos v. Pacific Regional Director, Bureau of Indian Affairs, Docket Nos. IBIA 16-051; IBIA 16-053; and IBIA 16-054

Dear Chairman Khan:

This is our Notice of Decision for the application of the Santa Ynez Band of Chumash Mission Indians to have the below described property accepted by the United States of America in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation of California.

The subject property encompasses approximately 2.13 acres, more or less, commonly referred to as Assessor's Parcel Numbers: 143-242-01 and 143-242-02 (Mooney); and 143-252-01 and 143-252-02 (Escobar). The property is contiguous to trust lands. The land referred to herein is situated in the unincorporated area of the County of Santa Barbara, State of California, described as follows:

PARCEL ONE: (APN: 143-242-01)

THOSE PORTIONS OF LOTS 5 TO 9 INCLUSIVE, OF BLOCK 20 IN THE TOWN OF SANTA YNEZ, COUNTY OF SANTA BARBARA, AS SAID LOTS AND BLOCK ARE DELINEATED ON THE MAP THEREOF, RECORDED OCTOBER 13, 1882, IN VOLUME B OF MISCELLANEOUS RECORDS, AT PAGE 441, RECORDS OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE WESTERLY LINE OF MAIN STREET WITH THE NORTHERLY LINE OF VALLEY STREET AS DELINEATED ON THE ABOVE SAID MAP; THENCE (1) ALONG THE SAID WESTERLY LINE OF MAIN STREET NORTH 0° 24’ 40" WEST 61.68 FEET; THENCE (2) FROM A TANGENT WHICH BEARS SOUTH 75° 32’ 55" WEST ALONG A CURVE TO THE LEFT, WITH A RADIUS OF 1950 FEET THROUGH ANGLE OF 6° 09. 44" FOR A DISTANCE OF 209.73 FEET TO A POINT ON THE ABOVE SAID NORTHERLY LINE OF VALLEY STREET; THENCE (3) ALONG SAID NORTHERLY LINE, NORTH 89° 35’ 20" EAST 206.68 FEET TO THE POINT OF BEGINNING.

TOGETHER WITH THAT PORTION OF THE WESTERLY HALF OF MAIN STREET, WHICH WAS ABANDONED BY BOARD OF SUPERVISORS OF THE COUNTY OF SANTA BARBARA, BY RESOLUTION #14448 AND RECORDED MAY 12, 1955 AS INSTRUMENT NO. 8610, IN BOOK 1314, PAGE 337 OF OFFICIAL RECORDS, RECORDS OF SAID COUNTY.

EXCEPTING THEREFROM ALL MINERALS, OIL, GASES AND OTHER HYDROCARBONS BY WHATSOEVER NAMES KNOWN THAT MAY BE WITHIN OR UNDER THE PARCEL OF LAND HEREINABOVE DESCRIBED AS RESERVED TO SHERMAN T. MANSFIELD, ET UX., IN THE DEED TO THE STATE OF CALIFORNIA, RECORDED FEBRUARY 4, 1954 AS INSTRUMENT NO. 2111, IN BOOK 1213, PAGE 417 OF OFFICIAL RECORDS OF SAID COUNTY.

PARCEL TWO: (APN: 143-242-02)

THOSE PORTIONS OF LOTS 10 TO 18 INCLUSIVE OF BLOCK 19 IN THE TOWN OF SANTA YNEZ, COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, AS SAID LOTS AND BLOCK ARE DELINEATED ON THE MAP THEREOF RECORDED OCTOBER 13, 1882 IN BOOK B OF MISCELLANEOUS RECORDS, AT PAGE 441, RECORDS OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEASTERLY CORNER OF THE ABOVE SAID LOT 18, BEING THE INTERSECTION OF THE WESTERLY LINE OF TYNDALL STREET WITH THE NORTHERLY LINE OF VALLEY STREET, ACCORDING TO THE ABOVE SAID MAP; THENCE (1) ALONG SAID WESTERLY LINE OF TYNDALL STREET NORTH 0° 24’ 40" WEST 103.34 FEET; THENCE (2) NORTH 74° 07’ 45" WEST 59.31 FEET; THENCE (3) FROM A TANGENT WHICH BEARS SOUTH 89° 35’ 20" WEST ALONG A CURVE TO THE LEFT WITH A RADIUS OF 1950 FEET THROUGH AN ANGLE OF 11° 37’ 44" FOR A DISTANCE OF 395.78 FEET TO A POINT IN THE EASTERLY LINE OF MAIN STREET, AS SAID STREET IS DELINEATED ON THE ABOVE SAID MAP; THENCE (4) ALONG SAID EASTERLY LINE OF MAIN STREET, SOUTH 0° 24’ 40" EAST 79.95 FEET TO AN INTERSECTION WITH THE ABOVE MENTIONED NORTHERLY LINE OF VALLEY STREET; THENCE (5) ALONG SAID NORTHERLY LINE OF VALLEY STREET, NORTH 89° 35’ 20" EAST 450.00 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM ALL MINERALS OILS, GASES AND OTHER HYDROCARBONS BY WHATSOEVER NAME KNOWN THAT MAY BE WITHIN OR UNDER THE PARCEL OF LAND HEREINABOVE DESCRIBED AS RESERVED TO SHERMAN T. MANSFIELD ET UX., IN THE DEED TO THE STATE OF CALIFORNIA, RECORDED FEBRUARY 4, 1954 AS INSTRUMENT NO. 2112, IN BOOK 1213, PAGE 421 OF OFFICIAL RECORDS OF SAID COUNTY.

TOGETHER WITH THE PORTION OF THE EAST ½ OF MAIN STREET, ABANDONED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA BARBARA BY RESOLUTION #14448 AND RECORDED MAY 12, 1955 AS INSTRUMENT NO. 8610, IN BOOK 1314, PAGE 337 OF OFFICIAL RECORDS, RECORDS OF SAID COUNTY.

SAID LAND IS ALSO SHOWN ON A MAP RECORDED IN BOOK 148, PAGE 16 OF RECORDS OF SURVEY IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

PARCEL THREE:

THAT PORTION OF MAIN STREET NOW ABANDONED BY RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, SAID ORDER TO ABANDON RECORDED MAY 12, 1955 AS INSTRUMENT NO. 8610 IN BOOK 1324, PAGE 337 OF OFFICIAL RECORDS, WHICH LIES SOUTHERLY OF THE SOUTHERLY LINE OF HIGHWAY AND NORTHERLY OF THE NORTHERLY LINE OF VALLEY STREET.

PARCEL ONE: (APN: 143-252-01)

THOSE PORTIONS OF LOTS 10, 11, 12, 13, 14 AND 15 IN BLOCK 15 OF THE TOWN OF SANTA YNEZ, IN THE COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, AS SAID BLOCK AND LOTS ARE DELINEATED ON THE MAP THEREOF RECORDED IN BOOK 1 AT PAGE 41 OF MAPS AND SURVEYS IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT INTERSECTION OF THE LINE COMMON TO SAID LOT 15 AND LOT 16 IN SAID BLOCK 15 WITH THE NORTHERLY LINE OF VALLEY STREET AS DELINEATED ON THE ABOVE SAID MAP; THENCE 1) ALONG SAID NORTHERLY LINE OF VALLEY STREET, SOUTH 89° 35’ 20" WEST 300.00 FEET TO AN INTERSECTION WITH THE EASTERLY LINE OF TYNDAL STREET, AS SAID STREET IS DELINEATED ON SAID MAP; THENCE 2) ALONG SAID EASTERLY LINE OF TYNDAL STREET, NORTH 0° 24’ 40" WEST 79.98 FEET; THENCE 3) NORTH 89° 35’ 20" EAST 147.14 FEET; THENCE 4) SOUTH 85° 30’ 15" EAST 153.42 FEET TO A POINT ON THE EASTERLY LINE OF THE ABOVE SAID LOT 15; THENCE 5) ALONG SAID EASTERLY LINE OF SAID LOT 15, SOUTH 0° 24’ 40" EAST 66.86 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM ALL MINERALS, OIL, GASES AND OTHER HYDROCARBONS BY WHATSOEVER NAME KNOWN THAT MAY BE WITHIN OR UNDER THE PARCEL OF LAND HEREINABOVE DESCRIBED, WITHOUT, HOWEVER, THE RIGHT TO DRILL, DIG OR MINE THROUGH THE SURFACE THEREOF BY DEED RECORDED JULY 10, 1957 AS INSTRUMENT NO. 13634 IN BOOK 1458, PAGE 542 OF OFFICIAL RECORDS.

PARCEL TWO: (APN: 143-252-02)

LOTS 16, 17 AND 18 IN BLOCK 15 OF THE TOWN OF SANTA YNEZ, IN THE COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, ACCORDING TO THE MAP RECORDED IN BOOK 1, PAGE 41 OF MAPS AND SURVEYS IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPTING THEREFROM ANY PORTION THEREOF LYING WITHIN THE LAND GRANTED TO THE STATE OF CALIFORNIA ON FEBRUARY 23, 1954 AS INSTRUMENT NO. 3105 IN BOOK 1218, PAGE 446 OF OFFICIAL RECORDS IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

Note: The total acreage is consistent with the Bureau of Indian Affairs; Bureau of Land Management Indian Land Surveyor Legal Description Review dated April 22, 2015 and updated on March 13, 2019.

Compliance with 25 Code of Federal Regulations Part 151

The Department of the Interior's ("Department") land acquisition regulations at 25 C.F.R. Part 151 ("Part 151 ") set forth the procedures for the Secretary of the Interior ("Secretary") to acquire land in trust. The regulations specify that it is the Secretary's policy to accept lands "in trust" for the benefit of tribes. Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

25 C.F.R. § 151.3- Land acquisition policy

Section 151.3 sets forth the conditions under which the Secretary may accept conveyance of land into trust for a tribe. The Secretary may acquire land in trust for a tribe:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) When the tribe already owns an interest in the land; or (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. The Tribe's application meets the requirements of subsection 151.3(a)(3). The acquisition facilitates tribal self-determination, economic development, or Indian housing.

25 CFR § 151.l0 – On-reservation Acquisitions

The Part 151 regulations distinguish between "on-reservation" and "off-reservation" trust acquisitions. The Secretary's discretionary on-reservation authority, may only be implemented when the subject lands are located "within or contiguous to an Indian reservation, and the acquisition is not mandated."[1]

The criteria found in § 151.10 are: (a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the ... tribe for additional land; (c) The purposes for which the land will be used; (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise; (g) If the land to be acquired is in fee status, whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM [Departmental Manual] 6, appendix 4, [the] National Environmental Policy Act (NEP A)3 Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.[2]

The Tribe has also requested that certain lands be proclaimed “reservation” pursuant to Section 7 of the Indian Reorganization Act of June 18, 1934 (Stat. 984; 24 U.S.C. 5110 (Formerly § 467)), which provides that the Secretary of the Interior may proclaim an Indian reservation or add lands to existing reservations. A Proclamation is simply an administrative function that allows the Tribe to take advantage of special federal assistance programs. The Office of the Assistant Secretary – Indian Affairs review all requests for adding land to a reservation and prepares the proclamation and Federal Register notice.

BIA has reviewed the Tribe’s Proclamation request and has determined that, immediately following the expiration of the 30-day administrative appeal period, if no appeal is filed, the BIA official will recommend that the Assistant Secretary – Indian Affairs issue the Proclamation. If an appeal is filed, a final decision is issued affirming the BIA official’s decision, BIA will immediately recommend that the Assistant Secretary – Indian Affairs issue the Proclamation. Reservation proclamations will only be issued after land is acquired in trust.

25 CFR § 151.l0(a) - The existence of statutory authority for the acquisition and any limitations contained in such authority

[1]25 C.F.R. § 151.10.

[2] 4 See generally 25 C.F.R. § 151.I0(a)-(c) and (e)-(h). (Section 151.I0(d) is applicable only to acquisitions for individual Indians.)

For the reasons explained below, we conclude that the Indian Reorganization Act of 1934 ("IRA")[3] provides the Secretary with the authority to acquire the Mooney and Escobar Parcels in trust for the Tribe.

I. BACKGROUND

The United States established the Santa Ynez Reservation in 1906, when the Roman Catholic Bishop of Monterey conveyed land to the Secretary to be held in trust for the Chumash Tribe.[4] The Bishop reserved an easement in the property as well as a reversionary interest in the event the Tribe abandoned the Reservation entirely.[5] The Department later worked to remove the reversionary rights from the conveyance in order to "protect the interest of the [Chumash Tribe] and clear title to the lands" of the Reservation.[6] To that end, the Department worked throughout the 1930s obtaining deeds from the Bishop's successors in interest.[7] By 1940, the Department obtained all of the deeds necessary to dispose of the reversionary interests held by third parties.[8]

In 1884, Congress first directed the Department to create an Indian Census in an Appropriations Act for the Indian Department.[9] The Department maintained Indian Census rolls from the initiation of the Indian Census in 1884 until and including 1934. The record reflects that the Tribe's members were included in the Indian Census. In the 1934 Annual Report, the Chumash Tribe was listed as being under the jurisdiction of the Mission Agency in California. The Mission Agency enumerated ninety enrolled members of the Chumash Tribe on the 1934 Indian Census: nineteen residing at the agency and seventy-one residing elsewhere.[10]

In 1934, Congress passed the IRA. As a statute of general applicability, the IRA applied to Indian reservations unless, pursuant to Section 18, "a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." On December 18, 1934, the Secretary called a Section 18 election for the Indians residing on the Reservation to determine whether the IRA would apply to the Tribe.[11] Twenty members of the Chumash Tribe residing at the Reservation were eligible to vote, and all twenty members voted to accept the IRA.[12] In 1935, the Commissioner of Indian Affairs wrote to the Chumash Tribe to

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[3] Act of June 18, 1934, c. 576, 48 Stat. 984, codified at 25 U.S.C.§ 5101 et seq. ("IRA")

[4] Deed from the Roman Catholic Bishop of Monterey to the United States (June 18, 1906) (1906 Deed).

[5] 1906 Deed at 4-5.

[6] Sol. Op. M-29739 Opinion at 1-3 (discussing the Department's acquisition of several deeds in trust for the Chumash Tribe to clear all remaining title issues involving the Reservation).

[7] *Id.*

[8] *Id.*

[9] Stat. 76, 98 (July 4, 1884).

[10] 1934 Annual Report at 127 (enumerating nineteen tribal members residing at the Santa Ynez Reservation on April 1, 1934). When the 1935 Indian Census was taken on January 1, 1935, the Mission Agency enumerated twenty members of the Tribe residing at the Santa Ynez Reservation, consistent with the number of votes cast in the IRA election held two weeks prior. See 1935 Annual Report at 161; Haas Report at 15.

[11] *See generally* Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.* at 15 (1947) (hereafter "Haas Report") (specifying, in part, tribes that either voted to accept or reject the IRA).

[12] *See* List of Chumash Tribe members eligible to vote at 1-2; Results of IRA Election at I.

confirm the results of the Secretarial election stating that "the Indians of the Santa Ynez jurisdiction have accepted the Indian Reorganization Act."[13] The Tribe currently resides on the Santa Ynez Reservation, just as it did in 1934.[14]

II. STANDARD OF REVIEW

A. Four-Step Procedure to Determine Eligibility

To guide the implementation of the Secretary's discretionary authority under Section 5 after *Carcieri*, the Department in 2010 prepared a two-part procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934.[15] The Solicitor of the Interior ("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[16] In 2018, continuing uncertainties over what evidence need be submitted to demonstrate federal jurisdictional status in and before 1934 prompted the Solicitor to review Sol. Op. M-37029's two-part procedure for determining eligibility under Category 1, and the interpretation on which it relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029 after concluding that its interpretation of Category 1 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."[17] The Solicitor then issued a new, four-step procedure ("Solicitor's Guidance") for use by attorneys in the Office of the Solicitor ("Solicitor's Office") for determining eligibility under Category 1.[18]

At Step One, the Solicitor's Office should determine whether Congress made the IRA applicable to the applicant tribe through separate statutory authority, as the existence of such authority makes it unnecessary to determine if the tribe was "under federal jurisdiction" in 1934. In the absence of such authority, the analysis proceeds to Step Two, which determines whether any evidence unambiguously demonstrates that the applicant tribe was under federal jurisdiction in 1934, in which case it may be deemed eligible under Category 1 without further inquiry. In the

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[13] Letter from Commissioner John Collier to the Indians of the Santa Ynez Reservation (Jan. 22, 1935).
[14] Application at 4. *See also* Bureau of Indian Affairs, Central California Agency Jurisdictional Map – Pacific Region, https://www.bia.gov/regional-offices/pacific/central-california-agency.
[15] U.S. Dept. of the Interior, Assistant Secretary – Indian Affairs, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) (hereafter "Cowlitz ROD"). *See also* Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Mar. 7, 2014), *revised* (Jan. 5, 2017).
[16] Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (hereafter "M-37029").
[17] Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).
[18] *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 9, 2020) (hereafter "Solicitor's Guidance").

absence of dispositive evidence of federal jurisdiction in 1934, the inquiry proceeds to Step Three, which looks for evidence that the tribe was unambiguously "recognized" prior to 1934. Where it does, the Department may presume that the tribe remained "under federal jurisdiction" through 1934 absent sufficient evidence that the tribe's jurisdictional status terminated before then. In the absence of dispositive evidence of "recognition," the inquiry proceeds to Step Four, the final step of the inquiry, which weighs the totality of an applicant tribe's evidence in its historical context to determine if it sufficiently demonstrates that it was "under federal jurisdiction" in 1934.

The Solicitor's 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 at Step Four, which necessarily vary by tribe, by region, and by the relevant federal policy era at issue.

B. The Meaning of the Phrase "Now Under Federal Jurisdiction."

To further assist Solicitor's Office attorneys in understanding and implementing its four-step procedure, the Solicitor's Guidance includes a memorandum detailing the Department's revised interpretation of Category 1, which we summarize below.[19]

The Solicitor concluded that the expression "now under federal jurisdiction" in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress's plenary authority[20] and is instead best interpreted as referring to tribes with whom the United States had clearly dealt on or a more or less sovereign-to-sovereign basis or as to whom the United States had clearly acknowledged a trust responsibility in or before 1934.

1. Statutory Context.

The Solicitor concluded that "now under federal jurisdiction" should be read as modifying the phrase "recognized Indian tribe."[21] The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,[22] and the majority opinion focused on the meaning of "now" without addressing whether or how the phrase "now under federal jurisdiction" modifies the meaning of "recognized Indian tribe."[23] In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless

[19] *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor (Mar. 5, 2020) ("Deputy Solicitor's Memorandum").
[20] Deputy Solicitor's Memorandum at 9.
[21] *Id.*; *See also Cty. of Amador*, 872 F.3d at 1020, n. 8 (*Carcieri* leaves open whether "recognition" and "jurisdiction" requirements are distinct requirements or comprise a single requirement).
[22] *Carcieri*, 555 U.S. at 382-83.
[23] *Ibid.*

have been "under federal jurisdiction" *in* 1934.[24] By "recognized," Justice Breyer appeared to mean "*federally* recognized"[25] in the formal, political sense that had evolved by the 1970s, not in the sense in which Congress likely understood the term in 1934. He also considered how "later recognition" might reflect earlier "Federal jurisdiction,"[26] and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.[27] Justice Breyer's suggestion that Category 1 does not preclude eligibility for tribes "federally recognized" *after* 1934 is consistent with interpreting Category 1 as requiring evidence of federal actions toward a tribe with whom the United States dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington ("Stillaguamish Tribe") shows.[28] It is also consistent with the Department's policies that in order to apply for trust-land acquisitions under the IRA, a tribe must appear on the official list of entities federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as such.[29]

Category 1 states that the term "Indian" shall include "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction."[30] The adverb "now" is part of the prepositional phrase "under federal jurisdiction,"[31] which it temporally qualifies.[32] Prepositional phrases function as modifiers and follow the noun phrase that they modify.[33] Category 1's grammar therefore supports interpreting the phrase "now under federal jurisdiction" as intended to modify "recognized Indian tribe." This grammatical interpretation finds further support in the IRA's legislative history, discussed below, and in Commissioner of Indian Affairs John Collier's statement that the phrase "now under federal jurisdiction" was intended to limit

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[24] *Id.* at 398 (Breyer, J., concurring).

[25] *Ibid*.

[26] *Id.* at 399 (Breyer, J., concurring).

[27] *Id*. at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

[28] *Ibid*.

[29] Federally Recognized Indian Tribe List Act of 1994, tit. I, § 104, Pub. L. 103-454, 108 Stat. 4791, codified at 25 U.S.C. § 5131 (mandating annual publication of list of all Indian tribes recognized by Secretary as eligible for the special programs and services provided by the United States to Indians because of their status as Indians). The Department's land-into-trust regulations incorporate the Department's official list of federally recognized tribe by reference. *See* 25 C.F.R. § 151.2.

[30] 25 U.S.C. § 5129.

[31] *Grand Ronde*, 830 F.3d 552, 560 (D.C. Cir. 2016). The *Grand Ronde* court found "the more difficult question" to be which part of the expression "recognized Indian tribe" the prepositional phrase modified. *Ibid*. The court concluded it modified only the word "tribe" "before its modification by the adjective 'recognized.'" *Ibid*. But the court appears to have understood "recognized" as used in the IRA as meaning "federally recognized" in the modern sense, without considering its meaning in historical context.

[32] H. C. House and S.E. Harman, *Descriptive English Grammar* at 163 (New York: Prentice-Hall, Inc. 1934) (hereafter "House and Harman) (adverbs may modify prepositional phrases).

[33] L. Beason and M. Lester, *A Commonsense Guide to Grammar and Usage* (7th ed.) at 15-16 (2015) ("Adjective prepositional phrases are always locked into position following the nouns they modify."); *see also* J. E. Wells, *Practical Review Grammar* (1928) at 305. A noun phrase consists of a noun and all of its modifiers. *Id*. at 16.

the IRA's application.[34] This suggests Commissioner Collier understood the phrase "now under federal jurisdiction" to limit and thus modify "recognized Indian tribe." This is further consistent with the IRA's purpose and intent, which was to remedy the harmful effects of allotment.[35] These included the loss of Indian lands and the displacement and dispersal of tribal communities.[36] Lacking an official list of "recognized" tribes at the time,[37] it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,[38] left unmodified, the phrase "recognized Indian tribe" could include tribes disestablished or terminated before 1934.

2. Statutory Terms.

The contemporaneous legal definition of "jurisdiction" defines it as the "power and authority" of the courts "as distinguished from the other departments."[39] The legal distinction between judicial and administrative jurisdiction is significant. Further, because the statutory phrase at issue here includes more than just the word "jurisdiction," its use of the preposition "under" sheds additional light on its meaning. In 1934, BLACK'S LAW DICTIONARY defined "under" as most frequently used in "its secondary sense meaning of 'inferior' or 'subordinate.'[40] It defined "jurisdiction" in terms of "power and authority," further defining "authority" as used "[i]n government law" as meaning "the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties."[41]

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[34] Sen. Hrgs. at 266 (statement of Commissioner Collier). *See also Carcieri*, 555 U.S. at 389 (citing Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936) ([IRA Section 19] provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act* * * *") (emphasis added by Supreme Court)); *Cty. of Amador*, 872 F.3d at 1026 (""under Federal jurisdiction" should be read to limit the set of "recognized Indian tribes" to those tribes that already had *some* sort of significant relationship with the federal government as of 1934, even if those tribes were not yet "recognized" (emphasis original)); *Grand Ronde*, 830 F.3d at 564 (though the IRA's jurisdictional nexus was intended as "some kind of limiting principle," precisely how remained unclear).

[35] *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs*, *House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7902, A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs,* 73d Cong. at 233-34 (1934) (hereafter "H. Hrgs.") (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apt. 28, 1934)).

[36] *Ibid*.

[37] In 1979, the BIA 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); *see also Cty. of Amador*, 872 F.3d at 1023 ("In 1934, when Congress enacted the IRA, there was no comprehensive list of recognized tribes, nor was there a 'formal policy or process for determining tribal status'" (citing William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 429-30 (2016))).

[38] *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

[39] BLACK'S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter "BLACK'S").

[40] BLACK'S at 1774.

[41] BLACK'S at 171. It separately defines "subject to" as meaning "obedient to; governed or affected by."

It is therefore significant that Congress added the phrase "under federal jurisdiction" to a statute designed to govern the Department's administration of Indian affairs and certain benefits for Indians. Seen in that light, these contemporaneous definitions support interpreting the phrase as referring to the federal government's exercise and administration of its responsibilities for Indians. Further support for this interpretation comes from the IRA's context. Congress enacted the IRA to promote tribal self-government but made the Secretary responsible for its implementation. Interpreting the phrase "under federal jurisdiction" as grammatically modifying "recognized Indian tribe" supports the interpretation of "jurisdiction" to mean the administration of federal authority over Indian tribes already "recognized" as such. The addition of the temporal adverb "now" to the phrase provides further grounds for interpreting "recognized" as referring to a *previous* exercise of that same authority, that is, in or before 1934.[42]

3. Legislative History.

The IRA's legislative history lends additional support for interpreting "now under federal jurisdiction" as modifying "recognized Indian tribe." A thread that runs throughout the IRA's legislative history is a concern for whether the Act would apply to Indians not then under federal supervision. On April 26, 1934, Commissioner Collier informed members of the Senate Committee on Indian Affairs ("Senate Committee") that the original draft bill's definition of "Indian" had been intended to do just that:[43]

> Senator THOMAS of Oklahoma. (….) In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.
>
> Commissioner COLLIER. Yes.
>
> Senator THOMAS. Numerous tribes have been lost (….) It is contemplated now to hunt those Indians up and give them a status again and try do to something for them?
> Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] Government aid.

[42] Our interpretation of "now under federal jurisdiction" does not require federal officials to have been aware of a tribe's circumstances or jurisdictional status in 1934. As explained below, prior to M-37029, the Department long understood the term "recognized" to refer to political or administrative acts that brought a tribe under federal authority. We interpret "now under federal jurisdiction" as referring to the issue of whether such a "recognized" tribe maintained its jurisdictional status in 1934, i.e., whether federal trust obligations remained, not whether particular officials were cognizant of those obligations.

[43] *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73rd Cong. at 80 (Apr. 26, 1934) (hereafter "Sen. Hrgs."). *See also Grand Ronde*, 75 F.Supp.3d at 387, 399 (noting same).

> Senator THOMAS. Without regard to whether or not he is now under your supervision?
>
> Commissioner COLLIER. Without regard; yes. *It definitely throws open Government aid to those rejected Indians*.[44]

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.[45] In Commissioner Collier's view, the IRA "does definitely recognize that an Indian [that] has been divested of his property is no reason why Uncle Sam does not owe him something. It owes him more."[46] Commissioner Collier's broad view was consistent with the bill's original stated policy to "reassert the obligations of guardianship where such obligations have been improvidently relaxed."[47]

On May 17, 1934, the last day of hearings, the Senate Committee continued to express concerns over the breadth of the bill's definition of "Indian," returning again to the draft definitions of "Indian" as they stood in the committee print. Category 1 now defined "Indian" as persons of Indian descent who were "members of any recognized Indian tribe."[48] As on previous days,[49] Chairman Wheeler and Senator Thomas questioned both the overlap between definitions and whether they would include Indians not then under federal supervision or persons not otherwise "Indian."[50]

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[44] Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).

[45] *See* LEWIS MERIAM, THE INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION at 763 (1928) (hereafter "MERIAM REPORT") (noting that issuance of patents to individual Indians under Dawes Act or Burke Act had "the effect of removing them in part at least from the jurisdiction of the national government"). *See also* Sen. Hrgs. at 30 (statement of Commissioner Collier) (discussing the role the Allotment Policy had in making approximately 100,000 Indians landless).

[46] Sen. Hrgs. at 80.

[47] H.R. 7902, tit. III, § 1. *See* Sen. Hrgs. at 20 ("The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. On the contrary, it makes permanent the guardianship services, and reasserts them for those Indians who have been made landless by the Government's own acts.").

[48] Sen. Hrgs. at 234 (citing committee print, § 19). The revised bill was renumbered S. 3645 and introduced in the Senate on May 18, 1934. *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 963 n. 55 (1972) (hereafter "*Tribal Self-Government*") (citing 78 CONG. REC. 9071 (1934)). S. 3645 which, as amended, became the IRA, differed significantly from H.R. 7902 and S. 2755, and its changes resulted from discussions between Chairman Wheeler and Commissioner John Collier to resolve and eliminate the main points in controversy. Sen. Hrgs. at 237. The Senate Committee reported S. 3645 out four days after its reintroduction, 78 CONG. REC. 9221, which the Senate debated soon after. The Senate passed the bill on June 12, 1934. *Id.* at 11139. The House began debate on June 15. *Id.* at 11724-44. H.R. 7902 was laid on the table and S. 3645 was passed in its place the same day, with some variations. *Id.* A conference committee was then formed, which submitted a report on June 16. *Id.* at 12001-04. The House and Senate both approved the final version on June 16. *Id.* at 12001-04, 12161-65, which was presented to the President and signed on June 18, 1934. *Id.* at 12340, 12451. *See generally Tribal Self-Government* at 961-63.

[49] *See, e.g.,* Sen. Hrgs. at 80 (remarks of Senator Elmer Thomas) (questioning whether bill is intended to extend benefits to tribes not now under federal supervision); *ibid*. (remarks of Chairman Wheeler) (questioning degree of Indian descent as drafted); *id*. at 150-151; *id*. at 164 (questioning federal responsibilities to existing wards with minimal Indian descent).

[50] *See, e.g., id*. at 239 (discussing Sec. 3), 254 (discussing Sec. 10), 261-62 (discussing Sec. 18), 263-66 (discussing Sec. 19).

The Senate Committee's concerns for these issues touched on other provisions of the IRA as well. The colloquy that precipitated the addition of "now under federal jurisdiction" began with a discussion of Section 18, which authorized votes to reject the IRA by Indians residing on a reservation. Senator Thomas stated that this would exclude "roaming bands" or "remnants of a band" that are "practically lost" like those in his home state of Oklahoma, who at the time were neither "registered," "enrolled," "supervised," or "under the authority of the Indian Office."[51] Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."[52] Chairman Wheeler conceded that such Indians lacked rights at the time but emphasized that the purpose of the Act was intended "as a matter of fact, to take care of the Indians that are taken care of at the present time,"[53] that is, those Indians then under federal supervision.

Acknowledging that landless Indians ought to be provided for, Chairman Wheeler questioned how the Department could do so if they were not "wards of the Government at the present time."[54] When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were "just as much Indians as any others,"[55] despite not then being under federal supervision, Commissioner Collier pointed out that such groups might still come within Category 3's blood-quantum criterion, which was then one-quarter.[56] After a brief digression, Senator Thomas asked whether, if the blood quantum were raised to one-half, Indians with less than one-half blood quantum would be covered by the Act with respect to their trust property.[57] Chairman Wheeler thought not, "unless they are enrolled at the present time."[58] As the discussion turned to Section 19, Chairman Wheeler returned to the blood quantum issue, stating that Category 3's blood-quantum criterion should be raised to one-half, which it was in final version of the Act.[59]

Senator Thomas then noted that Category 1 and Category 2, as drafted, were inconsistent with Category 3. Category 1 would include any person of "Indian descent" without regard to blood

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[51] Sen. Hrgs. at 263.

[52] *Ibid*. By "tribe," Senator Thomas here may have meant the Indians residing on a reservation. A similar usage appears earlier in the Committee's discussion of Section 10 of the committee print (enacted as Section 17 of the IRA), Sen. Hrgs. at 250-55. Section 10 originally required charters to be ratified by a vote of the adult Indians residing within "the territory specified in the charter." *Id.* at 232. Chairman Wheeler suggested using "on the reservation" instead to prevent "any small band or group of Indians" to "come in on the reservation and ask for a charter to take over tribal property." *Id.* at 253. Senator Joseph O'Mahoney recommended the phrase "within the territory over which the tribe has jurisdiction" instead, prompting Senator Peter Norbeck to ask what "tribe" meant—"Is that the reservation unit?" *Id.* at 254. Commissioner Collier then read from Section 19, which at that time defined "tribe" as "any Indian tribe, band, nation, pueblo, or other native political group or organization," a definition the Chairman suggested he could not support. *Ibid*. As ultimately enacted, Section 17 authorizes the Secretary to issue charters of incorporation to "one-third of the adult Indians" if ratified, however, "by a majority vote of the adult Indians living on the reservation."

[53] *Ibid*.

[54] *Ibid*.

[55] *Ibid*.

[56] *Ibid*.

[57] *Id*. at 264.

[58] *Ibid*.

[59] *Ibid*. (statement of Chairman Burton Wheeler) ("You will find here [*i.e.*, Section 19] later on a provision covering just what you have reference to.").

quantum, so long as they were members of a "recognized Indian tribe," while Category 2 included their "descendants" residing on a reservation.[60] Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.[61] Commissioner Collier then pointed out that at least with respect to Category 2, the descendants would have to reside within a reservation at the present time.[62]

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,[63] Chairman Wheeler finally turned to the IRA's definition of "tribe,"[64] which as then drafted included "any Indian tribe, band, nation, pueblo, or other native political group or organization."[65] Chairman Wheeler and Senator Thomas thought this definition too broad.[66] Senator Thomas asked whether it would include the Catawbas,[67] most of whose members were thought to lack sufficient blood quantum under Category 3, but who descended from Indians and resided on a state reservation.[68] Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.[69] Senator O'Mahoney from Wyoming then suggested that Categories 1 and 3 overlapped, suggesting the Catawbas might still come within the definition of Category 1 since they were of Indian descent and they "certainly are an Indian tribe."[70]

Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."[71] Senator O'Mahoney responded, saying "If you wanted to exclude any of them [from the Act] you certainly would in my judgment."[72] Chairman Wheeler proceeded to express concerns for those having little or no Indian descent being "under the supervision of the Government," persons he had earlier suggested should be excluded from the Act.[73] Apparently in response, Senator O'Mahoney then said, "If I may suggest, that could be handled by some separate provision excluding from the act certain types, but [it] must have a general definition."[74] It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,[75] asked

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[60] *Id*. at 264-65.
[61] *Id*. at 264.
[62] *Ibid*.
[63] *Id*. at 265.
[64] *Ibid*. at 265.
[65] *Compare* Sen. Hrgs. at 6 (S. 2755, § 13(b)), *with id.* at 234 (committee print, § 19). The phrase "native political group or organization" was later removed.
[66] Sen. Hrgs. at 265.
[67] *Ibid*.
[68] *Id*. at 266. The Catawbas at the time resided on a reservation established for their benefit by the State of South Carolina. *See* Catawba Indians of South Carolina, Sen. Doc. 92, 71st Cong. (1930).
[69] *Id*. at 264.
[70] *Id*. at 266.
[71] *Ibid*. at 266.
[72] *Ibid*. Nevertheless, Senator O'Mahoney did not understand why the Act's benefits should not be extended "if they are living as Catawba Indians."
[73] *Ibid*.
[74] *Ibid*.
[75] *Id*. at 231.

> 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.[76]

Without further explanation or discussion, the hearings adjourned.

The IRA's legislative history does not unambiguously explain what Congress intended "under federal jurisdiction" to mean or in what way it was intended to limit the phrase "recognized Indian tribe." However, the same phrase was used in submissions by the Indian Rights Association to the House of Representatives Committee on Indian Affairs ("House Committee"), where it described "Indians under Federal jurisdiction" as not being subject to State laws.[77] Variations of the phrase appeared elsewhere, as well. In a memorandum describing the draft IRA's purpose and operation, Commissioner Collier stated that under the bill, the affairs of chartered Indian communities would "continue to be, as they are now, *subject to* Federal jurisdiction rather than State jurisdiction."[78] Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."[79] Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,[80] described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."[81] These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.

The IRA's legislative history elsewhere shows that Commissioner Collier distinguished between Congress's plenary authority generally and its application to tribes in particular contexts. He noted that Congress had delegated "most of its plenary authority to the Interior Department or the Bureau of Indian Affairs," which he further described as "clothed with the plenary power."[82] But in turning to the draft bill's aim of allowing tribes to take responsibility for their own affairs, Commissioner Collier referred to the "absolute authority" of the Department by reference to "its rules and regulations," to which the Indians were subjected.[83] Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the OIA having direct supervision of Indians.[84]

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[76] *Id*. at 266.
[77] H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).
[78] *Id*. at 25 (Memorandum from Commissioner John Collier, *The Purpose and Operation of the Wheeler-Howard Indian Rights Bill (S. 2755; H.R. 7902)* (Feb. 19, 1934) (emphasis added)).
[79] *Id*. at 184 (statement of Commissioner Collier) (Apr. 8, 1934).
[80] Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* https://www.justice.gov/osg/bio/charles-fahy.
[81] *Id*. at 319 (statement of Assistant Solicitor Charles Fahy).
[82] *Id*. at 37 (statement of Commissioner Collier) (Feb. 22, 1934).
[83] *Ibid*. at 37 (statement of Commissioner Collier) (Feb. 22, 1934).
[84] *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 Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934)

Construing "jurisdiction" as meaning governmental supervision and administration is further consistent with the term's prior use by the federal government. In 1832, for example, the United States by treaty assured the Creek Indians that they would be allowed to govern themselves free of the laws of any State or Territory, "so far as may be compatible with the general jurisdiction" of Congress over the Indians.[85] In *The Cherokee Tobacco* cases, the Supreme Court considered the conflict between subsequent Congressional acts and "[t]reaties with Indian nations within the jurisdiction of the United States."[86] In considering the 14th Amendment's application to Indians, the Supreme Court in *Elk v. Wilkins* also construed the Constitutional phrase, "subject to the jurisdiction of the United States," in the sense of governmental authority:[87]

> The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.[88]

The terms of Category 1 suggest that the phrase "under federal jurisdiction" should not be interpreted to refer to the outer limits of Congress's plenary authority, since it could encompass tribes that existed in an anthropological sense but with whom the federal government had never exercised any relationship. Such a result would be inconsistent with the Department's understanding of "recognized Indian tribe" at the time, discussed below, as referring to a tribe with whom the United States had clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility.

If "under federal jurisdiction" is understood to refer to the application and administration of the federal government's plenary authority over Indians, then the complete phrase "now under federal jurisdiction" can further be seen as resolving the tension between Commissioner Collier's desire that the IRA include Indians "[w]ithout regard to whether or not [they are] now under

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(discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.,* field operations); ARCIA for 1900 at 22 (noting lack of "jurisdiction" over New York Indian students); *id.* at 103 (reporting on matters "within" jurisdiction of Special Indian Agent in the Indian Territory); *id*. at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); MERIAM REPORT 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."); Sen. Hrgs. at 282-98 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different OIA "jurisdictions").

[85] Treaty of March 24, 1832, art. XIV, 7 Stat. 366, 368. *See also* Act of May 8, 1906, 34 Stat. 182 (lands allotted to Indians in trust or restricted status to remain "subject to the exclusive jurisdiction of the United States" until issuance of fee-simple patents).

[86] *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870). The Court further held that the consequences of such conflicts give rise to political questions "beyond the sphere of judicial cognizance." *Ibid*.

[87] *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). *See also United States v. Ramsay*, 271 U.S. 470 (1926) (the conferring of citizenship does not make Indians subject to laws of the states).

[88] *Ibid*.

[federal] supervision" and the Senate Committee's concern to limit the Act's coverage to Indian wards "taken care of at the present time."[89]

C. The Meaning of the Phrase "Recognized Indian Tribe."

While today's concept of "federal recognition" merges the cognitive sense of "recognition" and the political-legal sense of "jurisdiction," as *Carcieri* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved. Sol. Op. M-37029 construed the term "recognized" as having been used historically in two senses: a "cognitive" or "quasi-anthropological" sense indicating that federal officials "knew" or "realized" that a tribe existed; and a political-legal sense connoting "that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States."[90] It concluded that in 1934, Congress used "recognized" in a cognitive or quasi-anthropological sense.[91] Sol. Op. M-37029's interpretation departed from the Department's prior, long-held understanding of this term as referring to actions taken by appropriate federal officials toward a tribe with whom the United States clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934.

1. Ordinary Meaning.

The 1935 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY first defines the verb "to recognize" as meaning "to know again (…) to recover or recall knowledge of."[92] Most of the remaining entries focus on the legal or political meanings of the verb. These include, "To avow knowledge of (…) to admit with a formal acknowledgment; as, to *recognize* an obligation; to *recognize* a consul"; Or, "To acknowledge formally (…); specif: (…) To acknowledge by admitting to an associated or privileged status." And, "To acknowledge the independence of (…) a community (…) by express declaration or by any overt act sufficiently indicating the intention to recognize."[93] These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for

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[89] Sen. Hrgs. at 79-80, 263. The district court in *Grand Ronde* noted these contradictory views. *Grande Ronde*, 75 F.Supp.3d at 399-400. Such views were expressed while discussing drafts of the IRA that did not include the phrase "now under federal jurisdiction."

[90] M-37029 at 8. M-37029 also noted that the political-legal sense of "recognized Indian tribe" evolved into the modern concept of "federal recognition" or "federal acknowledgment" by the 1970s, when the Department's administrative acknowledgment procedures were developed. *See* 43 Fed. Reg. 39,361 (Aug. 24, 1978). Originally classified at Part 54 of Title 25 of the Code of Federal Regulations, the Department's administrative acknowledgment procedures are today classified as Part 83. 47 Fed. Reg. 13326 (Mar. 30, 1982).

[91] *Id*. at 25 ("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."). *See Grande Ronde*, 75 F.Supp.3d at 397 (noting that Secretary did not reach the question of the precise meaning of "recognized Indian tribe" in the Cowlitz ROD).

[92] WEBSTER'S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for "recognize" (v.t.).

[93] *Ibid*., entries 2, 3.c, 5. *See also id.*, entry for "acknowledge" (v.t.) "2. To own or recognize in a particular character or relationship; to admit the claims or authority of; to recognize."

loans to Indians for tuition and expenses in "recognized vocational and trade schools."[94] While neither the Act nor its legislative history provide further explanation, the context strongly suggests that the phrase "recognized vocational and trade schools" refers to those formally certified or verified as such by an appropriate official.

2. Legislative History.

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.[95] Commissioner Collier, himself a "principal author" of the IRA,[96] also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.[97]

The IRA's legislative history further suggests that Congress did not intend "recognized Indian tribe" to be understood in a cognitive, quasi-anthropological sense. M-37029's contrary interpretation focuses on concerns expressed by some members of the Senate Committee for the ambiguous and potentially broad *scope* of the phrase. This concern arguably prompted Commissioner Collier to suggest inserting "now under federal jurisdiction" in Category 1 as a limiting phrase.[98] As explained above, Congress appears to have sought to limit the availability of the Act to those tribes over whom the United States had already asserted federal authority and for whom federal responsibilities remained in effect, contrary to Commissioner Collier's original intent.

As originally drafted, Category 1 referred only to "recognized" Indian tribes, leaving unclear whether it was used in a cognitive or in a political-legal sense. This ambiguity appears to have created uncertainty over Category 1's scope and its overlap with Section 19's other definitions of

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[94] The phrase "recognized Indian tribe" appeared in what was then section 9 of the committee print considered by the Senate Committee on May 17, 1934. Sen. Hrgs. at 232, 242. Section 9 provided the right to organize under a constitution to "[a]ny recognized Indian tribe." It was later amended to read "[a]ny Indian tribe, or tribes" before ultimate enactment as Section 16 of the IRA. 25 U.S.C. § 5123. The term "recognized" also appeared several times in the bill originally introduced as H.R. 7902. In three it was used in legal-political sense. H.R. 7902, 73d Cong. (as introduced Feb. 12, 1934), tit. I, § 4(j) (requiring chartered communities to be "recognized as successor to any existing political powers..."); tit. II, § 1 (training for Indians in institutions "of recognized standing"); tit. IV, § 10 (Constitutional procedural rights to be "recognized and observed" in courts of Indian offenses). H.R. 7902, tit. I, § 13(b) used the expression "recognized Indian tribe" in defining "Indian."

[95] *See, e.g.*, Sen. Hrgs. at 263 (remarks of Senator Thomas of Oklahoma) (discussing prior Administration's policy "not to recognize Indians except those already under [Indian Office] authority"); *id*. at 69 (remarks of Commissioner Collier) (tribal customary marriages and divorces "recognized" by courts nationally). Representative William W. Hastings of Oklahoma criticized an early draft definition of "tribe" on the grounds it would allow chartered communities to be "recognized as a tribe" and to exercise tribal powers under section 16 and section 17 of the IRA. *See id*. at 308.

[96] *Carcieri*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

[97] Sen. Hrgs. at 69 (remarks of Commissioner Collier) (Apr. 26, 1934). On at least one occasion, however, Collier appeared to rely on the cognitive sense in referring to "recognized" tribes or bands *not* under federal supervision. Sen. Hrgs. at 80 (remarks of Commissioner Collier) (Apr. 26, 1934).

[98] Justice Breyer concluded that Congress added "now under federal jurisdiction" to Category 1 "believing it definitively resolved a specific underlying difficulty." *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

"Indian," which appear to have led Congress to insert the limiting phrase "now under federal jurisdiction." As noted above, we interpret "now under federal jurisdiction" as modifying "recognized Indian tribe" and as limiting Category 1's scope. By doing so, "now under federal jurisdiction" may be construed as disambiguating "recognized Indian tribe" by clarifying its use in a political-legal sense.

3. Administrative Understandings.

Compelling support for interpreting the term "recognized" in the political-legal sense is found in the views of Department officials expressed around the time of the IRA's enactment and early implementation. Assistant Solicitor Cohen discussed the issue in the Department's HANDBOOK OF FEDERAL INDIAN LAW ("HANDBOOK"), which he prepared around the time of the IRA's enactment. The HANDBOOK's relevant passages discuss ambiguities in the meaning of the term "tribe."[99] Assistant Solicitor Cohen explains that the term "tribe" may be understood in both an ethnological and a political-legal sense.[100] The former denotes a unique linguistic or cultural community. By contrast, the political-legal sense refers to ethnological groups "recognized as single tribes for administrative and political purposes" and to single ethnological groups considered as a number of independent tribes "in the political sense."[101] This suggests that while the term "tribe," standing alone, could be interpreted in a cognitive sense, as used in the phrase "recognized Indian tribe" it would have been understood in a political-legal sense, which presumes the existence of an ethnological group.[102]

Less than a year after the IRA's enactment, Commissioner Collier further explained that "recognized tribe" meant a tribe "with which the government at one time or another has had a treaty or agreement or those for whom reservations or lands have been provided and over whom the government exercises supervision through an official representative."[103] Addressing the Oklahoma Indian Welfare Act of 1936 ("OIWA"), Solicitor Nathan Margold opined that because tribes may "pass out of existence as such in the course of time, the word "recognized" as used in the [OIWA] should be read as requiring more than "past existence as a tribe and its historical recognition as such," but "recognition" of a currently existing group's activities "by specific actions of the Indian Office, the Department, or by Congress."[104]

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[99] Cohen 1942 at 268.

[100] Cohen separately discussed how the term "Indian" itself could be used in an "ethnological or in a legal sense," noting that a person's legal status as an "Indian" depended on genealogical and social factors. Cohen 1942 at 2.

[101] *Id*. at 268 (emphases added).

[102] *Ibid*. at 268 (validity of congressional and administrative actions depend upon the [historical, ethnological] existence of tribes); *United States v. Sandoval*, 231 U.S. 28 (1913) (Congress may not arbitrarily bring a community or group of people within the range of its plenary authority over Indian affairs). *See also* 25 C.F.R. Part 83 (establishing mandatory criteria for determining whether a group is an Indian tribe eligible for special programs and services provided by the United States to Indians because of their status as Indians).

[103] Letter, Commissioner John Collier to Ben C. Shawanesee (Apr. 24, 1935).

[104] 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.

The Department maintained similar understandings of the term "recognized" in the decades that followed. In a 1980 memorandum assessing the eligibility of the Stillaguamish Tribe for IRA trust-land acquisitions,[105] Hans Walker, Jr., Associate Solicitor for Indian Affairs, distinguished the modern concept of formal "federal recognition" (or "federal acknowledgment") from the political-legal sense of "recognized" as used in Category 1 in concluding that "formal acknowledgment in 1934" is not a prerequisite for trust-land acquisitions under the IRA, "*so long as* the group meets the [IRA's] other definitional requirements."[106] These included that the tribe have been "recognized" in 1934. Associate Solicitor Walker construed "recognized" as referring to tribes with whom the United States had had "a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time*."[107] Associate Solicitor Walker then noted the Senate Committee's concerns for the potential breadth of "recognized Indian tribe." He concluded that Congress intended to exclude some groups that might be considered Indians in a cultural or governmental sense, but not "any Indians to whom the Federal Government had *already* assumed obligations."[108] Implicitly construing the phrase "now under federal jurisdiction" to modify "recognized Indian tribe," Associate Solicitor Walker found it "clear" that Category 1 "requires that some type of obligation or extension of services to a tribe must have existed in 1934."[109] As already noted, in the case of the Stillaguamish Tribe, such obligations were established by the 1855 Treaty of Point Elliott and remained in effect in 1934.[110]

Associate Solicitor Walker's views in 1980 were consistent with the conclusions reached by the Solicitor's Office in the mid-1970s following its assessment of how the federal government had historically understood the term "recognition." This assessment was begun under Reid Peyton Chambers, Associate Solicitor for Indian Affairs, and offers insight into how Congress and the Department understood "recognition" at the time the Act was passed. In fact, it was this historical review of "recognition" that contributed to the development of the Department's federal acknowledgment procedures.[111]

Throughout the United States' early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.[112] In 1871, Congress enacted legislation providing that no tribe within the territory of the United States could thereafter be

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[105] Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe at 1 (Oct. 1, 1980) (hereafter "Stillaguamish Memo").

[106] *Id*. at 1 (emphasis added). Justice Breyer's concurring opinion in *Carcieri* draws on Associate Solicitor Walker's analysis in the Stillaguamish Memo. *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

[107] *Id*. at 2 (emphasis added).

[108] *Id*. at 4 (emphasis added). This is consistent with Justice Breyer's concurring view in *Carcieri*.

[109] *Id*. at 6. In the case of the Stillaguamish Tribe, such obligations arose in 1855 through the Treaty of Point Elliott, and they remained in effect in 1934.

[110] Justice Breyer's concurring opinion in *Carcieri* draws on the analysis in the Stillaguamish Memo. *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

[111] 25 C.F.R. Part 83.

[112] U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.

"acknowledged or recognized" as an "independent nation, tribe, or power" with whom the United States could contract by treaty.[113] Behind the act lay the view that though Indian tribes were still "recognized as distinct political communities," they were "wards" in a condition of dependency who were "subject to the paramount authority of the United States."[114] While the question of "recognition" remained one for the political branches,[115] the contexts within which it arose expanded with the United States' obligations as guardian.[116]

After the close of the termination era in the early 1960s, during which the federal government had "endeavored to terminate its supervisory responsibilities for Indian tribes,"[117] Indian groups that the Department did not otherwise consider "recognized" began to seek services and benefits from the federal government. The most notable of these claims were aboriginal land claims under the Nonintercourse Act;[118] treaty fishing-rights claims by descendants of treaty signatories;[119] and requests to the Bureau of Indian Affairs ("BIA") for benefits from groups of Indians for which no government-to-government relationship existed,[120] which included tribes previously recognized and seeking restoration or reaffirmation of their status.[121] At around this same time, Congress began a critical historical review of the federal government's conduct of its special legal relationship with American Indians.[122] In January 1975, it found that federal Indian

[113] Act of March 3, 1871, c. 120, § 1, 16 Stat. 544, 566. Section 3 of the same Act prohibited further contracts or agreements with any tribe of Indians or individual Indian not a citizen of the United States related to their lands unless in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Id*., § 3, 16 Stat. 570-71.
[114] *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).
[115] *United States v. Holliday*, 70 U.S. 407, 419 (1865).
[116] *See* Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship). *Compare, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832) *with United States v. Kagama*, 118 U. S. 375 (1886).
[117] *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). *See also* Cohen 2012 at § 1.06 (describing history and implementation of termination policy). During the termination era, roughly beginning in 1953 and ending in the mid-1960s, Congress enacted legislation ending federal recognition of more than 100 tribes and bands in eight states. Michael C. Walsh, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983). Congress has since restored federal recognition to some terminated tribes. *See* Cohen 2012 at § 3.02[8][c], n. 246 (listing examples).
[118] *See*, *e.g.*, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 655 (D. Me.), *aff'd sub nom. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (Nonintercourse Act claim by unrecognized tribe in Maine); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 944 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (Nonintercourse Act claim by unrecognized tribe in Massachusetts).
[119] *United States v. State of Wash.*, 384 F. Supp. 312, 348 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (treaty fishing rights of unrecognized tribes in Washington State)
[120] AMERICAN INDIAN POLICY REVIEW COMMISSION, *Final Report, Vol. I* [Committee Print] at 462 (GPO 1977) (hereafter "AIPRC Final Report") ("A number of [unrecognized] Indian tribes are seeking to formalize relationships with the United States today but there is no available process for such actions."). *See also* TASK FORCE NO. 10 ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, *Final Report to the American Indian Policy Review Commission* (GPO 1976) (hereafter "*Report of Task Force Ten*").
[121] Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 LAW & SOC'Y REV. 930 (2017).
[122] Pub. L. No. 93-580, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, (hereafter "AIPRC Act"), *codified at* 25 U.S.C. § 174 note.

policies had "shifted and changed" across administrations "without apparent rational design,"[123] and that there had been no "general comprehensive review of conduct of Indian affairs" or its "many problems and issues" since 1928, before the IRA's enactment.[124] Finding it imperative to do so,[125] Congress established the American Indian Policy Review Commission[126] to prepare an investigation and study of Indian affairs, including "an examination of the statutes and procedures for granting Federal recognition and extending services to Indian communities."[127] It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."[128]

The Palmer Memorandum

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on "Federal 'Recognition' of Indian Tribes" (the "Palmer Memorandum").[129] Among other things, it examined the historical meaning of "recognition" in federal law, and of the Secretary's authority to "recognize" unrecognized groups. After surveying statutes and case law before and after the IRA's enactment, as well as its early implementation by the Department, the memorandum notes that "the entire concept is in fact quite murky."[130] The Palmer Memorandum finds that the case law lacked a coherent distinction between "tribal existence and tribal recognition," and that clear standards or procedures for recognition had never been established by statute.[131] It further finds there to be a "consistent ambiguity" over whether formal recognition consisted of an assessment "of *past* governmental action" – the approach "articulated in the cases and [Departmental] memoranda" – or whether it "included authority to take such actions *in the first instance*."[132] Despite these ambiguities, the Palmer Memorandum concludes

[123] *Ibid*. Commissioner John Collier raised this same issue in hearings on the draft IRA. *See* H. Hrgs. at 37. Noting that Congress had delegated most of its plenary authority to the Department or BIA, which Collier described as "instrumentalities of Congress...clothed with the plenary power." Being subject to the Department's authority and its rules and regulations meant that while one administration might take a course "to bestow rights upon the Indians and to allow them to organize and allow them to take over their legal affairs in some self-governing scheme," a successor administration "would be completely empowered to revoke the entire grant."

[124] *Ibid*. (citing MERIAM REPORT).

[125] *Ibid*.

[126] AIRPC Act, § 1(a).

[127] *Id*., § 2(3).

[128] *See*, *e.g.*, Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate (Jun. 7, 1974) (hereafter "Butler Letter") (describing authority for recognizing tribes since 1954); Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, Secretary's Authority to Extend Federal Recognition to Indian Tribes (Aug. 20, 1974) (hereafter "Chambers Memo") (discussing Secretary's authority to recognize the Stillaguamish Tribe); Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal "Recognition" of Indian Tribes (Jul. 17, 1975) (hereafter "Palmer Memo").

[129] Associate Solicitor Reid P. Chambers approved the Palmer Memo in draft form. *Ibid*. The Palmer Memo came on the heels of earlier consideration by the Department of the Secretary's authority to acknowledge tribes.

[130] Palmer Memo at 23.

[131] *Id*. at 23-24.

[132] *Id*. at 24. The memorandum concluded that the former question necessarily implied the latter.

that the concept of "recognition" could not be dispensed with, as it had become an accepted part of Indian law.[133]

Indirectly addressing the two senses of the term "tribe" described above, the Palmer Memorandum found that before the IRA, the concept of "recognition" was often indistinguishable from the question of tribal existence,[134] and was linked with the treaty-making powers of the Executive and Legislative branches, for which reason it was likened to diplomatic recognition of foreign governments.[135] Though treaties remained a "prime indicia" of political "recognition,"[136] the memorandum noted that other evidence could include Congressional recognition by non-treaty means and administrative actions fulfilling statutory responsibilities toward Indians as "domestic dependent nations,"[137] including the provision of trust services.[138] Having noted the term's ambiguity and its political and administrative uses, the Palmer Memorandum then surveyed the case law to identify "indicia of congressional and executive recognition."[139] It describes these indicia as including both federal actions taken toward a tribe with whom the United States dealt on a "more or less sovereign-to-sovereign basis," as well as actions that "clearly acknowledged a trust responsibility"[140] toward a tribe, consistent with the evolution of federal Indian policy.[141]

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[133] *Ibid*. at 24.

[134] The Palmer Memo noted that based on the political question doctrine, the courts rarely looked behind a "recognition" decision to determine questions of tribal existence per se. *Id*. at 14.

[135] *Id*. at 13. *See also* Cohen 1942 at 12 (describing origin of Indian Service as "diplomatic service handling negotiations between the United States and Indian nations and tribes").

[136] *Id*. at 3.

[137] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* AIPRC Final Report at 462 ("Administrative actions by Federal officials and occasionally by military officers have sometimes laid a foundation for federal acknowledgment of a tribe's rights."); *Report of Task Force Ten* at 1660 (during Nixon Administration "federally recognized" included tribes recognized by treaty or statute and tribes treated as recognized "through a historical pattern of administrative action.").

[138] Palmer Memo at 2; AIPRC Final Report at 111 (treaties but one method of dealing with tribes and treaty law generally applies to agreements, statutes, and Executive orders dealing with Indians, noting the trust relationship has been applied in numerous nontreaty situations). Many non-treaty tribes receive BIA services, just as some treaty-tribes receive no BIA services. AIPRC Final Report at 462; Terry Anderson & Kirke Kickingbird, An Historical Perspective on the Issue of Federal Recognition and Non-Recognition, Institute for the Development of Indian Law at 1 (1978). *See also Legal Status of the Indians-Validity of Indian Marriages*, 13 YALE L.J. 250, 251 (1904) ("The United States, however, continued to regard the Indians as nations and made treaties with them as such until 1871, when after an hundred years of the treaty making system of government a new departure was taken in governing them by acts of Congress.").

[139] *Id*. at 2-14.

[140] *Id*. at 14.

[141] Having ratified no new treaties since 1868, ARCIA 1872 at 83 (1872), Congress ended the practice of treaty-making in 1871, more than 60 years before the IRA's enactment. *See* Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, *codified at* 25 U.S.C. § 71. This caused the Commissioner of Indian Affairs at the time to ask what would become of the rights of tribes with which the United States had not yet treated. ARCIA 1872 at 83. As a practical matter, the end of treaty-making tipped the policy scales toward expanding the treatment of Indians as wards under federal guardianship, expanding the role of administrative officials in the management and implementation of Indian Affairs. Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship); *Brown v. United States*, 32 Ct. Cl. 432, 439 (1897) ("But since the Act 3d March, 1871 (16 Stat. L., 566, § 1), the Indian tribes have ceased to be treaty-making powers and have become simply the wards of the nation."); *United States v. Kagama*, 118 U.S. 375, 382 (1886) ("But,

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;[142] the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."[143] 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;[144] 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;[145] the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;[146] 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 a tribe; the institution of suits on behalf of a tribe;[147] and the expenditure of funds appropriated for the use of particular Indian groups.

The Palmer Memorandum also considered the Department's early implementation of the IRA, when the Solicitor's Office was called upon to determine tribal eligibility for the Act. While this did not provide a "coherent body of clear legal principles," it showed that Department officials closely associated with the IRA's enactment believed that whether a tribe was "recognized" was "an administrative question" that the Department could determine.[148] In making such determinations, the Department looked to indicia established by federal courts.[149] There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.[150] Early on, the factors the Department considered were "principally retrospective," reflecting a concern for "whether a particular tribe or band *had* been recognized, not whether it *should* be."[151] Because the Department had the authority to "recognize" a tribe for

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after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,-to govern them by acts of congress. This is seen in the act of March 3, 1871...").

[142] Butler Letter at 6; Palmer Memo at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).

[143] Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memo at 19.

[144] 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).

[145] Palmer Memo at 19 (citing Cohen 1942 at 271)); Butler letter at 4.

[146] Palmer Memo at 19 (citing Cohen 1942 at 271).

[147] *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)).

[148] *Id*. at 18.

[149] *Ibid*.

[150] *Ibid*.

[151] *Ibid*. (emphasis in original). *See also* Stillaguamish Memo at 2 (Category 1 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.").

purposes of implementing the IRA, the absence of "formal" recognition in the past was "not deemed controlling" *if there were sufficient indicia* of governmental dealings with a tribe "on a sovereign or quasi-sovereign basis."[152] The manner in which the Department understood "recognition" before, in, and long-after 1934[153] supports the view that Congress and the Department understood "recognized" to refer to actions taken by federal officials with respect to a tribe for political or administrative purposes in or before 1934.

D. Construing the Expression "Recognized Indian Tribe Now Under Federal Jurisdiction" as a Whole.

Based on the above interpretation of its component parts and their grammatical relation, the phrase "any recognized Indian tribe now under federal jurisdiction" in Section 19 of the IRA should be interpreted as referring to tribes for whom the United States has assumed and maintained trust responsibilities in 1934. Category 1 may thus be interpreted as intended to limit the IRA's coverage to tribes who were brought under federal jurisdiction in or before 1934 by the actions of federal officials clearly dealing with the tribe on a more or less sovereign-to-sovereign basis or clearly acknowledging a trust responsibility, and who remained under federal authority in 1934.

Before and after 1934, the Department and the courts regularly used the term "recognized" to refer to *exercises* of federal authority over a tribe that initiated or continued a course of dealings with the tribe pursuant to Congress' plenary authority. By contrast, the phrase "under federal jurisdiction" referred to the supervisory and administrative responsibilities of federal authorities toward a tribe thereby established. This means that Category 1 may further be seen as intended to exclude two categories of tribe from eligibility. The first category consists of tribes never "recognized" by the United States in or before 1934. The second category consists of tribes who *were* "recognized" before 1934 but no longer remained under federal jurisdiction in 1934. This would include tribes who had absented themselves from the jurisdiction of the United States or had otherwise lost their jurisdictional status, for example, because of policies predicated on "the dissolution and elimination of tribal relations," such as allotment and assimilation.[154] Though

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[152] Palmer Memo at 18.

[153] *See, e.g.*, Stillaguamish Memo. *See also* 25 C.F.R. § 83.12 (describing evidence to show "previous Federal acknowledgment" as including: treaty relations; denomination as a tribe in Congressional act or Executive Order; treatment by Federal government as having collective rights in lands or funds; and federally held lands for collective ancestors).

[154] *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994) ("The "ultimate purpose of the [Indian General Allotment Act was] to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country."); *see also Montana v. United States*, 450 U.S. 544, 559 (1981) (citing 11 CONG. REC. 779 (Sen. Vest), 782 (Sen. Coke), 783–784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881); SECRETARY OF THE INTERIOR ANN. REP. 1885 at 25–28; SECRETARY OF THE INTERIOR ANN. REP. 1886 at 4; ARCIA 1887 at IV–X; SECRETARY OF THE INTERIOR ANN. REP. 1888 at XXIX–XXXII; ARCIA 1889 at 3–4; ARCIA 1890 at VI, XXXIX; ARCIA 1891 at 3–9, 26; ARCIA 1892 at 5; SECRETARY OF THE INTERIOR ANN. REP. 1894 at IV). *See also* Cohen 1942 at 272 ("Given adequate evidence of the existence of a tribe during some period in the remote or recent past, the question may always be raised: Has the existence of this tribe been terminated in some way?").

outside Category 1's definition of "Indian," Congress may later enact legislation recognizing and extending the IRA's benefits to such tribes, as *Carcieri* instructs.[155] For purposes of the eligibility analysis, however, it is important to bear in mind that neither of these categories would include tribes who were "recognized" and for whom the United States maintained trust responsibilities in 1934, despite the federal government's neglect of those responsibilities.[156]

III. ANALYSIS

A. Procedure for Determining Eligibility.

The Solicitor's Guidance provides a four-step process to determine whether a tribe falls within the first definition of Indian in Section 19.[157] It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.[158] The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.[159] 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.[160] The Tribe, as explained below, provided dispositive evidence under Step 2 that it was "under federal jurisdiction" in 1934 and therefore eligible for the benefits of Section 5 of the IRA.

B. Dispositive Evidence of Federal Jurisdiction in 1934.

Having identified no separate statutory authority making the IRA applicable to the Tribe, the analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the applicant tribe was under federal jurisdiction in 1934.[161] Certain types of federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934. These are: elections conducted by the Department pursuant to Section 18 of the IRA; approval by the Secretary of a constitution following an election held pursuant to Section 16 of the IRA; issuance of a charter of incorporation following a petition submitted pursuant to Section 17 of the IRA; adjudicated treaty rights; inclusion in 1934 on the Department's Indian Population Report; and land acquisitions by the United States for groups of Indians in the years leading up to 1934.[162] Where any of these forms of evidence

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[155] *Carcieri*, 555 U.S. at 392, n. 6 (listing statutes by which Congress expanded the Secretary's authority to acquire land in trust to tribes not necessarily encompassed by Section 19).

[156] *See*, *e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) (improper termination of treaty-tribe's status before 1934).

[157] Solicitor's Guidance at 1.

[158] *Ibid*.

[159] *Ibid*.

[160] *Ibid*.

[161] *Id*. at 2.

[162] *Id*. at 2-4.

exist, then the Solicitor's Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.[163]

1. IRA Section 18 Election.

The IRA was a statute of general applicability, but included a provision that would render it inapplicable.[164] Section 18, as amended, directed the Secretary to conduct elections to allow Indians residing on a reservation to vote to reject the imposition of the Act.[165] In order for the Secretary to conclude that a reservation was eligible for an election, a determination had to be made that the relevant Indians satisfied one of the IRA's definitions of "Indian." The calling of a Section 18 election confirmed the Secretary's finding that the voters were "Indians" within the meaning of Section 19, as such an election is "certainly an acknowledgment of federal power and responsibility (*i.e.*, federal jurisdiction)" toward the Indians for whom the election was called.[166] From 1934-1936, the Department conducted 258 Section 18 elections,[167] the results of which it compiled by the Department in what later became known as the Haas Report.[168] Federal courts and the Interior Board of Indian Appeals have repeatedly held that Section 18 elections constitute unambiguous evidence that the Department considered a tribe or reservation to be under federal jurisdiction in 1934.[169]

In 1934, the United States understood that the Chumash Tribe was under the federal jurisdiction and supervision of the United States, and that the adult residents of the Tribe met the IRA's definition of "Indian." As detailed in the Haas Report, on December 18, 1934, the Chumash Tribe of the Santa Ynez Reservation voted on the IRA.[170] Twenty members of the Chumash Tribe residing at the Reservation were eligible to vote, and all twenty voted to accept the IRA.[171] In 1935, Commissioner of Indian Affairs John Collier wrote to the Chumash Tribe to confirm the

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[163] *Id*. at 2.f

[164] IRA, § 18.

[165] *Ibid*.

[166] *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. den.*, 139 S.Ct. 786 (Jan. 7, 2019).

[167] Haas Report at 3.

[168] *Ibid.* Table A at 13-20 (listing Section 18 elections conducted).

[169] *See, e.g., 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 den., 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.").

[170] *See* Haas Report at 15; List of Chumash Tribe members eligible to vote in the 1934 IRA election prepared by Superintendent John W. Dady (Nov. 24, 1934); Results of IRA Election held on December 18, 1934 at the Santa Ynez Reservation (Dec. 19, 1934). The Haas Report states that the election at the Santa Ynez Reservation occurred on December 15, 1934; after reviewing the documents prepared by Superintendent Dady and the Letter from Commissioner Collier, *infra* note 26, we conclude that the date on the Haas List is incorrect, and the correct date is December 18, 1934.

[171] *See* List of Chumash Tribe members eligible to vote at 1-2; Results of IRA Election at I.

results of the Secretarial election stating that "the Indians of the Santa Ynez jurisdiction have accepted the Indian Reorganization Act."[172] The Chumash Tribe's vote in a Section 18 IRA election, in itself, is presumptive evidence that the Tribe was under federal jurisdiction in 1934.

2. Inclusion on DOI's 1934 Indian Population Report.

In 1884, Congress first directed the Department to create an Indian Census in an Appropriations Act for the Indian Department. Section 9 of the Act provided that each Indian agent "be required, in his annual report, to submit a census of the Indians at his agency or upon the reservation under his charge."[173] From the initiation of the Indian Census in 1884, through and including 1934, the Department maintained Indian Census rolls.

The record also demonstrates that the Tribe's members were included on Indian Census rolls, further supporting the conclusion that the Tribe and its members were "under federal jurisdiction" in 1934. Enumeration on the Indian Census rolls reflects the existence of a federal-tribal relationship and demonstrates that the federal government acknowledged responsibility for the tribes and the Indians identified therein. In the Indian census included in the 1934 Annual Report, the Chumash Tribe was listed as being under the jurisdiction of the Mission Agency in California. The Mission Agency enumerated ninety enrolled members of the Chumash Tribe on the 1934 Indian Census: nineteen residing at the agency and seventy-one residing elsewhere.[174] This enumeration further demonstrates that the Tribe was under federal jurisdiction in 1934.[175]

3. Establishment of Santa Ynez Reservation for the Chumash Tribe.

The United States' establishment of the Santa Ynez Reservation by at least 1906 also demonstrates that the Chumash Tribe was under federal jurisdiction before and including in 1934. Throughout the period from 1906 to 1940, including in 1934, the Department consistently referred to the Chumash Tribe's property as the "Santa Ynez Reservation" under the federal jurisdiction of the Mission Agency or other Department officials.[176] This demonstrates that the

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[172] Letter from Commissioner John Collier to the Indians of the Santa Ynez Reservation (Jan. 22, 1935).

[173] Stat. 76, 98 (July 4, 1884).

[174] 1934 Annual Report at 127 (enumerating nineteen tribal members residing at the Santa Ynez Reservation on April 1, 1934). When the 1935 Indian Census was taken on January 1, 1935, the Mission Agency enumerated twenty members of the Tribe residing at the Santa Ynez Reservation, consistent with the number of votes cast in the IRA election held two weeks prior. See 1935 Annual Report at 161; Haas Report at 15.

[175] Members of the Chumash Tribe were consistently enumerated on Indian Census rolls during this period. *See e.g.*, 1931 Annual Report at 44 (enumerating 87 tribal members under the jurisdiction of the Mission Agency); 1932 Annual Report at 37 (enumerating 90 tribal members under the jurisdiction of the Mission Agency); 1933 Annual Report at 117 (enumerating 92 tribal members under the jurisdiction of the Mission Agency).

[176] E.g., 1902 Annual Report at 175 (listing the Santa Ynez Reservation as under the jurisdiction of the Mission Agency despite "[u]nsettled" issues involving the property); 1905 Annual Report at 192 (discussing the establishment of the Reservation and the remaining "legal technicalities to be disposed of going forward"); 1906 Annual Report at 205 (listing the Santa Ynez Reservation as under the jurisdiction of the Mission Agency); 1919 Annual Report at 74 (enumerating 71 members of the Chumash Tribe under the jurisdiction of the Santa Rosa superintendent); 1925 Annual Report at 34 (enumerating 77 members of the Chumash Tribe under the jurisdiction of the Mission Agency); 1930 Annual Report at 38

United States considered the Tribe and the reservation land upon which its members resided to be under federal jurisdiction at least as early as 1906, if not earlier. The establishment of the Santa Ynez Reservation for the Chumash Tribe further bolsters the conclusion that the Tribe was "under federal jurisdiction" prior to and in 1934.

IV. CONCLUSION

The Section 18 election held on the Chumash Tribe on December 18, 1934, inclusion on the DOI 1934 Indian Population Report, and establishment of the Santa Ynez Reservation by 1906 unambiguously establish that the United States considered the Tribe to be under federal jurisdiction in 1934. As such, the Tribe satisfies Category 1. We therefore conclude that the Secretary has the authority to acquire land-in-trust for the Tribe under Section 5 of the IRA.

The Interior Board of Indian Appeals

On May 15, 2018, the Interior Board of Indian Appeals ("Board") issued an Order Dismissing Appeals in Docket Nos. IBIA 16-053 and IBIA 16-054, Vacating and Remanding the Decision to have the Regional Director take further consideration of whether the lands are contiguous to the Tribe's Reservation and whether BIA is equipped to discharge the additional responsibilities that would result from the acquisition of the lands in trust.

The Order concerns an application from the Santa Ynez Band of Chumash Mission Indians to have 2.13 acres, more or less, located in Santa Barbara County, California accepted into trust. On August 12, 2015, a Notice of Application (NOA) was circulated for public comments. On August 24, 2015, a Supplemental NOA was circulated due to an omission in the legal description. The distribution list for the NOA included the County of Santa Barbara, Preservation of Los Olivos (POLO), and No More slots (NMS). POLO and NMS submitted comments by letters dated September 29, 2015 (received October 2, 2015) and October 12, 2015 (received October 19, 2015). The County of Santa Barbara, California did not submit comments during the comment period. On February 16, 2016, the BIA issued a decision to approve the land acquisition request. Subsequently, the Board received a Notice of Appeal from No More Slots on March 15, 2016, the County of Santa Barbara, California on March 16, 2016, and Preservation of Los Olivos on March 18, 2016.

Pursuant to 25 CFR 151.10, the following factors were considered in formulating our decision: (1) the need of the tribe for additional land; (2) the purposes for which the land will be used; (3) impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (4) jurisdictional problems and potential conflicts of land use which may arise; (5) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status; (6) the extent to which the applicant has

(enumerating 84 members of the Chumash Tribe under the jurisdiction of the Mission Agency): 1934 Annual Report at 127 (enumerating 90 members of the Chumash Tribe under the jurisdiction of the Mission Agency).

provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations. Accordingly, the following analysis of the application is provided.

As mentioned above, the Board issued an Order remanding the Decision for further consideration on two items which include, lands are contiguous to the Tribe's Reservation and whether BIA is equipped to discharge the additional responsibilities that would result from the acquisition of the lands in trust. 25 C.F.R.§ 151.10(a)-(f) and (g) has previously been reviewed by the Board but not remanded, therefore they are not incorporated in this Decision.

Clarification of the Two Issues on Remand

In response to the IBIA Remand Order, the Bureau of Indian Affairs (BIA) is providing our clarification of findings regarding the contiguity of the Mooney/Escobar Parcels and whether the BIA is equipped to discharge the additional responsibilities of bringing the 2.13 acres of land into trust that was submitted by the Santa Ynez Band.

Contiguous Determination

The subject property encompasses approximately 2.13 acres, more or less, commonly referred to as Assessor's Parcel Numbers: 143-242-01 and 143-242-02 (Mooney); and 143-252-01 and 143-252-02 (Escobar).

The Appellant has reported that the Mooney Parcel is not contiguous to the Santa Ynez Reservation and the Escobar Parcel is not contiguous to the Mooney Parcel.

The authority to bring land into trust for Indian tribes is authorized by Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108 (previously 465), and is governed by regulations at 25 C.F.R. § 151. In acquiring property in trust, the BIA must consider whether the application to take land into trust is processed pursuant to the criteria that applies to "on-reservation acquisitions" at § 151.10, or "off-reservation acquisitions" at § 151.11. Criteria for "on-reservation" acquisitions pursuant to § 151.10 apply when "the land is located within or contiguous to an Indian reservation".

In Order dated May 15, 2018, the IBIA stated: "In the present case, it is unclear whether the Regional Director examined the ownership of the subsurface interests nor have we been able to find a common boundary or to determine ownership of the subsurface interests based on our review of the record. On appeal, the Regional Director responds to arguments by the County regarding the purported meaning of Federal case law regarding tribal regulatory jurisdiction over public roads and rights-of-way intersecting or near a reservation, but does not squarely address who holds title to the servient estate over which the highway, roadway, and right-of-way run and allegedly preclude a finding of contiguity in this case."

Additionally, in the Remand Order, the Board stated that there was not enough evidence in the record to support a contiguous determination. It is also mentioned that there is not a clear definition of contiguous within the 25 CFR 151 regulations. Therefore, we will provide an analysis on the history of the property showing its contiguity.

The regulation at 25 CFR § 151.10 states, "The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation…" The definition of "Indian reservation" in 25 CFR 151.2(f), states:

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

The Department defined "contiguous" as "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point." The regulations are consistent with the Interior Board of Indian Affairs conclusion, in *County of Sauk v. Midwest Regional Director*, 45 IBIA 201 (2007), *Aff'd, Sauk County v. U.S. Department of the Interior,* No. 07-cv-543-bbc (W.D. Wisc. May 29, 2008), finding parcels to be contiguous despite surface easements for public roads that separated the land surfaces of the properties.

Currently, the property is adjacent to highway 246 which runs along the Santa Ynez Reservation and is contiguous to the Reservation. The Santa Ynez Reservation and the Mooney Parcel are separated by Valley Street. Additionally, the Mooney Parcel and the Escobar Parcel are separated by Tyndall Street, both of which are public right of ways. In an 1888 subdivision map of Santa Ynez (1888 Map), many parcels of land were laid out, in a grid system of streets that would provide access to various parcels. The southern boundary of the Mooney Parcel is the northern line of Valley Street on the 1888 Map. The 1888 Map included an offer to dedicate the public streets labeled on the map, including Valley Street. The offer included a reservation of an easement on behalf of the subdivider for "the sole and exclusive right to use said highways for the purpose of constructing and operating water ditches, and other conduits, street railways and other railroads thereon, and of laying and using above and beneath the surface thereof pipes, wires and other conductors for conducting water, gas, electricity and other useful elements along, over and across said highways at all times and under such conditions as [the owner] may deem advisable…" In 1946, the original developer of Santa Ynez quitclaimed all of its remaining interest in the subdivision area, including the streets offered for dedication, to the various owners of the subdivided lots. In 1959, the County of Santa Barbara accepted the 1888 offer of dedication by Resolution No. 19724.

In 1959, Political Code section 2631 provided as follows: "By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided." Section 2631 was later repealed, but the County's interest in Valley Street was established when the dedication was accepted in 1959. Therefore, at that time the owners of the adjoining properties owned fee title to Valley Street, with each adjoining owner owning to the center of the street. See Civil Code section 831 ("An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown"). As mentioned above, the original developer of the subdivision had conveyed all of its remaining rights in the subdivision to the various property owners, by deed recorded in 1946.

The fact that former section 2631 operates to bestow only an easement to the County, as opposed to fee ownership, is confirmed in City of Los Angeles v. Pacific Elec. Ry. Co. (1959) 168 Cal.App.2d 224. There, a deed conveyed a 50 foot wide strip to Los Angeles County for road purposes. Based upon section 2631, the court held that the deed conveyed only an easement, not fee ownership. The same result should occur here. By accepting a dedication for Valley Street, Santa Barbara County obtained only an easement in Valley Street. Civil Code section 831 therefore operates to provide that the adjoining owners, pursuant to the 1946 deed from the original subdivider, held ownership to the center of the street. As owner of the Mooney Parcel and the Existing Reservation, the Tribe is the owner of fee title to the portion of Valley Street that is between the parcels. Therefore, the two parcels are undoubtedly contiguous to each other. This would be the case even if in fact the northern boundary of the Existing Reservation does not actually extend to the northern boundary of Valley Street, because the Tribe undoubtedly owns the land immediately to the south of Valley Street. The Tribe's property ownership includes Valley Street itself.

The Board had previously noted that the definition of "contiguous" is not defined by the 25 C.F.R. § 151 regulations, *see Jefferson County v. Northwest Regional Director*, 47 IBIA 187 (September 2, 2008), and at one time, the definition was not found anywhere in Department regulations despite incorporation of the term "contiguous" in 25 C.F.R. § 151. In 2008, Department regulations implementing the Indian Gaming Regulatory Act (IGRA) defined "contiguous" as "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point". *73 Fed. Reg. 29354, 29376, May 20, 2008 ("Gaming on Trust Lands Acquired After October 17, 1988")* (Gaming Rules). The commentary section of the published Gaming Rules does not elaborate further on the definition discussed at page 29355 of the Federal Register:

> Section 292.2 How are key terms defined in this part?
>
> Contiguous
> Several comments related to the definition of contiguous. One comment suggested removing the definition from the section. A few other comments suggested keeping the

> definition but removing the second sentence that specifies that contiguous includes parcels divided by non-navigable waters or a public road or right-of-way. A few comments suggested including both navigable and non-navigable waters in the definition. Many comments regarded the concept of "corner contiguity." Some comments suggested including the concept, which would allow parcels that only touch at one point, in the definition. Other comments suggested that the definition exclude parcels that only touch at a point.
>
> Response: The recommendation to remove the definition was not adopted. Likewise, the recommendation to remove the qualifying language pertaining to non-navigable waters, public roads or rights-of-way was not adopted. Additionally, the suggestion to include navigable waters was not adopted. The concept of "corner contiguity" was included in the definition. However, to avoid confusion over this term of art, the definition uses the language "parcels that touch at a point."

Although the commentary section of the Gaming Rules does not elaborate on the meaning of the definition of contiguous, it clarifies the Department's intent to define "contiguous" to include parcels of land separated by non-navigable waters or a public road or right-of-way.

In *Jefferson County, supra*, the Board held that lands which are contiguous under 25 C.F.R. §151 are lands which adjoin or abut, as those terms are commonly defined. Although, the Board expressly did not address whether contiguous lands include those that touch at a corner. The Department's 2008 Gaming Rules definition of contiguous includes land that touches at a point. In *Jefferson County,* the Board also noted the definition of contiguous was previously addressed by the Board and the Wisconsin District Court in *County of Sauk v. Midwest Regional Director*, 45 IBIA 201 (2007), *aff'd, Sauk County v. U.S. Department of the Interior,* No. 07-cv-543-bbc (W.D. Wisc. May 29, 2008). In the *Sauk* case, parcels were found to be contiguous despite surface easements for public roads that separated the land surfaces of the properties. Although, in *Jefferson County,* the Board referenced the *Sauk* case as an example of a prior instance where the term "contiguity" had been defined, the Board did not consider the definition of "contiguous" incorporated in the Gaming Rules, which suggests the *Jefferson County* decision was published before the Board could consider the definition of "contiguous" adopted by the Department in the Gaming Rules.

The definition of "contiguous" established by the Department in the Gaming Rules is significant because the IGRA provides that gaming may only be conducted on land located within or contiguous to the boundaries of a reservation of an Indian tribe. 25 U.S.C. § 2719 (a)(1). Therefore, the definition of "contiguous" established by the Department in the Gaming Rules speaks to the contiguity of trust land, which is exactly what is at issue when the Department acquires land in trust pursuant to 25 C.F.R. §151. As the regulations in Part 151, the Gaming Rules concern land that has been or will be acquired for Indian tribes and whether that land is contiguous to existing land held in trust. Because the Gaming Rules define the term "contiguous" in the context of trust acquisition, the definition may be reasonably, rationally, and

appropriately applied to trust acquisitions pursuant to Part 151, when that term was not defined at the time the regulations for acquiring land in trust were promulgated.

The extension of the term "contiguous" to include "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point" must have been intended to encompass these features when they are located on fee property that separates trust lands because if a road, right-of-way, or body of water is owned as an easement that encumbers otherwise contiguous property held in fee, the underlying, or servient, property would remain contiguous to adjoining or abutting property and it would not be necessary for the definition of "contiguous" to include properties that are separated by a road, right-of-way, or body of water on the boundary of trust property – to that end, it is instructive to note the Gaming Rules do not define contiguous properties to include land that is separated by an "easement". Moreover, the inclusion of "water bodies" as an acceptable ownership interest separating contiguous trust properties indicates the Department did not intend for the term "contiguous" to be limited to properties separated only by surface easements, in as much as water bodies generally include both surface and subsurface ownership interests and because water bodies generally are not defined as surface easements.

The term "notwithstanding" is defined by both Black's Law Dictionary and Webster's, to mean "in spite of." In other words, the Gaming Rules define contiguity to include two land parcels with a common boundary "in spite of" the existence of a public road, right-of-way, or body of water along such boundaries. It is a common practice, as evidenced by public land records, for public roads to be located along township section lines and property boundaries to avoid interference by the roadway with landowner property use. Hence, Department Gaming Rules address use of neighboring properties that are acquired in trust, despite separation of those properties by public roads, rights-of-way, or bodies of water, by establishing a definition of contiguous that encompasses land parcels with a common boundary in spite of public roads located on boundaries.

As stated above, the Mooney Parcels are separated from the Santa Ynez Reservation by Valley Street, which was offered for dedication in the 1888 Map. In addition, the Mooney and Escobar Parcels are divided by Tyndall Street, another street that was dedicated in the Map. In the case here, the properties are contiguous as that term is defined in the Gaming Rules. Applying the same definition of contiguity, the Department adopted in the Gaming Rules to Part 151 acquisitions, the parcels here are contiguous. Because the term contiguous is not defined by Department trust acquisition regulations at Part 151, and because both the Gaming Rules and Part 151 concern the acquisition of trust land, we reasonably and rationally determine the term "contiguous" under Part 151 may be defined in the same manner as it was defined by the Department in the Gaming Rules. Applying the definition of contiguous incorporated in the Gaming Rules to Part 151, lands acquired in trust are contiguous to existing trust lands if the lands are separated by public roads or rights-of-way located along property boundaries.

Additionally, the Pacific Region received a memorandum dated March 13, 2019, from the Bureau of Land Management Indian Land Surveyor (BILS) stating the Mooney Parcel is contiguous to the Santa Ynez Reservation and the Escobar Parcel is contiguous to the Mooney Parcel. The BILS contiguous determination was based on two facts. 1) Valley Street and Tyndall Street are currently public rights-of-way even though the platted rights-of-way are open; and 2) The possible future right-of-way vacations of Valley Street and Tyndall Street by the Town of Santa Ynez. The common rule of vacation of a right-of-way is that when current parcel ownership (adjoining the public right-of-way to be vacated) is held by two different persons/entity, the right-of-way is split at the centerline and property owners would be granted their perspective part causing a new boundary line to be common and touching. If the property on both sides of the right-of-way to be vacated is owned by the same person/entity, the entire right-of-way to be vacated is owned by the same person/entity, the entire right-of-way would be granted to the person/entity and the new boundary line would be common and touching.

As noted above, the Santa Ynez Reservation and Mooney/Escobar Parcels are merely separated by two public rights-of-way. It is our determination the Escobar Parcel is contiguous to the Mooney Parcel, which is contiguous to existing trust land, which the Secretary has recognized the Santa Ynez Band as having governmental jurisdiction over.

25 C.F.R.§ 151.10(g) - Whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

The Board states in its Order that "the County does not argue that BIA would not be able to discharge any additional responsibilities related to emergency services, in light of the Regional Director's erroneous findings regarding emergency services, on which she apparently relied at least in part, we remand the matter for the Regional Director's further consideration of § 151.10(g)".

Emergency Services

With regard to police services, it is important to note that the land presently is subject to the full civil/regulatory and criminal/prohibitory jurisdiction of the State of California and Santa Barbara County. Once the land is accepted into trust and becomes part of the Reservation, the State of California will have the same territorial and adjudicatory jurisdiction over the land, persons, and transactions on the land as the State has over other Indian Country within the State. Under 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (P.L. 83-280), except as otherwise expressly provided in those statutes, the State of California would retain jurisdiction to enforce its criminal/prohibitory law against all persons and conduct occurring on the land.

With respect to fire and emergency services, California has determined that the state and its local governments are required to provide emergency and relieve services to persons on Reservations

based on their residency of the state and county in which the Reservation is located.[177] In addition, the Tribe itself has a fire department, the Chumash Fire Department, which has mutual aid agreements with the County and the California Department of Forestry and Fire Protection (CDF) (via the BIA) assuring that it will assist the County and State fire agencies as necessary and the County and State fire agencies will assist the Chumash Fire Department as necessary. [178]

In 2002, the Tribe established an Agreement with the Santa Barbara County Fire Department to provide fire protection. However, the Agreement to provide Fire Services between the Tribe and the County specifically excludes the Camp 4 property, which is held in trust by the United States for the Santa Ynez Band. The Agreement does provide that the Fire Chief has the discretion to divert fire protection and emergency medical services to areas in the immediate area, but outside of the boundaries of the Service Area. The Tribe has given the County of Santa Barbara permission to provide such services to the Mooney/Escobar Parcels, which in addition already services the Chumash Casino.

The above analysis illustrates that the Acceptance of the acquired land into Federal trust status should not impose any additional responsibilities or burdens on the BIA beyond those already inherent in the Federal trusteeship over the existing Santa Ynez Reservation. Most of the property is currently vacant and has no forestry or mineral resources which would require BIA management.

The Tribe has no current plans for the property other than to maintain it in its current state. Therefore, there are no easements or leases which are anticipated for the property. Thus, the acquisition of these lands into Federal trust status will place no discernable burdens on the BIA.

Decision

Based on the foregoing, we hereby issue notice of our intent to accept the subject real property into trust. The subject acquisition will vest title in the United States of America in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation of California in accordance with the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 5108). The applicable regulations are set forth in the Code of Federal Regulations, Title 25, INDIANS, Part 151, as amended.

Any party who wishes to seek judicial review of this decision must first exhaust administrative remedies. The Regional Director's decision may be appealed to the Interior Board of Indian Appeals (IBIA) in accordance with the regulations in 43 C.F.R. 4.310-4.340.

[177] See, *Acosta v. County of San Diego* 126 Cal. App. 2d 455 (CA 4th 1954). In the County of Santa Barbara, ambulance services are largely private entities and the Tribe has the ability to contract with such an entity for the parcels once they are in trust.
[178] See, California Master Cooperative Wildland Fire Management and Stafford Act Response Agreement; Agreement to Provide Fire Services.

If you choose to appeal this decision, your notice of appeal to the IBIA must be signed by you or your attorney and must be either postmarked or mailed (if you use mail) or delivered (if you use another means of physical deliver, such as FedEx or UPS) to the IBIA within 30 days from the date of receipt of this decision. The regulations do not authorize filings by facsimile/fax or by electronic means. Your notice of appeal should clearly identify the decision being appealed. You must send your original notice of appeal to the IBIA at the following address: Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy St., Suite 300, Arlington, Virginia 22203.

Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior, MS-4141-MIB, 1849 C Street, N.W., Washington, D.C. 20240; (2) each interested party known to the appellant; and (3) the Regional Director. Any notice of appeal sent to the IBIA must include a statement certifying that copies have been sent these officials and interested parties and should identify them by names or titles and addresses. If a notice of appeal is filed, the IBIA will notify the appellant of further procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,

AMY DUTSCHKE

Digitally signed by AMY DUTSCHKE
Date: 2021.01.08 10:11:37 -08'00'

Regional Director

Enclosure:
43 CFR 4.310, et seq.

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Stand Up For California - 7019 0140 0000 7335 1928
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Santa Ynez Valley Concerned Citizens - 7019 0140 0000 7335 1935
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Women's Environmental Watch - 7019 0140 0000 7335 1942
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Santa Ynez Valley Alliance - 7019 0140 0000 7335 1959
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state specifically and concisely the grounds upon which it is based.

(b) *Notice; burden of proof.* The OHA deciding official will, upon receipt of a demand for hearing, set a time and place therefor and must mail notice thereof to all parties in interest not less than 30 days in advance; provided, however, that such date must be set after the expiration of the 60-day period fixed for the filing of the demand for hearing as provided in §4.305(a). At the hearing, each party challenging the tribe's claim to purchase the interests in question or the valuation of the interests as set forth in the valuation report will have the burden of proving his or her position.

(c) *Decision after hearing; appeal.* Upon conclusion of the hearing, the OHA deciding official will issue a decision which determines all of the issues including, but not limited to, a judgment establishing the fair market value of the interests purchased by the tribe, including any adjustment thereof made necessary by the surviving spouse's decision to reserve a life estate in one-half of the interests. The decision must specify the right of appeal to the Board of Indian Appeals within 60 days from the date of the decision in accordance with §§4.310 through 4.323. The OHA deciding official must lodge the complete record relating to the demand for hearing with the title plant as provided in §4.236(b), furnish a duplicate record thereof to the Superintendent, and mail a notice of such action together with a copy of the decision to each party in interest.

§4.306 Time for payment.

A tribe must pay the full fair market value of the interests purchased, as set forth in the valuation report or as determined after hearing in accordance with §4.305, whichever is applicable, within 2 years from the date of decedent's death or within 1 year from the date of notice of purchase, whichever comes later.

§4.307 Title.

Upon payment by the tribe of the interests purchased, the Superintendent must issue a certificate to the OHA deciding official that this has been done and file therewith such documents in support thereof as the OHA deciding official may require. The OHA deciding official will then issue an order that the United States holds title to such interests in trust for the tribe, lodge the complete record, including the decision, with the title plant as provided in §4.236(b), furnish a duplicate record thereof to the Superintendent, and mail a notice of such action together with a copy of the decision to each party in interest.

§4.308 Disposition of income.

During the pendency of the probate and up to the date of transfer of title to the United States in trust for the tribe in accordance with §4.307, all income received or accrued from the land interests purchased by the tribe will be credited to the estate.

CROSS REFERENCE: See 25 CFR part 2 for procedures for appeals to Area Directors and to the Commissioner of the Bureau of Indian Affairs.

GENERAL RULES APPLICABLE TO PROCEEDINGS ON APPEAL BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is the date of mailing or the date of personal delivery, except that a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e) will be effective the date it is received by the Board.

(b) *Service.* Notices of appeal and pleadings must be served on all parties in interest in any proceeding before the Interior Board of Indian Appeals by the party filing the notice or pleading with the Board. Service must be accomplished upon personal delivery or mailing. Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party. Where a party is represented by more than one attorney, service on any one attorney is sufficient. The certificate of service on an attorney or

representative must include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days are excluded in the computation.

(d) *Extensions of time.* (1) The time for filing or serving any document except a notice of appeal may be extended by the Board.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

§ 4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receipt of the notice of docketing. Appellant must serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel will have 30 days from receipt of appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other parties in interest. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) Appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel must be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) The BIA is considered an interested party in any proceeding before the Board. The Board may request that the BIA submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date may not be less than the appropriate period of time established in this section.

§ 4.312 Decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse or set aside any proposed finding, conclusion, or order of a BIA official or an OHA deciding official. Distribution of decisions must be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect.

§ 4.313 Amicus Curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene or to join other parties or to appear as amicus curiae or to obtain an order in an appeal before the Board must apply in writing to the Board stating the grounds for the action sought. Permission to intervene, to join parties, to appear, or for other relief, may be granted for purposes and subject to limitations established by the Board. This section will be liberally construed.

(b) Motions to intervene, to appear as amicus curiae, to join additional parties, or to obtain an order in an appeal pending before the Board must be served in the same manner as appeal briefs.

§ 4.314 Exhaustion of administrative remedies.

(a) No decision of an OHA deciding official or a BIA official, which at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless made effective pending decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§ 4.315 Reconsideration.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and must contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§ 4.316 Remands from courts.

Whenever any matter is remanded from any federal court to the Board for further proceedings, the Board will either remand the matter to an OHA deciding official or to the BIA, or to the extent the court's directive and time limitations will permit, the parties will be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

§ 4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries with respect to any matter pending before the Board must be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems such action appropriate. If, prior to a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the Director of the Office of Hearings and Appeals will determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal will be limited to those issues which were before the OHA deciding official upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

Appeals to the Board of Indian Appeals in Probate Matters

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§ 4.320 Who may appeal.

(a) A party in interest has a right to appeal to the Board from an order of an OHA deciding official on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate.

(b) Notice of appeal. Within 60 days from the date of the decision, an appellant must file a written notice of appeal signed by appellant, appellant's attorney, or other qualified representative as provided in 43 CFR 1.3, with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203. A

statement of the errors of fact and law upon which the appeal is based must be included in either the notice of appeal or in any brief filed. The notice of appeal must include the names and addresses of parties served. A notice of appeal not timely filed will be dismissed for lack of jurisdiction.

(c) Service of copies of notice of appeal. The appellant must personally deliver or mail the original notice of appeal to the Board of Indian Appeals. A copy must be served upon the OHA deciding official whose decision is appealed as well as all interested parties. The notice of appeal filed with the Board must include a certification that service was made as required by this section.

(d) Action by the OHA deciding official; record inspection. The OHA deciding official, upon receiving a copy of the notice of appeal, must notify the Superintendent concerned to return the duplicate record filed under §§ 4.236(b) and 4.241(d), or under § 4.242(f) of this part, to the Land Titles and Records Office designated under § 4.236(b) of this part. The duplicate record must be conformed to the original by the Land Titles and Records Office and will thereafter be available for inspection either at the Land Titles and Records Office or at the office of the Superintendent. In those cases in which a transcript of the hearing was not prepared, the OHA deciding official will have a transcript prepared which must be forwarded to the Board within 30 days from receipt of a copy of the notice of appeal.

[66 FR 67656, Dec. 31, 2001, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.321 Notice of transmittal of record on appeal.

The original record on appeal must be forwarded by the Land Titles and Records Office to the Board by certified mail. Any objection to the record as constituted must be filed with the Board within 15 days of receipt of the notice of docketing issued under § 4.332 of this part.

§ 4.322 Docketing.

The appeal will be docketed by the Board upon receipt of the administrative record from the Land Titles and Records Office. All interested parties as shown by the record on appeal must be notified of the docketing. The docketing notice must specify the time within which briefs may be filed and must cite the procedural regulations governing the appeal.

§ 4.323 Disposition of the record.

Subsequent to a decision of the Board, other than remands, the record filed with the Board and all documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision, must be forwarded by the Board to the Land Titles and Records Office designated under § 4.236(b) of this part. Upon receipt of the record by the Land Titles and Records Office, the duplicate record required by § 4.320(c) of this part must be conformed to the original and forwarded to the Superintendent concerned.

APPEALS TO THE BOARD OF INDIAN APPEALS FROM ADMINISTRATIVE ACTIONS OF OFFICIALS OF THE BUREAU OF INDIAN AFFAIRS: ADMINISTRATIVE REVIEW IN OTHER INDIAN MATTERS NOT RELATING TO PROBATE PROCEEDINGS

SOURCE: 54 FR 6487, Feb. 10, 1989, unless otherwise noted.

§ 4.330 Scope.

(a) The definitions set forth in 25 CFR 2.2 apply also to these special rules. These regulations apply to the practice and procedure for: (1) Appeals to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in 25 CFR chapter 1, and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians which are referred to it for exercise of review authority of the Secretary or the Assistant Secretary—Indian Affairs.

(b) Except as otherwise permitted by the Secretary or the Assistant Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

(1) Tribal enrollment disputes;

(2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or

(3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

§ 4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—

(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or

(c) Where otherwise provided by law or regulation.

§ 4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary—Indian Affairs. As required by § 4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

(1) A full identification of the case;

(2) A statement of the reasons for the appeal and of the relief sought; and

(3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary—Indian Affairs may decide to review the appeal. If the Assistant Secretary—Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary—Indian Affairs.

(c) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

[54 FR 6487, Feb. 10, 1989, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each known interested party, upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken, and upon the Assistant Secretary—Indian Affairs. The notice of appeal filed with the Board shall certify that service was made as required by this section and shall show the names and addresses of all parties served. If the appellant is an Indian or an Indian tribe not represented by counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing.

§ 4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal which, as specified in § 4.332 of this part, may not be extended.

§ 4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.

(a) Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, at a minimum, inclusion of the following:

(1) The decision appealed from;

(2) The notice of appeal or copy thereof; and

(3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

(c) If the deciding official receives notification that the Assistant Secretary—Indian Affairs has decided to review the appeal before the administrative record is transmitted to the Board, the administrative record shall be forwarded to the Assistant Secretary—Indian Affairs rather than to the Board.

§ 4.336 Docketing.

An appeal shall be assigned a docket number by the Board 20 days after receipt of the notice of appeal unless the Board has been properly notified that the Assistant Secretary—Indian Affairs has assumed jurisdiction over the appeal. A notice of docketing shall be sent to all interested parties as shown by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§ 4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§ 4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to § 4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the Board. Simultaneously, the entire record of the proceedings, including the transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other

comments regarding the recommended decision with the Board in accordance with § 4.339 of this part.

§ 4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to or other comments on the decision with the Board.

§ 4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

SOURCE: 56 FR 61383, Dec. 3, 1991, unless otherwise noted.

§ 4.350 Authority and scope.

(a) The rules and procedures set forth in §§ 4.350 through 4.357 apply only to the determination through intestate succession of the heirs of persons who died entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985, Public Law 99–264 (100 Stat. 61), amended by Public Law 100–153 (101 Stat. 886) and Public Law 100–212 (101 Stat. 1433).

(b) Whenever requested to do so by the Project Director, an administrative judge shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Settlement Act of 1985 as amended, notwithstanding the decedent may have died testate.

(c) As used herein, the following terms shall have the following meanings:

(1) The term *Act* means the White Earth Reservation Land Settlement Act of 1985 as amended.

(2) The term *Board* means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary.

(3) The term *Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs official with delegated authority from the Minneapolis Area Director to serve as the federal officer in charge of the White Earth Reservation Land Settlement Project.

(4) The term *party (parties) in interest* means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent.

(5) The term *compensation* means a monetary sum, as determined by the Project Director, pursuant to section 8(c) of the Act.

(6) The term *adminstrative judge* means an administrative judge or an administrative law judge, attorney-advisor, or other appropriate official of the Office of Hearings and Appeals to whom the Director of the Office of Hearings and Appeals has redelegated his authority, as designee of the Secretary, for making heirship determinations as provided for in these regulations.

(7) The term *appellant* means a party aggrieved by a final order or final order upon reconsideration issued by an administrative judge who files an appeal with the Board.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991, as amended at 64 FR 13363, Mar. 18, 1999]

§ 4.351 Commencement of the determination process.

(a) Unless an heirship determination which is recognized by the Act already exists, the Project Director shall commence the determination of the heirs of those persons who died entitled to receive compensation by filing with the administrative judge all data, identifying the purpose for which they are being submitted, shown in the records relative to the family of the decedent.

(b) The data shall include but are not limited to: