



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

**MAR - 9 2020**

M-37055

## Memorandum

To: Secretary  
Assistant Secretary – Indian Affairs

From: Solicitor

Subject: Withdrawal of Solicitor’s Opinion M-37029, “The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act”

On March 12, 2014, the Solicitor issued M-37029 (“Sol. Op. M-37029”) that interpreted certain phrases found in the first definition of “Indian” (“Category 1”) at Section 19 (“Section 19”) of the Indian Reorganization Act of 1934 (“IRA”).<sup>1</sup> Sol. Op. M-37029 was published following the 2009 opinion of the United States Supreme Court (“Supreme Court”) in *Carcieri v. Salazar*,<sup>2</sup> which concluded that the phrase “now under federal jurisdiction” requires tribal applicants for trust-land acquisitions to have been “under federal jurisdiction” in 1934. The Supreme Court did not, however, construe the meaning of the phrases “recognized Indian tribe” or “under federal jurisdiction.”

In 2010, the Department of the Interior (“Department”) interpreted these phrases and other aspects of Section 19 in a record of decision for a fee-to-trust application submitted by the Cowlitz Indian Tribe (“Cowlitz ROD”).<sup>3</sup> The Cowlitz ROD concluded that the phrase “under federal jurisdiction” was ambiguous, and interpreted it to mean “an action or series of actions (...) that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.”<sup>4</sup> The Cowlitz ROD separately interpreted the phrase “recognized Indian tribe” and concluded it was not subject to the temporal limitation contained in “now under federal jurisdiction,” meaning that an applicant tribe is “recognized” for purposes of Category 1 so long as it is “federally recognized” at the time the IRA is applied.<sup>5</sup>

Sol. Op. M-37029 adopted the analysis and interpretive framework set forth in the Cowlitz ROD with little substantive change, including the Cowlitz ROD’s two-part procedure for determining whether a tribe was “under federal jurisdiction” in 1934.

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<sup>1</sup> Act of June 18, 1934, c. 576, 48 Stat. 984, codified at 25 U.S.C. § 5101, *et seq.*

<sup>2</sup> *Carcieri v. Salazar*, 555 U.S. 379 (2009).

<sup>3</sup> U.S. Department 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).

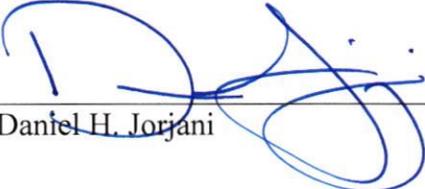
<sup>4</sup> Cowlitz ROD at 94.

<sup>5</sup> Cowlitz ROD at 87-89.

Since the issuance of Sol. Op. M-37029 in 2014, attorneys in the Office of the Solicitor (“Solicitor’s Office”) have consulted with the Bureau of Indian Affairs (“BIA”) to determine eligibility for trust-land acquisitions under Category 1 using Sol. Op. M-37029’s two-part procedure. In each case, the Department has assessed the evidence submitted by an applicant tribe to determine whether such evidence sufficiently demonstrated that the tribe was “under federal jurisdiction” in 1934.<sup>6</sup> Considerable uncertainty remains, however, over what evidence may be submitted to demonstrate federal jurisdictional status in and before 1934. Because of this, many applicant tribes spend considerable time and resources researching and collecting any and all evidence that might be relevant to this inquiry, in some cases prompting submissions totaling thousands of pages.

To remove such uncertainties and to assist tribes in assessing eligibility, in 2018, the Solicitor’s Office began a review of Sol. Op. M-37029’s two-part procedure for determining eligibility under Category 1, and the interpretation on which it relied. This review has led me to conclude that Sol. Op. M-37029’s interpretation of Category 1 is not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase “recognized Indian tribe now under federal jurisdiction.” Therefore, I hereby withdraw Sol. Op. M-37029.

Concurrent with this Opinion, I am issuing procedures under separate cover to guide Solicitor’s Office attorneys in determining the eligibility of applicant tribes under Category 1. This guidance derives from an interpretation of Category 1 that better reflects Congress’ and the Department’s understanding in 1934 of the phrase “recognized Indian tribe now under federal jurisdiction.”

  
Daniel H. Jorjani

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<sup>6</sup> *Checklist for Solicitor’s Office Review of Fee-to-Trust Applications*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs at ¶ 9 (Jan 5, 2017).



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Memorandum

MAR 05 2020

To: Daniel H. Jorjani, Solicitor

From: Kyle E. Scherer, Deputy Solicitor for Indian Affairs 

Eric N. Shepard, Associate Solicitor, Division of Indian Affairs 

Matthew Kelly, Counselor to the Solicitor 

Subject: Determining Eligibility under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act of 1934

The Department of the Interior (“Department”) may acquire land in trust or restricted status for individual Indians or tribes in accordance with the statutory terms authorizing the Secretary of the Interior (“Secretary”) to do so.<sup>1</sup> The Department’s policies and procedures for implementing the Secretary’s trust-acquisition authority<sup>2</sup> require the Department to evaluate each trust-acquisition request and the underlying statutory authority and any limitations it may contain.<sup>3</sup> Attorneys in the Office of the Solicitor (“Solicitor’s Office”) play a critical role in this process by ensuring that proposed trust-acquisitions comply with applicable statutory and regulatory requirements and relevant judicial precedent.<sup>4</sup>

Section 5 of the Indian Reorganization Act (“Section 5”)<sup>5</sup> authorizes the Secretary to acquire land in trust for “Indians.” Section 19 of the Act (“Section 19”) defines “Indian” to include several categories of persons.<sup>6</sup> As relevant here, the first definition includes all persons of Indian descent who are members of “any recognized Indian tribe now under federal jurisdiction” (hereafter “Category 1”).<sup>7</sup> In 2009, the United States Supreme Court (“Supreme Court”) in *Carcieri v. Salazar*<sup>8</sup> construed the term “now” in Category 1 to refer to 1934, the year

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<sup>1</sup> 25 C.F.R. § 151.3(a).

<sup>2</sup> See generally 25 C.F.R. Part 151 (“Part 151”); U.S. Dept. of the Interior, Bureau of Indian Affairs, Office of Trust Services, *Acquisition of Title to Land Held in Fee or Restricted Fee Status*, Ver. IV (rev. 1) (Jun. 28, 2016) (hereafter “*Fee-to-Trust Handbook*”).

<sup>3</sup> 25 C.F.R. §§ 151.10(a), 151.11(a).

<sup>4</sup> *Checklist for Solicitor’s Office Review of Fee-to-Trust Applications (Checklist)*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 7, 2014), revised and updated (Jan. 5, 2017) (hereafter “FTT Checklist”).

<sup>5</sup> Act of June 18, 1934, c. 576, § 5, 48 Stat. 984 (hereafter “IRA” or “Act”), codified at 25 U.S.C. § 5108.

<sup>6</sup> IRA, § 19, codified at 25 U.S.C. § 5129.

<sup>7</sup> 25 U.S.C. § 5129.

<sup>8</sup> 555 U.S. 379 (2009) (hereafter “*Carcieri*”).

of the IRA’s enactment. The Supreme Court did not consider the meaning of the phrase “under federal jurisdiction,” however, or whether it applied to the phrase “recognized Indian tribe.”

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.<sup>9</sup> The procedure derived from the Department’s interpretation of the phrase “under federal jurisdiction” in Category 1 as referring to “an action or series of actions (...) that are sufficient to establish, or that generally reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.”<sup>10</sup> The Solicitor of the Interior (“Solicitor”) memorialized the Department’s interpretation in a signed M-Opinion in 2014.<sup>11</sup>

Under the Department’s policies and procedures, Solicitor’s Office attorneys must consult with the Bureau of Indian Affairs (“BIA”) in determining the eligibility of tribes applying for trust-land acquisitions under Category 1 of the IRA.<sup>12</sup> Since 2010, the Solicitor’s Office has prepared analyses affecting more than 80 tribes using the eligibility procedures memorialized in M-37029. Despite this, however, uncertainty persists over what evidence can be submitted for the inquiry and how the Department will weigh such evidence. Because eligibility assessments are prepared by the Solicitor’s Office, they remain privileged legal opinions that are not publicly disclosed, eliminating a possible source of guidance. Given the importance of trust-land acquisitions as a resource for promoting tribal economic and political self-determination, tribes sometimes devote considerable resources to researching and collecting any and all forms of potentially relevant evidence, in some cases leading to submissions totaling thousands of pages.

In an effort to address these impediments and the burdens they placed on tribes, the Solicitor’s Office in 2018 began a review of the Department’s eligibility procedures to provide guidance for determining relevant evidence. The review prompted questions concerning M-37029’s interpretation of Category 1, on which the Department’s eligibility procedures rely. In particular, the review found that M-37029’s interpretation of the term “recognition” departed, without explanation, from the Department’s previous, long-held understanding of that term. Among other things, the Solicitor Office’s review concludes that in 1934, Congress and the Department would more likely have understood the phrase “recognized Indian tribe now under federal jurisdiction” as referring to tribes *previously* placed under federal authority through congressional or executive action who *remained* under federal authority in 1934. For these reasons, explained in more detail below, we recommend that M-37029 be withdrawn.

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<sup>9</sup> See 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 FTT Checklist.

<sup>10</sup> Cowlitz ROD at 94.

<sup>11</sup> Op. Sol. M-37029, *The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (hereafter “M-37029”).

<sup>12</sup> FTT Checklist at ¶ 9.

## I. Analysis

Our interpretation of Category 1 of Section 19 follows the two-step analysis articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* in reviewing an agency’s statutory interpretation.<sup>13</sup> At the first step, the agency must answer “whether Congress has spoken directly to the precise question at issue.”<sup>14</sup> If the language of the statute is clear, the court and the agency must give effect to “the unambiguously expressed intent of Congress.”<sup>15</sup> If, however, the statute is “silent or ambiguous,” pursuant to the second step, the agency must base its interpretation on a “reasonable construction” of the statute.<sup>16</sup> Before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction,<sup>17</sup> which include examination of a statute’s text, legislative history, and structure, as well as its purpose.<sup>18</sup> Where a statutory term lacks an express definition, resort should be had to its ordinary meaning.<sup>19</sup> Statutory provisions should not be examined in isolation, but read with a view to their place in the overall statutory scheme so as to fit, if possible, into a harmonious whole.<sup>20</sup> Only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is “more [one] of policy than of law.”<sup>21</sup>

Congress charged the Department with administering the IRA.<sup>22</sup> Thus, when the Department interprets an ambiguity in the Act’s terms or fills a gap where Congress has been silent, its interpretation should be either controlling or accorded deference, unless it is unreasonable or contrary to the statute.<sup>23</sup> An agency’s interpretation of a statute that Congress charged it to administer will not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress’s

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<sup>13</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (hereafter “*Chevron*”).

<sup>14</sup> *Id.* at 842-43.

<sup>15</sup> *Id.* at 843.

<sup>16</sup> *Id.* at 840.

<sup>17</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (hereafter “*Kisor*”) (citing *Chevron*, 467 U.S. at 843, n. 9).

<sup>18</sup> *Petit v. U.S. Dept. of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (citing *Bell Atlantic Telephone Companies v. F.C.C.*, 131 F.3d 1044, 1047 (D.C. Cir. 1997)). See also *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

<sup>19</sup> *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225–228 (1994).

<sup>20</sup> *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

<sup>21</sup> *Kisor*, 139 S. Ct. at 2415.

<sup>22</sup> *County of Amador v. U.S. Dept. of the Interior*, 872 F.3d 1012, 1021 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 64 (2018) (hereafter “*Cty. of Amador*”) (citing *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, 559 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017) (hereafter “*Grand Ronde*”)); *United States v. Eberhardt*, 789 F.2d 1354, 1359–60 (9th Cir. 1986).

<sup>23</sup> See *Chevron*, 467 U.S. at 842-45; *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). See also *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1866-71 (2013) (courts must give *Chevron* deference to an agency’s interpretation of a statutory ambiguity, even whether the issue is whether the agency exceeded the authority authorized by Congress); *Skidmore v. Swift*, 323 U.S. 134, 139 (1944) (agencies merit deference based on the “specialized experience and broader investigations and information” available to them). The *Chevron* analysis is frequently described as a two-step inquiry. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (hereafter “*Brand X*”) (“If the statute is ambiguous on the point, we defer at step two to the agency’s interpretation so long as the construction is a ‘reasonable policy choice for the agency to make.’”).

expressed intent.<sup>24</sup> A court need not conclude that the agency's interpretation was the only one it could permissibly have adopted or even the one that the court would have reached had the question initially arisen in a judicial proceeding.<sup>25</sup>

Agencies are free to change their existing policies so long as they provide a reasoned explanation for the change.<sup>26</sup> An initial agency interpretation is not carved in stone, and an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis" in response to changed factual circumstances or a change in administrations.<sup>27</sup> An agency's revised statutory interpretation that departs from its prior interpretation also deserves deference,<sup>28</sup> provided the change is not sudden and unexplained, or does not fail to take account of legitimate reliance on prior interpretations.<sup>29</sup> Change alone is not invalidating, since the purpose of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.<sup>30</sup> Though an agency must provide a "reasoned explanation" for its new policy, it need not demonstrate that the reasons for the new policy are better than the reasons for the old one.<sup>31</sup> It is enough that the new policy is permissible under the statute; that there are good reasons for it; and that the agency believes it is better, which a conscious change of course adequately indicates.<sup>32</sup> An agency's revised interpretation of a statute it administers also is not necessarily foreclosed by conflicting interpretations adopted by the courts. This follows from *Chevron*, which established a presumption that Congress intends ambiguities in statutes to be resolved first and foremost by the agency charged with its implementation.<sup>33</sup> A court's judicial construction of a statute trumps an agency interpretation otherwise entitled to *Chevron* deference only if the judicial construction "follows from the unambiguous terms of the statute" leaving no room for agency discretion.<sup>34</sup> In that case the judicial construction carries precedential force under the doctrine of *stare decisis*.<sup>35</sup>

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<sup>24</sup> *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (citing *Chevron*, 467 U.S. at 842-44).

<sup>25</sup> *Ibid.* (citing *Chevron*, 467 U.S. at 843 n.11).

<sup>26</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

<sup>27</sup> *Brand X*, 545 U.S. at 981 (citing *Chevron*, 467 U.S. at 863-64; *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983)).

<sup>28</sup> *Rust*, 500 U.S. at 186 (citing *Chevron*, 467 U.S. at 862); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (hereafter "*Smiley*") (mere fact that an agency interpretation contradicts a prior agency position is not fatal).

<sup>29</sup> *Smiley*, 517 U.S. at 742 (citing *State Farm*, 463 U.S. at 46-57).

<sup>30</sup> *Ibid.*

<sup>31</sup> *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (hereafter "*Fox Television*").

<sup>32</sup> *Fox Television*, 556 U.S. at 515. See also *Rust*, 500 U.S. at 187 (upholding agency's changed interpretation of statutory ambiguity based on its determination that prior policy failed properly to implement statute; on need for clear and operational guidance; on new interpretation's being more consistent with original statutory intent; and on client experience under prior policy).

<sup>33</sup> *Brand X*, 545 U.S. at 981.

<sup>34</sup> *Id.* at 982-83. See also WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 8434 (2d ed. 1987) ("An underlying premise of the *Chevron* doctrine, however, is that agencies, subject to suitable constraints, ought to be able to choose among reasonable constructions of ambiguous provisions in statutes they are specially charged with administering. To preserve this authority from the freezing effects of judicial precedents, *Brand X* recognized that, where a judicial precedent, properly read, merely constitutes a court's best effort to resolve ambiguity, the agency can use its *Chevron* authority to adopt a different statutory construction.").

<sup>35</sup> WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (2d ed.) § 8434.

## A. M-37029's Interpretation of Category 1.

Congress enacted the IRA in 1934 “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”<sup>36</sup> The overriding purpose of the Act was to “establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,”<sup>37</sup> and to redress the disastrous consequences of allotment, through which two-thirds of tribal lands had been lost.<sup>38</sup> Congress sought to strengthen tribal governments and ensure that the BIA would be more responsive to tribal needs.<sup>39</sup> To achieve these goals, Congress, through the IRA, ended the federal policy of allotment in severalty,<sup>40</sup> and provided for the acquisition of new lands to be held in trust for tribes.<sup>41</sup> Section 5 of the IRA provides the Secretary discretionary authority to acquire any interest in lands for the purpose of providing lands in trust for Indians.<sup>42</sup> Section 19 defines “Indian” in relevant part as including the following three categories:

**[Category 1]** all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and **[Category 2]** all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include **[Category 3]** all other persons of one-half or more Indian blood.<sup>43</sup>

Prior to the Supreme Court decision in *Carcieri* in 2009, the Department interpreted the phrase “any recognized Indian tribe now under federal jurisdiction” in Category 1 as requiring applicants for trust-land acquisition under the IRA to be “federally recognized” (or “federally acknowledged”) when the IRA was applied.<sup>44</sup> However, in 2009, the Supreme Court concluded that the term “now” in Category 1 unambiguously refers to tribes that were “under the federal

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<sup>36</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citing H. R. Rep. No. 73-1804 at 6 (1934); S. Rep. No. 73-1080 at 1 (1934)).

<sup>37</sup> *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (hereafter “*Mancari*”).

<sup>38</sup> *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 from President Franklin D. Roosevelt to Rep. Edgar Howard (Apr. 28, 1934)).

<sup>39</sup> *Mancari*, 417 U.S. at 543.

<sup>40</sup> IRA, § 1.

<sup>41</sup> U.S. Dept. of the Interior, Office of the Solicitor, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 84 (1942) (hereafter “Cohen 1942”) (citing S. Rep. No. 73-1080 at 1); IRA, § 5, codified at 25 U.S.C. § 5108.

<sup>42</sup> 25 U.S.C. § 5108.

<sup>43</sup> 25 U.S.C. § 5129 (bracketed numerals added). For ease of reference, this memorandum refers to each category of eligible persons as Category 1, Category 2, and Category 3 respectively.

<sup>44</sup> *Carcieri*, 555 U.S. at 391.

jurisdiction of the United States when the IRA was enacted in 1934.”<sup>45</sup> The majority opinion did not, however, interpret the phrase “under federal jurisdiction.”

In December 2010, the Department issued a record of decision to accept land into trust for the Cowlitz Indian Tribe (“Cowlitz”).<sup>46</sup> Construing the language of Category 1, the Cowlitz ROD concluded that the term “now” does not modify “recognized” and that Category 1 therefore requires only that a tribe be federally recognized at the time the IRA was applied.<sup>47</sup> The Cowlitz ROD further concluded that the phrase “under federal jurisdiction” is ambiguous and interpreted it as requiring a two-part test for determining whether a tribe was “under federal jurisdiction” in 1934.<sup>48</sup> The first step looked to whether a tribe was under federal jurisdiction in or before 1934.<sup>49</sup> The second step examined whether the tribe’s jurisdictional status prior to 1934 remained intact in 1934.<sup>50</sup> Interpreting the phrase “recognized Indian tribe” separate from “under federal jurisdiction,” the Cowlitz ROD concluded it was not modified by the term “now,” and that a tribe may be considered “recognized” for purposes of Category 1 if it is “federally recognized” when the IRA is applied.<sup>51</sup>

In 2014, the Solicitor memorialized the Cowlitz ROD’s framework for determining Category 1 eligibility in M-37029. Like the Cowlitz ROD, M-37029 construed the phrases “recognized Indian tribe” and “under federal jurisdiction” independent of each other,<sup>52</sup> providing three reasons for doing so:<sup>53</sup> (1) because the Supreme Court in *Carciere* did not suggest that the phrase “under federal jurisdiction” encompassed the preceding term “recognized”;<sup>54</sup> (2) because a tribe might be under federal jurisdiction in 1934 but not then “recognized” as the term is understood today;<sup>55</sup> and (3) because the grammatical structure of Category 1 “necessitates” separate inquiries.<sup>56</sup> Based on this, M-37029 concluded that the adverb “now,” which modifies “under federal jurisdiction,” does not also modify “recognized.”<sup>57</sup>

The IRA does not define “under federal jurisdiction,” and after reviewing contemporaneous dictionary definitions of “jurisdiction,” M-37029 concluded that this phrase had no clear or discrete meaning in 1934.<sup>58</sup> M-37029 found that the Act’s legislative history shed no light on its ambiguities, which the Solicitor’s Office also acknowledged at the time of

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<sup>45</sup> *Id.* at 395.

<sup>46</sup> Cowlitz ROD at 77-106.

<sup>47</sup> *Id.* at 89.

<sup>48</sup> *Id.* at 94-95.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Id.* at 95.

<sup>51</sup> M-37029 at 25, 26. That is, at the time the Secretary proceeds with the tribe’s application.

<sup>52</sup> *Id.* at 6-20 (interpreting “under federal jurisdiction”); *id.* at 23-26 (interpreting “recognition”); *id.* at 3 (characterizing “recognized” and “under federal jurisdiction” in Section 19 as distinct concepts).

<sup>53</sup> *Id.* at 2 n.9.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*; see also *id.* at 24 (citing *Carciere*, 555 U.S. at 397 (Breyer, J., concurring)).

<sup>58</sup> *Id.* at 8-9.

enactment.<sup>59</sup> Though Congress intended “under federal jurisdiction” to be a “limiting phrase,”<sup>60</sup> M-37029 determined it lacked unambiguous meaning, and that Congress had left an interpretive gap for the agency to fill.<sup>61</sup> M-37029 thus turned to basic principles of federal Indian law and Congress’s plenary authority over Indian affairs for the underlying basis of its jurisdictional analysis.<sup>62</sup>

M-37029 rejected the claim that the phrase “under federal jurisdiction” should be interpreted as synonymous with Congress’s plenary authority.<sup>63</sup> Instead, it concluded that *Carciari* required “some indication” or evidence that a tribe was under federal jurisdiction in 1934.<sup>64</sup> In brief, this meant some federal “exercise of responsibility for and obligation to an Indian tribe and its members.”<sup>65</sup> M-37029 thus construed the phrase “under federal jurisdiction” as requiring a two-part procedure to determine eligibility under Category 1. The first part examined whether there was a sufficient showing in the tribe’s history at or before 1934 that

the United States (...) had taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.<sup>66</sup>

For some tribes, it continued, evidence of federal jurisdiction in 1934 would be unambiguous, obviating the need to consider part two of the inquiry.<sup>67</sup> For others, “a variety of actions viewed in concert” might demonstrate a tribe’s jurisdictional status.<sup>68</sup>

The second part of M-37029’s eligibility procedure examined whether a tribe’s jurisdictional status, if established prior to 1934, “remained intact in 1934.”<sup>69</sup> In some cases this might be clear, but in others it would require either exploring “the universe of actions or evidence that might be relevant” or generally ascertaining whether certain actions, “alone or in conjunction with others,” sufficiently indicated that the tribe retained its jurisdictional status in

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<sup>59</sup> *Id.* at 9-12; *id.* at 12, n. 75 (citing Analysis of Differences Between House Bill and Senate Bill at 14-15, Box II, Records Concerning the Wheeler-Howard Act, 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4) (undated), Records of the Bureau of Indian Affairs, 1793-1999, Record Group 75; National Archives Building, Washington, D.C.). *See also id.* at 21-23 (discussing Department’s early implementation of the IRA).

<sup>60</sup> *Id.* at 17.

<sup>61</sup> *Ibid.* The courts to have considered it have consistently upheld M-37029’s interpretation. *See, e.g., Grand Ronde. See also Cent. N.Y. Fair Bus. Ass’n v. Jewell*, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015) (not reported), *aff’d*, 673 Fed. Appx. 63 (2nd Cir. 2016) (not reported), *cert. denied*, 137 S. Ct. 2134 (2017) (deferring to Department’s reasonable interpretation of “under federal jurisdiction”); *Shawano County, Wisconsin v. Acting Midwest Reg’l Dir.*, 53 IBIA 62 (2011); *Village of Hobart, Wisc. v. Acting Midwest Reg’l Dir.*, 57 IBIA 4 (2013).

<sup>62</sup> *Id.* at 12-16.

<sup>63</sup> *Id.* at 17-18 (citing *United States v. Rodgers*, 466 U.S. 475, 479 (1984)).

<sup>64</sup> *Id.* at 18.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Id.* at 19.

<sup>67</sup> *Id.* at 19-20.

<sup>68</sup> *Id.* at 19.

<sup>69</sup> *Ibid.*

1934.<sup>70</sup> M-37029 added that once a tribe’s jurisdictional status was established, an absence of probative evidence of termination would strongly suggest it was retained, noting that an absence of any federal action or disavowals of federal responsibility by Executive officials could not by itself revoke jurisdiction.<sup>71</sup>

However, M-37029 only briefly discussed the evidence that could be used to demonstrate federal jurisdictional status.<sup>72</sup> It referred broadly to “guardian-like actions” by federal officials on behalf of tribes and “continuous courses of dealings” between tribes and the United States.<sup>73</sup> It provided an illustrative list of such actions ranging from ratified treaties to the education of Indian students at BIA schools.<sup>74</sup> It suggested that such evidence could originate with Congress or the Executive, including the Office of Indian Affairs (“OIA”), which was responsible for implementing Indian statutes and administering Indian affairs.<sup>75</sup> M-37029 further noted that its examples were not exhaustive, and that evidence of other types of federal actions might demonstrate that a tribe was under federal jurisdiction.<sup>76</sup>

Having construed the phrase “under federal jurisdiction,” M-37029 briefly turned to the meaning of “recognized Indian tribe.”<sup>77</sup> It rejected interpreting Category 1 as requiring a tribe to be “federally recognized” in 1934 for several reasons.<sup>78</sup> First, it noted that the *Carciere* majority did not identify a temporal requirement for federal recognition, and that Justice Breyer’s concurring opinion explained that “now” does not modify “recognized” and that the IRA “imposes no time limit on recognition.”<sup>79</sup> Second, it found that the term “recognition” is itself ambiguous, and discussed how, in 1934, it was used in both a “cognitive” (or “quasi-anthropological”) sense and a formal, political-legal sense as connoting a political relationship between a tribe and the United States.<sup>80</sup> M-37029 asserted that in 1934, some members of the Senate Committee on Indian Affairs (“Senate Committee”) seemed to use “recognized” in the cognitive sense,<sup>81</sup> adding that the political-legal sense later evolved into the concept of “federal recognition” or “federal acknowledgment” in the 1970s, around the time the Department promulgated its administrative acknowledgment regulations.<sup>82</sup> M-37029 thus concluded that the

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Id.* at 20.

<sup>72</sup> *Id.* at 19 (providing non-exclusive list of examples of guardian-like actions or courses of dealings that may be relevant).

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* M-37029 includes a more extensive discussion elections conducted by the Secretary pursuant to Section 18 of the IRA, which may provide sufficient evidence of being under federal jurisdiction in 1934. M-37029 at 19-21.

<sup>77</sup> *Id.* at 23-26.

<sup>78</sup> *Id.* at 24.

<sup>79</sup> *Ibid.* (citing *Carciere*, 555 U.S. at 397-98 (Breyer, J., concurring); *id.*, n. 154 (citing *Carciere*, 555 U.S. at 400 (Souter, J., dissenting))).

<sup>80</sup> *Ibid.*

<sup>81</sup> *Id.* at 25.

<sup>82</sup> *Id.* at 24. *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 were later reclassified as Part 83.

IRA does not require the Department to determine that a tribal applicant was a “recognized Indian tribe” in 1934, adding that an applicant need only be “recognized” at the time the IRA is applied,<sup>83</sup> consistent with the Secretary’s interpretation of “recognized Indian tribe” as contained in Part 151,<sup>84</sup> which defines “tribe” as “any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians that is recognized by the Secretary as eligible for the special programs and services” from the BIA.<sup>85</sup> By definition, M-37029 concluded, a “federally recognized” tribe necessarily satisfies both the cognitive and the legal senses of the term “recognition.”<sup>86</sup>

## **B. The Meaning of the Phrase “Now Under Federal Jurisdiction.”**

M-37029 reviewed various definitions of the term “jurisdiction” before it concluded that the phrase “under federal jurisdiction” was ambiguous on its face.<sup>87</sup> It found that the legislative history did not otherwise clarify or explain the expression’s meaning, beyond indicating “a desire to limit the scope of eligibility for IRA benefits.”<sup>88</sup> It reviewed the principles behind plenary authority and further provided examples of the “great breadth of actions and jurisdiction” that the federal government has historically “held (...) and asserted” over Indians.<sup>89</sup> Though it rejected the claim that “under federal jurisdiction” is synonymous with plenary authority,<sup>90</sup> M-37029 found that the phrase lacks “one clear and unambiguous meaning.”<sup>91</sup> Instead it suggested that determining whether a tribe was “under federal jurisdiction” would “likely” require evidence of “a particular exercise of plenary authority.”<sup>92</sup> While we agree that “under federal jurisdiction” as used in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress’s plenary authority,<sup>93</sup> we differ from M-37029 to conclude that the phrase “now under federal jurisdiction” refers to tribes with whom the United States had clearly dealt on a more-or-less sovereign-to-sovereign basis or as to whom it had clearly acknowledged a trust responsibility in or before 1934.

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47 Fed. Reg. 13326 (Mar. 30, 1982). M-37029 further notes that evidence submitted for the administrative acknowledgment process may be used to show that a tribe was under federal jurisdiction in 1934. M-37029 at 25.

<sup>83</sup> *Id.* at 25.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* (citing 25 C.F.R. § 151.2; Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103- 454, tit. I, 108 Stat. 4791 (hereafter “List Act”). M-37029 adds that this definition represents “the Secretary’s interpretation of [the phrase] ‘recognized Indian tribe.’” *Ibid.* (citing 25 C.F.R. Part 151).

<sup>86</sup> *Id.* at 26.

<sup>87</sup> *Id.* at 8-9.

<sup>88</sup> *Id.* at 9-12.

<sup>89</sup> *Id.* at 12-16.

<sup>90</sup> *Id.* at 17.

<sup>91</sup> *Id.* at 18.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Id.* at 17.

### a. Statutory Context.

M-37029 found that the interpretation of Category 1's terms required separate inquiries.<sup>94</sup> It explained this by noting that *Carcieri* did not suggest "that the term 'recognized' [was] encompassed within the phrase 'under federal jurisdiction'"<sup>95</sup> and that the Supreme Court "never identified a temporal requirement for federal recognition" as it did for being under federal jurisdiction.<sup>96</sup> However, the *Carcieri* majority focused on the meaning of "now" without addressing whether or how the phrase "now under federal jurisdiction" modifies the meaning of "recognized Indian tribe."<sup>97</sup>

M-37029 also concluded that construing "recognized" apart from "under federal jurisdiction" would be consistent with Justice Breyer's concurrence in *Carcieri*,<sup>98</sup> which advised that a tribe recognized *after* 1934 might nonetheless have been "under federal jurisdiction" *in* 1934.<sup>99</sup> Yet even M-37029 noted that by "recognized" Justice Breyer appeared to mean "federally recognized"<sup>100</sup> in the formal, political sense that had evolved by the 1970s, not in the cognitive sense that M-37029 claims Congress in 1934 used the term.<sup>101</sup> Contrary to M-37029,<sup>102</sup> however, Justice Breyer did not state that "now" does not modify "recognized." Instead, he considered how "later recognition" might reflect "Federal jurisdiction,"<sup>103</sup> and he gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.<sup>104</sup> The suggestion that Category 1 does not preclude eligibility for tribes "federally recognized" *after* 1934 is consistent with interpreting Category 1 as requiring some form of "recognition" in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington ("Stillaguamish Tribe") shows. It is also consistent with the requirement that to be eligible for trust-land acquisitions under the IRA in the first instance, 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.<sup>105</sup>

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<sup>94</sup> *Id.* at 2, n. 9.

<sup>95</sup> *Ibid.* See also *Cty. of Amador*, 872 F.3d at 1020 n.8 (noting that *Carcieri* leaves open whether "recognition" and "jurisdiction" requirements are distinct requirements or comprise a single requirement).

<sup>96</sup> *Id.* at 24.

<sup>97</sup> As M-37029 noted, the majority found the Narragansett Indian Tribe ineligible under Category 1 because it was not "under federal jurisdiction" in 1934, not because it was not "federally recognized" at the time. *Ibid.* (citing *Carcieri*, 555 U.S. at 382-83).

<sup>98</sup> *Id.* at 2, n. 9.

<sup>99</sup> *Id.* at 3-4 (citing *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring)).

<sup>100</sup> *Id.* at 3 n. 18. M-37029 further notes that Justice Breyer neither discussed nor explained the meaning of "recognition" as used in 1934. *Ibid.*

<sup>101</sup> See *id.* at 24-25 (describing cognitive sense of "recognition" and the evolution of the modern notion of "federal recognition" in the 1970s).

<sup>102</sup> *Id.* at 24 ("Justice Breyer explained in his concurrence [that] that word 'now' modifies 'under federal jurisdiction' but does not modify 'recognized'.").

<sup>103</sup> *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring).

<sup>104</sup> See *id.* at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

<sup>105</sup> List Act, § 104, codified at 25 U.S.C. § 5131. 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 (defining "tribe" to mean

M-37029 also found it consistent with the grammatical structure of Category 1 to interpret “recognized Indian tribe” apart from “now under federal jurisdiction.”<sup>106</sup> Because it did not otherwise discuss Category 1’s grammar, the basis for this conclusion remains unclear. In any event, we interpret Category 1’s grammatical structure differently. Category 1 provides that the term “Indian” shall include “all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction.”<sup>107</sup> The adverb “now” forms part of the prepositional phrase “under federal jurisdiction,”<sup>108</sup> which it temporally qualifies.<sup>109</sup> Prepositional phrases function as modifiers and follow the noun phrase that they modify.<sup>110</sup> We therefore find that Category 1’s grammar supports interpreting the entire phrase “now under federal jurisdiction” as intended to modify “recognized Indian tribe.” Our grammatical interpretation finds further support in the IRA’s legislative history, which we discuss below, and in Commissioner of Indian Affairs John Collier’s statement that the phrase “now under federal jurisdiction” was intended to limit the IRA’s application.<sup>111</sup> 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. These included the loss of Indian lands and the displacement

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“any Indian tribe, nation, band, pueblo, town, community, rancheria, colony, or other group of Indians” that is “recognized by the Secretary as eligible for the special programs and services provided by the Bureau of Indian Affairs and as listed in the *Federal Register*” (emphasis added). The regulations at Part 151 were originally promulgated as Part 120a. 43 Fed. Reg. 32,311 (Jul. 19, 1978).

<sup>106</sup> See M-37029 at 2, n. 9; 3, n. 18; 24. The words of a statute should be given the meaning that proper grammar and usage assign them. *Lake Cty. v. Rollins*, 130 U.S. 662, 670 (1889). Lawmakers are generally presumed to be aware of the rules of grammar, *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 494 (5th Cir. 2014) (citing *United States v. Goldenberg*, 168 U.S. 95, 102–03 (1897)), for which reason such rules should govern statutory interpretation so long as they do not contradict a statute’s legislative intent or purpose. *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (citing A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 140 (2012)).

<sup>107</sup> 25 U.S.C. § 5129.

<sup>108</sup> *Grand Ronde*, 830 F.3d at 560. 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.

<sup>109</sup> H. C. HOUSE AND S.E. HARMAN, *DESCRIPTIVE ENGLISH GRAMMAR* at 163 (New York: Prentice-Hall, Inc. 1934) (adverbs may modify prepositional phrases).

<sup>110</sup> 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* at 305 (1928). A noun phrase consists of a noun and all of its modifiers. *Id.* at 16.

<sup>111</sup> M-37029 at 17; *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 266 (1934) (hereafter “Sen. Hrgs.”) (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 in 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).

and dispersal of tribal communities. Lacking an official list of “recognized” tribes at the time,<sup>112</sup> it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,<sup>113</sup> left unmodified, the phrase “recognized Indian tribe” could include tribes disestablished or terminated before 1934.

### **b. Statutory Terms.**

Though M-37029’s interpretation looked to the contemporaneous legal definition of “jurisdiction,” which defined it as the “power and authority” of the courts “as distinguished from the other departments,”<sup>114</sup> M-37029 ultimately relied on the broader definitions contained in the 1935 edition of Webster’s Dictionary.<sup>115</sup> Contrary to M-37029, we find the legal distinction between judicial and administrative jurisdiction to be significant. Because the statutory phrase at issue includes more than just the word “jurisdiction,” we think the use of the preposition “under” sheds additional light on its meaning. BLACK’S LAW DICTIONARY, for example, defines “under” as most frequently used in “its secondary sense meaning of ‘inferior’ or ‘subordinate.’”<sup>116</sup> And though BLACK’S LAW DICTIONARY defines “jurisdiction” in terms of “power and authority,” it defines “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.”<sup>117</sup>

Congress added the phrase “under federal jurisdiction” to a statute designed to govern the administration of 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.<sup>118</sup>

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<sup>112</sup> *Id.* at 25, n. 158; *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) (hereafter “Wood 2016”).

<sup>113</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

<sup>114</sup> M-37029 at 8 (citing BLACK’S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter “BLACK’S”).

<sup>115</sup> *Id.* at 8-9. This defined “jurisdiction” broadly in terms of a sovereign’s power to govern or sphere of authority, which appears to have prompted M-37029’s extended discussion of plenary power generally. *See id.* at 12-16.

<sup>116</sup> BLACK’S at 1774.

<sup>117</sup> *Id.* at 171. BLACK’S separately defines “subject to” as meaning “obedient to; governed or affected by.”

<sup>118</sup> 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.

### c. Legislative History.

The IRA's legislative history lends additional support for interpreting "now under federal jurisdiction" as modifying "recognized Indian tribe." M-37029 interpreted the IRA's legislative history as doing little more than indicating a "desire to limit the scope" of Section 19's definition of "Indian."<sup>119</sup> It does more than that. Congress included the phrase "now under federal jurisdiction" in the definition contained in Category 1. As a result, M-37029's interpretation does not consider how the phrase when read in its entirety might limit Category 1's scope.

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 that the original draft bill's definition of "Indian" had been intended to do just that:<sup>120</sup>

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.

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.*<sup>121</sup>

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.<sup>122</sup> 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

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<sup>119</sup> M-37029 at 9 (generally describing "now under federal jurisdiction" as amending the IRA's definition of "Indian").

<sup>120</sup> Sen. Hrgs. at 80 (Apr. 26, 1934). *See also Grand Ronde*, 75 F. Supp. 3d at 387, 399 (noting same).

<sup>121</sup> *Id.* at 79-80 (emphasis added).

<sup>122</sup> *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).

something. It owes him more.”<sup>123</sup> 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.”<sup>124</sup>

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 as they stood in the committee print. Category 1 then defined “Indian” as persons of Indian descent who were “members of any recognized Indian tribe.”<sup>125</sup> As on previous days,<sup>126</sup> 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.”<sup>127</sup>

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.”<sup>128</sup> Senator Thomas felt that “If they are not a tribe of Indians they do not come under [the Act].”<sup>129</sup>

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<sup>123</sup> Sen. Hrgs. at 80.

<sup>124</sup> 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.”).

<sup>125</sup> 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.

<sup>126</sup> *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).

<sup>127</sup> *See, e.g., id.* at 239 (discussing Sec. 3); 254 (discussing Sec. 10); 261-62 (discussing Sec. 18); 263-66 (discussing Sec. 19).

<sup>128</sup> *Id.* at 263.

<sup>129</sup> *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

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,”<sup>130</sup> 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.”<sup>131</sup> When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were “just as much Indians as any others,”<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> Chairman Wheeler thought not, “unless they are enrolled at the present time.”<sup>135</sup> 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 the final version of the Act.<sup>136</sup>

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 quantum, so long as they were members of a “recognized Indian tribe,” while Category 2 included their “descendants” residing on a reservation.<sup>137</sup> Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.<sup>138</sup> Commissioner Collier then pointed out that at least with respect to Category 2, the descendants of members would have to reside within a reservation at the present time.<sup>139</sup>

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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.”

<sup>130</sup> *Id.* at 254.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Id.* at 264.

<sup>135</sup> *Ibid.*

<sup>136</sup> *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.”).

<sup>137</sup> *Id.* at 264-65.

<sup>138</sup> *Id.* at 264.

<sup>139</sup> *Ibid.*

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,<sup>140</sup> Chairman Wheeler finally turned to the IRA's definition of "tribe,"<sup>141</sup> which as drafted then included "any Indian tribe, band, nation, pueblo, or other native political group or organization."<sup>142</sup> Chairman Wheeler and Senator Thomas thought this definition too broad.<sup>143</sup> Senator Thomas asked whether it would include the Catawbas,<sup>144</sup> 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.<sup>145</sup> Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.<sup>146</sup> Senator O'Mahoney from Wyoming then suggested that Categories 1 and 3 overlapped, proposing the Catawbas might still come within the definition of Category 1 since they were of Indian descent and they "certainly are an Indian tribe."<sup>147</sup> Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."<sup>148</sup> Senator O'Mahoney responded, saying "If you wanted to exclude any of them [from the Act] you certainly would in my judgment."<sup>149</sup> Chairman Wheeler proceeded to express his concerns for those having little or no Indian descent being "under the supervision of the Government," whom he had earlier suggested should be excluded from the Act.<sup>150</sup> 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."<sup>151</sup> It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,<sup>152</sup> asked:

Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.<sup>153</sup>

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<sup>140</sup> *Id.* at 265.

<sup>141</sup> *Ibid.*

<sup>142</sup> *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.

<sup>143</sup> Sen. Hrgs. at 265.

<sup>144</sup> *Ibid.*

<sup>145</sup> *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).

<sup>146</sup> We disagree that Chairman Wheeler believed that the blood-quantum limitation applied to all parts of Section 19's definition, M-37029 at 11, n. 68, and we instead read the colloquy as examining how, as drafted, Section 19's overlapping parts created further ambiguities.

<sup>147</sup> Sen. Hrgs. at 266.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.* Nevertheless, Senator O'Mahoney did not understand why the Act's benefits should not be extended "if they are living as Catawba Indians."

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Id.* at 231.

<sup>153</sup> *Id.* at 266.

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 how it might be interpreted to limit "recognized Indian tribe."<sup>154</sup> However, the phrase was, in fact, 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.<sup>155</sup> 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."<sup>156</sup> Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."<sup>157</sup> Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,<sup>158</sup> described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."<sup>159</sup> 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 how Congress delegated "most of its plenary authority to the Interior Department or the Bureau of Indian Affairs," which he further describes as "clothed with the plenary power."<sup>160</sup> But in turning to the draft bill's aim of allowing tribes to take responsibility for their own affairs, Commissioner Collier refers to the "absolute authority" of the Department by reference to "its rules and regulations," to which the Indians were subjected.<sup>161</sup> 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.<sup>162</sup>

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<sup>154</sup> M-37029 at 11.

<sup>155</sup> H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).

<sup>156</sup> *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)).

<sup>157</sup> *Id.* at 184 (statement of Commissioner Collier) (Apr. 8, 1934).

<sup>158</sup> Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* <https://www.justice.gov/osg/bio/charles-fahy>.

<sup>159</sup> H. Hrgs. at 319 (statement of Assistant Solicitor Charles Fahy).

<sup>160</sup> *Id.* at 37 (statement of Commissioner Collier).

<sup>161</sup> *Ibid.* (statement of Commissioner Collier).

<sup>162</sup> *See, e.g.*, U.S. Dep't. 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) (discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.*, field operations); ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (hereafter "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

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.<sup>163</sup> In *The Cherokee Tobacco* case, the Supreme Court considered the conflict between subsequent Congressional acts and “[t]reaties with Indian nations within the jurisdiction of the United States.”<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup>

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,<sup>167</sup> 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 contemporary understanding of “recognized Indian tribe,” 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.

By interpreting the phrase “under federal jurisdiction” as used in Category 1 to refer to the application and administration of the federal government’s plenary authority over Indians, the entire phrase “now under federal jurisdiction” can then be seen as resolving the tension between the desire of Commissioner Collier that the IRA include Indians “[w]ithout regard to whether or not [they are] now under [federal] supervision” and the concern of the Senate Committee to limit the Act’s coverage to Indian wards “taken care of at the present time.”<sup>168</sup>

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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”).

<sup>163</sup> 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).

<sup>164</sup> *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.*

<sup>165</sup> *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).

<sup>166</sup> *Ibid.*

<sup>167</sup> M-37029 at 17-18. M-37029 nevertheless dismissed the relevance of “more limiting” terms that also appeared in the legislative history like “federal supervision,” “federal guardianship,” and “federal tutelage.” *See id.* at 11.

<sup>168</sup> 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.”

Thus, we conclude that the phrase “now under federal jurisdiction” is best understood as referring to the federal administration of Indian affairs with respect to particular Indian groups.

### C. The Meaning of the Phrase “Recognized Indian Tribe.”

Because we conclude that Category 1’s grammatical structure supports interpreting the phrase “now under federal jurisdiction” as modifying “recognized Indian tribe,” we must turn to the interpretation of the phrase “recognized Indian tribe.” Despite suggesting that the term “recognized” meant something different in 1934 than it did in the 1970s, M-37029 appeared to use these historically distinct concepts interchangeably. And while today’s concept of “federal recognition” merges the cognitive sense of “recognition” and the political-legal sense of “jurisdiction,” as *Carciari* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved.<sup>169</sup>

Congress’s authority to recognize Indian tribes flows from its plenary authority over Indian affairs.<sup>170</sup> Early in this country’s history, Congress charged the Secretary and the Commissioner of Indian Affairs with responsibility for managing Indian affairs and implementing general statutes enacted for the benefit of Indians.<sup>171</sup> Because Congress has not

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<sup>169</sup> M-37029 at 8, n. 57 (citing *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (in the absence of a statutory definition of a term, the court’s “task is to construe it in accord with its ordinary or natural meaning.”); *id.* at 275 (the court “presume[s] Congress intended the phrase [containing a legal term] to have the meaning generally accepted in the legal community at the time of enactment.”)).

<sup>170</sup> *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”)).

<sup>171</sup> 25 U.S.C. § 2 (charging Commissioner of Indian Affairs with management of all Indian affairs and all matters arising out of Indian relations); 43 U.S.C. § 1457 (charging Secretary with supervision of public business relating to Indians); 25 U.S.C. § 9 (authorizing President to prescribe regulations for carrying into effect the provisions of any act relating to Indian affairs). *See also* H. Hrgs. at 37 (remarks of Commissioner Collier) (“Congress through a long series of acts has delegated most of its plenary authority to the Interior Department or the Bureau of Indian Affairs, which as instrumentalities of Congress are clothed with the plenary power, an absolutist power”); *id.* at 51 (Memorandum of Commissioner John Collier) (providing statutory examples of “the broad discretionary powers conferred by Congress on administrative officers of the Government”).

generally defined “Indian,”<sup>172</sup> it left it to the Secretary to determine to whom such statutes apply.<sup>173</sup> “Recognition” generally is a political question to which the courts ordinarily defer.<sup>174</sup>

Based on its interpretation of Category 1’s grammar, M-37029 found that a tribe could be considered “recognized” for purposes of the IRA so long as it is “federally recognized” when the Act is applied.<sup>175</sup> Arguendo, M-37029 concluded that even if “now” did modify “recognized Indian tribe,” the meaning of “recognized” was ambiguous.<sup>176</sup> M-37029 understood the term 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.”<sup>177</sup> M-37029 interpreted the IRA’s legislative history to show that in 1934, Congress used “recognized” in a cognitive or quasi-anthropological sense.<sup>178</sup> As we explain below, however, 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

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<sup>172</sup> U.S. Dept. of the Interior, Commissioner of Indian Affairs, “Indian Wardship,” Circular No. 2958 (Oct. 28, 1933) (“No statutory definition seems to exist of what constitutes an Indian or of what Indians are wards of the Government.”); *Eligibility of Non-enrolled Indians for Services and Benefits under the Indian Reorganization Act*, Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Acting Deputy Commissioner of Indian Affairs (Dec. 4, 1978) (“there exists no universal definition of ‘Indian’”). See also Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esq. on behalf of the Stillaguamish Tribe, at 8-9 (Oct. 27, 1976) (suggesting that “recognized Indian tribe” in IRA § 19 refers to tribes that were “administratively recognized” in 1934).

<sup>173</sup> *Secretary’s Authority to Extend Federal Recognition to Indian Tribes*, Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, at 1 (Aug. 20, 1974) (hereafter “Chambers Memo”) (“the Secretary, in carrying out Congress’s plan, must first determine, i.e., recognize, to whom [a statute] applies”); Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate at 5 (Jun. 7, 1974) (hereafter “Butler Letter”) (same); *Dobbs v. United States*, 33 Ct. Cl. 308, 315-16 (1898) (recognition may be effected “by those officers of the Government whose duty it was to deal with and report the condition of the Indians to the executive branch of the Government”).

<sup>174</sup> *Baker v. Carr*, 369 U.S. 186, 216 (1962) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865) (deferring to decisions by the Secretary and Commissioner of Indian Affairs to recognize Indians as a tribe as political questions)). See also Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, *Federal “Recognition” of Indian Tribes* at 2-6 (Jul. 17, 1975) (hereafter “Palmer Memorandum”).

<sup>175</sup> M-37029 at 25 (interpreting IRA as not requiring determination that a tribal applicant was “a recognized Indian tribe” in 1934).

<sup>176</sup> *Id.* at 24 (“To the extent that the courts (contrary to the views expressed here) deem the term ‘recognized Indian tribe’ in the IRA to require recognition in 1934”).

<sup>177</sup> *Ibid.* M-37029 also notes 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).

<sup>178</sup> *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).

acknowledged a trust responsibility in or before 1934. M-37029 neither acknowledged this previous understanding, nor explained why it was departing from it.

### **a. 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."<sup>179</sup> 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."<sup>180</sup> These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for loans to Indians for tuition and expenses in "recognized vocational and trade schools."<sup>181</sup> 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.

### **b. Legislative History.**

The IRA's legislative history supports interpreting "recognized" as used in Category 1 in the political-legal sense.<sup>182</sup> For example, 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.<sup>183</sup> Commissioner Collier, himself a "principal author" of the IRA,<sup>184</sup> also

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<sup>179</sup> WEBSTER'S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for "recognize" (v.t.).

<sup>180</sup> *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."

<sup>181</sup> 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."

<sup>182</sup> *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).

<sup>183</sup> *Id.* at 308 (remarks of Rep. William Hastings (Okla.)) (May 22, 1934).

<sup>184</sup> *Carciari*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

used the term “recognized” in the political-legal sense in explaining how some American courts had “recognized” tribal customary marriage and divorce.<sup>185</sup>

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 focused 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.<sup>186</sup> 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 “Indian,” which likely led Congress to insert the limiting phrase “now under federal jurisdiction.” As noted above, we interpret “now under federal jurisdiction” to modify “recognized Indian tribe” and to limit Category 1’s scope. If the meaning of “under federal jurisdiction” as used in Category 1 is not synonymous with plenary authority, as M-37029 concluded, no ethnological tribe could come “under federal jurisdiction” without some political or administrative act by federal officials. For this reason, we construe “now under federal jurisdiction” as disambiguating “recognized Indian tribe” and supporting its interpretation in a political-legal sense.

### **c. Administrative Understandings.**

Compelling support for interpreting the term “recognized” in the political-legal sense is also 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 and which M-37029 appears to have misconstrued. The HANDBOOK’s relevant passages discuss ambiguities in the meaning of the term “tribe,” not “recognized.”<sup>187</sup> Assistant Solicitor Cohen there explains that the term “tribe” may be understood in both an ethnological and a political-legal sense.<sup>188</sup> 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

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<sup>185</sup> 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. *Id.* at 80 (remarks of Commissioner Collier).

<sup>186</sup> 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).

<sup>187</sup> Cohen 1942 at 268. *Cf.* M-37029 at 24.

<sup>188</sup> 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.

ethnological groups considered as a number of independent tribes “in the political sense.”<sup>189</sup> 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.<sup>190</sup>

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.”<sup>191</sup> 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 (...) [t]he 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.”<sup>192</sup>

The Department maintained a similar understanding 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,<sup>193</sup> 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.”<sup>194</sup> 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 “a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time.*”<sup>195</sup> 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.”<sup>196</sup> Implicitly construing the phrase

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<sup>189</sup> Cohen 1942 at 268 (emphases added).

<sup>190</sup> *Ibid.* (validity of congressional and administrative actions depends 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).

<sup>191</sup> Letter from Commissioner John Collier to Ben C. Shawanese (Apr. 24, 1935).

<sup>192</sup> I OP. SOL. INT. 864 (*Oklahoma – Recognized Tribes*, Memorandum from Solicitor Nathan M. Margold to the Commissioner of Indian Affairs, (Dec. 13, 1938)); Cohen 1942 at 271.

<sup>193</sup> M-37029 at 25, n. 159 (citing *Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe*, Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs at 1 (Oct. 1, 1980) (hereafter “Stillaguamish Memo”). M-37029 relies on the Stillaguamish Memo to claim that Category 1 does not require “formal acknowledgment” to be eligible for trust-land acquisitions.

<sup>194</sup> Stillaguamish Memo 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).

<sup>195</sup> *Id.* at 2 (emphasis added).

<sup>196</sup> *Id.* at 4 (emphasis added). This is consistent with Justice Breyer’s concurring view in *Carcieri*.

“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.”<sup>197</sup> 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.<sup>198</sup>

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, which M-37029 neither referenced nor discussed, was begun under Reid Peyton Chambers, Associate Solicitor for Indian Affairs, and offers insight into how Congress and the Department understood “recognition” in 1934. It was, in fact, this historical review of “recognition” that contributed to the development of the Department’s federal acknowledgment procedures.<sup>199</sup>

Throughout the United States’ early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.<sup>200</sup> In 1871, Congress enacted legislation providing that no tribe within the territory of the United States could thereafter be “acknowledged or recognized” as an “independent nation, tribe, or power” with whom the United States could contract by treaty.<sup>201</sup> 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.”<sup>202</sup> While the question of “recognition” remained one for the political branches,<sup>203</sup> the contexts within which it arose expanded with the United States’ obligations as guardian.<sup>204</sup>

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,”<sup>205</sup>

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<sup>197</sup> *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.

<sup>198</sup> 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).

<sup>199</sup> 25 C.F.R. Part 83.

<sup>200</sup> U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.

<sup>201</sup> 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.

<sup>202</sup> *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).

<sup>203</sup> *United States v. Holliday*, 70 U.S. 407, 419 (1865).

<sup>204</sup> *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).

<sup>205</sup> *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). *See also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 1.06 at 84-93 (Nell Jessup Newton ed., 2012) (hereafter “Cohen’s 2012”) (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’s 2012 at § 3.02[8][c], n. 246 (listing examples).

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;<sup>206</sup> treaty fishing-rights claims by descendants of treaty signatories;<sup>207</sup> and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,<sup>208</sup> which included tribes previously recognized and seeking restoration or reaffirmation of their status.<sup>209</sup> 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.<sup>210</sup> In January 1975, it found that federal Indian policies had “shifted and changed” across administrations “without apparent rational design,”<sup>211</sup> 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.<sup>212</sup> Finding it imperative to do so,<sup>213</sup> Congress established the American Indian Policy Review Commission<sup>214</sup> 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.”<sup>215</sup> It was against this backdrop that the Department undertook its own review of the history and meaning of “recognition.”<sup>216</sup>

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<sup>206</sup> See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 655 (D. Me. 1975), *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).

<sup>207</sup> *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).

<sup>208</sup> AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, VOL. I [Committee Print] at 462 (GPO 1977) (hereafter “AIPRC 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”).

<sup>209</sup> 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).

<sup>210</sup> Pub. L. No. 93-580, § 1, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, (hereafter “AIPRC Act”), *codified at* 25 U.S.C. § 174 note.

<sup>211</sup> *Id.*, § 1(a). 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.”

<sup>212</sup> *Id.* at § 1(b) (citing Meriam Report).

<sup>213</sup> *Id.* at § 1(c).

<sup>214</sup> *Id.* at § 1(a).

<sup>215</sup> *Id.* at § 2(3).

<sup>216</sup> See, e.g., Butler Letter (describing authority for recognizing tribes since 1954); Chambers Memo (discussing Secretary’s authority to recognize the Stillaguamish Tribe); Palmer Memorandum.

### i. The Palmer Memorandum.

In July 1975, Alan K. Palmer, acting Associate Solicitor for Indian Affairs, prepared a 28-page memorandum on “Federal ‘Recognition’ of Indian Tribes.”<sup>217</sup> 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 Palmer Memorandum noted that “the entire concept is in fact quite murky.”<sup>218</sup> It found 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.<sup>219</sup> It further found 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*.”<sup>220</sup> Despite these ambiguities, the Palmer Memorandum concluded that the concept of “recognition” could not be dispensed with, as it had become an accepted part of Indian law.<sup>221</sup>

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,<sup>222</sup> 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.<sup>223</sup> Though treaties remained a “prime indicia” of political “recognition,”<sup>224</sup> 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,”<sup>225</sup> including the provision of trust services.<sup>226</sup>

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<sup>217</sup> Associate Solicitor Reid P. Chambers approved the Palmer Memorandum in draft form. *Id.* The Palmer Memorandum came on the heels of earlier consideration by the Department of the Secretary’s authority to acknowledge tribes.

<sup>218</sup> Palmer Memorandum at 23.

<sup>219</sup> *Id.* at 23-24.

<sup>220</sup> *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.

<sup>221</sup> *Ibid.*

<sup>222</sup> The Palmer Memorandum 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.

<sup>223</sup> *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”).

<sup>224</sup> *Id.* at 3.

<sup>225</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* AIPRC 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.”).

<sup>226</sup> Palmer Memorandum at 2; AIPRC 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 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

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."<sup>227</sup> It described 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"<sup>228</sup> toward a tribe, consistent with the evolution of federal Indian policy.<sup>229</sup>

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included treaties;<sup>230</sup> the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."<sup>231</sup> 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;<sup>232</sup> 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;<sup>233</sup> the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;<sup>234</sup> the establishment of schools and other service institutions for the benefit of a tribe; the supervision of tribal contracts; the establishment by the

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(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.").

<sup>227</sup> Palmer Memorandum at 2-14.

<sup>228</sup> *Id.* at 14.

<sup>229</sup> Having ratified no new treaties since 1868, ARCIA 1872 at 83, 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, 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...").

<sup>230</sup> Butler Letter at 6; Palmer Memorandum at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).

<sup>231</sup> *Ibid.* (citing Cohen 1942 at 271); Palmer Memorandum at 19.

<sup>232</sup> *Id.* at 5; Palmer Memorandum 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).

<sup>233</sup> Palmer Memorandum at 19 (citing Cohen 1942 at 271)); Butler Letter at 4.

<sup>234</sup> *Ibid.*

Department of an agency office or Superintendent for a tribe; the institution of suits on behalf of a tribe;<sup>235</sup> 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.<sup>236</sup> In making such determinations, the Department looked to indicia established by federal courts.<sup>237</sup> There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.<sup>238</sup> 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."<sup>239</sup> Because the Department had the authority to "recognize" a tribe for 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."<sup>240</sup>

The manner in which the Department understood "recognition" before, in, and long-after 1934<sup>241</sup> supports our interpretation of "recognized" in Category 1 to mean something different than the formal concept of "federal recognition" (or "federal acknowledgment") as understood today. It further supports our understanding 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.**

As noted above, the grammatical construction of Category 1 supports reading the phrase "now under federal jurisdiction" as modifying "recognized Indian tribe." Based on our interpretation of its component phrases, we conclude that Category 1 as a whole was 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-

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<sup>235</sup> *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)).

<sup>236</sup> *Id.* at 18.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> *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.").

<sup>240</sup> *Ibid.*

<sup>241</sup> *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 the federal government as having collective rights in lands or funds; and federally-held lands for collective ancestors).

sovereign basis or clearly acknowledging a trust responsibility, and who remained under federal authority in 1934.

This construction of “recognized Indian tribe” and “now under federal jurisdiction” suggests that in 1934, each phrase referred to a different aspect of a tribe’s trust relationship with the United States. As discussed, “recognition” then referred to actions which the federal government took in relation to tribes with whom it clearly dealt on a more or less sovereign-to-sovereign basis or as to whom it clearly acknowledged a trust responsibility as evidenced by actions taken by federal officials toward a tribe as such for political-legal purposes. 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. M-37029 similarly noted that a “particular exercise of plenary authority” was the prerequisite for showing that a tribe was “under federal jurisdiction.”<sup>242</sup> By contrast, the phrase “under federal jurisdiction” referred to the supervisory and administrative responsibilities of federal authorities toward a tribe thereby established. We therefore conclude that the phrase “any recognized Indian tribe now under federal jurisdiction” in Section 19 of the IRA refers to tribes for whom the United States maintained trust responsibilities in 1934.

Based on this understanding, we conclude that Congress intended the phrase “now under federal jurisdiction” to exclude two categories of tribe from Category 1. 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.<sup>243</sup> Though outside Category 1’s definition of “Indian,” Congress may later enact legislation recognizing and extending the IRA’s benefits to such tribes, as *Carciere* instructs.<sup>244</sup> For purposes of conducting the 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

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<sup>242</sup> M-37029 at 18.

<sup>243</sup> *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?”).

<sup>244</sup> *Carciere*, 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).

States maintained trust responsibilities in 1934, despite the federal government's neglect of those responsibilities.<sup>245</sup>

The legislative history of the IRA reflects the Department's own uncertainty over the tribes that remained under federal supervision in 1934, which was understandable given that the Department maintained no official list of recognized tribes and had no formal policy or process for determining recognition in 1934.<sup>246</sup> Subsequent efforts by the Solicitor's Office to implement Category 1 demonstrated the time-intensive and fact-specific nature of each inquiry, which may have prompted the observation from the time that the phrase "now under federal jurisdiction" would provoke "interminable questions of interpretation."<sup>247</sup> M-37029 interpreted this remark as referring to the semantic ambiguity of "jurisdiction." However, it might better be interpreted as referring to the challenges in determining which of the tribes previously brought under federal authority remained "under federal jurisdiction" in 1934.<sup>248</sup> This issue could explain why, soon after the IRA's enactment, Assistant Solicitor Cohen discussed evidence that might show a tribe's loss of federal jurisdictional status,<sup>249</sup> which must be positive and unambiguous,<sup>250</sup> and could include acts of Congress; the language of specific treaty provisions; and actions by tribes themselves.<sup>251</sup> Negative forms of evidence could include "the cessation of collective action and collective recognition;"<sup>252</sup> the physical separation of a group from the main body of a tribe; and the cessation of participation in tribal resources and tribal government."<sup>253</sup>

## II. Conclusion

While we find that the IRA does not define the meaning of the phrases "under federal jurisdiction" and "recognized Indian tribe," we conclude that they should be interpreted differently than M-37029. In 1934, the ordinary meaning of "jurisdiction" included the sense of

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<sup>245</sup> 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).

<sup>246</sup> *Cty. of Amador*, 872 F.3d at 1023 (citing *Wood* 2016 at 429–30; Cohen's 2012, § 3.02[7][a] at 153 (noting "the history of inconsistent, vague, and contradictory policies surrounding the recognition of tribes"))).

<sup>247</sup> See M-37029 at 12 (citing *Analysis of Differences Between House Bill and Senate Bill* at 14-15, Box II, Records Concerning the Wheeler Howard Act, 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4) (undated) (National Archives Records)).

<sup>248</sup> See, e.g., I OPS. SOL. INT. 724, *Status of St. Croix Chippewa Indians*, Memorandum from Solicitor Nathan R. Margold (Feb. 8, 1937) (finding St. Croix Chippewa Indians no longer "recognized" based on prior Congressional and Departmental actions); I OPS. SOL. INT. 735, *Status of Nahma and Beaver Indians*, Memorandum from Acting Solicitor Frederic L. Kirgis (Mar. 15, 1937) (not recognized or under federal jurisdiction).

<sup>249</sup> Cohen 1942 at 272.

<sup>250</sup> *Id.* at 273; *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) (evidence of termination by Congress must be clear and explicit) (citing *Morton v. Mancari*, 417 U.S. 535 (1974)); *U.S. v. Ramsey*, 271 U.S. 467, 469 (1926) (Congress alone may determine when the federal relationship with a tribe shall cease); List Act, § 103(4) (only Congress may terminate tribes recognized by legislation, the courts, or Part 83 procedures).

<sup>251</sup> *Id.* at 272.

<sup>252</sup> *Ibid.* However, neither allotment nor the granting of citizenship to Indians could imply a termination of tribal relations. *Ibid.* (citing *United States v. Nice*, 241 U.S. 591 (1916)).

<sup>253</sup> *Id.* at 273.

being under government supervisory and administrative authority. Based on that, and with support from with IRA’s legislative history, we conclude that the phrase “under federal jurisdiction” as used in Category 1 refers to the federal government’s supervisory and administrative responsibilities toward tribes as such. Like M-37029, we interpret “recognized” as it appears in Category 1 to mean something different from the modern concept of “federally recognized.”<sup>254</sup> Unlike M-37029, we believe Congress understood this term in a political-legal, not an ethnological sense. We further note that the construction of “recognized Indian tribe” described herein is a return to the Department’s prior, long-held understanding of the phrase. The historical analysis of “recognition” prepared by the Solicitor’s Office in 1975 supports our view that in 1934, both the Department and Congress would have understood “recognized Indian tribe” to refer to those tribes over whom appropriate federal officials had exercised plenary authority through political or administrative acts. Based on Category 1’s grammar, we interpret the phrase “now under federal jurisdiction” as modifying “recognized Indian tribe,” and thus we 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.<sup>255</sup>

For the reasons explained above, we conclude that our construction of Category 1 better reflects the ordinary meaning, statutory context, legislative history, and the Department’s long-held understanding of the phrase “recognized Indian tribe now under federal jurisdiction.” We therefore recommend withdrawing M-37029. Further, we attach procedures that are consistent with our construction of Category 1 that can be used to guide Solicitor’s Office attorneys in determining the eligibility of applicant tribes under Section 19’s first definition of “Indian.”

Attachment: Draft Memorandum, *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act*.

Corrections: Minor scrivener’s errors identified following this Memorandum’s issuance have been corrected. These corrections do not in any way affect the Memorandum’s substance.

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<sup>254</sup> The Ninth Circuit concluded that “when read most naturally,” the phrase “recognized Indian tribe now under federal jurisdiction” includes all tribes under federal jurisdiction in 1934 and “recognized” at the time the IRA is applied. *Cty. of Amador*, 872 F.3d at 1023 (describing Department’s pre-*Carciari* administrative practice of treating all “federally recognized Indian tribes” as eligible for trust-land acquisitions “so long as those tribes were recognized as of the time the land was placed in trust”). By “recognized,” however, the Ninth Circuit appears to have meant “federally recognized.” *Ibid.* (noting that lack of comprehensive list of recognized tribes or ‘formal process for determining tribal status in 1934 made it unlikely that Congress intended IRA’s applicability to turn on whether a tribe “happened to have been recognized by a government that lacked a regular process for such recognition”). See also *Grand Ronde*, 830 F.3d at 561.

<sup>255</sup> Consistent with the IRA’s intent to end federal policies of allotment and assimilation and to remedy their deleterious effects, we do not take the view that Department officials must have been cognizant at the time of the IRA’s enactment that a tribe was “recognized” or “under federal jurisdiction.” In our view, the IRA does not preclude the Department from correcting past errors and confirming whether a tribe was “under Federal jurisdiction” on the date it was enacted as part of its official efforts to implement the statute. See *Cty. of Amador*, 872 F.3d at 1023-24; *Carciari*, 555 U.S. at 397-98 (Breyer, J., concurring).