United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

April 27, 2021

M-37070

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs
Director, Bureau of Indian Affairs

From: Principal Deputy Solicitor

Subject: Withdrawal of Certain Solicitor M-Opinions, Reinstatement of Sol. Op. M-37029 *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act*, and Announcement Regarding Consultation on "Under Federal Jurisdiction" Determinations

On January 20, 2021, President Biden issued Executive Order 13990 directing all executive departments and agencies to review certain actions taken in the preceding four years.[1] Consistent with the Executive Order the White House issued a non-exclusive list of agency actions taken by the Department of the Interior (Department) that should be reviewed. Included on the list was Sol. Op. M-37055, *Withdrawal of Solicitor's Opinion M-37029, The Meaning of 'Under Federal Jurisdiction' for the Purposes of the Indian Reorganization Act*. (M-37055).[2]

M-37055 withdrew Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (M-37029), which established criteria for determining when a tribe could be considered "under federal jurisdiction" (UFJ) under Section 19 of the Indian Reorganization Act of 1934 (IRA). My review of M-37055 necessarily included review of the procedures issued concurrent with it, *Procedures for Determining Eligibility for Land-into-Trust under the First Definition of 'Indian' in Section 19 of the Indian Reorganization Act* (Procedures), as well as its companion, Sol. Op. M-37054, *Interpreting the Second Definition of 'Indian' in Section 19 of the Indian Reorganization Act of 1934* (M-37054).

Multiple federal court decisions have held that the Department's interpretation of the IRA's first definition of "Indian" memorialized in M-37029 was reasonable.[3] And for over a decade, Tribal

[1] Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).
[2] THE WHITE HOUSE, BRIEFING ROOM, FACT SHEET: LIST OF AGENCY ACTIONS FOR REVIEW (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (action number 16 under Department of the Interior heading).
[3] *See, e.g., Confederated Tribes of the Grand Ronde Cmty. of Oreg. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 278 (D.D.C. 2016), *aff'd*, 879 F.3d 1177, 1183-86 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (2019); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015), *vacated and remanded sub nom., No Casino in Plymouth v. Zinke*, 698 F. App'x 531 (9th Cir. 2017) (vacated on other grounds); *County of Amador v. U.S. Dep't of*

Nations and the Department have relied on M-37029's criteria in preparing UFJ opinions for applicant tribes. Despite this, M-37029 was withdrawn in 2020 without engaging in tribal consultation pursuant to Executive Order 13175. A second Opinion, M-37054, construed the second definition of "Indian" in the IRA but was never applied by the Department.[4] This Opinion was also issued without engaging in tribal consultation.

President Biden's January 26, 2021 *Memorandum on Tribal Consultation and Strengthening Nation to Nation Relationships* emphasizes that respect for tribal sovereignty and a commitment to the trust and treaty responsibilities are Administration priorities. The Presidential Memorandum further states that "regular, meaningful, and robust consultation with Tribal Nations [is] a cornerstone of Federal Indian policy."[5]

Because there was no tribal consultation with respect to either of these Opinions, pursuant to delegated authority, I hereby withdraw M-37054, M-37055, and the Procedures. This will allow the proper level of consultation to be conducted with Tribal Nations on this important issue. Furthermore, I am reinstating M-37029 in the interim. Neither the withdrawal of M-37055 and the Procedures, nor the reinstatement of M-37029 is intended to alter or otherwise affect any previous final agency action issued in reliance on M-37055.

Accordingly, I am recommending that the Bureau of Indian Affairs and the Office of the Solicitor schedule virtual consultation sessions with Tribal Nations within the next 90 days to engage in meaningful and robust consultation regarding the Department's interpretation of the term "Indian" as used in Section 19 of the IRA.

Robert T Anderson

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Robert T. Anderson

cc: Deputy Solicitor – Indian Affairs

the Interior, 136 F. Supp. 3d 1193, 1200, 1207-10 (E.D. Cal. 2015), *aff'd*, 872 F.3d 1012 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 64 (2018); *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 594-96 (9th Cir. 2018); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015) (not reported), *aff'd*, 673 F. App'x. 63 (2nd Cir. 2016) (not reported), *cert denied*, 137 S. Ct. 2134 (2017).

[4] M-37054 was written in apparent response to the adverse ruling in *Littlefield v. United States Dep't of the Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016), *aff'd Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30 (1st Cir. Feb. 27, 2020), the only time that the second definition had been relied upon by the Department for a trust land acquisition. The Department did not appeal the Massachusetts district court's decision. The Department took no agency actions based on M-37054.

[5] Presidential Memorandum of January 26, 2021, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*.