Stand Up For California!
"Citizens making a difference"

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August 17, 2020

The Honorable David Bernhardt
Secretary
U.S. Department of the Interior
Mail Stop 7328
1849 C Street, NW
Washington, D.C. 20240

VIA REGULAR MAIL AND
ELECTRONIC MAIL

Subject: Tejon Indian Tribe – Fee-to-Trust Application for a Casino in Bakersfield, CA

Dear Secretary Bernhardt:

On behalf of Stand Up For California! ("Stand Up"),[1] I am writing to express our views regarding whether the Tejon Indian Tribe ("Tejon Tribe" or "Tribe") was "under Federal jurisdiction" in 1934, as required by *Carcieri v. Salazar*, 555 U.S. 379 (2009). As you know, the Tejon Tribe has submitted a fee-to-trust application for a Class III casino in Bakersfield, California.

For the reasons presented below, Stand Up does not believe the Tejon Tribe meets the requirement in the Indian Reorganization Act of 1934 ("IRA") of being a "recognized Indian tribe now under Federal jurisdiction," as of 1934. Instead, the Tejon Indians residing on the Tejon Ranch were under state jurisdiction in 1934 and, therefore, the Secretary of the Interior lacks authority to acquire any land into trust for this applicant.

The *Carcieri v. Salazar* Decision

The IRA authorizes the Secretary of the Interior to acquire land and hold it in federal trust "for the purpose of providing land for Indians."[2] In the Act's definition of "Indian," Congress

[1] Stand Up for California! ("Stand Up") is a statewide organization with a focus on gambling issues affecting California, including tribal gaming, card clubs, horse racing, satellite wagering, charitable gaming, and the state lottery. For more than twenty (20) years, Stand Up has been a leading opponent of off-reservation Indian gaming in California, in addition to advocating for other federal and state policy positions.

[2] 25 U.S.C. § 465. This section has been transferred to 25 U.S.C. § 5108 by the compilers of the United States Code.

limited the authority of the Secretary to "any recognized Indian tribe now under Federal jurisdiction."[3]

In *Carcieri v. Salazar*, the U.S. Supreme Court held that "the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."[4] Apart from interpreting "now" to mean in 1934, the Court did not interpret the language "under federal jurisdiction."

Justice Breyer, however, suggested in a concurring opinion that a tribe "may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time."[5] He provided three examples of Interior Department administrative decisions involving "post-1934 recognition on grounds that implied a 1934 relationship between [a] tribe and the Federal Government that could be described as jurisdictional …."[6] These three examples involved "a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office."[7] Based on this concurring opinion, the Department has since developed two approaches for determining whether a tribe was "under federal jurisdiction" in 1934.

The Department's Interpretations of *Carcieri v. Salazar* Since 2009

A. The Solicitor's 2014 M-Opinion.

On March 12, 2014, the Solicitor issued M-37029, an opinion interpreting the meaning of the term "under federal jurisdiction" in the IRA.[8] This Opinion established a two-part test. The Solicitor explained the first part of the test as follows:

> The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally

[3] 25 U.S.C. § 479. This section has been transferred to 25 U.S.C. § 5129 by the compilers of the United States Code.
[4] *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).
[5] 555 U.S. at 397 (Breyer, J., concurring).
[6] *Id*. at 399.
[7] *Id*. Justice Breyer continued on to note that the history of the Narragansett Tribe was distinguishable from these three examples, as the Tribe was under state jurisdiction in 1934 ("I can find no similar indication of 1934 federal jurisdiction here. Instead, both the State and Federal Government considered the Narragansett Tribe as under *state*, but not *federal*, jurisdiction in 1934.") (emphasis in original).
[8] Op. Sol. M-37029, *The Meaning of 'Under Federal Jurisdiction for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (hereinafter "2014 M-Opinion.").

> reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.[9]

Once the first part of the test has been satisfied, the second question—according to this M-Opinion—is "to ascertain whether the tribe's jurisdictional status remained intact in 1934."[10]

B. The Office of the Solicitor's 2020 Eligibility Memorandum

The Solicitor withdrew the M-37029 opinion on March 9, 2020.[11] In its place, the Solicitor issued guidance to help attorneys in the Solicitor's Office evaluate the eligibility of tribes submitting land-into-trust applications and remain compliant with the *Carcieri* opinion.[12]

The new guidance clarifies that, moving forward, the Department will interpret the phrase "now under federal jurisdiction" to modify "recognized Indian tribe" and limit its scope.[13] This would return the Department to its previous and long-standing interpretation of this language.[14] Thus, the phrase "recognized Indian tribe now under federal jurisdiction" would refer to "tribes *previously* placed under federal authority through congressional or executive action who *remained* under federal authority in 1934."[15]

The Solicitor's guidance also clarified that the phrase "under federal jurisdiction" is distinct from circumstances in which a State exercised jurisdiction over land or communities in 1934:

> The IRA's legislative history does not unambiguously explain what Congress intended "under federal jurisdiction" to mean or how it might be interpreted to limit "recognized Indian tribe." However, the phrase was, in fact, used in submissions by the Indian Rights Association to the House of Representatives Committee on Indian Affairs … where it described

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[9] *Id*. at 19.
[10] *Id*.
[11] Op. Sol. M-37055, *Withdrawal of Solicitor's Opinion, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).
[12] Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor, *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934* (Mar. 5, 2020) (hereinafter "Eligibility Memorandum"); and Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act* (Mar. 10, 2020) (hereinafter "Procedures Memorandum").
[13] *Eligibility Memorandum* at 22.
[14] *Id*. at 2; *see also id*. at 11 ("Prepositional phrases function as modifiers and follow the noun phrase that they modify. We therefore find that [the first definition's] grammar supports interpreting the entire phrase 'now under federal jurisdiction' as intended to modify 'recognized Indian tribe.'").
[15] *Id.* at 2 (emphasis in original); *see also id*. at 31 ("[W]e interpret the entire phrase 'recognized Indian tribe now under federal jurisdiction' to include tribes 'recognized' in or before 1934 who *remained* under federal authority at the time of the IRA's enactment.") (emphasis in original).

> "Indians under Federal jurisdiction" as not being subject to State laws. Variations of the phrase appeared elsewhere, as well.[16]

During consideration of the IRA by Congress in 1934, Department representatives and attorneys also emphasized this federal-state jurisdictional distinction, as described in the Solicitor's guidance:

> In a memorandum describing the draft IRA's purpose and operation, Commissioner [of Indian Affairs John] 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." Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction." Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States, described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction." These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.[17]

C. The Solicitor's 2020 Procedures Memorandum

The Solicitor issued a Procedures Memorandum concurrent with the guidance, which outlines a four-step process for determining tribal eligibility for land-into-trust under the Act.[18] For three of the four steps, the Solicitor provided forms of evidence that "presumptively satisfy each of the three steps."[19] Only in the absence of presumptive evidence in each the first three steps should the analysis proceed to the fourth step, in which the Department will "weigh the totality of an applicant tribe's evidence."[20]

This four-step analysis is to be applied as follows:

1. Step One. The first step determines "whether or not Congress enacted legislation after 1934 making the IRA applicable to a particular tribe."[21] In such cases, there is no question that a tribe is eligible for trust land, and no further analysis is required.

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[16] *Id*. at 17.
[17] *Id.* (emphasis added in the Solicitor's *Eligibility Memorandum*).
[18] *Procedures Memorandum*, *supra* footnote 12.
[19] *Id*. at 1.
[20] *Id.*
[21] *Id*. at 2.

2. Step Two. Assuming that the answer in Step One is negative, the second step determines "whether an applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such."[22] According to the Procedures Memorandum, the following forms of evidence can be used to meet the criteria in Step Two:

a. Section 18 Elections. Section 18 of the IRA directed the Secretary to conduct votes "to allow Indians residing on a reservation to vote whether to [accept or] reject the application of the IRA."[23] During the 1934-36 period, 258 elections were held.[24]

b. Section 16 Constitution. Section 16 of the IRA authorized the Secretary to call a special election of a tribe's members to vote to approve a tribal constitution and bylaws.

c. Section 17 Charters. Section 17 of the IRA authorized the Secretary to approve and issue a charter of incorporation to a tribe upon a petition by at least one-third of the applicant tribe's adult Indians.

d. Treaty Rights. According to the Procedures Memorandum, the "continuing existence of treaty rights guaranteed by a treaty entered into by the United States and ratified before the era of treaty-making ended in 1871 may also constitute presumptive evidence that a tribe remains under federal jurisdiction in 1934."[25]

e. 1934 Indian Population Report. The listing of a *tribe* in the Department's 1934 Indian Population Report is "presumptive evidence that the Department considered the tribe under federal supervision and authority in 1934."[26]

f. Federal Land Acquisitions. Clear evidence that the United States took efforts to acquire lands on behalf of an applicant tribe in the years leading up to 1934 also constitutes "presumptive evidence that the United States 'recognized' the tribe and treated it as under federal jurisdiction."[27]

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[22] *Id*.
[23] *Id*.
[24] *Id*. at 3, *citing* Theodore Haas, *Ten Years of Tribal Government Under the I.R.A.* at 3 (U.S. Indian Service Tribal Relations Pamphlets 1947).
[25] *Id.* at 4.
[26] *Id*.
[27] *Id*. at 5.

g. Kappler's *Indian Affairs, Laws and Treaties*. According to the Procedures Memorandum, a "final source of evidence that may provide presumptive evidence that an applicant tribe was under federal jurisdiction in and immediately around 1934 is inclusion in Volume V of Charles J. Kappler's *Indian Affairs, Laws and Treaties*."[28]

3. Step Three. The third step determines "whether an applicant tribe's evidence sufficiently demonstrates that it was 'recognized' in or before 1934 *and* remained under jurisdiction in 1934."[29]

4. Step Four. The fourth step "assesses the totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was 'recognized' in or before 1934 and remained 'under federal jurisdiction' through 1934."[30]

The History of the Tejon Indian Tribe as of 1934

For the purpose of this IRA analysis, the relevant portions of the documented history of the Tejon Tribe are as follows:

1. Treaty of 1851. On June 10, 1851, George Barbour, an Indian Affairs Commissioner negotiated a land cessation treaty with eleven southern California tribes, including the Tejon Indian Tribe (called "Texon" at the time).[31] This treaty was never ratified by the U.S. Senate and thus was legally void.[32]

2. California Claims Act of 1851. Also in 1851, Congress enacted legislation to identify and adjudicate private land claims in California, called the California Claims Act.[33] This 1851 Act provided a two-year time period to determine which title claims had been recognized by the Mexican government and, therefore, would be recognized by the United States.[34] In *Barker v. Harvey*, the U.S. Supreme Court ruled in 1901 that any Indian title claims in California not presented during this two-year window were abandoned and extinguished.[35]

3. Tejon Ranch Lands. By 1867, most of the Tejon Ranch lands had been acquired

[28] *Id.* at 6.
[29] *Id.* at 6 (emphasis in original).
[30] *Id*. at 8.
[31] Arlinda F. Locklear, V. Heather Sibbison, Lawrence S. Roberts, and Suzanne R. Schaeffer, *The Tejon Indian Tribe – Request for Confirmation of Status*, June 30, 2006 (hereinafter "2006 Tejon Tribe Submission")
[32] *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015).
[33] California Claims Act of March 3, 1851, 9 Stat. 631.
[34] *Id*.
[35] *Barker v. Harvey*, 181 U.S. 481, 491 (1901) ("If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property.'").

by Edward Beale, a former Superintendent of Indian Affairs.[36] Beale's son subsequently transferred ownership of these lands to a Los Angeles business consortium, the Tejon Ranch Syndicate.[37]

4. Tule River Reservation. In 1873, the Tule River Reservation was established by Executive Order for the Tejon Tribe (Manche Cajon) and other bands of Indians.[38] However, not all Indians of Tejon descent moved there. Instead, a group remained on lands that became a portion of the present day Tejon Ranch, located in Kern County, California.[39]

In a 2015 letter to the Department, the Tejon Tribe argued that this Executive Order was an "offer" to relocate and did not compel any Tejon Indians to relocate to the Tule River Reservation.[40] This letter cited *United States v. Santa Fe Pacific Railroad Co.*, in which the Supreme Court determined that a reservation created by an Act of Congress for the Walapai (Hualpai) Tribe in Arizona did not contain language requiring the members of this Tribe to relocate to this reservation.[41]

5. Attempted Purchase of Tejon Ranch Lands. In 1914, 1915, 1920, and again in 1924, the Department attempted to purchase Tejon Ranch lands for the individuals residing there, but the Tejon Ranch owners declined to sell in response to each attempt.[42]

6. Assistant Secretary Withdrawal Order. In November of 1916, the Assistant Secretary issued a Departmental order to withdraw 880 acres of vacant public lands for the potential use of the individuals of Tejon descent living on the Tejon Ranch.[43] The purpose of this internal order was to have a contingency plan in case future land claims litigation by the

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[36] *2006 Tejon Tribe Submission* at 11.
[37] Memorandum from Assistant Secretary – Indian Affairs to Regional Director, Pacific Region, and Deputy Director, Office of Indian Services, *Reaffirmation of Federal Recognition of Tejon Indian Tribe*, at 5, April 24, 2012 (hereinafter "2012 Reaffirmation Memorandum").
[38] *2012 Reaffirmation Memorandum* at 4.
[39] *Id.*
[40] Letter from Kathryn Morgan, Chair, Tejon Indian Tribe, to The Honorable Kevin Washburn, Assistant Secretary—Indian Affairs, and Ms. Paula Hart, Director, Office of Indian Gaming, at 3 (June 1, 2015) ("[T]he executive order creating the Tule River Reservation simply identified land to be set aside for the enumerated bands; it contained no provision compelling the named bands to relocate.").
[41] *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 353 (1941) ("We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it hoped would be accepted as a compromise of a troublesome question.").
[42] *2012 Reaffirmation Memorandum* at 5. *See also 2006 Tejon Tribe Submission* at 12-16.
[43] *2012 Reaffirmation Memorandum* at 7.

United States was unsuccessful and the Tejon Indians were evicted from the Tejon Ranch.[44] This internal order was also intended as a temporary measure.[45]

These lands were never used by anyone of Tejon descent, as the Indians residing on the Tejon Ranch refused to leave. The lands were also unsuitable for use, described as being in "scattered tracts … accessible only by foot, and … steep and rough in topography."[46] The Department revoked its 1916 withdrawal order in 1962, noting that the "lands … have never been used and are not needed by the Indians for any purpose."[47]

7. The Tejon Ranch Land Claims Case. In December of 1920, the U.S. Department of Justice filed a land claims lawsuit in U.S. District Court to try and secure the rights of the Tejon Indians to their aboriginal territory.[48] The District Court dismissed the complaint because a title claim was not filed within the two-year window required by the California Claims Act of 1851.[49] The Ninth Circuit Court of Appeals affirmed the dismissal, holding that the Tejon Indians failed "to present the claim to the land commission, for it is well established by a line of decisions of the U.S. Supreme Court that any grant under the Mexican government is lost and abandoned, if not presented to the commission."[50]

The Supreme Court agreed to hear this case and "confirmed that the Tribe's aboriginal title had been effectively extinguished by virtue of the Tribe's failure to comply with the arcane title perfection requirements imposed by the 1851 California Claims Act."[51]

8. Tejon Ranch Leasing Agreement. After the Supreme Court ruling in 1924, the Tejon Indians residing on the Tejon Ranch came to an agreement with the private owners that would permit the Tejon Indians to remain on Ranch lands for nominal rent and "so long as no further claims were made against the Ranch and the Indians lived in accordance with rules set by the Ranch."[52] This arrangement was described in greater detail in a letter from the Secretary of the Interior to the Vice President of the United States, dated June 26, 1930:

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[44] *2006 Tejon Tribe Submissio*n at 14-15, citing Exhibit 21 ("[S]hould the United States be unsuccessful in this [land claims] suit, the [Indian Affairs] Office believes it would be advantageous to have the foregoing lands reserved for the use of the Indians.").
[45] *Id*., citing Exhibit 21 ("Since it is not now certain that they will be ejected, the Office believes that at present only a temporary withdrawal is necessary.").
[46] Public Land Order 2738, 27 Fed. Reg. 7,636 (Aug. 2, 1962).
[47] *Id*.
[48] *2006 Tejon Tribe Submission* at 16.
[49] *Id*. at 17.
[50] *United States v. Title Ins. & Trust Co*., 288 F. 821, 824 (9th Cir. 1923).
[51] *2006 Tejon Tribe Submission* at 18; *see also United States v. Title Ins. & Trust Co*., 265 U.S. 472, 483 (1924) ("[T]here [can] be no doubt of the power of the United States … to provide reasonable means for determining the validity of all titles within the ceded territory, to require all claims to lands therein to be presented for examination, and to declare that all not presented should be regarded as abandoned.").
[52] *2006 Tejon Tribe Submission* at 19.

> In regard to purchasing some of these lands for the El Tejon Indians it may be said that by a decision of the United States Supreme Court … title to the lands occupied by these Indians was in the Title Insurance and Trust Company … and that the Tejon Indians had no legal or valid title thereto or occupancy thereof. The company did not care to sell any of its lands.
>
> However, the owners have been leasing to the Tejon Band the particular tracts … for a nominal consideration of $1.00 per year. The procedure is, of course, merely for the purpose of having the Indians recognize the lessors as owners of the property.
>
> Correspondence in our files indicates that the Indians of the Tejon Rancho are free to do as they please without let or hinderance in regard to the privately owned lands which they occupy. As the situation in this case is viewed these Indians are generally industrious, self-supporting and contented under present conditions, and have not made any request or demand that lands be purchased for them or that conditions be changed, consequently, I question the wisdom of disturbing them in their present occupancy of the privately owned lands or in any way disrupting their evidently orderly and peaceful mode of living.[53]

These arrangements were confirmed again eight years later, in a 1938 letter from the Assistant Commissioner of Indian Affairs to a Bakersfield attorney:

> … the owners of the El Tejon Rancheria permit the Indians to reside peacefully on the lands occupied by them for a rental of $1.00 per year, [hence] it is not believed that the existing relationship should be disturbed at this time; nor is it deemed advisable to ask Congress for legislation such as you suggest, especially as it would necessitate the appropriation of a large sum of money to pay for the lands involved.[54]

9. Education of Tejon Children. In 1916 and 1917, the Department approved contracts with Kern County and provided funding to educate Tejon children at a public school approximately six miles from the Tejon Ranch.[55] This was followed by a 1917 contract between the Bureau of Indian Affairs and Kern County whereby the BIA paid tuition costs for a school operated by the County on the Tejon Ranch.[56] In 1920, the Trustees of the Indian School District

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[53] Letter from The Honorable Ray Wilbur, Secretary of the Interior, to The Honorable Charles Curtis, Vice President of the United States, June 26, 1930, excerpted in *2006 Tejon Tribe Submission* at 20.
[54] Letter from William Zimmerman, Assistant Commissioner of Indian Affairs, to George W. Hurley, Esq., March 28, 1938, excerpted in *2006 Tejon Tribe Submission* at 20-21.
[55] *2006 Tejon Tribe Submission* at 21. *See also* Exhibits 48, 49, 50, and 51.
[56] *Id*. *See also* Exhibits 52 and 53.

for Kern County entered into a lease agreement with the Tejon Ranch owners to arrange for the use of Ranch property on which could be built a school for Tejon children, operated by the County, with funding from the BIA.[57]

This arrangement to educate Tejon children continued until 1948, when the school closed a few years after the retirement of a long-time teacher at the school.[58] After 1948, Tejon children living at Tejon Ranch were bused to public schools or attended BIA boarding schools.[59]

Application of the Department's New Guidance and Procedures for Evaluating Federal Jurisdiction in 1934

According to the Procedures Memorandum, the Solicitor's Office is instructed to evaluate the phrase "under federal jurisdiction" in 1934 *before* examining whether a tribe was "recognized on or before 1934.[60] This appears to be the reverse order of how the evaluation should be conducted, given the Department's interpretation that the phrase "now under federal jurisdiction" modifies the phrase "recognized Indian tribe."[61]

A more useful approach would be to take a two-step process: (1) to determine whether a tribe was "recognized" on or before 1934; and (2) to determine whether a tribe remained under federal jurisdiction in 1934. This is similar to the approach advocated in the 2014 M-Opinion that has been withdrawn, except for the additional requirement that a tribe must have been "recognized" *and* "under federal jurisdiction" as of 1934.

The Tejon Tribe does not meet either of these requirements and, therefore, the Department lacks authority to acquire land in trust for the Tribe under the Indian Reorganization Act. What follows is an application of the four-step process outlined in the Department's Procedures Memorandum, based on documents and evidence in the public domain:

1. Step One. The Tejon Tribe does not meet the criteria in Step One, as Congress has not enacted legislation making the IRA applicable to the Tribe.

2. Step Two. With one possible exception, the Tejon Tribe does not meet the criteria in Step Two either. The United States did not hold a Section 18 election for the Indians living on the Tejon Ranch.[62] Interior has also not approved a Section 16 tribal constitution or a Section 17 tribal charter of incorporation for the Tribe under the IRA.

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[57] *Id*. at 22. See also Exhibits 56 and 57.
[58] *Id*. at 23.
[59] *Id*. at 24.
[60] *See id*. at 2-8.
[61] *See* Eligibility Memorandum at 31.
[62] Individuals of Tejon descent living on the Tule River Reservation could participate in an IRA election held for that Reservation on November 17, 1934. The Tule River Indians approved the IRA in that election and organized

The only treaty involving the Tejon Indians (the Treaty of June 10, 1851) was never ratified by the U.S. Senate and, therefore, did not establish continuing treaty rights for any of the signatories past the middle of the 19th Century. Additionally, the Tejon Tribe was not listed in the 1934 Indian Population Report or in Volume V of Kappler's *Indian Affairs, Laws and Treaties*.

An argument the Tejon Tribe will advance is that the Department's order in 1916 to withdraw 880 acres of public lands for the Tejon Indians living on the Tejon Ranch established "federal jurisdiction" for purposes of this IRA analysis. However, this withdrawal order was intended as a *temporary* measure, in case the United States was unsuccessful in a land claims lawsuit that the Interior Department was recommending on behalf of the Indians living on the Tejon Ranch at the time.[63]

Additionally, these lands were never used by anyone, as the Tejon Indians living on the Tejon Ranch refused to leave their homes. The lands were also completely unsuitable for any practical use and the Department revoked this withdrawal order in 1962, stating that the "lands … have never been used and are not needed by the Indians for any purpose."[64]

As described earlier, a land claims case was initiated by the U.S. Department of Justice in 1920. The government did not prevail in the District Court, the 9th Circuit Court of Appeals, or before the Supreme Court. In the final decision, the Supreme Court confirmed in 1924 that any aboriginal title to the Tejon Ranch was lost and abandoned by the failure of Tejon Indians to file a timely title claim within the two-year window required by the California Claims Act of 1851.[65]

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under Section 16 of the Act. *See* Theodore Haas, *Ten Years of Tribal Government Under the Indian Reorganization Act*, at Table A, *available at* http://thorpe.ou.edu/IRA/IRAbook/tribalgovpt1tblA.htm.

[63] Memorandum from Bo Sweeney, Assistant Secretary, to the Secretary of the Interior, at 2 (Nov. 7, 1916) ("[S]hould the United States be unsuccessful in this suit, the Office believes it would be advantageous to have the foregoing lands reserved for the use of the Indians. Since it is not now certain that will be ejected, the Office believes that at present *only a temporary withdrawal is necessary*.") (emphasis added). During the period from 1914-1924, the Interior Department made several attempts to purchase a portion of the Tejon Ranch, but the owners of the Ranch lands refused to sell. *See supra* footnote 42.

[64] *See* Public Land Order 2738, 27 Fed. Reg. 7,636 (Aug. 2, 1962). While it is unclear why the BIA did not revoke this Departmental order before 1962, any negligence by the agency should not provide a basis to argue that federal jurisdiction "remained" in 1934. The land was only held as a contingency for a land claims case that the federal government lost in 1924 and the individual Indians residing on the Tejon Ranch repeatedly rejected suggestions that they move out of the Tejon Ranch. These Indians of Tejon descent were living under State jurisdiction in 1934 and were not a "recognized Indian tribe" nor "under federal jurisdiction" in 1934.

[65] *United States v. Title Ins. & Trust Co*., 265 U.S. 472, 483 (1924) ("T]here [can] be no doubt of the power of the United States … to provide reasonable means for determining the validity of all titles within the ceded territory, to require all claims to lands therein to be presented for examination, and to declare that all not presented should be regarded as abandoned.").

This land claims litigation established unambiguously that these lands within the Tejon Ranch have been under the jurisdiction of the State of California since 1853, the closure of the two-year window required by the California Claims Act. Only those Indians of Tejon descent who moved to the Tule River Reservation came under federal jurisdiction. While it could be argued that aboriginal title rights for Tejon Indians were somewhat unclear after the 1850's, State jurisdiction was clearly and unequivocally confirmed once the Supreme Court issued its 1924 opinion in this case.

The Tejon Indians and the Tejon Ranch subsequently reached a private agreement to remain on Ranch lands for a nominal rent and "so long as no further claims were made against the Ranch and the Indians lived in accordance with rules set by the Ranch."[66] As a non-federal agreement, any enforcement of its terms would be under California law and in a State court.

This arrangement—*i.e.*, to remain on Ranch lands under the jurisdiction of the State of California—was in effect after the Supreme Court's decision in 1924 and remained in effect in 1934, as documented by Interior Department correspondence in 1930 and 1938.

As noted above, the Secretary of the Interior wrote a letter to the Vice President of the United States on June 26, 1930, stating the following:

> Correspondence in our files indicates that the Indians of the Tejon Rancho are free to do as they please without let or hinderance in regard to the privately owned lands which they occupy. As the situation in this case is viewed these Indians are generally industrious, self-supporting and contented under present conditions, and have not made any request or demand that lands be purchased for them or that conditions be changed, consequently, I question the wisdom of disturbing them in their present occupancy of the privately owned lands or in any way disrupting their evidently orderly and peaceful mode of living.[67]

In March of 1938, these arrangements were again confirmed in a letter sent from the Assistant Commissioner of Indian Affairs to a local attorney in Bakersfield. The Assistant Commissioner stated in this letter that "the owners of the El Tejon Rancheria permit the Indians to reside peacefully on the lands occupied by them for a rental of $1.00 per year, [hence] it is not believed that the existing relationship should be disturbed at this time."[68]

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[66] *2006 Tejon Tribe Submission* at 19.
[67] Letter from The Honorable Ray Wilbur, Secretary of the Interior, to The Honorable Charles Curtis, Vice President of the United States, June 26, 1930, excerpted in *2006 Tejon Tribe Submission* at 20.
[68] Letter from William Zimmerman, Assistant Commissioner of Indian Affairs, to George W. Hurley, Esq., March 28, 1938, excerpted in *2006 Tejon Tribe Submission* at 20-21.

This State jurisdictional status was also confirmed many years later when Assistant Secretary—Indian Affairs Larry Echo Hawk reaffirmed the federal relationship with Tejon in 2012.[69] In the memorandum explaining why he waived the Department's acknowledgment regulations to make this reaffirmation decision, he acknowledged that the Tejon Indians living on the Tejon Ranch were living on private lands subject to State jurisdiction:

> By the mid-1930's, the Government had ceased its efforts to secure land for the Tribe due to an apparent compromise such that, for the time being, the Tribe was 'content' living at Tejon Ranch for nominal rent. While the Federal Government halted its attempts to purchase the land at Tejon Ranch, it continued to monitor the situation in which the Tribe was permitted to live on the privately owned territory.[70]

It is clear from this history that the Indians of Tejon descent living on the Tejon Ranch have been living on private lands for many decades, including, and most importantly, the ten-year period from 1924-1934. After the issuance of the Supreme Court decision confirming that aboriginal title was extinguished and abandoned in the 1850's, these Tejon Indians chose to stay on these lands, instead of moving to the Tule River Reservation, or to other lands under federal jurisdiction. Instead, these individuals continued living under the jurisdiction of the State of California and subjected themselves to any additional occupancy rules imposed on them by the private landowners of the Tejon Ranch.

Additional evidence of their jurisdictional status is the fact that the Tejon Indians were not listed in the Department's 1934 Indian Population Report, but were listed on the Indian Roll developed by the State of California in 1933.[71]

As described earlier, State jurisdiction is distinct from federal jurisdiction and the latter cannot be established by referencing the plenary power of Congress over Indian tribes.[72] The legislative history of the IRA is replete with examples where this distinction is highlighted and discussed, as documented in the Solicitor's 2020 *Eligibility Memorandum* and discussed earlier.[73] Justice Breyer, in his concurring opinion in *Carcieri*, also confirmed that the terms are distinguishable, as applicable to the Narragansett Tribe.[74]

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[69] *2012 Reaffirmation Memorandum*, *supra* footnote 37.
[70] *Id*. at 6 (citation omitted).
[71] *See 2006 Tejon Tribe Submission* at 33. A review of the 1934 Indian Population Report was last completed on August 10, 2020 (https://www.archives.gov/research/census/native-americans/1885-1940.html). There was no mention of Tejon Indians or the Tejon Indian Tribe.
[72] *2014 M-Opinion* at 17-18 (citing *United States v. Rodgers*, 466 U.S. 475, 479 (1984)).
[73] *Eligibility Memorandum* at 17, *supra* footnote 12.
[74] 555 U.S. at 399 (Breyer, J., concurring) ("I can find no similar indication of 1934 federal jurisdiction here. Instead, both the State and Federal Government considered the Narragansett Tribe as under *state*, but not *federal*, jurisdiction in 1934.") (emphasis in original).

3. Step Three. The third step in this analysis determines whether a tribe can present sufficient evidence that "it was 'recognized' in or before 1934 *and* remained under jurisdiction in 1934.[75]

According to the Procedures Memorandum, the Solicitor's Office may consider three forms of evidence to "presumptively demonstrate the establishment of a political-legal relationship with a tribe."[76] These three forms are: (1) ratified treaties in effect in 1934; (2) tribe-specific Executive Orders; and (3) tribe-specific legislation.

These criteria do not apply here, as the Tejon Tribe lacks any ratified treaty, tribe-specific Executive Order, or tribe-specific legislation (or statute).[77]

On the issue of recognition, the historical record is clear that the Tejon Tribe was never formally recognized by the United States until 2012, when Assistant Secretary—Indian Affairs Larry Echo Hawk waived the acknowledgment regulations in 25 C.F.R. Part 83 and "reaffirmed" the government-to- government relationship between the Tribe and the United States.[78] In an April 2012 memorandum explaining his decision, Assistant Secretary Echo Hawk relied on the land-related actions discussed above: (1) attempting to purchase Tejon Ranch lands for the Tejon Indians residing there; (2) attempting to secure the Ranch lands for Tejon Indians through a land claims lawsuit; and (3) withdrawing other public lands for the use of Tejon Indians.[79]

This decision by the Assistant Secretary to waive the Part 83 acknowledgment process was highly controversial and resulted in a negative report by the Office of the Inspector General of the Interior Department.[80] The Inspector General also determined that other American Indian groups with "historical, genealogical, and ancestral claims to the original Tejon Indians were left out of the process."[81] Research conducted by the Office of Federal Acknowledgment revealed that as many as 10 other Indian groups with "potential historical, genealogical, and ancestral claims to the original Tejon Indians."[82] Additionally, since Federal funding is determined by the number of enrolled members a tribe has, the decision by the Assistant Secretary to bypass the

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[75] *Procedures Memorandum* at 6 (emphasis in original).
[76] *Id*.
[77] As noted earlier, the Tule River Reservation was established in 1873 by Executive Order for the Tejon Tribe (Manche Cajon) and other bands of Indians. However, the Indians of Tejon descent living on the Tejon Ranch refused on numerous occasions to move to this Reservation or to any other lands outside of the Ranch. *See 2012 Reaffirmation Memorandum* at 4 and 7.
[78] *See* Letter from Larry Echo Hawk, Assistant Secretary—Indian Affairs, to The Honorable Kathryn Montes Morgan, Chairwoman, Tejon Indian Tribe, January 6, 2012.
[79] *Reaffirmation Memorandum* at 4.
[80] U.S. Department of the Interior, Office of Inspector General, *Investigative Report of the Tejon Indian Tribe*, at 1 (Jan. 9, 2013) ("We could not find any discernable process used by Echo Hawk and his staff in selecting the Tejon Tribe for recognition above the other [American Indian] groups [with pending acknowledgment petitions under Part 83].").
[81] *Id*.
[82] *Id*. at 3.

Part 83 acknowledgement process did not permit Interior to identify tribal members in an organized process with appropriate oversight by the Department.[83]

As discussed above, none of these actions established federal jurisdiction in 1934. The attempts to purchase land from the Tejon Ranch ceased around 1924. The land claims litigation, also ended in 1924, confirmed that aboriginal title to the Tejon Ranch was extinguished decades earlier and the Ranch land was subject to State, not federal, jurisdiction. And the withdrawal of public lands in 1916 was intended as a temporary measure and as a contingency in case the land claims case failed, which it did.[84] This land was never used and 18 years later, in 1934, it cannot be relied on to demonstrate that federal jurisdiction "remained" over any Tejon Indians residing on the Tejon Ranch.

While the status of Tejon Indians living on the Tejon Ranch was somewhat ambiguous before the Supreme Court's land claims decision in 1924, the historical record firmly establishes that they were not under federal jurisdiction in 1934.

4. Step Four. This final step evaluates the "totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was 'recognized' in or before 1934 and remained 'under federal jurisdiction' through 1934."[85]

In addition to the land-related activities discussed above, the Tejon Tribe will certainly argue that the Department's involvement in funding the education of Tejon students in County-operated schools should be sufficient to demonstrate federal jurisdiction over a "recognized Indian tribe" as of 1934. It does not.

As a threshold matter, involvement of the Department in the education of individual Indians of Tejon descent is distinguishable from evidence of a tribal relationship with the United States. As described in the 2018 Record of Decision involving the Mashpee Wampanoag Tribe:

> The Tribe on remand argues that by admitting children as students to the Carlisle Indian School between 1905 and 1918, the Federal Government "explicitly acknowledged its jurisdiction over the Tribe." … While such evidence clearly demonstrate exercises of federal authority over Indians generally and individual Indians specifically, none suffice, in isolation, to show an exercise of federal authority over the Mashpee Tribe as distinct from some of its members.

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[83] *Id*. at 4. After the Tejon decision, the Department issued a policy statement requiring that all subsequent requests for federal acknowledgment by reaffirmation or other alternative basis must be made under Part 83. *See* 80 Fed. Reg. 37,538 (Jul. 1, 2015).
[84] It should be noted that the 1916 land was withdrawn by Departmental Order at the Assistant Secretary-level and not by Executive Order at the Presidential-level, as required in the Step 3 criteria.
[85] *Procedures Memorandum* at 8.

> The evidence of Mashpee student enrollment at Carlisle, by itself, does not unambiguously demonstrate that such enrollment was predicated on a jurisdictional relationship with the Tribe as such. Without any other evidence that the Federal Government provided services to or otherwise assumed jurisdiction over the Tribe, the Mashpee student records fall short of demonstrating that the Tribe itself came under federal jurisdiction. Thus while the evidence of enrollment at Carlisle is plainly relevant to the Sol. Op M-37029 inquiry, without more it is insufficient to show that the Tribe "was subjected to … clear, federal jurisdiction."[86]

The Tejon Indians also do not meet the school enrollment criteria in either the 2014 M-Opinion or the 2020 Procedures Memorandum. The 2014 M-Opinion refers to the "education of Indian students at BIA schools."[87] Unlike the Mashpee fact pattern above, the Tejon children attended schools operated by Kern County, with some funding from the BIA.[88] These were not BIA-operated schools.

Similarly, the 2020 Procedures Memorandum refers to "the establishment of schools and other service institutions for the benefit of a tribe."[89] A contract with a County school system for a small group of individual Tejon students, with no evidence of tribal involvement, does not establish federal jurisdiction over a "recognized Indian tribe."

Conclusion

Based on the historical records in the public domain and the 2006 submission by the Tejon Tribe, there is insufficient evidence to establish that this group was a tribe "'recognized' in or before 1934 who *remained* under federal authority at the time of the IRA's enactment."[90]

Since at least 1873, this group of Indians of Tejon descent remained on the Tejon Ranch instead of moving to the Tule River Reservation, or to other lands under federal jurisdiction. They chose to continue living on privately owned lands even after the loss of their land claims litigation in 1924. There is also little evidence in the public record that they operated as a tribe (and as a tribe with a government-to-government relationship with the United States).

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[86] U.S. Department of the Interior, Record of Decision—Mashpee Wampanoag Tribe, at 27, September 7, 2018. This decision was recently remanded by a U.S. District Court back to the Department to re-evaluate how it should apply the criteria in the 2014 M-Opinion. *See Mashpee Wampanoag Tribe v. Bernhardt*, No: 1:18-cv-02242 (D.D.C. June 5, 2020).
[87] *2014 M-Opinion* at 19.
[88] *See supra* footnote 57.
[89] *Procedures Memorandum* at 7.
[90] *See Eligibility Memorandum* at 31.

There is certainly some evidence of federal actions to help Indians of Tejon descent to recover their aboriginal territory and/or move outside of the Tejon Ranch to lands under federal jurisdiction. However, the Supreme Court confirmed in 1924 that these Indians of Tejon descent were living on lands under State, and not federal, jurisdiction. Ten years later, in 1934, this was their jurisdictional status when the IRA was enacted; and they are not able to demonstrate that they were, or "remained," under federal jurisdiction in 1934.

Funding arrangements by the BIA to support the education of children of Tejon descent in County-operated schools do not establish or confirm federal jurisdiction either, as this activity was distinct from any tribal relationship with the federal government, whether such relationship was formally recognized or not. And a funding agreement between the BIA and the Kern County school system fails to meet the criteria in either the 2014 M-Opinion or the Procedures Memorandum and, cannot, by itself, establish that the federal government had jurisdiction over a "recognized Indian tribe" in 1934.

For these reasons, it is Stand Up's position that the Secretary of the Interior lacks the authority under the IRA to acquire any land into trust for the Tejon Indian Tribe.

Sincerely,

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cc: The Honorable Katharine MacGregor, Deputy Secretary
The Honorable Tara Sweeney, Assistant Secretary—Indian Affairs
The Honorable Daniel Jorjani, Solicitor
Paula Hart, Director, Office of Indian Gaming