United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Secretary
Assistant Secretary – Indian Affairs

From: Solicitor

Subject: Interpreting the Second Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934

The purpose of this opinion is to provide interpretations of certain terms in the second definition of "Indian" ("Category 2") found at Section 19 of the Indian Reorganization Act of 1934 ("IRA" or "Act").[1] Doing so will help guide implementation of the discretionary authority of the Secretary of the Interior ("Secretary") to take land into trust for Indians under Section 5 of the IRA ("Section 5").[2]

I. BACKGROUND

Section 5 of the IRA provides the Secretary discretionary authority to acquire land in trust for "Indians." Section 19 of the Act ("Section 19") defines "Indian" as including:

> **[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.[3]

In 2015, the Department of the Interior ("Department") issued a record of decision approving a trust-acquisition request pursuant to Section 5 that relied on an analysis prepared by the Office of the Solicitor ("Solicitor's Office") of certain terms identified in Category 2.[4] This is

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[1] Act of June 18, 1934, ch. 576, 48 Stat. 984, *codified at* 25 U.S.C. § 5101, *et seq.*

[2] IRA, § 5, codified at 25 U.S.C. § 5108.

[3] IRA, § 19 (bracketed numerals and emphasis added), codified at 25 U.S.C. § 5129. Section 19 also defines the term "tribe" for purposes of the Act.

[4] U.S. Department of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe ("Mashpee" or "Tribe") (Sep. 18, 2015) (hereinafter the "ROD").

the only time the Department has relied on Category 2 to find a tribe eligible for trust-land acquisitions under Section 5.

In support of its determination, the ROD identified several ambiguities in Category 2. The first concerns the referent of "such" in the phrase "such members." The ROD found it to incorporate "members of any recognized Indian tribe" but not the phrase "now under federal jurisdiction."[5] The United States District Court for the District of Massachusetts ("District Court") rejected this interpretation,[6] concluding that "such members" unambiguously incorporates the entirety of the phrase "recognized Indian tribe now under federal jurisdiction." This decision was upheld by the United States Court of Appeals for the First Circuit ("First Circuit") in a unanimous opinion authored by former Chief Judge Sandra Lynch and joined by Associate Justice (Ret.) David Souter, sitting by designation, and Senior Judge Kermit Lipez.[7]

The second ambiguity concerns the meaning of the expression "descendants of such members who were, on June 1, 1934, residing (...)." The pronoun "who" leaves unclear whether the reservation-residence requirement applies to Category 1's "members" or Category 2's "descendants." The difference is significant. If it is "members" who must have lived on a reservation in 1934, then the persons comprising the class of eligible "descendants" is potentially limitless. If it is "descendants" who must have resided on a reservation in 1934, then the class of eligible persons is historically finite. Although the ROD had no need to resolve this question based on the facts before it,[8] it nevertheless suggested that the Department's prior interpretations of the requirement, which had limited its applicability to "descendants," might not apply where *tribal*, as opposed to *individual*, trust land acquisitions under Section 5 of the IRA were involved.[9]

The third ambiguity identified in the ROD concerns the meaning of the phrase "any Indian reservation," which the IRA does not define. The ROD considered the IRA's legislative history and early implementation, as well as the Indian canon of construction, before interpreting the phrase to mean lands set aside with legal effect for Indian use and occupation, irrespective of federal superintendence.[10]

For the reasons explained below, we reaffirm the Department's long-standing view that Category 2 requires the "descendants" of enrolled members of a recognized Indian tribe under federal jurisdiction in 1934 to have resided on an Indian reservation as of June 1, 1934. We

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[5] ROD at 93.

[6] *Littlefield v. United States Dep't of the Interior*, 199 F. Supp. 3d 391, 399-400 (D. Mass. 2016) (hereafter "*Littlefield*"). Because the ROD did not address eligibility under Category 1, the District Court afforded the Department the opportunity to consider this issue on remand, which it did, applying its procedures for determining eligibility under Category 1. The Department concluded that the Tribe did not sufficiently demonstrate that it was under federal jurisdiction in 1934. *See* Letter, Tara Sweeney, Assistant Secretary, Indian Affairs, to Hon. Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe at 15 (Sep. 7, 2018) (hereafter "Remand Decision").

[7] *Littlefield v. Mashpee Wampanoag Indian Tribe*, No. 16-2484, 2020 WL 948895 (1st Cir. Feb. 27, 2020).

[8] The ROD found it unnecessary to independently determine whether Category 2's reservation-residence requirement applies to "members" or "descendants" because the applicant tribe presented facts sufficient to satisfy either interpretation.

[9] ROD at 100.

[10] *Id.* at 98-99.

further conclude that based on the IRA's structure, history and purpose, as well as the Department's contemporaneous understanding, the phrase "any Indian reservation" in Category 2 is properly understood as referring only to lands set aside for the use or occupancy of Indians under federal authority or for which the United States assumed obligations sufficient to establish ongoing federal superintendence in 1934.

II. DISCUSSION

A. Statutory Interpretation

1. Statutory Construction and Deference

We interpret Category 2 using the two-step analysis articulated in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* in reviewing an agency's statutory interpretation.[11] First we examine "whether Congress has directly spoken to the precise question at issue."[12] If the intent of Congress is clear, the inquiry ends, and the Department "must give effect to the unambiguously expressed intent of Congress."[13] Step one is conducted using traditional tools of statutory construction[14] "including an examination of the statute's text, legislative history, and structure, as well as its purpose."[15] Only if the language is "silent or ambiguous with respect to the specific issue"[16] does the analysis proceed to step two. Under step two, the Department's interpretation of a statutory ambiguity is accorded deference so long as it is based on a "permissible construction"[17] and Congress has delegated authority to the Department to fill the gaps of the statute.[18] Because Congress charged the Department with administering the IRA,[19] courts should defer[20] to the Department's reasonable interpretation of the IRA's statutory text, even if the court would have otherwise reached a contrary conclusion.[21]

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[11] *Chevron U.S.A., Inc. v. Natural Resource Def. Council*, 467 U.S. 837, 842-43 (1984).

[12] *Id.* at 842.

[13] *Id.* at 842-43.

[14] *Id.* at 843 n.9.

[15] *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).

[16] *Chevron*, 467 U.S. at 843.

[17] *Id.* at 840.

[18] *Id.* at 865-66.

[19] *County of Amador v. United States Department of the Interior*, 872 F.3d 1012, 1021 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 64 (2018) (hereafter "*Cty. of Amador*") (citing *Grand Ronde*, 830 F.3d 552, 559 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017); *United States v. Eberhardt*, 789 F.2d 1354, 1359–60 (9th Cir. 1986)).

[20] *Chevron*, at 844-45.

[21] *Id.* at 840.

2. Summary of Interpretations

This opinion reaffirms the Department's previous and long-held view that Category 2's reservation-residence requirement applies to the "descendants" of enrolled members of a recognized Indian tribe, and thereby refers to a closed class of eligible persons. Further, and contrary to the ROD, this opinion concludes that Congress did not intend the term "reservation" in Category 2 to include non-federal reservations. The ROD found that the phrase "any Indian reservation" was ambiguous and interpreted it to include lands set aside by federal, state, or colonial authorities.[22] Interpreting the phase within its statutory context provides sufficient clarity that Congress intended the phrase to refer to lands set aside under *federal* authority or for which the United States otherwise assumed obligations sufficient to establish ongoing federal superintendence in 1934. The text's clear meaning is consistent with the IRA's semantics, purpose and intent, and the Department's historical implementation of Category 2.

The Indian canon of construction requires that we interpret ambiguous statutes in favor of Indians.[23] It does not, however, permit the Department to disregard Congress's clearly expressed intent.[24] The ROD's conclusion that Congress intended to include non-federal reservations runs contrary to the unambiguous meaning of the term "reservation" as it was used in Section 19 of the IRA. We acknowledge, however, that the methods of statutory construction which constitute "traditional tools" and the level of clarity required to conclude that Congress "directly addressed the precise question at issue" is an open question.[25] Nevertheless, our interpretation would not change even if we found the statutory phrase "any Indian reservation" ambiguous based on the IRA's legislative history, purpose, and policy.

Changes in an agency interpretation of ambiguities in statutes it is charged with implementing may be permitted over time.[26] As the Supreme Court explained in *Chevron*, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency (...) must consider varying interpretations and the wisdom of its policy on a continuing basis."[27] In *National Cable & Telecommunications Association*, the Supreme Court held that "[o]nly a judicial precedent holding that [a] statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[28]

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[22] ROD at 98.

[23] *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

[24] *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

[25] *Chevron*, 467 U.S. at 843. *See, e.g., Scialabba v. De Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) (concluding statute "does not speak unambiguously to the issue here"). *Id.* at 2219 (Sotomayor, J., dissenting) (concluding statute "answers the precise question in this case").

[26] *Rust v. Sullivan*, 500 U.S. 173, 186-187 (1991); *see generally FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (ruling that when reviewing agency actions under the Administrative Procedure Act's "arbitrary" and "capricious" standard courts should not apply a "more searching review" simply because the agency changed course).

[27] *Chevron*, 467 U.S. at 863-64.

[28] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

We acknowledge that construction of the phrase "any Indian reservation" may affect certain reliance interests. As the Supreme Court explained in *Encino Motorcars, LLC v. Navarro*, "an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[29] There, the Supreme Court found a substantial reliance interest where the U.S. Department of Labor changed a 33-year-old policy that classified entire categories of employees throughout an industry. The Supreme Court noted that industry-wide practices, including the negotiation and structuring of employee compensation plans, were based upon prior agency policy; that the change was directly contrary to case law; and that the new policy would require costly systemic changes.[30]

The Department's changed understanding of the meaning of the phrase "any Indian reservation" in Category 2 does not affect substantial reliance concerns of the magnitude discussed in *Encino Motors*. The ROD remains the only instance to date in which the United States has interpreted the phrase "any Indian reservation" in a record of decision to take land into trust for a tribe. The *Littlefield* litigation challenging the ROD commenced soon after the ROD's issuance in 2015. Though Plaintiffs challenged the ROD's interpretation of "any Indian reservation" in Category 2, the District Court based its decision only on its interpretation of "such members," a decision the First Circuit since affirmed. Thus, the ROD's interpretation of "reservation"[31] remains unresolved. This longstanding uncertainty, and the fact that courts have yet to reach the ROD's interpretation of "reservation," militate against any reasonable reliance on the ROD's interpretation.

B. Applicability of Section 19 Generally

It is necessary first to address the suggestion that eligibility under Section 19 depends on the applicant and the IRA benefits sought. The ROD noted that the Department has construed Category 2's reservation-residence requirement as applying to "descendants" in the context of Indian preference in Section 12 of the IRA, which is "solely applicable to individuals, not tribes."[32] The ROD then questioned the Department's land-into-trust regulations, which rely on this interpretation to define "individual Indian."[33] The ROD explained that since their promulgation in 1980, the Department's land-into-trust regulations have defined the phrase "individual Indian" as any "descendant" of an enrolled member of a tribe where "said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation."[34] Though it provided no further explanation or analysis, the ROD could be read to suggest that the Department will apply Category 2 differently to *individuals* seeking trust land acquisitions under Section 5 than to *tribes* seeking the same benefits.[35] Because such an outcome would be contrary

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[29] 136 S. Ct. 2117, 2126 (2016) (citing *F.C.C. v. Fox Television*, 556 U.S. at 515 (2009)).

[30] *Encino Motorcars*, 136 S. Ct. at 2126.

[31] *Littlefield*, 199 F. Supp. 3d at 399. *See also* First Amended Complaint, *Littlefield*, Case No. 16-cv-10184 at ¶¶ 22-27, 136, ECF No. 12.

[32] ROD at 100.

[33] *Ibid.*

[34] 25 C.F.R. § 120a.2(c)(2) (1980); 25 C.F.R. § 151.2(c)(2) (2018).

[35] ROD at 100.

to the plain language of the IRA and to the Department's long-standing interpretation of its terms, we take this opportunity to reject any such suggestion.

Section 5 authorizes the Secretary to acquire land in trust "for Indians." Category 2 defines "Indian" as including certain persons of Indian descent who, in 1934, resided "within the present boundaries of any Indian reservation." Category 2 does not itself reference "tribes." However, Section 19 elsewhere directs that the term "tribe" shall be construed as including "the Indians residing on one reservation."[36] Thus, while those eligible under Category 2 may *also* be considered a "tribe," by its own terms, Category 2 refers only to "Indians."[37] There is consequently no basis in the IRA's text to support the ROD's suggestion that Category 2 may be applied differently to tribes and individual Indians. The ROD might further be read to suggest that the Department's interpretation of ambiguities in Category 2 might vary depending on the applicant. Lacking any support in the statutory text, such a result would be contrary to the fundamental tenets of administrative practice. If Section 19 applies to all applicants for IRA benefits, then the Department's interpretation of Section 19's ambiguities must do the same. Similarly, and contrary to the ROD's suggestion, the requirements of Section 19 do not change depending on the benefits an applicant seeks. By their terms, Section 5 and Section 12 of the IRA apply to "Indians," which Congress defined in Section 19 and which it did not otherwise limit through Section 5 or Section 12.

C. "Members" or "Descendants"

The ROD concluded that Category 2's reservation-residence requirement is ambiguous for leaving unclear whether it applies to "members" or "descendants." To avoid any uncertainty for future tribal applicants seeking to rely on Category 2, we hereby reaffirm the Department's long-standing position that Section 19's reservation-residence requirement applies to those persons who resided on an Indian reservation on June 1, 1934 and who descended from the members of a recognized Indian tribe.

1. Legislative History

The IRA's legislative history supports the view that Congress intended Category 2's reservation-residence requirement to apply to the descendants of members of a recognized Indian tribe. As introduced in February 1934, H.R. 7902 and S. 2755 contained two definitional provisions referring to reservation residence. The first appeared in title I ("Indian Self-Government"), section 13(b) of H.R. 7902. It provided:

> The term 'Indian' as used in this title to specify the persons to whom charters may be issued, shall include all persons of Indian descent who **[1]** are members of any recognized Indian tribe, band, or nation, *or* **[2]** *are descendants of such members*

[36] IRA, § 19 (emphasis added).

[37] ROD at 93 (second definition of "Indian" applies to individual Indians and tribes).

> *and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation* (...).[38]

The second part of section 13(b) expressly limited eligibility to persons who descended from tribal members *and* who resided within an Indian reservation in 1934. The Senate Committee on Indian Affairs ("Senate Committee") interpreted it this way when analyzing an identical provision in S. 2755, the Senate version of H.R. 7902 as introduced. The Senate Committee characterized it as including "all persons of Indian descent who are members of existing tribes or descendants of members *and* who reside within existing reservations."[39]

A separate reservation-residence requirement appeared in title III ("Indian Lands"), section 18 of both H.R. 7902 and S. 2755. It defined the phrase "a member of an Indian tribe" as including "any descendant of a member permanently residing within an existing Indian reservation."[40] Like Section 19 of the IRA, this language leaves unclear whether "permanently residing within an existing Indian reservation" modifies "any descendant" or "a member [of an Indian tribe]." However, in its analysis of section 18, both the Senate Committee and the House Committee characterized this language as intended to include individuals "excluded from any final roll of an Indian tribe but nevertheless belonging in every social sense to the Indian group."[41] The committee print of H.R. 7902 for the House of Representatives Committee on Indian Affairs ("House Committee") incorporated certain amendments, typographical corrections, and minor changes of language.[42] Section 13(b) of title I was renumbered as section 15(b) and amended as follows:

> The term "Indian" as used in this title to specify the persons to whom charters may be issued, shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, ~~or~~ and all persons who are descendants of such members who were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation...[43]

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[38] H.R. 7902, 73d Cong., tit. I, § 13(b) (introduced Feb. 12, 1934) (bracketed numbers and emphasis added). H.R. 7902 title I, § 13(c) defined "residing upon any Indian reservation" as requiring a permanent abode for a continuous period of at least one year prior to February 1, 1934 and subsequent to September 1, 1932.

[39] *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 23 (1934) ("Sen. Hrgs.") (emphasis added).

[40] H.R. 7902, tit. III, § 18, 73d Cong. (introduced Feb. 12, 1934) (emphasis added). S. 2755, tit. III, § 18 (introduced Feb. 12, 1934).

[41] ROD at 82 (citing *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs, House of Representatives*, 73d Cong. at 27 (1934) ("H. Hrgs.")); *see also* Sen. Hrgs. at 28. At the time, Commissioner Collier believed there would be few applicants under Category 2 since most persons within it would be considered members of a recognized Indian tribe "except where a final roll has been made." *See* U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 3134, Enrollment under the Indian Reorganization Act at 1 (Mar. 7, 1936) ("Circ. 3134").

[42] H. Hrgs. at 196-199.

[43] *Id.* at 196 (deletions shown struck-through, additions underscored).

Though the proposed change contains the same ambiguity at issue here, the House Committee explained that its purpose was

> (...) to clarify the intent of the section that residence upon a reservation is deemed an essential qualification of charter membership in a community *only with respect to persons who are not members of any recognized Indian tribe* and not possessed of one fourth degree of Indian blood.[44]

The amended language is the same as that in Category 2 as it appears in the committee print before the Senate Committee on May 17, 1934.[45]

Interpreting Category 2's reservation-residence requirement as limited to descendants is further consistent with the views of John Collier, Commissioner of Indian Affairs, as expressed in his colloquy with Senator Thomas of Oklahoma at the time:

> Senator Thomas: Well, if someone could show that they were a descendant of Pocahontas, although they might be only five-hundredths Indian blood, they could come under the terms of this act.
>
> Commissioner Collier: If they are actually residing within the present boundaries of an Indian reservation at the present time.[46]

Commissioner Collier's interpretation comports with the Senate Committee's earlier analysis of title I, section 13 of S. 2755, which describes the Indians to whom charters could be granted, as including "all persons of Indian descent who are members of existing tribes or descendants of members and who reside within existing reservation."[47]

2. Administrative Interpretations

a. Departmental Guidance Circa 1934

Stronger evidence that Congress and the Department understood Category 2's reservation-residence requirement as applying only to "descendants" comes from the Department's earliest implementation and discussion of the Act. For example, Commissioner Collier issued an undated memorandum in the form of questions and answers about the IRA to explain the Act's provisions for Department personnel responsible for its implementation. One question directly addressed Category 2's ambiguous reservation-residence requirement:

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[44] *Ibid.* (emphasis added).

[45] Sen. Hrgs. at 234.

[46] *Id.* at 264.

[47] *Id.* at 23.

> Q. Section 19 – Does the second 'who' beginning 'who were on June 1, 1934' and ending 'any Indian reservation' refer to Indians mentioned in first [*sic*] part or the actual descendants of Indians?
>
> Ans. Refers to descendants.[48]

In separate guidance issued around the same time, Commissioner Collier explained that while every adult "member of a recognized tribe" could vote in a Section 18 election, "the descendants, the children and grandchildren, of non-members can vote at this election *only if they were actually living on the reservation on June 1, 1934.*"[49]

Immediately after the IRA's enactment, Hastings Robertson, a South Dakota county judge, wrote the Department to ask "Does [Category 2] mean that the person of Indian descent must have resided within the present boundaries of an Indian reservation on June 1st, 1934, or does it mean that the ancesters [*sic*] must have so resided on June 1st, 1934?"[50] Judge Robertson had previously discussed the issue with the Rev. Henry Roe Cloud, a well-known Indian education reformer and a co-author of the Merriam Report.[51] They had anticipated that the IRA would include a provision for the enrollment of an Indian "not a member of any tribe by enrollment, whose ancestors had been members of some tribe at any time prior to the passage of the [Act], if the member seeking enrollment was living within the bounderies [*sic*] of an Indian reservation on June 1st 1934." William Zimmerman, Jr., Assistant Commissioner of Indian Affairs, explained in response that Category 2's reservation-residence requirement applied "to the person, not the ancestor."[52] Responding to similar inquiry from around the same time, John Herrick, Assistant to the Commissioner of Indian Affairs, also explained that Category 2 includes "such descendants of enrolled Indians as were residing on an Indian reservation as of June 1, 1934,"[53] adding that

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[48] Questions and Answers Concerning the Indian Reorganization (Modified Wheeler-Howard) Act, Commissioner John Collier (92420) at 16 (n.d.); Notebook 1, Box 25; Entry 132-B Circulars, Orders, and other Issuances, 1877-1947; Record Group 75; National Archives and Records Administration – Washington, D.C.

[49] John Collier, Commissioner of Indian Affairs, Facts About the New Indian Reorganization Act, No. 96377 at 8 (n.d.) (emphasis added).

[50] Letter from the Hon. Hastings Robertson, County Judge, Bennett County, South Dakota to Commissioner of Indian Affairs John Collier (Jul. 2, 1934). *See also* Letter from John Herrick, Assistant Commissioner of Indian Affairs to Joe Whitebear (Aug. 12, 1936) (second definition includes "such descendants of enrolled Indians as were residing on an Indian reservation as of June 1, 1934[, but d]escendants who were not enrolled and were not residing on the Indian reservation on that date would not come under the term").

[51] Yale College, Native American Cultural Center, https://nacc.yalecollege.yale.edu/house/history (last visited Dec. 22, 2019) (the Rev. Henry Roe Cloud was a member of the Winnebago Nation of Nebraska and in 1910 became the first Native American graduate of Yale University).

[52] Letter from William Zimmerman, Jr., Asst. Commissioner of Indian Affairs, to the Hon. Hastings Robertson, County Judge, Bennett County, South Dakota (Jul. 20, 1934).

[53] Letter from John Herrick, Assistant to the Commissioner of Indian Affairs, to Joe Whitebear (Aug. 12, 1936).

> Descendants who were not enrolled and were not residing on the reservation on that date would not come under the term[s of the Act], unless they could qualify under part three [*i.e.*, the third definition of "Indian"].[54]

Around 1938, the Office of Indian Affairs ("OIA") finalized rules and regulations to govern Secretarial elections conducted under the IRA.[55] These memorialized the Department's position that the descendants of tribal members who were not enrolled as tribal members could vote only if they resided on the reservation and were otherwise recognized as members of the tribe.[56]

b. Associate Solicitor Guidance

The Solicitor's Office continued to interpret Category 2's reservation-residence requirement as applicable to "descendants" throughout the 1970s and 1980s. In 1976, Reid P. Chambers, Associate Solicitor for Indian Affairs, prepared a memorandum for the Commissioner of Indian Affairs addressing the "frequently raised" ambiguity of the reservation-residence requirement.[57] Associate Solicitor Chambers noted that Category 2 left unclear whether the phrase "who were (...) residing" refers to "members" or to "descendants." He concluded that the correct interpretation was that the reservation-residence requirement applies to "descendants" and thus establishes a closed category of eligible persons. This was consistent with the Act's legislative history,[58] as well as the overall scheme of the IRA, which allowed "descendants" to become "members" of tribes by reorganizing under the Act.[59] Though offered in the context of the question presented, Associate Solicitor Chambers concluded that Congress did not likely intend "a proliferation of (...) eligibility over time."[60] Two years later, Thomas W. Fredericks, then serving as Associate Solicitor for Indian Affairs, expressed the same view in describing Category 2 as applying to the descendants of members of a recognized Indian tribe "if the descendant was residing within the boundaries of a reservation in 1934."[61]

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[54] *Ibid.*

[55] Rules and Regulations governing Elections Under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as Approved by the Secretary of the Interior August 20, 1935 and Amended October 18, 1935, and March 24, 1938, No. 32309 (n.d.).

[56] *Id.* at 2.

[57] Application of Definition of Indian in 25 U.S.C. § 479 to Descendants of Members Born After June 1, 1934, Memorandum from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs (Mar. 24, 1976) ("Chambers Op."). This memorandum was prepared in response to discussions on whether to conform the blood-quantum used for Indian employment preference to that set forth in Category 3 of Section 19.

[58] Chambers Op. at 3 (citing Sen. Hrgs. at 263-64 (exchange between Senator Elmer Thomas and Commissioner of Indian Affairs John Collier)).

[59] *Id.* at 2-3. Chambers explained that with "the adoption of a basic organic tribal document pursuant to the Act, formal membership criteria were established for the first time," which would then officially make the descendants "members of a recognized Indian tribe" under the first definition.

[60] *Id.* at 3.

[61] Eligibility of Non-enrolled Indians for Services and Benefits under the Indian Reorganization Act, Memorandum from Associate Solicitor, Indian Affairs, to Acting Deputy Commissioner of Indian Affairs (Dec. 4, 1978).

c. Land-into-Trust Regulations

In 1978, the Department proposed regulations to govern the trust acquisition of land for tribes and individual Indians.[62] They defined the term "individual Indian" as including:

> Any person who is a descendent of [an enrolled member] and said descendent was, on June 1, 1934, physically residing on a *federally recognized Indian reservation.*[63]

The Department explained that this was the definition the Bureau of Indian Affairs used for purposes of Indian preference.[64] In promulgating the final rule,[65] the Department addressed objections by further explaining that the definition was based on "administrative precedent and applicable statutes."[66] This definition of "individual Indian" remains in effect today.[67]

3. Purpose and Intent

Interpreting Category 2's reservation-residence requirement as applicable to "descendants" is consistent with Congress's intent to limit the IRA's benefits to Indians for whom the United States had already established federal obligations. Commissioner Collier suggested inserting the phrase "now under federal jurisdiction" after the expression "recognized Indian tribe" in Category 1, describing it as a "limiting phrase" in response to concerns expressed by members of the Senate Committee. The Department since then has consistently maintained that while Congress did not intend the IRA to "cut off any Indians" for whom the United States had assumed obligations, the IRA's drafters "intended to exclude at least some groups which could be considered Indians in a cultural or governmental sense."[68] Section 19 thus "requires that some type of obligation or extension of services to a tribe must have existed *in* 1934."[69] Consistent with this position, in floor debates in the House of Representatives before the IRA's passage, the Chair of the House Committee explained that Section 19 was intended, among other things, "to prevent persons (...) not already members of a tribe or descendants of such members living on a reservation" from claiming the Act's benefits.[70]

4. Summary

Interpreting Category 2's reservation-residence requirement as applying to "members" would be contrary to Congressional intent. That interpretation would establish a potentially

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[62] 43 Fed. Reg. 32311 (July 19, 1978). The Department's land into trust regulations, today classified at 25 C.F.R. Part 151 (hereafter "Part 151"), were originally classified at 25 C.F.R. Part 120a.

[63] 25 C.F.R. § 120a.2(c) (1980) (emphasis added).

[64] 43 Fed. Reg. 32311.

[65] 45 Fed. Reg. 62034 (Sep. 18, 1980).

[66] *Ibid.*

[67] 25 C.F.R. § 151.2(c)(2) (2018).

[68] Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs at 4 (Oct. 1, 1980) ("Stillaguamish Memo").

[69] *Id.* at 6. *See also Carcieri v. Salazar*, 555 U.S. 379 (2009) (the term "now" in Category 1 means "1934").

[70] 78 Cong. Rec. 12056 (Jun. 15, 1934) (remarks of Rep. Edgar Howard).

limitless class of descendants eligible for the Act's benefits. It would also be contrary to the Department's understanding in 1934 that Category 2 made residence upon a reservation an "essential" eligibility criterion "only with respect to persons who are *not* members of any recognized tribe" or who lack the necessary blood quantum. For the reasons set forth above, we therefore interpret Category 2's reservation-residence requirement as applicable to "descendants," not "members," and thus as establishing a closed and historically limited class of eligible persons.

D. "Indian Reservation"

The ROD concluded that the term "reservation" as used in Category 2 was ambiguous. It noted that the IRA included no definition of "reservation,"[71] and that Congress had deleted definitions contained in earlier versions of the draft legislation.[72] The ROD found dictionaries to offer "limited insight" into the concept,[73] which had an "amorphous nature (...) throughout much of United States' history,"[74] as reflected, in part, in the non-uniform ways that reservations had been brought into existence historically.[75] Supreme Court precedent demonstrated that the means for establishing Indian reservations were not uniform;[76] the Department's HANDBOOK OF FEDERAL INDIAN LAW, published in 1942, explained the various origins of Indian reservations;[77] and the Solicitor in 1945 noted the lack of any generally applicable definition of the term.[78] Finally, the ROD did not find the Department's definition of "reservation" in its land-into-trust regulations dispositive because it was drafted "long after" the IRA's enactment; because it only applies at the time of acquisition; and because nothing suggests it was intended to address eligibility under Category 2.[79]

The ROD found that while there was no single definition of "reservation" in 1934, there was a "generally accepted understanding" that "reservation" and "Indian reservation" referred to

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[71] ROD at 95.

[72] *Id.* at 82.

[73] *Id.* at 96 (limited value of contemporaneous dictionary definitions).

[74] *Id.* at 95 (noting different regulatory definitions of "reservation").

[75] *Id.* at 95-97.

[76] *Id.* at 95-96.

[77] U.S. Dept. of the Interior, HANDBOOK OF FEDERAL INDIAN LAW (1942) (hereafter "DOI HANDBOOK"). Originally planned by U.S. Assistant Attorney General Carl McFarland, *id.* at xxvii, it was prepared by Assistant Solicitor Felix S. Cohen, who helped draft the IRA. *See* Memorandum from John Collier, Commissioner of Indian Affairs, to Division Heads and Section Chiefs 7681-39 JC (Feb. 15, 1939); *Confederated Tribes of Grand Ronde Cty. of Oreg. v. Jewell*, 75 F. Supp. 3d 387, 404, n. 10 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016). The ROD characterized the DOI HANDBOOK as asserting that reservations established between a tribe and a foreign sovereign could be the basis for "an ongoing relationship between a tribe and the United States and continued reservation of the subject land." ROD at 96. However, the DOI HANDBOOK instead references two treaties entered into between tribes and the United States that incorporate by reference boundaries established in earlier treaties between the tribes and the British Crown and Colonies. DOI HANDBOOK at 294.

[78] ROD at 97 (citing II OP. SOL. INT. 1378 (Memorandum from Solicitor Warner G. Gardner to K.S. Haskell, Judicial and Departmental Construction of the Words "Indian Reservation") (Dec. 29, 1945)).

[79] *Id.* at 97-98 (citing 25 C.F.R. § 151.2(f)).

"lands set aside for Indian use and occupation."[80] For this reason, the ROD concluded that "reservation" as used in Category 2 should be interpreted as referring to lands set aside for Indian use and occupancy, "so long as that set aside carries legal effect."[81] The ROD did not identify who could set lands aside for Indians, nor did it explain the meaning of "legal effect." After concluding that its interpretation entails a "case-by-case" evaluation, however, the ROD described evidence relevant to the inquiry as including "colonial, state, and Federal records pertaining to a protected Indian settlement."[82]

The ROD's interpretation of the phrase "any Indian reservation" creates several uncertainties. The evidence it relies on implies that phrase may include lands set aside for Indians by a State if it has "legal effect" under State law. However, this would mean that the Federal Government's obligations toward Indians under the IRA could be triggered by unilateral actions of a State, contrary to Congress's plenary authority over Indians under the Indian Commerce Clause.[83]

Elsewhere, however, the ROD suggested that the definition of "reservation" includes a federal element of some kind. The ROD detailed how the State (and earlier Colony) of Massachusetts set lands aside for the Mashpee Tribe under the State's legislative authority.[84] Though it never contended that the tribe's lands were set aside under federal authority,[85] it nevertheless suggested that the tribe's lands constituted a "reservation" under Category 2 based on federal "acknowledgment," "oversight," and "control" of the land.[86]

We conclude that the ROD's interpretation of "any Indian reservation" created more ambiguities than it resolved. In light of the analysis below, we further conclude that the ROD's interpretation of "any Indian reservation" in Category 2 ignored the statutory context; was inconsistent with the IRA's purpose and intent; and misconstrued the Department's early implementation of the IRA by including non-federal reservations within the definition. Based on these findings, we conclude that the phrase "any Indian reservation" in Category 2 refers to lands set aside under federal authority for the use and occupation of Indians over which the Federal

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[80] *Id.* at 98.

[81] *Ibid.*

[82] *Ibid.*

[83] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) ("The Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").

[84] ROD at 101-107 (discussing history of the Mashpee Tribe at the Town of Mashpee, Massachusetts).

[85] *See* Remand Decision at 15. The Department's Remand Decision expressly noted that the Tribe's land "was not set aside by the United States.").

[86] ROD at 114 ("[T]he Tribe and its land were subject to oversight and control by several other governmental entities, including the federal government."); *id.* at 115 (Mashpee's lands subject to federal oversight as part of Federal Government's agenda to remove Indians from their aboriginal territories); *id.* at 117 (United States "had, at various times, acknowledged the Mashpee reservation"). The ROD determined that the exercise of state or local municipal government authority over the land or superintendence over its resident Indians, "does not, in and of itself, undermine its reservation status." ROD at 99.

Government exercised superintendence. Federal superintendence may be presumed when the lands in question were set aside under federal authority.

1. Statutory Context

Because the IRA does not define "any Indian reservation," the ROD concluded that Congress left it to the Department's expertise to accommodate the particular circumstances of each tribe and reservation.[87] The ROD considered this consistent with Commissioner Collier's view of the IRA as "a flexible statute that could provide a flexible and universal tool to address tribes and tribal issues nationally."[88] The ROD also found this approach "logical" given the "amorphous nature" of the "reservation concept" throughout United States history.[89] The ROD described a number of ways in which lands had been historically set aside for Indians[90] before concluding that in 1934, the phrase "any Indian reservation" would have been commonly understood as meaning lands set aside with "legal effect" for Indian use and occupation.[91]

Several aspects of the ROD's analysis are untenable. The first, and most significant, is its failure to consider the phrase "any Indian reservation" within the context of the IRA as a whole, a fundamental principle of statutory construction. "Statutory construction is a holistic endeavor, and an expression that seems ambiguous in isolation may become clearer when viewed in the context of the statute as a whole."[92] For example, and as a general rule of statutory construction, identical terms appearing in different parts of the same act are intended to have the same meaning.[93]

The phrase "any Indian reservation" appears elsewhere in four different sections of the IRA.[94] Section 1 of the IRA prohibits further allotment of "any Indian reservation" created or set apart "by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise." While the expression "treaty or agreement" could literally include agreements with governments other than the United States, such an interpretation runs counter to the intent of Section 1, which was to end further allotment of reservation lands under the General Allotment Act.[95] Section 3 of the IRA refers to the remaining surplus lands of "any Indian reservation" previously "opened, or authorized to be opened, to sale, or any other form of disposal" by "Presidential proclamation" or by "any of the public land laws of the United States," and

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[87] *Id.* at 83.

[88] *Id.* at 91.

[89] *Id.* at 95.

[90] *Id.* at 95-98.

[91] *Id.* at 98.

[92] *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (Kagan, J.), *reh'g denied*, No. 17-6086, 2019 WL 6257579 (U.S. Nov. 25, 2019) (citing *Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (Scalia, J.)).

[93] *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860, 1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

[94] IRA §§ 1, 3, 8, and 19.

[95] *See* General Allotment Act, Pub. L. No. 49-119, §1, 24 Stat. 388 (Feb. 8, 1887) (authorizing the President to allot in severalty "any reservation created for [Indian] use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use...").

includes a proviso excepting its application "within any reclamation project heretofore authorized in any Indian reservation." Like Section 1, Section 3 makes clear from its context that "any Indian reservation" refers to lands set aside by the United States. Section 8 of the IRA limits the Act's application to Indian allotments or homesteads on the public domain outside the boundaries of "any Indian reservation now existing or established hereafter." Section 8's reference to allotments and homesteads could, consistent with Section 3, be understood as referring to rights arising under the public land laws of the United States, implying that "any Indian reservation" refers only to lands set aside by the Federal Government.

The word "reservation" alone also appears throughout the IRA in contexts suggesting it refers to lands set aside for Indians by the United States. For example, it is used in some sections in reference to particular federal Indian reservations.[96] It is expressly used in the context of federally-established reservations in Section 5, which authorizes the Secretary to acquire land in trust "within or without existing reservations," and in Section 7, which authorizes the Secretary to proclaim lands acquired under the IRA as "new Indian reservations" or to add such lands to "existing reservations."

Its use in certain benefits provisions of the IRA may at times appear ambiguous. For example, Section 16 authorizes a tribe or tribes residing on "the same reservation" to adopt a constitution and bylaws vesting it with certain rights and powers in addition to "all powers vested in any Indian tribe or tribal council by existing law." Not long after the IRA's enactment, however, Solicitor Nathan Margold issued a lengthy opinion construing the "powers vested in any Indian tribe or tribal council by existing law."[97] Solicitor Margold interpreted this to mean tribal powers under federal law, not state or colonial laws. He made clear that the Department understood "reservation" as referring to Indian lands under federal supervision outside the jurisdiction of the states.[98] Similarly, Section 17 authorizes the Secretary to issue a corporate charter to the Indians "living on the reservation." The powers that may be conveyed by such a charter to the incorporated tribe under Section 17 may not include the authority to "sell, mortgage, or lease for a period exceeding ten years" any land "included in the limits of the reservation," suggesting that Congress understood "reservation" to mean those lands set aside for Indians under federal supervision. Likewise, Section 18 authorizes the adult Indians residing on "any reservation" to vote to reject the IRA's application to the reservation.[99] However, the Department's early implementation of these provisions show that the Department understood the term as referring only to federal Indian reservations.[100]

Finally, interpreting "any Indian reservation" in Category 2 as referring to lands set aside under federal authority is also consistent with the definition of "Indian" in Category 1, which

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[96] IRA §§ 3 (Papago Indian Reservation), 5 (Navajo Reservation), 13 (Klamath Indian Reservation), *and* 14 (Sioux Reservation).

[97] 55 Int. Dec. 17 (Solicitor Nathan Margold, "Powers of Indian Tribes" (Oct. 25, 1934)).

[98] *See, e.g., id.* at 48-50 (power to exclude non-members from tribe's jurisdiction); discussing powers of a tribe to exclude non-members from its reservation); *id.* at 50-64 (tribal powers over property).

[99] *See, e.g.*, IRA §§ 16 (Indians "residing on the same reservation"), 17 ("Indians living on the reservation"), and 18 (Act shall not apply to "any reservation" wherein a majority of adult Indians vote to reject it).

[100] *See infra* Section II.C.3(a).

defines it as persons of Indian descent who are members of recognized Indian tribes "now under federal jurisdiction." As the ROD noted, Congress added this federal jurisdictional requirement to Category 1 to limit the IRA's application to Indians already under federal authority.[101] Indians residing on lands set aside for their use by the Federal Government were unambiguously considered to be "under federal jurisdiction" in 1934.

2. Purpose and Intent

Understanding that Congress intended "any Indian reservation" to mean reserved Indian lands under federal superintendence is also consistent with the policy and intent behind the IRA. The phrase appears in Section 19 in a definitional provision that limits who may apply for the IRA's benefits. As originally introduced, the IRA's purpose was to grant benefits to "Indians living under federal tutelage."[102] A constant thread in the legislative history is concern for whether the IRA would apply to Indians not then under federal supervision.[103] In Senate hearings on the bill, Senate Committee members expressed concern over extending the Act's benefits to Indians not under federal supervision, including at least one state-recognized tribe.[104] Commissioner Collier suggested adding "now under federal jurisdiction" to Category 1 as a "limiting phrase" in response to such concerns.[105] At the time, residence on a federal Indian reservation was considered an indicia of being under federal supervision, as the ROD acknowledged.[106]

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[101] ROD at 94.

[102] *See* H.R. 7902, 73d Cong. (introduced Feb. 12, 1934).

[103] *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).

[104] *Id.* at 80, 263-66 (discussing Catawba Tribe). *See also* Stillaguamish Memo at 4 (the IRA's drafters "intended to exclude at least some groups which could be considered Indians in a cultural or governmental sense, but they did not intend to use the Act to cut off any Indians to whom the Federal Government had already assumed obligations").

[105] Sen. Hrgs. at 266 (remarks of Commissioner Collier) ("That [phrase] 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."); *Carcieri*, 555 U.S. at 397 (Breyer, J., concurring) (Congress expected the phrase would make clear that the Secretary could take land into trust only for "those tribes in respect to which the Federal Government already had the kinds of obligations that the words 'under federal jurisdiction' imply."). *See also* U.S. Dept. of the Interior, Office of Indian Affairs, Commissioner of Indian Affairs, Circ. No. 3123 (Nov. 18, 1935) (Section 19 "shows on the part of congress a definite policy to limit the application of Indian benefits, [under the IRA], to those who are Indians by virtue of actual tribal affiliation or by virtue of possessing one-half degree or more of Indian blood").

[106] ROD at 94 (it was "well established at the time of IRA that Indian residents of a reservation were automatically subject to Federal authority"). Before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the OIA having direct supervision of Indians. *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census, 1919 (May 7, 1919) (directing Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS ("ARCIA") for 1900 at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); ARCIA for 1930 at 33 (discussing enrolled Indians who "resided at the Federal jurisdiction where enrolled"); Sen. Hrgs. at 282-298 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different OIA "jurisdictions").

Interpreting "Indian reservation" in Category 2 as referring to lands set aside under federal authority thus provides a jurisdictional parallel to the "now under federal jurisdiction" requirement in Category 1. The legislative history makes clear that Congress did not intend the IRA to apply to those who were not under federal supervision or who had since left federal supervision. Category 1 and Category 2 are consistent with this intent, and each applies to a distinct class of persons: Category 1 to members of any recognized Indian tribe, Category 2 to their non-member descendants. Seen in that light, interpreting the term "reservation" in Category 2 to mean a "federal reservation" emphasizes that Category 1 and Category 2 both require evidence of federal superintendence in 1934. Category 2, to accommodate unenrolled descendants, accomplishes the requisite federal supervision through a specific reference to descendants residing within the boundaries of a reservation under federal superintendence. Indeed, the legislative history suggests that Congress intended Category 2 to accommodate tribal members' unenrolled children who resided on a reservation and who maintained tribal relations, but who were excluded from enrollment.[107] Interpreting "any Indian reservation" in Category 2 as lands set aside by federal authorities is consistent with this limiting intent.[108] Category 1 remains open to those "under federal jurisdiction" to accommodate those residing outside the boundaries of a federal reservation. In this way, Category 1 and Category 2 are consistent.

3. Administrative Implementation

a. The Long Island Indians

The ROD's interpretation of "Indian reservation" relies in part on what it interpreted to be the Department's early implementation of the IRA and the views of Assistant Solicitor Felix Cohen, as reflected in the Department's HANDBOOK ON FEDERAL INDIAN LAW.[109] In particular, the ROD discussed internal Departmental correspondence over whether lands set aside by the State of New York for the Shinnecock and Poosepatuck Indians ("Long Island Tribes"), neither of which were federally recognized at the time, constituted "reservations" for purposes of Section 18 of the IRA.[110] The ROD claimed this correspondence reflected a "fundamental disagreement" between Solicitor Margold and Commissioner Collier over the status of the lands belonging to the Long Island Tribes. The ROD found "more relevant and persuasive" what it took to be Solicitor Margold's position that the IRA "'applies to Indians living on reservations that are not federal reservations.'"[111] Our review of this correspondence suggests that the ROD misconstrued this perceived disagreement by conflating two separate issues. One was whether the Long Island Tribes' lands could be considered "reservations" within the meaning of Section

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[107] *See* Sen. Hrgs. at 235, 263-64, 305, 318, 376; H. Hrgs. at 27. *See also* H.R. 7902 (as introduced), tit. III, § 18; Circ. No. 3134.

[108] *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Commissioner of Indian Affairs, Circ. No. 2958, "Indian Wardship" (Oct. 28, 1933) (Indians residing on a federal reservation and maintaining tribal relations to be considered "wards" of the Federal Government).

[109] ROD at 84-89.

[110] Section 18 authorized the Secretary to conduct a special election among the adult Indians residing on a "reservation" to reject the IRA's application to them.

[111] ROD at 88, citing Nathan Margold, Solicitor, Annotation (May 19, 1936) ("Margold Annotation"), attached to Untitled Memorandum, John Collier, Commissioner of Indian Affairs (May 18, 1936) (regarding Long Island Indians).

18 of the IRA. The other was whether the Long Island Tribes could be considered "Indians" under Section 19, and thus eligible in the first instance for an election under Section 18. The ROD then dismissed Commissioner Collier's rejection of the non-Federal reservations, despite it representing the considered position of the Department in 1936.

The correspondence begins with a 1936 report by an OIA Field Agent of a visit to the Long Island Tribes' lands.[112] The purpose of the visit was to gather information to guide the OIA on whether these tribes should come under the terms of the IRA. Though he stated he had not "examined into the legal aspects of the problem," the Field Agent reported that "it is generally understood" that the Long Island Tribes' lands "could be considered 'Reservations' within the meaning of Section 19." However, he recommended that the Long Island Tribes be excluded from the IRA as a matter of policy, in part because of their assimilation to non-Indian society and their loss of "Indian culture."[113]

The Department prepared a response for Commissioner Collier instructing William K. Harrison, the Special Agent in charge of the New York Agency, to deny the Long Island Tribes an opportunity to conduct a vote under Section 18. John Meiklejohn, an attorney in the Solicitor's Office, wrote a memorandum expressing his disagreement with the draft response.[114] Meiklejohn argued instead that the term "reservation" in Section 18 should be interpreted to include state as well as federal Indian reservations.[115] Disputing the relevance of assimilation, he concluded that, "[i]n any case, we are not concerned, when dealing with the application of the [IRA] to the residents of a reservation, with the degree of blood possessed by such residents."[116]

Commissioner Collier signed a response to Special Agent Harrison on May 18, 1936, despite Meiklejohn's objections.[117] It concluded that "there is no legal basis" for holding a Section 18 vote on the Long Island Tribes' lands since the tribes' members were not recognized as Indians in their own community; had "none of the traditional or cultural traits" of Indians; and because their "so-called reservations are not Federal territory but state reservations which have never been under Federal supervision." Secretary Harold L. Ickes signed and approved Commissioner's Collier's response on May 21, 1936. Because it was signed by the Secretary, Collier's response must be taken as authoritatively reflecting the Department's views at the time.

In a memorandum of the same date as his letter,[118] Commissioner Collier explained he did not find Meiklejohn's arguments "entirely persuasive" because the Long Island Tribes "have not been under the jurisdiction of the Federal Government;" lacked "the half degree of blood

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[112] Field Representative Harper, Report on the Shinnecock and Poosepatuck Indian Reservations, In Relation to the Reorganization Act (Jan. 1936) ("Harper Report").

[113] Harper Report at 10.

[114] Memorandum, John Meiklejohn, Attorney, Indian Organization, to Fred Daiker [Asst. Commissioner of Indian Affairs] (May 14, 1936) ("Meiklejohn Memo").

[115] *Id.* at 1.

[116] *Id.* at 3.

[117] Letter from John Collier, Commissioner of Indian Affairs, to William K. Harrison, Special Agent in Charge, New York Agency (May 18, 1936).

[118] Untitled Memorandum, John Collier, Commissioner of Indian Affairs (May 18, 1936) (regarding Long Island Indians).

required by Section 19" of the IRA; and, "culturally viewed, [were] not Indians at all." Commissioner Collier thus concluded that "the considerations of policy all weigh in the direction of adopting the more obvious legal conclusion" that the Long Island Tribes were ineligible to conduct a vote under the IRA.

Commissioner Collier's memorandum shows no addressee. However, Solicitor Margold placed a note in its lower margin on May 19, 1936, before Secretary Ickes approved it on May 21. Margold agreed that the occupants of the Long Island Tribes' lands "are not Indians and therefore not within the application of the Indian Reorganization Act, even though that act applies to *Indians* living on reservations that are not *federal* reservations."[119] The date of Margold's note could suggest that both the note and Commissioner Collier's explanatory memorandum were intended for the Secretary's review and consideration before Commissioner Collier's response was approved and distributed.

The ROD characterized this correspondence as reflecting officials' views of "Indian character," and of whether the IRA applied to "non-Federal reservations," neglecting the distinction it draws between eligibility under Section 19 and any separate requirements that particular provisions might impose. Yet Commissioner Collier's explanatory memorandum concludes that the Long Island Tribes were not "under the jurisdiction of the Federal Government" and lacked "the half degree of [Indian] blood," which are both eligibility criteria in Section 19. Solicitor Margold similarly found that the Long Island Tribes were "not within the [IRA's] application" because they were "not Indians" within the meaning of Section 19. Hence they could not conduct a vote under Section 18, even if such votes *could* be conducted on state reservations.[120] Solicitor Margold and Commissioner Collier agreed on this point, regardless of the Solicitor's views on the application of Section 18. Commissioner Collier expressed similar views a year later in a letter concerning the Section 18 election conducted for the Minnesota Chippewa Indians:

> [T]he purpose of Section 19 is to define what persons are entitled to the benefits provided by the Act and has nothing to do with determining who shall vote in a tribal election [carried out pursuant to Section 18].[121]

Collier made clear that the Long Island Tribes did not satisfy the eligibility criteria contained in Section 19 because they had never been "under the jurisdiction of the Federal Government."[122] On this, Solicitor Margold and Commissioner Collier agreed. That Solicitor Margold disagreed with Commissioner Collier's interpretation of the term "reservation" to

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[119] Margold Annotation (emphasis original).

[120] *See also* Remand Decision at 15 (whether the Mashpee Tribe occupied a "reservation" within the meaning of Section 18 does not resolve question of whether the Tribe satisfied the definition of "Indian" in Section 19).

[121] Letter from John Collier, Commissioner of Indian Affairs, to Charles Smith, Secretary, Minnesota Council of American Indians at 1 (May 10, 1937). *See also* DOI HANDBOOK at 5 (characterizing IRA § 19 as "limited in its connotation to the purposes of the [IRA].").

[122] Letter from John Collier, Commissioner of Indian Affairs, to William K. Harrison, Special Agent in Charge, New York Agency (May 18, 1936).

exclude "state reservations which have never been under Federal supervision" was secondary.[123] The correspondence is nonetheless illuminating and makes clear that even if the Long Island Tribes had satisfied Section 19, the Department would not have considered their lands a reservation for purposes of holding a Section 18 election because their lands were not under federal supervision.

b. 2014 Mechoopda Determination

In a 2014 decision to take land into trust for the Mechoopda Indian Tribe ("Mechoopda"),[124] the Department determined that the word "reservation" as used in Section 18 of the IRA referred to lands set aside for Indians under federal authority. In finding that the Mechoopda was under federal jurisdiction in 1934, the decision relied on evidence of federal efforts to acquire land for the Tribe's benefit at that time.[125] It further noted that while those efforts were pending, the Mechoopda in 1935 requested an election under Section 18 of the IRA.[126] The Department denied the request after Commissioner Collier concluded that a Section 18 election could not be held because the land sought for the Mechoopda "was not yet *a government* reservation."[127] In 2012, the Solicitor's Office concluded that Commissioner Collier's determination was

> (...) consistent with the implementation of the IRA at the time (...) in that [the IRA] applied to Indian reservations (*i.e., tribal trust or restricted lands*) unless a majority of the adult Indians residing at the reservation voted to reject the statute's application (...).[128]

The ROD did not mention the Department's interpretation of "reservation" in the Mechoopda Decision. To the extent the ROD suggested that "reservation" could include lands set aside under state authority,[129] then under the ROD's interpretation, a tribe could be eligible for IRA benefits by residing on lands set aside by a State but remain ineligible for other benefits requiring residence on lands set aside under federal authority.

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[123] In addition to the Long Island Tribes discussed in the ROD, Commissioner Collier declined other, similar requests from Indians residing on state reservations seeking to organize under the IRA. *See, e.g.*, Letter from John Collier, Commissioner of Indian Affairs, to J.C. Cavill, Superintendent, Great Lakes Agency (May 29, 1940) (response to Letter from Austin Mandoka, Chairman of the Athens Indian Committee, to John Collier, Commissioner of Indian Affairs (March 20, 1934)).

[124] *See* Letter from Kevin K. Washburn, Assistant Secretary, Indian Affairs, to Hon. Dennis Martinez, Chairman, Mechoopda Indian Tribe of Chico Rancheria (Jan. 24, 2014) (hereafter "Mechoopda Decision"). The Department determined that the Mechoopda Tribe satisfied the IRA's first definition of "Indian" in Category 1, under the same framework for determining whether a tribe was under federal jurisdiction in 1934 later adopted in M-37029.

[125] Mechoopda Decision at 33-35.

[126] *Id.* at 35.

[127] *Ibid.* (citing Telegram from John Collier, Commissioner, to O.H. Lipps, Superintendent (May 16, 1935) (emphasis added)).

[128] *See* U.S. Dept. of the Interior, Office of the Solicitor, *Determination Whether the Mechoopda Indian Tribe of Chico Rancheria was Under Federal Jurisdiction in 1934* at 12 (Dec. 7, 2012) (emphasis added).

[129] ROD at 98.

c. Land-into-Trust Regulations

The ROD also considered the regulatory definition of "Indian reservation" in the Department's land-into-trust regulations at Part 151,[130] which defines "Indian reservation" as "that area of land *over which the tribe is recognized by the United States as having governmental jurisdiction*," except where a tribe's reservation has been otherwise "disestablished or totally allotted."[131] The ROD did not find this definition dispositive because it was drafted "long after the enactment of the IRA" and because it was only intended to govern the processing of fee to trust applications, not eligibility determinations for purposes of Category 2.[132]

In considering the Department's prior interpretations of the meaning of "Indian reservation" for purposes of Category 2, the ROD discounted its use of 25 C.F.R. § 151.2(c), which implements Category 2 in the context of trust acquisitions for individuals, and which defines "individual Indian" to mean any descendant of an enrolled member of a tribe who was, on June 1, 1934, "physically residing on a *federally recognized Indian reservation*."[133]

While the Department promulgated land-in-trust regulations 46 years after the enactment of the IRA, the use of the term "Indian reservation" found therein is consistent with the definition as it is summarized in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW:

> The term "Indian reservation" originally meant any land reserved from an Indian cession to the federal government regardless of the form of tenure. During the 1850s, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin. In the 1850s, the federal government began frequently to reserve public lands from entry for Indian use. This use of the term "reservation" from public land law soon merged with the treaty use of the word to form a single definition describing federally protected Indian tribal lands without depending on any particular source.[134]

The regulatory definition implementing Category 2 is consistent with the evolution of the term "Indian reservation" and refers to lands set aside by federal authorities for the use and occupancy of Indians.

4. Summary

To interpret "any Indian reservation" as used in Category 2 to include non-federal reservations is contrary to the term's meaning. Congress did not intend Category 2 to serve as a relaxed standard for tribes or individuals unable to satisfy the Category 1 definition; but rather a consistent criterion for extending the IRA to unenrolled descendants living as part of a

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[130] *Id.* at 90.

[131] 25 C.F.R. § 151.2(f) (2018) (emphasis added).

[132] ROD at 97-98.

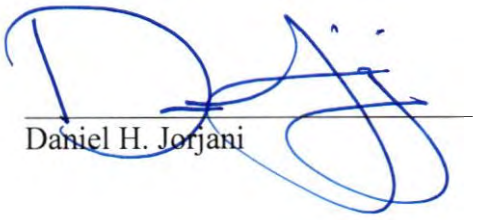
[133] 43 Fed. Reg. 32312.

[134] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04, at 190-91 (2012 ed.) (footnotes omitted).

reservation community for which the Federal Government maintained obligations. For the reasons set forth above, we therefore interpret the term "reservation" as used in Category 2's definition of "Indian" to require evidence that lands were set aside under *federal* authority or evidence that the United States otherwise assumed obligations sufficient to establish ongoing federal superintendence.

III. CONCLUSION

The purpose of the preceding analysis is to ensure that the Secretary's implementation of Section 5 of the IRA is consistent with Congressional intent and with the Department's long-standing practices and policies. For purposes of determining a tribe's eligibility under the IRA's definitions of "Indian," the ambiguous phrase "who were (...) residing" in Category 2 should be interpreted as modifying the term "descendants," not "members," thus establishing a closed, and historically specific, class of eligible persons. Further, the phrase "any Indian reservation" in Category 2 should be interpreted as referring to lands set aside under federal authority for the use and occupancy of Indians or lands over which the Federal Government otherwise exercised federal superintendence. This memorandum does not address any other ambiguities that may be contained in Section 19 of the IRA.



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