IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	CIVIL ACTION NO. 1:16-cv-10184-WGY

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION OR CLARIFICATION

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6), the United States Department of the Interior ("Interior") et al. ("Defendants") respectfully request that the Court reconsider or clarify the portions of the July 28, 2016 Memorandum & Order ("Order") that went beyond the "narrow question of statutory construction," Order at 2 n.1, concerning the meaning of "such members" in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 479 ("Section 479"). The Court erred when, instead of remanding to Interior, it determined that the Mashpee Wampanoag Tribe ("Tribe")—based on the date that the Tribe obtained federal recognition—was not "under Federal jurisdiction" in 1934 for the purposes of the IRA. Order at 12, 14-15, 22. The Court's error in doing so is particularly manifest in light of—and, indeed directly conflicts with—the recent decision in *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, __F.3d__, No. 14-5326, 2016 WL4056092, at *4-10 (D.C. Cir. July 29, 2016).[1]

While Defendants disagree with the Court's interpretation of "such members," Defendants do not seek reconsideration of that aspect of the Order in this Motion. Defendants, however, seek reconsideration of the Court's determination to extend its analysis after interpreting "such members." The Court, consistent with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and settled principles of administrative law, should have remanded to Interior to reconsider its September 18, 2015 Record of Decision ("ROD") in light of the Court's reading of "such members." Instead, the Court summarily concluded—based on the Tribe's federal recognition in 2007—that the Tribe was not "under Federal jurisdiction" in 1934. In so doing, the Court made a factual determination that Interior expressly declined to make in the ROD, AR000131-32, even though the Court did not need to reach the issue to fully

[1] Attached hereto as Exhibit A for the Court's reference.

adjudicate Plaintiffs' First Cause of Action.

The Court compounded the error in reaching the issue of the Tribe's 1934 federal jurisdictional status by assuming that an Indian tribe recognized *after* 1934 could not have been "under Federal jurisdiction" *in* 1934. The Court's ruling directly conflicts with the recent decision in *Grand Ronde*, in which the D.C. Circuit, consistent with every district court that has addressed the issue, upheld Interior's determination that the Cowlitz Indian Tribe, federally recognized in 2002, was "under Federal jurisdiction" in 1934. The Court's contrary determination appears to be based on a misreading of *Carcieri v. Salazar*, 555 U.S. 379 (2009), Order at 15, reliance on facts in contention, *id.* at 3, and reliance on misguided assumptions concerning recognition and the effect of the assertion of state jurisdiction over Indians, *id.* at 3, 12, 14-15, 22. The Court, however, did not explain its conclusion even though it acknowledged, *id.* at 21 n.8, that courts have consistently held that "recognized Indian tribe" and "under Federal jurisdiction" are ambiguous phrases for which Interior's interpretation is afforded deference.[2]

Defendants thus urge the Court to reconsider or clarify its Order to limit its scope to the Court's reading of "such members" in Section 479, with a remand of the matter to Interior for further proceedings.

[2] The Court cited to Defendants' Mem. Opp., ECF No. 38, which cited *Citizens for a Better Way v. U.S. Dep't of Interior*, No. 12-3021, 2015 WL5648925, at *21 (E.D. Cal. Sept. 24, 2015) ("'recognized Indian tribe,' as used in the IRA, does not equate to federal recognition . . . since 'federal recognition' in its modern legal sense post-dated the IRA"); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 08-0660, 2015 WL1400384, at *7-11 (N.D.N.Y. Mar. 26, 2015) (finding ambiguous "recognized Indian tribe" and "under Federal jurisdiction" and deferring to Interior); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1183-87 (E.D. Cal. 2015) ("[T]here is far more ambiguity than not about what it means for a tribe to be 'under Federal jurisdiction' in 1934"); *Cty. of Amador v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1193, 1207-08 (E.D. Cal. 2015) (finding "under Federal jurisdiction" ambiguous and deferring to Interior); *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 401-04 (D.D.C. 2014) (finding ambiguous "recognized Indian tribe" and "under Federal jurisdiction" and deferring to Interior); *Sandy Lake Band of Miss. Chippewa v. United States*, No. 11-2786, 2012 WL1581078, at *7-9 (D. Minn. May 4, 2012) (upholding Interior's interpretation of "recognized Indian tribe").

BACKGROUND

I. The Indian Reorganization Act's Definitions

Section 479 of the IRA defines the term "Indian" as including (1) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" ("First Definition"); (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation" ("Second Definition"); and (3) "all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

II. Record of Decision

Interior concluded in the ROD, AR00050-189, that the Tribe falls within the Second Definition of "Indian" in Section 479, such that it has the requisite authority to acquire land in trust for the Tribe pursuant to the IRA. AR00132-72. In making its decision, Interior expressly declined to opine on whether the Tribe also falls within the First Definition of "Indian" in Section 479. AR00131-32. With respect to the Second Definition, Interior made no determination as to whether the Tribe was "under Federal jurisdiction" in 1934, because Interior's interpretation of the Second Definition in the ROD did not require such analysis. *Id.* Interior's reading of Section 479 did, however, require that it determine whether the Tribe constituted a "recognized Indian tribe" under Section 479. Based on Interior's prior interpretation of the phrase as having no temporal requirement, Interior concluded that the Tribe was a "recognized Indian tribe" due to its 2007 federal acknowledgment. AR000145 n.237 (citing Interior's preexisting interpretation, set forth in M-37029 (AR000663-88), to support its conclusion that "[a] tribe, such as the Tribe, that has received formal recognition through the Departmental acknowledgment process at 25 C.F.R. Part 83 satisfies this part of the statute.").[3]

[3] A copy of M-37029 is attached hereto as Exhibit B for the Court's reference.

STANDARD OF REVIEW

This Court has "substantial discretion and broad authority to grant or deny" a motion for reconsideration made pursuant to either Fed. R. Civ. P. 59(e)[4] or 60(b). *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 81 (1st Cir. 2008). That discretion balances "the need for finality of judgments with the need to render a just decision." *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 190 (1st Cir. 2004). "In order to prevail on a Rule 59(e) motion based on manifest error or law of fact, the moving party must make a showing of some substantial reason that the court is in error." *Kalman v. Berlyn Corp.*, 706 F. Supp. 970, 974 (D. Mass. 1989) (citing *Robinson v. Watts Detective Agency Inc.*, 685 F.2d 729, 743 (1st Cir. 1982)).[5]

Rule 60(b)(6) provides for relief from a judgment or order for "any other reason that justifies relief" not specifically set forth in Rule 60(b)(1)-(5). And Rule 60(b)(6) is "peculiarly malleable," such that the Court's "decision to grant or deny such relief is inherently equitable in nature." *Ungar v. PLO*, 599 F.3d 79, 83-84 (1st Cir. 2010).

ARGUMENT

I. The Court Erred in Deciding an Issue that Interior Specifically Reserved

In light of its holding regarding the interpretation of "such members," the Court was correct in remanding to Interior. The Court erred, however, in deciding whether the Tribe was "under Federal jurisdiction" in 1934. Such determination is a complex, Indian tribe-specific inquiry, involving a mixed question of law and fact, which Interior had specifically reserved. AR000131-32. Remand is required under the APA by the ordinary remand rule, which

[4] "[I]t is settled in this circuit that a motion which asked the court to modify its earlier disposition of a case because of an allegedly erroneous legal result is brought under Fed. R. Civ. P. 59(e)." *Appeal of Sun Pipe Line Co.*, 831 F.2d 22, 24 (1st Cir. 1987).

[5] Rule 59 motions are not "confined to the six specific grounds for relief found in Rule 60(b)." *Pérez-Pérez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 284 (1st Cir. 1993).

recognizes that, except in rare instances, a court reviewing agency action "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry," and must instead "remand to the agency for additional investigation or explanation." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002) (internal citations omitted)).[6]

It likewise is a fundamental principle of administrative law that after determining that an agency has made an error of law, the court's inquiry is at an end. Thereafter, the case must be remanded to the agency for further action consistent with the correct legal standard. *See*, *e.g.*, *S. Prairie Constr. Co. v. Local No. 627*, 425 U.S. 800, 803-804 (1976) (court of appeals invaded the statutory province of the National Labor Relations Board by deciding the unit question in the first instance instead of remanding to the Board to make the initial determination). After the Court found that Interior's interpretation of "such members" was incorrect, it should have ended its analysis and remanded the matter for further proceedings consistent with the Court's ruling.

II. An Indian Tribe Recognized *after* 1934 Can Still Demonstrate Federal Jurisdiction *in* 1934, and the Court Manifestly Erred by Concluding Otherwise

In *Carcieri*, the Supreme Court held that the word "now" in the First Definition of "Indian" unambiguously meant 1934, the year the IRA was enacted. 555 U.S. at 395. The Court in *Carcieri*, however, "did not pass on the exact meaning of 'recognized' or 'under Federal jurisdiction'" in the First Definition. *Grand Ronde*, 2016 WL4056092, at *2. Nor did it determine whether the word "now" in the First Definition modified "recognized Indian tribe" in addition to the phrase "under Federal jurisdiction." *Id.*, at *5-6; *see also Mackinac Tribe v. Jewell*, No. 15-5118, 2016 WL3902667, at *2 (D.C. Cir. July 19, 2016).

[6] *See also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (the "reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed").

When the Court accepted Plaintiffs' interpretation of "such members," Order at 15, it concluded that the Second Definition should be read as "all persons who are descendants of such members [of any recognized Indian tribe now under Federal jurisdiction] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." The Order is silent as to the meaning of the phrases "recognized Indian tribe" or "under Federal jurisdiction," even though the Court acknowledged the ambiguity of the terms. Order at 21 n.8. When the Court concluded that because the Tribe obtained federal recognition in 2007, it was not "under Federal jurisdiction" in 1934, *id.* at 12, 14-15, 22, the Court appears to have conflated the phrases "recognized Indian tribe" and "under Federal jurisdiction." As discussed below, these terms have independent meaning and "now" only modifies "under Federal jurisdiction."

A. Interior's Interpretation of "Recognized Indian Tribe" is Reasonable and Entitled to Deference

In the ROD, Interior construed "such members" in the Second Definition as referring back to the phrase "members of any recognized Indian tribe" in the First Definition. AR000145-47. Interior then applied the agency's preexisting interpretation of "recognized Indian tribe," set forth in M-37029 (AR000685-88), which concluded that, because "now" in the First Definition does not modify "recognized Indian tribe," the tribal applicant need only be federally recognized when the Secretary invokes the IRA to fall within the scope of the phrase. AR000688. Accordingly, Interior concluded in the ROD that the Tribe's status as a federally recognized Indian tribe at the time the ROD was issued[7] established that it was a "recognized Indian tribe" for IRA purposes. AR000145 n.237. The Court erred by not explaining how Interior's interpretation was in error or otherwise not entitled to the deference consistently extended to it.

[7] *See* 80 Fed. Reg. 1,942, 1,944 (Jan. 14, 2015) (Tribe included on the annual *Federal Register* list of federally recognized Indian tribes).

Had the Court considered Interior's interpretation, the Court should have accorded it deference. Most recently the D.C. Circuit, in a case involving the Cowlitz Indian Tribe which obtained federal acknowledgment in 2002, applied "the familiar *Chevron* analysis" to hold that "'recognized' is ambiguous," and deferred to Interior's interpretation. *See Grand Ronde*, 2016 WL4056092, *5-7. The D.C. Circuit considered the grammatical structure of the First Definition, and after concluding that "now" is an adverb modifying the phrase "under Federal jurisdiction," it moved on to the "more difficult question" of whether the phrase "now under Federal jurisdiction" modifies only "tribe" or the entire phrase "recognized Indian tribe." *Id.*, at *5. After determining that the statute could be read either way and was therefore ambiguous, the D.C. Circuit then deferred to Interior's interpretation that the First Definition need not be read as requiring recognition in 1934. *Id.*, at *5-7. Other district courts have similarly held. *See Confederated Tribes of the Grand Ronde Cmty.*, 75 F. Supp. 3d at 400-01 (recognition in 1934 not required); *Citizens for a Better Way*, 2015 WL5648925, at *21 (same); *Cent. N.Y. Fair Bus. Ass'n*, 2015 WL1400384, at *10-11 (same). The Order concludes otherwise, but offers no explanation or rationale for its determination.

B. "Under Federal Jurisdiction" is a Distinct Inquiry from "Recognized" and Interior Expressly Reserved the Opportunity to Opine on the Issue in the First Instance

When it obtained federal recognition in 2007, the Tribe had to demonstrate, among other things, that it "had been identified as an American Indian entity on a substantially continuous basis since 1900," and that a "predominant portion" of that entity "comprises a distinct community [that] has existed as a community from historical times to the present." 25 C.F.R. §§ 83.7(a)-(b) (2007). Whether the Tribe was "under Federal jurisdiction" in 1934 is a different inquiry, one that Interior has construed as involving two fact-intensive components. The first

component examines whether, at some point in or before 1934, the United States had assumed duties, responsibilities or obligations to the Tribe, establishing that the federal government asserted its authority, i.e., jurisdiction, over the Tribe. The second component examines whether that jurisdictional relationship between the federal government and the Tribe remained intact in 1934. *See* M-37029 at 16-20 (AR000678-82); *Grand Ronde*, 2016 WL4056092, at *8-9 (discussing Interior's two-part inquiry and concluding it is reasonable). The complex task for Interior when considering whether a tribe was "under Federal jurisdiction" in 1934 is to review the historical record in its entirety, evaluating both positive and negative evidence, to determine whether on balance the record supports the factual and legal conclusion that the tribe was "under Federal jurisdiction" in 1934. *See Grand Ronde*, 2016 WL4056092, at *10. The Court's role under the APA, on the other hand, is to review Interior's actual decision, rather than rewrite or add to it. The ROD expressly declined to opine on the Tribe's "under Federal jurisdiction" status, thus reserving its determination for another day. AR000131-32. Interior should be permitted to determine whether the Tribe was "under Federal jurisdiction" in 1934 in the first instance, as "[t]here is an institution specifically designed and coordinated to have expertise in the social, cultural, political, and legal history of the indigenous peoples of the United States. This institution is not the Court. It is the Bureau of Indian Affairs." *New York v. Salazar*, No. 08-00644, 2012 WL4364452, at *13-15 (N.D.N.Y. Sept. 24, 2012) (remanding the "under Federal jurisdiction" inquiry to Interior to consider in the first instance).

III. Neither *Carcieri*, nor Plaintiffs' Disputed Factual Assertions Improperly Accepted by the Court, Actually Resolve Whether the Tribe was "Under Federal Jurisdiction" in 1934

In the Order, the Court appears to rely on Plaintiffs' assertion that "the Mashpees had been subject to colonial and state governmental jurisdiction" prior to the Tribe's federal

acknowledgment in 2007, Order at 3, as a basis for stating throughout the Order that the Tribe was not "under Federal jurisdiction" in 1934, *id.* at 12, 14-15, 22. But, as noted, Interior specifically stated that it had not addressed the issue, and Defendants never conceded it. The Court nonetheless appears to adopt Plaintiffs' erroneous legal and factual assumption that the presence or assertion of state jurisdiction necessarily and conclusively forecloses federal jurisdiction. The acceptance of Plaintiffs' assertion as "undisputed" followed by the erroneous conclusion drawn from it demonstrate that the Court manifestly erred.

A. *Carcieri* Does Not Require this Court to Opine, in the First Instance, on Whether the Tribe was "Under Federal Jurisdiction" in 1934

As set forth above, the Court did not need to opine on whether the Tribe was "under Federal jurisdiction" in 1934, and the *Carcieri* decision does not compel otherwise. The Supreme Court did not evaluate the meaning of the phrase "under Federal jurisdiction." Instead, it concluded, based on what it found to be a unique concession and the absence of contrary record evidence, that the Indian tribe in that case was not "under Federal jurisdiction" in 1934. *Carcieri*, 555 U.S. at 395-96. Those are not the facts here, as the ROD, the Administrative Record, and proceedings in this litigation establish that the question was not conceded. Thus, remand is required.

First, Interior's post-*Carcieri* practice when relying on the First Definition is to determine whether a tribal applicant was "under Federal jurisdiction" in 1934. The ROD expressly declined to opine on this question because the Secretary read the Second Definition as not requiring it. AR00131-32. Interior therefore reserved its opinion on, *and did not concede*, the issue of whether the Tribe was "under Federal jurisdiction" in 1934.

Nor did Defendants concede the issue in this litigation, as Defendants have consistently defended the rationale in the ROD—the challenged agency action at issue in this APA case—

arguing that a finding of "under Federal jurisdiction" is not required for Second Definition purposes.[8] Notably, because of the stipulated briefing process, Defendants never answered either of Plaintiffs' original or amended complaints. Defendants, in summary judgment briefing, properly referred the Court to the Administrative Record, which should have been the *only* basis for the Court's findings. In this APA case, Plaintiffs' factual assertions should not be weighed against the record to determine whether they are in "dispute." *See* Order at 2 n.1, 3. In APA cases, there are no "factual disputes" to resolve, as the "entire case on review is a question of law." *Patel v. Johnson*, 2 F. Supp. 3d 108, 117 (D. Mass. 2014) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). The Court's review is limited to the Administrative Record, not Plaintiffs' assertions that that the Court accepts as true. 5 U.S.C. § 706; *Lovgren v. Locke*, 701 F.3d 5, 20 (1st Cir. 2012).

Finally, the Administrative Record itself does not justify the Court's ruling. Given the voluminous materials in the Administrative Record concerning the Tribe's federal jurisdictional status, including numerous historical records, *see, e.g.*, AR001912-2112; AR002121-449; AR002458-96; AR002497-508; AR002510-32; AR002540-87; AR002587-6512; AR006518-31; AR006623-43, it cannot be said, as the Court did in *Carcieri*, that the Administrative Record only contains contrary evidence. Instead, the Administrative Record contains voluminous materials concerning the Tribe's history that Interior is entitled to evaluate in the first instance.

B. The Assertion or Presence of State Jurisdiction Does Not Displace Federal Jurisdiction

Even if Plaintiffs' assertions regarding the Tribe's relationship with the Commonwealth of Massachusetts were "undisputed" and the Court could properly rely on them, to the extent the Court's Order assumes that any assertion of state jurisdiction over the Tribe ousts or otherwise

[8] *See, e.g.*, Defs.' Mem., ECF No. 56, at 24 n.28.

forecloses federal jurisdiction, that view is legally erroneous. In *United States v. John*, 437 U.S. 634, 653 (1978), the Supreme Court stated that "the fact that federal supervision over [the Mississippi Choctaws] has not been continuous, [does not] destroy[] the federal power to deal with them." The First Circuit similarly concluded that the United States can have a relationship with Indians on the basis of protection of land even where in all other respects the Federal Government has not dealt with them. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). Simply put, assertions of state and federal jurisdiction are not mutually exclusive. Thus, the inquiry for Interior is whether the Tribe was under *federal* jurisdiction in 1934, which cannot be answered by merely looking to when the Tribe obtained federal recognition, or whether the state asserted authority over the Tribe.

CONCLUSION

Defendants respectfully ask that the Court reconsider or clarify the portions of the Order that go beyond the "narrow question of statutory construction" concerning the meaning of "such members," and remand to Interior so it can reconsider its decision in light of that ruling.

DATED: August 24, 2016

Respectfully submitted,

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EXHIBIT A

2016 WL 4056092
Only the Westlaw citation is currently available.
United States Court of Appeals,
District of Columbia Circuit.

Confederated Tribes of the Grand Ronde Community of Oregon, Appellant
v.
Sally Jewell, in her Official capacity as Secretary of the United States Department of the Interior, et al., Appellees.

No. 14-5326
|
Consolidated with 15-5033
|
Argued March 18, 2016
|
Decided July 29, 2016

Synopsis

Background: Operator of tribal casino, along with county, city, and local businesses, brought consolidated actions against Secretary of the Interior, bringing challenge under Administrative Procedure Act (APA), Indian Reorganization Act (IRA), Indian Gaming Regulatory Act (IGRA), and National Environmental Policy Act (NEPA) with respect to her decision to take into trust 152 acres of land for Cowlitz Indian Tribe and to allow gaming there, and tribe intervened as defendant. The United States District Court for the District of Columbia, Barbara J. Rothstein, J., 75 F.Supp.3d 387, granted defendants' summary judgment motion. Plaintiffs appealed.

Holdings: The Court of Appeals, Wilkins, Circuit Judge, held that:

[1] term "recognized," as used in larger phrase "recognized Indian tribe now under Federal jurisdiction" in IRA's definition of "Indian," was ambiguous under *Chevron* analysis;

[2] Secretary reasonably interpreted term "recognized," as used in IRA section defining "Indian," so that there was no temporal limitation on when recognition occurred;

[3] term "under federal jurisdiction," as used in larger phrase "recognized Indian tribe now under Federal jurisdiction" in IRA's definition of "Indian," was ambiguous under *Chevron* analysis;

[4] Secretary reasonably interpreted term "under federal jurisdiction," as used in IRA"s definition of "Indian," so as to require two-part inquiry;

[5] Secretary reasonably applied its two-part inquiry as to whether tribe was "under federal jurisdiction"; and

[6] Secretary reasonably found that land parcel was within broader area of historical significance to tribe, and thus met initial-reservation exception under IGRA.

Affirmed.

West Headnotes (16)

[1] Indians
Who are Indians or Native Americans

Word "now," as used in definition of "Indian" under Indian Reorganization Act of 1934, unambiguously limited definition to members of those tribes that were under federal jurisdiction in the year 1934. 25 U.S.C.A. § 479.

Cases that cite this headnote

[2] Federal Courts
Summary judgment

Court of Appeals reviews de novo a district court's grant of summary judgment.

Cases that cite this headnote

[3] Administrative Law and Procedure
Discretion of Administrative Agency

Administrative Law and Procedure
Arbitrary, unreasonable or capricious action; illegality

Administrative Law and Procedure
Substantial evidence

Court of Appeals will not uphold an agency decision that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence. 5 U.S.C.A. § 706(2)(A), (E).

Cases that cite this headnote

[4] **Administrative Law and Procedure**
Plain, literal, or clear meaning; ambiguity
Administrative Law and Procedure
Permissible or reasonable construction

When it comes to an agency's interpretation of a statute Congress has authorized it to implement, the Court of Appeals will employ the familiar *Chevron* analysis, under which, if Congress has directly spoken to the issue, that is the end of the matter, but otherwise, in cases of implicit legislative delegation, the court must determine if the agency's interpretation is permissible, and if so, defer to it.

Cases that cite this headnote

[5] **Indians**
Purpose and construction

Statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.

Cases that cite this headnote

[6] **Administrative Law and Procedure**
Deference to agency in general

Agency action is always subject to arbitrary and capricious review under the Administrative Procedure Act (APA), even when it survives the second step of the *Chevron* analysis. 5 U.S.C.A. § 706(2)(A).

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Administrative construction

Court of Appeals will give substantial deference to an agency's interpretation of its own regulations unless it is contrary to the regulation's plain language.

Cases that cite this headnote

[8] **Indians**
Who are Indians or Native Americans

Term "recognized," as used in larger phrase "recognized Indian tribe now under Federal jurisdiction" in definition of "Indian" under Indian Reorganization Act of 1934 (IRA), was ambiguous under *Chevron* analysis of interpretation by Secretary of the Interior, as question was open as to whether temporally limited prepositional phrase "now under Federal jurisdiction" modified noun "tribe" before its modification by adjective "recognized," such that there would be no temporal limitation on when recognition must occur, or whether phrase modified already-modified noun "recognized tribe," such that recognition must have already happened as of 1934. 25 U.S.C.A. § 479.

Cases that cite this headnote

[9] **Indians**
Who are Indians or Native Americans

Under *Chevron*, Secretary of the Interior reasonably interpreted term "recognized," as used in section of Indian Reorganization Act of 1934 (IRA) defining "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," so that there was no temporal limitation on when recognition occurred, where prior decisions with respect to other tribes were consistent with this interpretation. 25 U.S.C.A. § 479.

Cases that cite this headnote

[10] **Indians**
Who are Indians or Native Americans

Term "under federal jurisdiction," as used in larger phrase "recognized Indian tribe now under Federal jurisdiction" in definition of "Indian" under Indian Reorganization Act of

1934 (IRA), was ambiguous under *Chevron* analysis of interpretation by Secretary of the Interior, where Congress did not provide any further meaning to these words; due to Congress's plenary powers every Indian tribe could be considered "under Federal jurisdiction" in some sense, and, other than legislative history indicating that jurisdictional nexus was meant as some kind of limiting principle, how it would limit universe of recognized tribes was unclear. 25 U.S.C.A. § 479.

Cases that cite this headnote

[11] Indians

Status of Indian Nations or Tribes

Indians

Authority over and regulation of tribes in general

Indian tribes are independent sovereigns, but at the same time domestic dependent nations and subject to the plenary and exclusive authority of Congress.

Cases that cite this headnote

[12] Indians

Who are Indians or Native Americans

Under *Chevron*, Secretary of the Interior reasonably interpreted term "under federal jurisdiction," as used in section of Indian Reorganization Act of 1934 (IRA) defining "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," so as to require two-part inquiry, first considering whether there was sufficient showing in tribe's history, at or before 1934, that it was under federal jurisdiction, and second taking into account whether federal-jurisdiction status remained intact in 1934, even though this inquiry did not require formal relationship between tribe and federal government, where IRA did not mandate any such relationship. 25 U.S.C.A. § 479.

Cases that cite this headnote

[13] Indians

Who are Indians or Native Americans

Secretary of the Interior reasonably applied its two-part inquiry as to whether tribe was "under federal jurisdiction" under section of Indian Reorganization Act of 1934 (IRA) defining "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," where Secretary found no clear evidence that government terminated tribe or that tribe otherwise lost "under federal jurisdiction" status, and Secretary reasonably determined that contacts between tribe and federal government from 1855 through 1934 were sufficient to show that tribe was under federal jurisdiction and that those contacts remained intact, even though Secretary sometimes equivocally exercised its authority and responsibilities. 25 U.S.C.A. § 479.

Cases that cite this headnote

[14] Indians

Lands available for gaming

Secretary of the Interior reasonably found that land parcel was within broader area of historical significance to Indian tribe, and thus met initial-reservation exception under Indian Gaming Regulatory Act (IGRA), so as to permit gaming on that land, where Secretary identified historical evidence of tribal use or occupancy three miles northwest of parcel, ten miles south of parcel, and less than three miles north from parcel, exclusive use and occupancy within 14 miles of parcel, signs of major nineteenth century battle less than three miles from parcel, signs of tribal hunting only six miles from parcel, and tribe's presence at fort south of parcel, and Secretary's finding was supported by its prior decisions. 5 U.S.C.A. § 706; Indian Gaming Regulatory Act § 20, 25 U.S.C.A. § 2719(b)(1)(B)(ii); 25 C.F.R. § 292.6(d).

Cases that cite this headnote

[15] Environmental Law

Preservation of error in administrative proceeding

County forfeited its challenge to Indian tribe's membership numbers used by Secretary of the Interior in her final environmental impact statement (FEIS) regarding gaming use of land taken into trust, where county never raised to agency any duty to verify membership enrollment pursuant to applicable regulation, and instead, at best, county expressed some concern about business plan and tribe's unmet needs in reference to National Environmental Policy Act (NEPA) process. National Environmental Policy Act of 1969 § 2, 42 U.S.C.A. § 4321 et seq.; 25 C.F.R. § 83.12(b).

Cases that cite this headnote

[16] Environmental Law

Land use in general

In issuing final environmental impact statement (FEIS) regarding gaming use of land taken into trust for Indian tribe, Secretary of the Interior had no obligation under National Environmental Policy Act (NEPA) regulation to verify that tribe's unmet needs report was accurate, where neither annual unmet needs figure of which county complained nor tribe's membership numbers that purportedly inflated tribe's unmet needs were environmental in nature. National Environmental Policy Act of 1969 § 2, 42 U.S.C.A. § 4321 et seq.; 40 C.F.R. § 1506.5(a).

Cases that cite this headnote

Appeals from the United States District Court for the District of Columbia, (No. 1:13-cv-00849)

Attorneys and Law Firms

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Before: Pillard and Wilkins, Circuit Judges, and Edwards, Senior Circuit Judge.

Opinion

Wilkins, Circuit Judge:

***1** The Cowlitz are an American Indian tribe from southwestern Washington state. After refusing to sign a land cession treaty with the United States in 1855, President Lincoln by 1863 proclamation opened its land to non-Indian settlement. Without a land base, the Cowlitz scattered, and for decades federal Indian policy reflected a mistaken belief that they no longer existed as a distinct communal entity. After a formal process for federal acknowledgment came into being in 1978, the Cowlitz at last gained legal status as a tribe in the eyes of the government in 2002. Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002). Immediately thereafter, they successfully petitioned the Department of the Interior to take into trust and declare as their "initial reservation" a parcel of land. The Cowlitz wish to use this parcel

for tribal government facilities, elder housing, a cultural center, as well as a casino.

Two groups of Plaintiff-Appellants bring challenges under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, to the Interior Secretary's decision to take the land into trust and to allow casino-style gaming. One group [1] is comprised of Clark County, Washington, homeowners and community members in the area surrounding the parcel, as well as competing gambling clubs and card rooms (collectively, "Clark County"). Another is the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), which owns and operates a competing casino. The District Court consolidated the actions, allowed the Cowlitz to intervene and, in reviewing cross-motions for summary judgment, ruled in favor of the Secretary and the Cowlitz. *See Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F.Supp.3d 387 (D.D.C. 2014).

For the reasons that follow, we affirm the judgment of the District Court. The Secretary reasonably interpreted and applied the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et seq.*, to conclude that the Cowlitz are a "recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479. The Secretary also reasonably determined that the Cowlitz meet the "initial-reservation" exception to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* Lastly, we reject Appellants' remaining claims of error under the IRA, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and 25 C.F.R. § 83.12(b) (1994), based on the Secretary's alleged failure independently to verify the Tribe's business plan and membership figures.

I.

The 1934 IRA was meant "to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies." *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008). Whereas a prior policy of allotment sought "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large," *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), Congress enacted the IRA, among other things, to "conserve and develop Indian lands and resources," Pub. L. No. 383, 48 Stat. 984, 984 (1934). As part of this effort, the statute permits the Secretary of the Interior to accept lands into federal trust for "Indians." 25 U.S.C. § 465.

***2 [1]** There are three ways to qualify as an "Indian" under the IRA, which extends to:

> [1] [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction ...
>
> [2] [A]ll persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ...
>
> [3] [A]ll other persons of one-half or more Indian blood.

25 U.S.C. § 479. In *Carcieri v. Salazar*, the Supreme Court held that the word, "now," unambiguously limits the first definition to members of those tribes that were under federal jurisdiction in the year 1934. 555 U.S. 379, 391, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). In so holding, it did not pass on the exact meaning of "recognized" or "under Federal jurisdiction." These two terms are at the heart of our case.

Appellants challenge whether the Cowlitz qualify as "Indians" under the IRA because another statute—the IGRA—permits gaming on land that the Secretary takes into trust on behalf of Indians pursuant to the IRA. 25 U.S.C. § 2719. For lands acquired after October 17, 1988, there is a blanket prohibition on IGRA-regulated gaming, *id.* § 2719(a), unless the land meets certain statutory criteria, *id.* § 2719(b). Pertinent to our case, the IGRA contains an exception for land acquired as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process"—the so-called "initial-reservation" exception. *Id.* § 2719(b)(1)(B)(ii). Another exception—for so-called "restored lands"—applies where land has been acquired as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii). These exceptions "ensur[e] that tribes lacking reservations when [the] IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). For the whole point of the IGRA is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of

promoting tribal economic development, self-sufficiency, and strong tribal governments." *Diamond Game Enters. v. Reno*, 230 F.3d 365, 366–67 (D.C. Cir. 2000) (quoting 25 U.S.C. § 2702(1)).

After an Indian Claims Commission ("ICC")[2] decision concluded that the federal government had "deprived the Cowlitz Tribe of its aboriginal title as of March 20, 1863, without the payment of any consideration therefor,"[3] 25 Ind. Cl. Comm. 442, 463 (June 23, 1971), it was not until years later in 2002 that the Tribe gained federal acknowledgment.[4] Final Determination to Acknowledge the Cowlitz Indian Tribe, 65 Fed. Reg. 8,436 (Feb. 18, 2000); 67 Fed. Reg. at 607. The federal acknowledgment process requires an applicant group to show, *inter alia*, that it has existed as a distinct community since 1900. *See* 25 C.F.R. § 83.11(b). The acknowledgment conferred on the Cowlitz legal status as an Indian tribe, thereby qualifying them for the protection, services, and benefits afforded by the federal government to Indian tribes. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 134 (2012 ed.) [hereinafter Cohen].

***3** The same day the Cowlitz gained federal acknowledgment, they submitted an application to Interior requesting that it accept into trust and declare a 151.87-acre parcel of land their "initial reservation." The parcel is located in Clark County, Washington, closest to the town of La Center, and is approximately 24 miles from the Tribe's headquarters in Longview, Washington, 30 minutes from Portland, Oregon, and 20 minutes from Vancouver, Washington. Grand Ronde's casino, in comparison, is located approximately 65 miles from Portland. The parties dispute the Cowlitz's historical connections to the parcel, but at least agree that it is 14 miles south of Cowlitz aboriginal territory, where the tribe exercised exclusive use and occupancy.

As part of the tribal gaming approval process, while the initial-reservation request and land-into-trust petition were pending with Interior, the National Indian Gaming Commission ("NIGC")[5] issued a 2005 Opinion suggesting that the parcel also could qualify for the IGRA's restored-lands exception.[6] The Bureau of Indian Affairs next prepared a draft environmental impact statement ("DEIS") and final environmental impact statement ("FEIS") in 2006 and 2008, respectively. *See* 42 U.S.C. § 4332(C) (requiring a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment"). In 2010, the Secretary initially approved the land-trust application, and declared the land to be the initial reservation of the Cowlitz. Following a separate APA challenge and remand, Interior issued a revised record of decision ("ROD") in April 2013 that, among other things, confirmed its initial reservation decision.

Grand Ronde and Clark County each challenged the final ROD in June 2013. They alleged: 1) that the Cowlitz were neither "recognized" nor "under federal jurisdiction" in 1934, and therefore cannot be the beneficiary of a trust acquisition under the IRA; 2) that the Tribe lacks sufficient historic connections to the parcel to meet the regulatory requirements for the IGRA's initial-reservation exception; and 3) that the FEIS failed, in various ways, to satisfy the requirements of the National Environmental Policy Act. Clark County additionally claimed that the Secretary lacked authority to take the land into trust because it allegedly shirked a responsibility under 25 C.F.R. § 83.12(b) (1994) regarding additions to a tribe's membership roll after federal acknowledgment.

The District Court consolidated the actions, allowed the Cowlitz to intervene as a defendant, and granted summary judgment for Interior and the Cowlitz. This appeal timely followed.

II.

[2] **[3]** We review the District Court's grant of summary judgment *de novo*. *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006). We will not uphold an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "unsupported by substantial evidence," 5 U.S.C. § 706(2)(E).

[4] **[5]** **[6]** **[7]** When it comes to an agency's interpretation of a statute Congress has authorized it to implement, we employ the familiar *Chevron* analysis. *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007) (citing *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). If Congress has directly spoken to the issue, that is the end of the matter. *Id.* (citing *Chevron*,

467 U.S. at 842–43, 104 S.Ct. 2778). Otherwise, in cases of implicit legislative delegation, we must determine if the agency's interpretation is permissible, and if so, defer to it. *Id*; *Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778. We do so while mindful of the "governing canon of construction requir[ing] that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (quoting *Cobell v. Norton*, 240 F.3d 1081, 1101 (D. C. Cir. 2001)). Of course, agency action is always subject to arbitrary and capricious review under the APA, even when it survives *Chevron* Step Two—an inquiry that in our case overlaps. *See Judulang v. Holder*, —— U.S. ——, 132 S.Ct. 476, 483 n.7, 181 L.Ed.2d 449 (2011); *see also* EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 217-220 (2d ed. 2013). Finally, we give substantial deference to an agency's interpretation of its own regulations unless it is contrary to the regulation's plain language. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994).

A.

***4** The Secretary's authority to take land into trust is limited, in pertinent part, to doing so on behalf of "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Appellants challenge the Secretary's decision with respect to both what it means to be "recognized" and to be "under Federal jurisdiction." We first tackle the meaning of "recognized."

1.

The Secretary determined that the Cowlitz's federal acknowledgment in 2002 satisfied the statute's recognition requirement. The Secretary began by explaining that, although "now under Federal jurisdiction" refers to when the IRA was enacted, "now" is cabined to that Federal-jurisdiction requirement and does not modify "recognized." Citing Justice Breyer's approach from his concurrence in *Carcieri*, the ROD explained that "[t]he IRA imposes no time limit upon recognition," J.A. 255 (quoting 555 U.S. at 398, 129 S.Ct. 1058 (Breyer, J., concurring)), and "the tribe need only be 'recognized' as of the time the Department acquires the land into trust," J.A. 255. Thus, there was no need to further delineate the precise contours of the term, which the Secretary acknowledged carries much historical baggage. The concept of "recognition" has been used at once in the cognitive or quasi-anthropological sense, in terms of knowing or realizing that a tribe exists, and alternatively in a political sense, to refer to a formalized, unique relationship between a tribe and the United States. Rather than parse the range of interactions with the government qualifying as recognition, the Secretary concluded that under any definition, the Cowlitz's 2002 acknowledgment through the administrative federal acknowledgment process was sufficient. J.A. 254-55.

According to Appellants, the Secretary's interpretation was error because the IRA mandates that a tribe must have been recognized in the year 1934. When it comes to the meaning of recognition, they furthermore believe the IRA uses that term in the political sense. Appellants advocate that there must have been some "formal political act confirming the tribe's existence as a distinct political society" back in 1934, which, they maintain, the Cowlitz cannot show. Grand Ronde Br. 19 (citing *California Valley Miwok*, 515 F.3d at 1263).

2.

We first confront whether Congress has directly spoken to the issue, an inquiry we undertake using traditional tools of statutory interpretation, and decide it has not. *Chevron*, 467 U.S. at 842 n.9, 104 S.Ct. 2778; *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 297 (D.C. Cir. 2003).

Before moving to *Chevron* Step One, though, we pause to confirm that the *Chevron* framework is in fact applicable. Clark County suggests that the Supreme Court already foreclosed any role by Interior to interpret the first definition of Indian in the IRA. Clark County Br. 9-10 (citing *Carcieri*, 555 U.S. at 391, 129 S.Ct. 1058). That is too broad a reading of *Carcieri*, whose holding reaches only the temporal limits of the Federal-jurisdiction prong. 555 U.S. at 395, 129 S.Ct. 1058. ("We hold that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."). When the Court in another passage wrote that there was "no gap in 25 U.S.C. § 479 for the agency to fill," *Carcieri*, 555 U.S. at 391, 129 S.Ct. 1058, it was rejecting a government argument that the IRA's

three definitions of "Indian" were "illustrative rather than exclusive," Brief for Respondents at 26, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526). The Court disagreed that the statute's phrasing somehow empowered Interior to create additional categories of Indians. *See Carcieri*, 555 U.S. at 391, 129 S.Ct. 1058 (citing Brief for Respondents at 26-27). That sentence does not mean, however, that the IRA is wholly immune to a *Chevron* analysis.

***5** **[8]** We thus turn to the text of the statute, which defines "Indian" as:

> [1] [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction ...
>
> [2] [A]ll persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ...
>
> [3] [A]ll other persons of one-half or more Indian blood.

25 U.S.C. § 479. When considering the larger phrase, "recognized Indian Tribe now under Federal jurisdiction," the word, "now" is an adverb, and adverbs modify verbs, adjectives or other adverbs. MICHAEL STRUMPF & AURIEL DOGULAS, THE GRAMMAR BIBLE 112 (2004). Adverbs typically precede the adjectives and adverbs they seek to modify, which strongly signals that "now" is limited to the prepositional phrase, "now under Federal jurisdiction." *See id.* at 121. The placement of "now" in reference to "under Federal jurisdiction" is only half the answer, however. The more difficult question is whether that temporally limited prepositional phrase, "now under Federal jurisdiction," modifies the noun, "tribe," before its modification by the adjective, "recognized," or whether it modifies the already modified noun, "recognized tribe." If "now under Federal jurisdiction" only modifies "tribe," there is no temporal limitation on when recognition must occur. If the prepositional phrase instead modifies "recognized tribe," recognition must have already happened as of 1934. *See Carcieri*, 555 U.S. at 391, 129 S.Ct. 1058.

Understood in this way, we agree with the District Court that "recognized" is ambiguous and susceptible to either interpretation. While Appellants disagree, Grand Ronde offers a grammatical hypothetical that only confirms this ambiguity. When considering a statute giving benefits to "any certified veteran wounded in 1934," Grand Ronde Br. 12, that phrase might very well refer to a universe of veterans wounded in 1934, but thereafter certified, *Confederated Tribes*, 75 F.Supp.3d at 399. Like in our situation, "wounded in 1934" modifies the noun, "veteran." But "veteran" is also modified by "certified," and it is unclear from the sentence's structure when the certification must occur. Grande Ronde's own example shows that Appellants' construction "is not an inevitable one." *Regions Hosp. v. Shalala*, 522 U.S. 448, 460, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998); *see also id.* at 458, 118 S.Ct. 909 ("[T]he phrase 'recognized as reasonable' might mean costs the Secretary ... *has* recognized as reasonable ... or *will* recognize as reasonable").

The structure of the IRA does not counsel otherwise. Appellants contend that the IRA's second definition of "Indian" erases any ambiguity in the first definition and does not make sense unless we understand the statute to require recognition in 1934. The second definition refers to "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479. Appellants do not believe a descendant of a tribe recognized in 2002 could have lived on a reservation in 1934. That assumption is incorrect, for, as the government explains, recognition that occurs after 1934 "simply means, in retrospect, that any descendant of a Cowlitz Tribal member who was living on an Indian reservation in 1934 then met the IRA's second definition." Gov't Br. 47. As a concrete example, the District Court pointed to Cowlitz members who lived on the reservation of the Quinault Tribe in 1934. *Confederated Tribes*, 75 F.Supp.3d at 400. Thus, the IRA's second definition does not overcome the ambiguity we see in the first definition.

***6** We move on to legislative history, which similarly does not provide any clarity on when recognition must occur or what it entails. The Senate Committee on Indian Affairs discussed how to define "Indian" throughout April and May of 1934, and did so in contradictory ways. One exchange between Senator Elmer Thomas and Commissioner of Indian Affairs John Collier suggested the IRA was being crafted expansively, to "throw[ ] open Government aid to those rejected Indians." *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprises: Hearing on S. 2755 and S. 3645*

Before the S. Comm. on Indian Affairs, 73 Cong. 80 (1934) [hereinafter Subcommittee Hearing]. Other Senators expressed concern about whether individuals might evade the blood quantum requirement in the third definition of Indian, covering persons of one-half or more Indian blood, 25 U.S.C. § 479, if they could show they were "members of any recognized Indian tribe," Subcommittee Hearing at 266. To cabin eligibility, Chairman Wheeler said, "You would have to have a limitation after the description of the tribe," after which Collier suggested inserting "now under Federal jurisdiction," after "recognized Indian tribe." Subcommittee Hearing at 266. The hearing then abruptly ended, leaving only so much to glean from these words —certainly nothing about when recognition must occur. At most, this history reflects Congressional intent to limit what was a much broader concept of recognition by some "jurisdictional" connection to the government, even though, as discussed later, nobody seemed to know what that jurisdictional connection might be. While not telling us anything about any time limitation on recognition, the legislative history at least counters Appellants' contention that "recognized Indian tribe" was some established term of art unambiguously referring to a tribe's political status.

3.

[9] Proceeding to *Chevron* Step Two, we note that Appellants raise claims under both *Chevron* and *State Farm*, which in this case overlap. *See* EDWARDS, *supra*, at 217 ("In [some] situations, what is 'permissible' under *Chevron* is also reasonable under *State Farm*.") (quoting *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995)). Ultimately, we defer to Interior's interpretation of the statute. *Citizens Exposing Truth*, 492 F.3d at 465. Consistent with Justice Breyer's concurrence in *Carcieri*, it was not unlawful for the Secretary to conclude that a "tribe need only be 'recognized' as of the time the Department acquires the land into trust." J.A. 255.

Appellants disagree on account of what they allege is inconsistent agency interpretation of the IRA. *See Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006) ("When an agency adopts a materially changed interpretation of a statute, it must in addition provide a 'reasoned analysis' supporting its decision to revise its interpretation." (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983))). Appellants believe four things in particular prove their point: 1) a 1976 Department decision regarding the Stillaguamish Tribe; 2) a 1980 decision in *Brown v. Commissioner of Indian Affairs* by the Interior Board of Indian Appeals, 8 IBIA 183 (1980); 3) a 1994 Department letter to the House Committee on Natural Resources; and 4) a 2015 Department decision regarding the Mashpee Wampanoag Tribe. We reject the inferences Appellants would have us draw from each of these documents, none of which shows a "materially changed [agency] interpretation" of the IRA. *Alabama Educ. Ass'n*, 455 F.3d at 392. Rather, "administrative practice suggests that the Department has [already] accepted th[e] possibility" that "[t]he statute ... imposes no time limit upon recognition." *Carcieri*, 555 U.S. at 398, 129 S.Ct. 1058 (Breyer, J., concurring).

The Stillaguamish Tribe's path to qualifying for IRA benefits actually shows that the IRA does not limit the benefits it confers only to tribes recognized as of 1934. Appellants point to Interior's 1976 decision denying the tribe's request to take certain land into trust, but that was not the end of the story. What they fail to mention is that Interior reconsidered this decision just a few years later, in 1980. In so doing, it concluded the opposite —that the Stillaguamish did in fact "constitute a tribe for purposes of the IRA." J.A. 527. "It is irrelevant," explained the Department, "that the United States was ignorant *in 1934* of the rights of the Stillaguamish." J.A. 526 (emphasis added). The government even went so far as to say that it did not matter that it had "on a number of occasions ... taken the position that the Stillaguamish did not constitute a tribe." J.A. 527. Indeed, there are several instances throughout history where the United States initially has determined that a tribe "had long since been dissolved," only to correct this misapprehension later in time. *See Carcieri*, 555 U.S. at 398–99, 129 S.Ct. 1058 (Breyer, J., concurring). The Stillaguamish experience is therefore consistent with Interior's position vis-à -vis the Cowlitz.

***7** The *Brown v. Commissioner of Indian Affairs* decision is of no greater help to Appellants. 8 IBIA 183 (1980). There, the Interior Board of Indian Appeals confronted whether the appellant's Cowlitz nephew could receive a gift deed of a portion of his uncle's allotment on the Quinault Tribe reservation. To receive the gift, the nephew had to be an "Indian" under the IRA. *Id.* at 184-85. The Board first considered if the nephew qualified on

account of his inclusion on the official census roll of the "Indians of the Quinault Reservation" back "when the IRA was passed." *Id.* at 187. The uncle argued that the nephew's prior membership in that group provided the necessary statutory hook because the group had been "under Federal jurisdiction" in 1934. *See id.* at 188. The Board, however, declined "to dwell on the import of th [a]t phrase." *Id.* It was furthermore unconvinced that the "Indians of the Quinault Reservation" were "one and the same" as the present-day, federally recognized Quinault Tribe, and so rejected the uncle's argument. *Id.* at 188.

The Board therefore did not offer a contrary interpretation of "recognized" in its discussion of the nephew's membership in the "Indians of the Quinault Reservation." Nor did the Board elsewhere hold that the IRA requires Cowlitz recognition in 1934. *See* Grand Ronde Br. 13. "[I]n the absence" back in 1980 "of any evidence that [the nephew] was or is now a member of any other federally recognized tribe," *id.* at 190, the Board was left to uphold the conveyance under the IRA's second definition, *see id.* Knowing what we know now, post-2002, the conclusion that the nephew could not rely on his membership in the as-yet unrecognized Cowlitz Tribe is unremarkable. This is especially true in light of the Stillaguamish opinion, issued that same year, which confirms that the government has sometimes mistakenly taken a position that an Indian group does not constitute a tribe.

We can next dismiss outright the idea that Interior offered a contrary position in a 2015 record of decision to the Mashpee Wampanoag Tribe. *See* Grand Ronde Br. 13-14. Appellants' reliance on that decision is odd, given that Interior expressly said "there is no temporal limitation on the term 'recognized' and therefore, recognition in 1934 is not required." J.A. 4553 n.237.

Lastly, we find no merit in Appellants' remaining argument based on the inclusion of the year, 1934, in brackets in one sentence of a 1994 letter to the House Committee on Natural Resources. *See* J.A. 4636 (paraphrasing the first definition of "Indian" as including "all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction"). We fail to glean from those brackets or the letter any interpretation of the statute, let alone a departure from past agency interpretation; instead, the Assistant Secretary was responding to a request "to provide a list of nonhistoric Indian tribes." J.A. 4634. Even when the Supreme Court adjudicated the meaning of the IRA's first definition of "Indian" in *Carcieri*, it was unswayed by the persuasive authority of precisely this type of parenthetical. *Compare United States v. John*, 437 U.S. 634, 650, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (writing that the IRA defined "Indian" in part as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction"), *with* Brief of Petitioner at 25-26, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526) (advocating that "[t]he bracketed phrase 'in 1934' [in *United States v. John*] ... reflects the Court's understanding that the word 'now' restricts the operation of the IRA to tribes that were federally recognized and under federal jurisdiction at the time of enactment"), *and Carcieri*, 555 U.S. at 381–96, 129 S.Ct. 1058 (nowhere citing *United States v. John* in holding that "now under Federal jurisdiction" is restricted to 1934.).

As shown above, Interior's interpretation was reasonable. Neither the agency decisions pointed to by Appellants, nor the parenthetical from the 1994 letter—nor *United States v. John*, for that matter—persuade us otherwise, and we are bound to defer to the Board's reasonable interpretation of the statute it is charged to administer. *UC Health v. NLRB*, 803 F.3d 669, 681 (D.C. Cir. 2015).

B.

***8** The Secretary's authority to take land into trust, as mentioned, is limited to "recognized Indian tribe[s] now under Federal jurisdiction," 25 U.S.C. § 479, which leads Appellants also to challenge the Secretary's determination on what is required by the IRA's jurisdictional requirement.

The Secretary interpreted "now under Federal jurisdiction" to require a two-part inquiry. J.A. 260. First, the Secretary considers:

> whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions—through a course of

> dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members —that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.

J.A. 260-61. The second part of the test takes into account whether the Federal-jurisdiction status remained intact in 1934. J.A. 261.

Applying this test, the Secretary detailed the government's course of dealings with the Cowlitz dating from failed treaty negotiations at the 1855 Chehalis River Treaty Council, J.A. 263, to acknowledgment and communication with Cowlitz chiefs in the late 19th century, J.A. 264, to government provision of services into the 1900s, J.A. 265, to supervision in the 1920s by the local Taholah Agency, J.A. 265, to organization and claims efforts leading up to the ICC award, J.A. 266, to allotment activities, J.A. 267-68. Another "important action by the Federal Government evidencing the Tribe was under federal jurisdiction in 1934" was Interior's approval of an attorney contract for the Tribe in 1932, pursuant to a statute that required contracts between Indian tribes and attorneys be approved by the Commissioner of Indian Affairs and Secretary. J.A. 269. Furthermore, the Secretary explicitly rejected arguments relating to the 2005 NIGC Restored Lands Opinion, which discussed the lack of a government-to-government relationship with the Tribe, as conflating the modern, political concept of recognition with that used in the IRA, which was closer to an "ethnological and cognitive" concept. J.A. 270-71. In any event, the Secretary explained, "recognition is not the inquiry before us. Rather, it is the concept of federal jurisdiction that is addressed." J.A. 270.

[10] **[11]** Appellants urge that the phrase, "under Federal jurisdiction" is unambiguous, but we disagree. Congress nowhere in the statute gave further meaning to these words. Moreover, "jurisdiction" is a term of extraordinary breadth. Indian tribes are independent sovereigns, but at the same time "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 2, 5 Pet. 1, 8 L.Ed. 25 (1831), and subject to the "plenary and exclusive" authority of Congress, *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). As the government notes, due to Congress's plenary powers, every Indian tribe could be considered "under Federal jurisdiction" in some sense. *See* Gov't Br. 51. As already discussed, the legislative history provides no further clues, except that the jurisdictional nexus was meant as some kind of limiting principle. *See* Subcommittee Hearing at 266. Precisely how it would limit the universe of recognized tribes is unclear; Assistant Solicitor of the Interior Felix Cohen contemporaneously described the Senate bill as including the term, " 'now under Federal jurisdiction', *whatever that may mean*." S.A. 3 (emphasis added). Interior correctly predicted at the time that the phrase was "likely to provoke interminable questions of interpretation." J.A. 398 (agency analysis of differences between House and Senate bills, 1934). Indeed it has. We easily conclude that the phrase is ambiguous.

***9** **[12]** The Secretary's two-part test is furthermore reasonable. It makes sense to take treaty negotiations into account, as one of several factors reflecting authority over a tribe, even if they did not ultimately produce agreement. This is all the more so given the context within which the particular negotiations at issue occurred. The Cowlitz refused to sign an 1855 land cession treaty proposed at the Chehalis River Treaty Council, J.A. 625, whereby Governor Stevens of the Washington Territory and other federal agents sought to move the Cowlitz to a reservation on the Pacific Coast, J.A. 660-68. The Cowlitz resisted relocation and refused the treaty, J.A. 667, but years later the United States offered the Cowlitz's land for sale to settlers without compensation anyway, J.A. 498. As the District Court explained, the fact that the government nevertheless took the Cowlitz land even after the tribe resisted the treaty corroborates that the government treated the Cowlitz as under its jurisdiction.

We are not persuaded that the Secretary's interpretation is unreasonable for failure to require a formal, government-to-government relationship carried out between the tribe and the highest levels of the Interior Department. *See* Clark County Br. 24; Grand Ronde Br. 28 ("[T]he existence of a government-to-government relationship is the *sine qua non* of federal jurisdiction."). The statute does not mandate such an approach, which also does not follow from any ordinary meaning of jurisdiction. Whether the government acknowledged federal responsibilities toward a tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed. And as the Secretary explained, we can understand the existence of such responsibilities

sometimes from one federal action that in and of itself will be sufficient, and at other times from a "variety of actions when viewed in concert." J.A. 261. Such contextual analysis takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian affairs and implementing the statute. It is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction.

[13] Appellants make several additional arguments urging that the Secretary applied the two-part test in an arbitrary and capricious manner. Appellants maintain that the Cowlitz were "terminated" as a tribe as of 1934, which is the antithesis of being under federal jurisdiction, and that "the Secretary did not even *address*" this fact. Grand Ronde Br. 26. Appellants further believe that the Tribe conceded that they had been terminated before the NIGC, while advocating that it met the restored-lands exception to the IGRA, and that the Commission accepted this concession.

This version of events is somewhat of a mischaracterization. First, the Secretary *did* consider whether the Cowlitz were previously terminated, and found "no clear evidence" that the government terminated the Cowlitz, or that the tribe otherwise lost that status. J.A. 264. Second, the NIGC opinion is of little value when it comes to this particular inquiry. In order to meet the restored-lands exception—a requirement of the IGRA, not the IRA—the Commission interpreted the IGRA to require, *inter alia*, a period of non-recognition by the government. J.A. 1362 (citing *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for the W. Div. of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004)). So, whereas Appellants point to a 1933 quotation within the NIGC opinion, where Commissioner Collier said the Cowlitz were "no longer in existence as a communal entity," Grand Ronde Br. 24-25 (citing J.A. 1364), that sentiment goes to the government's mistaken belief at the time that the Cowlitz had been absorbed into the greater population. That error is consistent with the NIGC's conclusion that "the historical evidence establishes that the United States did not *recognize* the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002." J.A. 1363 (emphasis added). It is a conclusion about recognition—not whether the Tribe was under Federal jurisdiction. Finally, neither the Secretary nor this Court is bound by the Cowlitz's previous position before the NIGC. The Cowlitz used the term, "*de facto* termination," J.A. 1289, but essentially argued that the government failed to recognize it for a period of time, which is true.

***10** The only additional argument we need address is the assertion that the ROD is contrary to the agency's history of "consistently" finding the Cowlitz were not under federal jurisdiction in 1934. Grand Ronde Br. 30. Appellants focus on yet another lone sentence within an agency technical report produced during the federal acknowledgment process. *See* J.A. 1076 (discussing documents that purportedly showed the Cowlitz were not a "reservation tribe under Federal jurisdiction or under direct Federal supervision"). We think this statement reflects a narrower and dated understanding that equated land and direct supervision with jurisdiction. But the Secretary explained in the ROD that jurisdiction can be shown in more ways than that, *see* J.A. 260-63, and adequately documented the dealings that evidenced jurisdiction in 1934, *see* J.A. 267 (relying on a March 16, 1934 instruction from the Taholah agency to place Cowlitz Indians on the census roll for the Quinault Reservation); J.A. 269 (citing evidence of the agency granting "allotments [on the Quinault Reservation] to eligible Cowlitz Indians during the period from 1905 to 1930"); J.A. 269 (referencing agency approval of an attorney contract that was in the name of "the Cowlitz Tribe or Band of Indians"). At the end of the day, there is a large and complex record of Interior interactions with the Cowlitz for almost a century. The erroneous assumption that the Cowlitz no longer existed may have colored lone statements, when taken out of context, touching on aspects of jurisdiction over the Tribe. However, after reviewing the record in its entirety, we are confident that the Secretary reasonably determined the contacts between the United States and the Cowlitz from 1855 through 1934 satisfied part one of the two-part test, and that those contacts remained intact despite what was at times the agency's equivocal exercise of its authority and responsibilities.

C.

[14] Appellants next dispute the Secretary's determination that the Cowlitz parcel met the initial-reservation exception under the IGRA, so as to permit gaming on that land.

To recall, the IGRA's initial-reservation exception from its ban against gaming on Indian lands includes those lands taken into trust as "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii). Interior regulations require a tribe seeking to come within that exception to show, *inter alia*, that the land in question is "*within* an area where the tribe has significant historical connections." 25 C.F.R. § 292.6(d) (emphasis added). This is in contrast to the restored-lands exception, which requires at least "a significant historical connection *to the land*" itself. *Id.* § 292.12 (b) (emphasis added). A tribe can show significant historical connections by "demonstrat[ing] by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." *Id.* § 292.2. The Secretary has interpreted "vicinity" in both the initial-reservation and restored-lands context to mean "those circumstances" of use and occupancy "lead[ing] to the natural inference that the tribe also made use of the" parcel in question." J.A. 292; *see also* J.A. 4518, 4534.

The Secretary determined that the Cowlitz met the initial-reservation exception after reviewing a number of historical sources, including those relied on by the ICC and the government during the federal acknowledgment determination. The Secretary identified evidence of Cowlitz use or occupancy three miles northwest of the Cowlitz parcel, J.A. 295 (lodges and about 100 "Kowalitsk"), ten miles south, J.A. 296 (trading presence), and less than three miles north from the Cowlitz Parcel, J.A. 300-01 (Cowlitz boatmen), as well as "exclusive use and occupancy ... within 14 miles," J.A. 298 (ICC decision). The ROD further relied on signs of a major Cowlitz battle in the 1800s less than three miles from the parcel, J.A. 299, and, only six miles from the parcel, hunting by the Cowlitz Indian Zack, who also assisted settlers during the 1855-1856 Indian war, J.A. 300. The record also includes documentation of the Tribe's presence at Fort Vancouver, J.A. 297, 301, which is south of the city of Vancouver, Washington, which itself is south of the land in question. All of this provided sufficient "historical evidence of occupancy and use by the Cowlitz of lands in the vicinity of the Cowlitz Parcel," and "significant historical connections to the Cowlitz Parcel." J.A. 302.

Appellants attack "[t]he Secretary's IGRA ruling [as] constitut[ing] the worst sort of ad hoc decision-making." Grand Ronde Br. at 42. Specifically, they allege the Secretary: 1) used the wrong standard; 2) failed to recognize that, under the right standard, the initial-reservation test requires significant historical connections "to the parcel *itself*," which the Cowlitz cannot show; and 3) departed from agency precedent.

***11** Appellants base their first two objections on two perceived ambiguities within the ROD. At times the Secretary used language indicating not just that the Cowlitz had a demonstrable presence within an area of significant historical connection to the parcel, but that the evidence showed a connection to the parcel itself. *Compare* J.A. 291 ("We determine that the Cowlitz Tribe has significant historical connections to the land in the vicinity of the Cowlitz Parcel."), *with* J.A. 303 ("The key question is whether the historic Cowlitz Indians had significant historical connections with the Cowlitz Parcel."). Second, although the Secretary cited the Scotts Valley Opinion, explaining that whether a tribe's use and occupancy occurred "within the vicinity" of the land at issue asks whether the circumstances "lead to the natural inference that the tribe also made use of the parcel in question," J.A. 292 (internal quotation marks omitted), the Secretary did not again use the words, "natural inference," in explaining how the numerous pieces of evidence supported the ROD's conclusion that the parcel fulfilled the IGRA's regulatory requirements.

Seeing as the Secretary ultimately "conclude[d] that the Tribe has significant historical connections with the Cowlitz Parcel," J.A. 302, any error the Secretary may have made in that regard did not amount to reversible error, *see* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). We are unconvinced that the Secretary used the wrong standard. If anything, the Secretary used the correct standard but found more than what was necessary for the initial-reservation exception. To be clear, contrary to the interpretation pressed by Grand Ronde, this exception does not mandate that historical documentation implicate the actual land where gaming will take place. The regulation provides that the Cowlitz had only to show that the parcel was "*within* an area where the tribe has significant historical connections." 25 C.F.R. § 292.6(d) (emphasis added). Indeed, the regulation's breadth comports with the agency's rejection of various, strict forms of the test suggested at the time of the regulation's adoption, which the agency feared might "create too large a barrier

to tribes in acquiring lands." Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,360 (May 20, 2008); *see also Citizens Exposing Truth*, 492 F.3d at 467 ("IGRA's [initial-reservation] exception 'ensur[es] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.' ") (quoting *City of Roseville*, 348 F.3d at 1030). Thus, the agency's interpretation of its regulation was in line with its intent at the time of promulgation, and any ambiguity in the language used by the agency as it exhaustively analyzed evidence dating back to the early 1800s only shows the ROD went above and beyond fulfilling the regulatory requirements. *Cf. PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.").

Moving on, Appellants urge that the ROD broke from past precedent, but the gist of their argument is really that they disagree with the Secretary's finding that the record establishes "significant" connections to the parcel. *See* Clark County Br. 47 ("[T]he Secretary has required connections based on subsistence use and occupancy to be enduring, substantial, and non-speculative." (emphasis deleted)); Grand Ronde Br. 36 ("[N]ot just *any* historical connections will do."). There is no "sharp break" from the opinions regarding the Scott's Valley Band of Pomo Indians, Grand Ronde Br. 39, the Guidiville Band of Pomo Indians, Clark County Br. 50-51 & n.20, or any others, *see* Grand Ronde Br. 40 n.18. To the extent Appellants think this precedent shows Interior required a higher quantum of evidence in previous cases, those were restored-lands opinions, *see* J.A. 4303, 4336, where a connection was made "often [to] the very *heart* of the tribe's territory." Grand Ronde 39; *see also* 25 C.F.R. § 292.12(b) (necessitating "a significant historical connection *to the land*" (emphasis added)).

***12** Appellants' strongest argument is that the agency in an opinion to the Guidiville Band said that documentation of a trade route was insufficient to establish subsistence use because "something more than evidence that a tribe merely passed through a particular area is needed." J.A. 4316. At first glance, that is in contrast to the Cowlitz ROD, where "[e]vidence of trade and trade routes ... [wa]s a key consideration." J.A. 298. The Cowlitz ROD does not stop there, however, but continues to distinguish the Guidiville Opinion by explaining that it had not previously "conclude[d] that activities associated with a trade route or trading activities in general can never constitute evidence of significant historical connections." J.A. 299. "[S]uch activities have to be substantial enough to be more than 'a transient presence in the area,' " explained the Secretary, J.A. 299, which is the same as its prior interpretation of the regulation, *see* J.A. 4316 (requiring in the Guidiville Opinion "something more than a transient presence in an area").

The ROD is supported by substantial evidence amply showing that Interior found the Cowlitz parcel to be within a broader area of historical significance to the Tribe. J.A. 292-302. The decision is not otherwise arbitrary or capricious, and thus we find no merit in Appellants' challenges on this front.

D.

The Clark County Appellants alone bring these next claims stemming from the Tribe's membership growth in the time since its federal acknowledgment application. We reject them all.

In April 2006, Interior issued a DEIS for the casino. The agency subsequently received comments requesting that it provide the tribe's business plan, which is required as part of the tribe's fee-to-trust application package. *See* 25 C.F.R. 151.11(c) ("Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use."). The plan showed the Tribe had 3,544 members. It also stated the Tribe would require approximately $113 million annually for its "unmet needs," or, in other words, to fund government infrastructure, programs, and services. The Secretary appended the plan to the FEIS, which included the $113 million figure from the plan in the FEIS Purpose and Need statement.

Appellants protest that the Tribe's new membership level from the business plan represents a dramatic increase from 1,482 members in 2002, when the Cowlitz were first federally acknowledged. *See* Clark County Br. 27-28. Under IRA regulation 25 C.F.R. § 83.12(b) (1994),[7] the Cowlitz had submitted a list of members as part of the federal acknowledgment process, which became its official "base roll" for federal funding and other purposes. That

regulation also provides that additions to the roll must meet certain criteria, such as "maintaining significant social and political ties with the tribe," *see* Clark County Mot. Summ. J. 25 (citing 25 C.F.R. § 83.12(b) (1994)), and so Clark County believes the agency had a duty to verify the membership increase, *see* Clark County Br. 27-28. Clark County additionally argues that the agency had a duty under NEPA's implementing regulations to verify the Tribe's self-reported unmet economic needs. Clark County Br. 35-39. Appellants' concern in that regard relates back to the agency's consideration of the range of reasonable alternatives, *see Confederated Tribes*, 75 F.Supp.3d at 420–21; Interior had originally identified nineteen possible project locations, but eliminated five locations that were north of the parcel as too inconvenient to the Seattle and Portland markets to "adequately meet the economic objectives and needs of the Tribal government," *id.* at 420 (citing J.A. 2805).

[15] We first reject any claim regarding 25 C.F.R. § 83.12(b) as forfeited. Clark County never raised to the agency a duty to verify membership enrollment pursuant to this regulation. The best Appellants can point to are letters expressing the County's concern to the agency about the business plan and the Tribe's unmet needs in reference to the NEPA process. *See* J.A. 2144-46 (letter to BIA submitting supplemental comments to the DEIS); J.A. 2375 (letter to Interior arguing that the tribe is using inflated member statistic in its "Business Plan to inflate its tribal needs to constrain BIA review and short circuit the NEPA process"); *see also* Clark County Br. 30 (citing to instances in the record where it framed the expansion issue in terms of NEPA reasonable alternatives). Not only did Clark County fail to invoke Section 83.12(b) in express terms, but it was not "necessarily implicated" in discussion of an entirely different statutory scheme. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008). And despite referencing NEPA in these letters, Appellants fail to point us to any of their comments to the FEIS raising concerns about Cowlitz membership levels. This directly undercuts their claim that the Secretary failed to address questions about the Tribe's expanded enrollment. While some comments responding to the FEIS referenced the Tribe's unmet needs figure, as opposed to membership levels, *see, e.g.*, J.A. 3381, 3413, the Secretary fully addressed all questions about the business plan actually raised before the agency, *see* J.A. 191 (determining agency review of a "Tribe's internal economic planning strategy document" to "be inappropriate and contrary to federal Indian policies encouraging tribal sovereignty, self-determination and self-governance").

***13** **[16]** We are similarly unpersuaded that the Secretary had an obligation under NEPA regulation 40 C.F.R. § 1506.5(a) to verify that the Cowlitz's unmet needs report was accurate. *See* Clark County Br. 35-39. That regulation provides that "[i]f an agency requires an applicant to submit *environmental information* for possible use by the agency in preparing an environmental impact statement ... [t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy." *Id.* § 1506.5(a) (emphasis added). Neither the annual unmet needs figure complained of here, nor the membership numbers that purportedly inflated the Tribe's unmet needs, are environmental in nature. It may be the case that Section 1506.5(a) might in other circumstances apply to some kind of information that is simultaneously socioeconomic and environmental, as Appellants argue. *See* Clark County Br. 37. But at least as presented here, Clark County's quarrel is that the agency's failure to do its own investigation resulted in excluding from consideration reasonable alternatives located farther away from competing casino interests. *See* Clark County Br. 38; *see also* J.A. 3366 (lamenting the economic impact of the "emergence of a tribal casino on the outskirts of" La Center, Washington). That is the gravamen of this particular complaint, which we are not convinced is appropriately pursued under Section 1506.5. As Clark County did not challenge on any other grounds the decision to exclude certain allegedly reasonable alternatives from the FEIS, *see Confederated Tribes*, 75 F.Supp.3d at 419–20, we have no occasion to rule on those issues. Clark County ultimately cannot prevail in any of its claims related to the Tribe's membership or business plan.

* * *

For all of the foregoing reasons, we affirm the judgment of the District Court in its entirety.

So ordered.

All Citations

--- F.3d ----, 2016 WL 4056092

Footnotes

1 The City of Vancouver, Washington, was voluntarily dismissed from the case following oral argument.

2 The ICC no longer exists but was a special tribunal created to try pre-1946 Indian claims against the federal government. *Six Nations Confederacy v. Andrus*, 610 F.2d 996, 997 (D.C. Cir. 1979).

3 In 1973, the ICC entered judgment in favor of the Cowlitz for $1,550,000. 30 Ind. Cl. Comm. 129, 143 (April 12, 1973).

4 Following an administrative appeal and remand, in December 2001, the Assistant Secretary for Indian Affairs issued a Reconsidered Final Determination affirming the earlier one. J.A. 1143. The Reconsideration was published in the Federal Register on, and federal acknowledgment was effective as of, January 4, 2002. 67 Fed. Reg. 607 (Jan. 4, 2002).

5 Congress created the NIGC, an independent regulatory commission located within the Interior Department, to implement the IGRA. *See Diamond Game Enters.*, 230 F.3d at 367; Cohen at 876 n.5.

6 The tribe noted that it was effectively asking to qualify for both exceptions —one through the Secretary and one through the NIGC. At the time there was no prohibition on qualifying for both exceptions at the same time, but that changed in 2008. *See Confederated Tribes*, 75 F.Supp.3d at 395 n.3 (citing 25 C.F.R. § 292.6 (2008)); 25 C.F.R. § 292.11(b)(2) (2008).

7 In 2015, Interior updated and revised the Part 83 regulations, eliminating this particular "base roll" limitation provision. *See* Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862, 37,885 (July 1, 2015).

End of Document

EXHIBIT B

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

March 12, 2014

M-37029

Memorandum

To: Secretary

From: Solicitor

Subject: The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act

I. INTRODUCTION

In February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*.[1] The Court in that decision held that the word "now" in the phrase "now under federal jurisdiction" in the Indian Reorganization Act ("IRA") refers to the time of the passage of the IRA in 1934. The *Carcieri* decision specifically addresses the Secretary's authority to take land into trust for "persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction."[2] The case does not address taking land into trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA. This opinion addresses interpretation of the phrase "under federal jurisdiction" in the IRA for purposes of determining whether an Indian tribe can demonstrate that it was under federal jurisdiction in 1934.

II. Supreme Court Decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009)

In 1983, the Narragansett Indian Tribe of Rhode Island ("Narragansett") was acknowledged as a federally recognized tribe.[3] Prior to being acknowledged, the Narragansett filed two lawsuits to recover possession of approximately 3,200 acres of land comprising its aboriginal territory that were alienated by Rhode Island in 1880 in violation of the Indian Trade and Intercourse Act. On September 30, 1978, the parties settled the lawsuit which was incorporated into federal implementing legislation known as the Rhode Island Indian Claims Settlement Act.[4] In exchange for relinquishing its aboriginal title claims, the Narragansett agreed to accept possession of 1,800 acres within the claim area.

In 1985, after the Narragansett had been acknowledged, the Rhode Island Legislature transferred the settlement lands to the Narragansett. Subsequently, the Narragansett requested that its settlement lands be taken into trust by the Federal Government pursuant to Section 5 of the IRA.

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[1] 555 U.S. 379 (2009).
[2] *See* 25 U.S.C. § 479.
[3] 48 Fed. Reg. 6177 (Feb. 10, 1983).
[4] 25 U.S.C. §§ 1701-1716 (2014).

The Narragansett's application was approved by the Bureau of Indian Affairs ("BIA") and upheld by the Interior Board of Indian Appeals ("IBIA") notwithstanding a challenge by the Town of Charlestown.[5] The settlement lands were taken into trust with the restriction contained in the Settlement Act that the lands were subject to state criminal and civil jurisdiction.[6]

In 1998, the BIA approved, pursuant to Section 5 of the IRA, the Narragansett's application to acquire approximately 32 acres into trust for low income housing for its elderly members. The IBIA affirmed the BIA's decision.[7]

The State and local town filed an action in district court against the United States claiming that the Department of the Interior's ("Department's" or "Interior's") decision to acquire 32 acres into trust violated the Administrative Procedure Act; that the Rhode Island Indian Claims Settlement Act precluded the acquisition; and that the IRA was unconstitutional and did not apply to the Narragansett. In 2007, the First Circuit, acting *en banc*, rejected the State's argument that Section 5 did not authorize the BIA to acquire land for a tribe who first received federal recognition after the date the IRA was enacted.[8] The State sought review in the Supreme Court, which the Court granted on February 25, 2008. Among other parties, the Narragansett Tribe filed an *amicus* brief in the Supreme Court case.

A. Majority Opinion

The Supreme Court in a 6-3 ruling (Breyer, J., concurring; Souter and Ginsburg, J.J., concurring in part and dissenting in part; Stevens, J., dissenting) reversed the First Circuit and held that the Secretary did not have authority to take land into trust for the Narragansett because the Narragansett was not under federal jurisdiction at the time the IRA was enacted in 1934. Justice Thomas, writing for the majority, determined that the Court's task was to interpret the term "now" in the statutory phrase "now under federal jurisdiction," which appears in IRA Section 19's first definition of "Indian."[9]

Interpreting Section 19, in concert with Section 5, the Supreme Court applied a strict statutory construction analysis to determine whether the term "now" in the definition of Indian in Section 19 referred to 1998 when the Secretary made the decision to accept the parcel into trust or referred to 1934 when the IRA was enacted.[10] The Court analyzed the ordinary meaning of the word "now" in 1934,[11] within the context of the IRA,[12] as well as contemporaneous departmental

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[5] *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 18 IBIA 67 (Dec. 5, 1989).

[6] 25 U.S.C. § 1708.

[7] *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (June 29, 2000).

[8] *Carcieri v. Kempthorne*, 497 F.3d 15, 30-31 (1st Cir. 2007)

[9] *Carcieri*, 555 U.S. at 382. Furthermore, while the definition of Indian includes members of "any recognized Indian tribe now under federal jurisdiction," the Supreme Court did not suggest that the term "recognized" is encompassed within the phrase "now under federal jurisdiction." Consistent with the grammatical structure of the sentence – in which "now" modifies "under federal jurisdiction" and does not modify "recognized" – and consistent with Justice Breyer's concurring opinion, we construe "recognized" and "under federal jurisdiction" as necessitating separate inquiries. *See* discussion Section III.F.

[10] *Carcieri*, 555 U.S. at 388.

[11] The Court examined dictionaries from 1934 and found that "now" meant "at the present time" and concluded that such an interpretation was consistent with the Court's decisions both before and after 1934. *Id.* at 388-89.

correspondence,[13] concluding that "the term 'now under the federal jurisdiction' in [Section 19] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."[14] The majority, however, did not address the meaning of the phrase "under federal jurisdiction" in Section 19, concluding that the parties had not disputed that the Narragansett Tribe was not under federal jurisdiction in 1934.[15]

B. Justice Breyer's Concurring Opinion

Justice Breyer wrote separately, concurring in the majority opinion with a number of qualifications. One of these qualifications is significant for the Department's implementation of the Court's decision. He stated that an interpretation that reads "now" as meaning "'in 1934' may prove somewhat less restrictive than it first appears. That is because a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time."[16] Put another way, the concepts of "recognized" and "under federal jurisdiction" in Section 19 are distinct – a tribe may have been under federal jurisdiction in 1934 even if BIA officials at the time did not realize it.

Justice Breyer cited to specific tribes that were erroneously treated as not under federal jurisdiction by federal officials at the time of the passage of the IRA, but whose status was later recognized by the Federal Government.[17] Justice Breyer further suggested that these later-recognized tribes could nonetheless have been "under federal jurisdiction" in 1934 notwithstanding earlier actions or statements by federal officials to the contrary. In support of these propositions, Justice Breyer cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under federal jurisdiction in 1934, but which nevertheless exhibited a "1934 relationship between the tribe and Federal Government that could be described as jurisdictional."[18]

Justice Breyer specifically cited to the Stillaguamish Tribe as an example in which the tribe had treaty fishing rights as of 1934, even though the tribe was not formally recognized by the United

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[12] The Court also noted that in other sections of the IRA, Congress had used "now or hereafter" to refer to contemporaneous and future events and could have explicitly done so in Section 19 if that was Congress' intent in the definition. *Id.* at 390.

[13] The Court noted that in a letter sent by Commissioner Collier to BIA Superintendents, he defined Indian as a member of any recognized tribe "that was under [f]ederal jurisdiction at the date of the Act." *Id.* at 390 (quoting from *Letter from John Collier, Commissioner to Superintendents*, dated March 7, 1936).

[14] *Id.* at 395.

[15] *Id.* at 382, 392. The issue of whether the Narragansett Tribe was "under federal jurisdiction in 1934" was not considered by the BIA in its decision, nor was evidence concerning that issue included in the administrative record before the courts. When the BIA issued its decision, the Department's long standing position was that the IRA applied to all federally recognized tribes. Because the Narragansett Tribe was federally recognized, the administrative record assembled pertained solely to the Bureau's compliance with the Part 151 regulatory factors. *See* 25 C.F.R. Part 151.

[16] *Carcieri*, 555 U.S. at 397 (Breyer, J., concurring).

[17] *Id.* at 398.

[18] *Id.* at 399. Justice Breyer concurred with Justices Souter and Ginsburg that "recognized" was a distinct concept from "now under federal jurisdiction." However, in his analysis he appears to use the term "recognition" in the sense of "federally recognized" as that term is currently used today in its formalized political sense (i.e., as the label given to Indian tribes that are in a political, government-to-government relationship with the United States), without discussing or explaining the meaning of the term in 1934. *See infra* discussion Section III.F.

States until 1976.[19] The concurring opinion of Justice Breyer also cited Interior's erroneous 1934 determination that the Grand Traverse Band of Ottawa and Chippewa Indians had been "dissolved," a view that was later repudiated by Interior's 1980 correction concluding that the Band had "existed continuously since 1675."[20] Finally, Justice Breyer cited the Mole Lake Band as an example of a case in which the Department had erroneously concluded the tribe did not exist, but later determined that the anthropological study upon which that decision had been based was erroneous and thus recognized the tribe.[21]

Thus, Justice Breyer concluded that, regardless of whether a tribe was formally recognized in 1934, a tribe could have been "under federal jurisdiction" in 1934 as a result, for example, of a treaty with the United States that was in effect in 1934, a pre-1934 congressional appropriation, or enrollment as of 1934 with the Indian Office.[22] Justice Breyer, however, found no similar indicia that the Narragansett were "under federal jurisdiction" in 1934. Indeed, Justice Breyer joined the majority in concluding that the evidence in the record before the Supreme Court indicated that the Narragansett were not federally recognized or under federal jurisdiction in 1934.[23] Justices Souter and Ginsburg, by contrast, would have reversed and remanded to allow the Department an opportunity to show that the Narragansett Tribe was under federal jurisdiction in 1934, contending that the issue was not addressed in the record before the Court.[24] Justice Stevens dissented, finding that the IRA placed no temporal limit on the definition of an Indian tribe,[25] and criticizing the majority for adopting a "cramped reading" of the IRA.[26]

In sum, the Supreme Court's majority opinion instructs that in order for the Secretary to acquire land under Section 5 of the IRA for a tribe pursuant to the first definition of "Indian" in Section 19, a tribe must have been "under federal jurisdiction" in 1934. The majority opinion, however, did not identify the types of evidence that would demonstrate that a tribe was under federal jurisdiction. Nor, in 1934, was there a definitive list of "tribes under federal jurisdiction."[27] Therefore, to interpret the phrase "now under federal jurisdiction" in accordance with the holding in *Carcieri*, the Department must interpret the phrase "under federal jurisdiction."

III. STATUTORY INTERPRETATION

A. Statutory Construction and Deference

Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency's statutory interpretation. At the first step, the agency must answer

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[19] *Id.* at 398.
[20] *Id.*
[21] *Id.* at 399.
[22] *Id.*
[23] *Id.* at 395-96 (noting the petition for writ of *certiorari* represented that the Tribe was neither federally recognized nor under federal jurisdiction in 1934; *id.* at 399 (Breyer, J., concurring) ("neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934."). *But see supra* note 5.
[24] *Id.* at 401 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part).
[25] *Id.* (Stevens, J., dissenting).
[26] *Id.* at 413-14.
[27] Memo. from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, at 7 ("Stillaguamish Memorandum").

"whether Congress has directly spoken to the precise question at issue."[28] If the language of the statute is clear, the court and the agency must give effect to "the unambiguously expressed intent of Congress."[29] If, however, the statute is "silent or ambiguous,"[30] pursuant to the second step, the agency must base its interpretation on a "reasonable construction" of the statute.[31] When an agency charged with administering a statute interprets an ambiguity in the statute or fills a gap where Congress has been silent, the agency's interpretation should be either controlling or accorded deference unless it is unreasonable or contrary to the statute.[32]

Even when agency decisions may not be entitled to deference under *Chevron*, they are entitled to some respect because these decisions are "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[33] *Skidmore* deference requires that a court establish the appropriate level of judicial deference towards an agency's interpretation of a statute by considering several factors, including "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[34] For *Skidmore* deference to apply, a reviewing court need only find the existence of factors pointing toward a reason for granting the agency deference. Even if the court does not agree with the agency decision, it should nonetheless extend deference if the agency's position is deemed to be reasonable.[35]

Finally, the canons of construction applicable in Indian law, which derive from the unique relationship between the United States and Indian tribes, also guide the Secretary's interpretation of any ambiguities in the IRA.[36] Under these canons, statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians, with any ambiguities to be resolved in their favor.[37]

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[28] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).
[29] *Id.* at 843.
[30] *Id.*
[31] *Id.* at 840.
[32] The Secretary receives deference to interpret statutes that are consigned to her administration. *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 Serves.*, 545 U.S. 967, 986 (2005) ("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.'").
[33] *Skidmore*, 323 U.S. at 139.
[34] *Id.* at 140.
[35] *See, e.g., Cathedral Candle Co. v. United States Int'l Trade Comm'n*, 400 F.3d 1352, 1366 (Fed. Cir. 2005) (noting that the court need not have initially reached the same conclusion as the agency). *See also Tualatin Valley Builders Supply Inc. v. United States*, 522 F.3d 937, 942 (9th Cir. 2008); *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1069 (9th Cir. 2003) (en banc).
[36] *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783 (D.S.D. 2006) (outlining the principles of liberality in construction of statutes affecting Indians).
[37] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

1. The IRA

The IRA was the culmination of many years of effort to change the Federal Government's Indian policy. As the Supreme Court has held, the "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[38] This "sweeping" legislation manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy characterized by the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes."[39]

While the IRA's land acquisition provision was to address in part the dismal failure of the assimilation and allotment policy, it also had a broader purpose to "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property."[40] As Commissioner Collier acknowledged in his testimony before Congress during the introduction of the IRA legislation, "[t]he Indians are continuing to lose ground; yet Government costs must increase, while the Indians must still continue to lose ground, unless existing law be changed. . . . While being stripped of their property, these same Indians cumulatively have been disorganized as groups and pushed to a lower social level as individuals . . . . The disastrous condition peculiar to the Indian situation in the United States . . . is directly and inevitably the result of existing law – principally, but not exclusively, the allotment law and its amendments and its administrative complications."[41] During the time of the IRA's passage, Tribes' economic conditions were unconscionable and Congress had sought to disband and dismantle tribal governance structures.[42] The BIA administratively controlled reservation life, which included the establishment and imposition of governance systems on the tribes.[43] After the publication of the Meriam Report documenting the conditions of Indians and tribes,[44] a concerted effort was made to reverse course. The IRA was enacted to help achieve this shift.[45]

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[38] *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974).

[39] *United States* v. *Celestine*, 215 U.S. 278, 290 (1909).

[40] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler). *See also* The Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (1928) ("Meriam Report") (detailing the deplorable status of health, *id.* at 3-4, 189-345, poverty, *id.* at 4-8, 430-60, 677-701, education, *id.* at 346-48, and loss of land, *id.* at 460-79). The IRA was not confined to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of "Indian tribe." 25 U.S.C. § 479.

[41] Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 15-16 (Feb 22, 1934) ("House Hearings").

[42] *Id.* at 15-18 (At the conclusion of the allotment era in 1934, Indian land holdings were reduced from 138,000,000 acres to 48,000,000 acres, a loss of more than eighty-five percent of the land allotted to Indians.).

[43] Meriam Report at 6 ("The economic basis of the . . . Indians has been largely destroyed by the encroachment of white civilization. The Indians can no longer make a living as they did in the past by hunting, fishing, gathering wild products, and the . . . limited practice of primitive agriculture."); *id.* at 7 ("[P]olicies adopted by the government in dealing with Indians have been of a type which, if long continued, would tend to pauperize any race. . . . Having moved the Indians from their ancestral lands to restricted reservations . . . , the government undertook to feed them and to perform . . . services for them . . . ."); *id.* at 8 ("The work of the government directed toward the education and advancement of [Indians] . . . is largely ineffective. . . . [T]he government has not appropriated enough funds to permit the Indian Service to employ an adequate personnel properly qualified for the task before it.").

[44] *See supra* note 40 ("Meriam Report").

[45] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972).

As originally introduced, the IRA was a self-governance act. It acknowledged the right of tribes to self-organize and self-govern. As passed, the IRA had the following express purposes:

> An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organization; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.[46]

To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-governance. Congress authorized Indian tribes to adopt their own constitutions and bylaws[47] and to incorporate.[48] It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application.[49] In service of the broader goal of "recogn[izing] [] the separate cultural identity of Indians," the IRA encouraged Indian tribes to revitalize their self-government and to take control of their business and economic affairs.[50] Congress also sought to assure a solid territorial base by, among other things, "put[ting] a halt to the loss of tribal lands through allotment."[51] Of particular relevance here, Section 5 of the IRA provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.[52]

Section 19 of the IRA defines those who are eligible for its benefits. That section provides that the term "tribe" "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[53] Section 19 further provides as follows:

> The term "Indian" . . . shall include all persons of Indian descent who are [1] members of any recognized Indian tribe now under [f]ederal jurisdiction, and [2] all persons who are

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[46] Pub. L. No. 73-383, 48 Stat. 984 (1934).
[47] Section 16, 25 U.S.C. § 476,
[48] Section 17, 25 U.S.C. § 477.
[49] Section 18, 25 U.S.C. § 478.
[50] Graham Taylor, *The New Deal and American Indian Tribalism*, 39 (1980). *See also* Act of June 18, 1934, 48 Stat. 984 ("An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses . . . .")
[51] *Mescalero*, 411 U.S. at 151.
[52] 25 U.S.C. § 465.
[53] 25 U.S.C. § 479.

> descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.[54]

With a few amendments, the IRA has remained largely unchanged since 1934. Indeed, the IRA is one of the main cornerstones promoting tribal self-determination and self-governance policies promulgated by the United States. These concepts remain the United States' guiding principles in modern times.[55]

2. Meaning of the phrase "under federal jurisdiction"

In examining the statute, the first inquiry is to determine whether there is a plain meaning of the phrase "under federal jurisdiction." For the purposes of this memorandum, I analyze this phrase in the context of the first definition of "Indian" in the IRA – members of any recognized Indian tribe now under federal jurisdiction.[56] The IRA does not define the phrase "under federal jurisdiction," and as shown below, the apparent author of the phrase, John Collier, did not provide a definition either. In discerning the meaning of the phrase since Congress has not spoken directly on this issue, one option is to look to the dictionary definitions of the word "jurisdiction."[57] In 1933, Black's Law Dictionary defined the word "jurisdiction" as:

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.[58]

The entry in Black's includes the following quotation: "The authority of a court as distinguished from the other departments; . . ."[59] Since the issue before the Department concerns an "other department" rather than a court, I turn to the contemporaneous Webster's Dictionary for assistance. Webster's definition of "jurisdiction" provides a broader illustration of this concept as it pertains to governmental authority:

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[54] *Id.*

[55] *See, e.g.,* President Obama's Executive Order 13647 (June 26, 2013) (establishing the White House Council on Native American Affairs); Department of the Interior's Tribal Consultation Policy (December 2011); and President Obama's Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (November 5, 2000), (reiterating a commitment to the policies set out in Executive Order 13175).

[56] 25 U.S.C. § 479.

[57] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (When a term is not defined in statute, the court's "task is to construe it in accord with its ordinary or natural meaning."); *id.* at 275 (With a legal term, the court "presume[s] Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment.").

[58] *Black's Law Dictionary* at 1038 (3d ed. 1933).

[59] *Id.*

> 2. Authority of a sovereign power to govern or legislate; power or right to exercise authority; control.
> 3. Sphere of authority; the limits, or territory, within which any particular power may be exercised.[60]

These definitions, however, while casting light on the broad scope of "jurisdiction," fall short of providing a clear and discrete meaning of the specific statutory phrase "under federal jurisdiction." For example, these definitions do not establish whether in the context of the IRA, "under federal jurisdiction" refers to the outer limits of the constitutional scope of federal authority over the tribe at issue or to whether the United States exercised jurisdiction in fact over that tribe. I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction."

3. The Legislative History of the IRA

The Department of the Interior drafted the proposed legislation that subsequently was enacted as the IRA. The Interior Solicitor's Office took charge of the legislative drafting, with much of the work undertaken by the Assistant Solicitor, Felix S. Cohen.[61] In February 1934, the initial version of the bill was introduced in both the House of Representatives and the Senate. The Indian Affairs Committees in both bodies held hearings on the bill over the next several months, which led to significant amendments to the bills. These amendments included the addition of the phrase "now under federal jurisdiction" to the definition of the term "Indian." Confusion regarding whether the blood quantum requirement applied to the first two parts of the definition, as well as a desire to limit the scope of the definition, led to the addition of the "under federal jurisdiction" language. However, other than indicating a desire to limit the scope of eligibility for IRA benefits, the legislative history did not otherwise define or clarify the meaning of the term "under federal jurisdiction."

In the initial version of the Senate bill proposed in February 1934, the term "Indian" was defined as persons who are members of recognized tribes without any reference to federal jurisdiction. The definition also included descendants residing on the reservation and a one-quarter or more blood quantum requirement, as follows:

> Section 13 (b) The term 'Indian' as used in this title to specify the person 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 are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood, but nothing in this definition or

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[60] *Merriam-Webster's New International Dictionary* (2d ed. 1935). *See, e.g., Sanders v. Jackson,* 209 F.3d 998, 1000 (7th Cir. 2000) (The plain meaning of a statutory term can sometimes be ascertained by looking to the word's ordinary dictionary definition.).

[61] Elmer Rusco, *A Fateful Time*, 192-93 (2000); *id.* at 207 ("In a memorandum to Collier on January 17, 1934, Felix Cohen reported that drafts of the proposed legislation . . . are now ready . . . . On January 22, Cohen sent the commissioner drafts of two bills . . . .") (internal quotations and citations omitted). *See also* John Collier, *From Every Zenith; A Memoir and Some Essays on Life and Thought*, 229-30 (1964) (discussing the role of the Indian Service in bringing about Indian self-government).

> in this Act shall prevent the Secretary of the Interior or the constituted authorities of a chartered community from prescribing, by provision of charter or pursuant thereto, additional qualifications or conditions for membership in any chartered community, or from offering the privileges of membership therein to nonresidents of a community who are members of any tribe, wholly or partly comprised within the chartered community.[62]

The amended definition of "Indian" in Section 19 of the version of the bill that was before the Senate Committee during the Committee hearing on May 17, 1934 included "all persons of Indian descent who are members of any recognized tribe."[63] This definition was further amended following the Senate Committee hearings on May 17, 1934. At one point in that hearing Senators Thomas and Frazier raised questions regarding the bill's treatment of Indians who were not members of tribes and were not enrolled, supervised, or living on a reservation:

> The CHAIRMAN [Wheeler]. They do not have any rights at the present time, do they?
>
> Senator THOMAS of Oklahoma. No rights at all.
>
> The CHAIRMAN. Of course this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of at the present time.
>
> Senator FRAZIER. Those other Indians have got to be taken care of, though.
>
> The CHAIRMAN. Yes; but how are you going to take care of them unless they are wards of the Government at the present time?[64]

Countering this notion, Senator Thomas then brought up the deplorable conditions of the Catawbas of South Carolina and the Seminoles of Florida, stating that they "should be taken care of."[65] Chairman Wheeler responded:

> The CHAIRMAN. There is a later provision in here I think covering that, and defining what an Indian is.
>
> Commissioner COLLIER. This is more than one-fourth Indian blood.
>
> The CHAIRMAN. That is just what I was coming to. As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half. In other words, I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter

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[62] House Hearings at 6 (emphasis added).
[63] To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., at 237 (May 17, 1934) ("Senate Hearing").
[64] *Id.* at 263.
[65] *Id.*

> bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.
>
> Senator THOMAS of Oklahoma. If your suggestion should be approved then do you think that Indians of less than half blood should be covered with regard to their property in this act?
>
> The CHAIRMAN. No; not unless they are enrolled at present time.[66]

To address this concern, Chairman Wheeler proposed amending the third definition of "Indian" in the IRA to include "all other persons of one-half or more Indian blood,"[67] rather than those of one-quarter blood.[68] Chairman Wheeler, however, remained concerned that the term "recognized Indian tribe" was still over-inclusive in the first definition of "Indian" and could include "Indians" who were essentially "white people."[69] In response to the Chairman's concerns and to Senators O'Mahoney and Thomas' interest in including landless tribes such as the Catawba, Commissioner Collier at the close of the hearing on May 17, 1934, suggested that the language "now under federal jurisdiction" be added after "recognized Indian tribe," as follows:

> Commissioner COLLIER. 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.[70]

Almost immediately after Commissioner Collier offered this proposal, the hearing concluded without any explanation of the phrase's meaning. Nor did subsequent hearings take up the meaning of the phrase "under federal jurisdiction," which does not appear anywhere else in the statute or legislative history.[71] Although there was significant confusion over the definition of

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[66] *Id.* at 263-64.

[67] 25 U.S.C. § 479.

[68] Senate Hearing at 264. Thus, the Committee understood that Indians that were neither members of existing tribes or descendants of members living on reservations came within the IRA only if they satisfied the blood-quantum requirement. *Id.* at 264-66. In other words, the blood-quantum requirement was not imposed on the other two definitions of "Indian" included in the Act. Chairman Wheeler initially misunderstood the interplay between the three parts of the definition of the term "Indian," seeming to believe (incorrectly) that the blood quantum limitation applied to all parts of the definition. *Id.* at 266. Senator O'Mahoney attempted to correct the Chairman's misunderstanding by pointing out that the one-half' blood quantum limitation does not apply to the first part of the definition of the term "Indian": "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe–comma. There is no limitation of blood so far as that [definition] is concerned." *Id.*

[69] *Id.*

[70] *Id.* at 266.

[71] The legislative history refers elsewhere to more limiting terms such as "federal supervision," "federal guardianship," and "federal tutelage." Yet Congress chose not to use those terms, and instead relied on the broader

"Indian" during the hearing,[72] which renders difficult a precise understanding of the colloquy, Commissioner Collier's suggested language arguably sought to strike a compromise that addressed both Senators O'Mahoney and Thomas' desire to include tribes like the Catawba that maintained tribal identity and Chairman Wheeler's concern that groups of Indians who have abandoned tribal relations and connections be excluded.[73]

Concerns about the ambiguity of the phrase "under federal jurisdiction" surfaced in an undated memorandum from Assistant Solicitor Felix Cohen, who was one of the primary drafters of the initial proposal for the legislation. In that memorandum, which compared the House and Senate bills, Cohen stated that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' *whatever that may mean.*"[74] Based on Cohen's analysis, the Solicitor's Office prepared a second memorandum recommending deletion of the phrase "under federal jurisdiction" because it was likely to "provoke interminable questions of interpretation."[75] The phrase, however, remained in the bill; and Cohen's prediction that the phrase would trigger "interminable questions of interpretation" is remarkably prescient.

On June 18, 1934, the IRA was enacted into law. In order to be eligible for the benefits of the IRA, an individual must qualify as an Indian as defined in Section 19 of the Act, which reads in part as follows:

> Section 19. The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction, and 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 all other persons of one-half or more Indian blood.[76]

Using this definition, the Department immediately began the process of implementing the IRA and its provisions.

B. Backdrop of Congress' Plenary Authority

The discussion of "under federal jurisdiction" should be understood against the backdrop of basic principles of Indian law, which define the Federal Government's unique and evolving relationship with Indian tribes. The Constitution confers upon Congress, and to a certain extent

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concept of being under federal jurisdiction. *See, e.g.,* Senate Hearing at 79-80 (Senate discussion of the notion that federal supervision over Indians ends when Indians are divested of property and that the bill would not be so limiting).

[72] During the crucial discussion in which "under federal jurisdiction" was proposed, Senate Hearing at 265-66, the Senators are not clear whether they are discussing the Catawba or the Miami Tribe; whether the first definition of "Indian" – members of recognized tribes – or the second definition – descendants of tribal members living on a reservation – is at issue; whether the Catawba were understood to have land; or the meaning of the term "member."

[73] *Id.*

[74] Memo of Felix Cohen, *Differences Between House Bill and Senate Bill*, at 2, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 2, (undated) (National Archives Records) (emphasis added).

[75] *Analysis of Differences Between House Bill and Senate Bill*, at 14-15, Box 11, Records Concerning the Wheeler-Howard Act, 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4) (undated) (National Archives Records).

[76] 25 U.S.C. § 479.

the Executive Branch, broad powers to administer Indian affairs. The Indian Commerce Clause provides the Congress with the authority to regulate commerce "with the Indian tribes,"[77] and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate.[78] The Supreme Court has long held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[79]

The Court has also recognized that "[i]nsofar as [Indian affairs were traditionally an aspect of military and foreign policy], Congress' legislative authority would rest in part, not upon affirmative grants of the Constitution, but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as necessary concomitants of nationality."[80] In addition, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation . . . ."[81] In order to protect Indian lands from alienation and third party claims, Congress enacted a series of Indian Trade and Intercourse Acts ("Nonintercourse Acts")[82] that ultimately placed a general restraint on conveyances of land interests by Indian tribes:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.[83]

Indeed, in *Johnson v. M'Intosh*, the Supreme Court held that while Indian tribes were "rightful occupants of the soil, with a legal as well as just claim to retain possession of it," they did not own the "fee."[84] As a result, title to Indian lands could only be extinguished by the Sovereign.[85]

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[77] U.S. CONST., art. I, § 8, cl. 3.
[78] U.S. CONST., art. II, § 2, cl. 2.
[79] *United States v. Lara*, 541 U.S. 193, 200 (2004). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (If Congress possesses legislative jurisdiction then the question is whether and to what extent Congress has exercised that undoubted jurisdiction.); *Mancari*, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").
[80] *Lara*, 541 U.S. at 201 (internal citations and quotation marks omitted).
[81] *Mancari*, 417 U.S. at 552 (citation omitted).
[82] *See* Act of July 22, 1790, Ch. 33, § 4, 1 Stat. 137; Act of March 1, 1793, Ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, Ch. 30, § 12, 1 Stat. 469; Act of Mar. 3, 1799, Ch. 46, § 12, 1 Stat. 743; Act of Mar. 30, 1802, Ch. 13, § 12, 2 Stat. 139; Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729. In applying the Nonintercourse Act to the original states the Supreme Court held "that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 670 (1974). This is the essence of the Act: that all land transactions involving Indian lands are "exclusively the province of federal law." *Id.* The Nonintercourse Act applies to both voluntary and involuntary alienation, and renders void any transfer of protected land that is not in compliance with the Act or otherwise authorized by Congress. *Id.* at 668-70.
[83] Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729, codified at 25 U.S.C. § 177.
[84] 21 U.S. 543, 574 (1823).
[85] *See Oneida Indian Nation of New York*, 414 U.S. at 667 ("Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.").

Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities . . . ."[86] Once a federal relationship is established with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease.[87] And Congress must authorize the transfer of tribal interests in land.

Lastly, the Supremacy Clause[88] ensures that laws regulating Indian Affairs and treaties with tribes supersede conflicting state laws. These constitutional authorities serve as the continuing underlying legal authority for Congress, as well as the Executive Branch, to exercise jurisdiction over tribes, and thus serve as the backdrop of federal jurisdiction.[89]

A brief overview of Congress' powers over Indian affairs is also necessary to reflect the unique legal relationship between the United States and Indian tribes that forms the underlying basis of any "jurisdictional" analysis.

Between 1789 and 1871, over 365 treaties with tribes were negotiated by the President and ratified by the Senate under the Treaty Clause. Many more treaties were negotiated but never ratified. Many treaties established on-going legal obligations of the United States to the treaty tribe(s), including, but not limited to, annuity payments, provisions for teachers, blacksmiths, doctors, usufructuary hunting, fishing and gathering rights, housing, and the reservation of land and water rights. Furthermore, treaties themselves implicitly established federal jurisdiction over tribes. Even if the treaty negotiations were unsuccessful, the act of the Executive Branch undertaking such negotiations constitutes, at a minimum, acknowledgment of jurisdiction over those particular tribes.[90]

As Indian policy changed over time — from treaty making to legislation to assimilation and allotment — the types of federal actions that evidenced a tribe was under federal jurisdiction changed as well. Legislative acts abound, the implementation of which demonstrate varying degrees of jurisdiction over Indian tribes. Beginning with the Trade and Intercourse Act of 1790,[91] Congress first established the rules for conducting commerce with the Indian tribes. The

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[86] *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913). *See also United States v. Kagama*, 118 U.S. 375, 384-85 (1886) ("From [the Indians'] very weakness[,] so largely due to the course of dealing of the Federal Government . . . and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . It must exist in that government, because it never has existed anywhere else . . . .").

[87] *Grand Traverse Tribe of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960, 968-69 (6th Cir. 2004) (citing *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975)). *See also United States v. Nice*, 241 U.S. 591, 598 (1916); *Tiger v. W. Investment Co.*, 221 U.S. 286, 315 (1911).

[88] U.S. CONST., art. VI, §1, cl. 2.

[89] Because this authority lies in the Constitution, it cannot be divested except by Constitutional amendment.

[90] *Worcester v. Georgia*, 31 U.S. 515, 556, 569-60 (1832); Felix Cohen, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 271 (1942 ed.) (listing treaty relations as one factor relied upon by the Department in establishing tribal status); Memo from Duard R. Barnes, Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, Nov. 16, 1967 (M-36759) (discussing treaty relations between the Federal Government and the Burns Paiute Tribe as evidence of tribal status even though such relations did not result in a ratified treaty).

[91] Act of July 22, 1790, 1 Stat. 137.

Trade and Intercourse Act (sometimes referred to as the Non-Intercourse Act), last amended in 1834,[92] regulated trading houses, liquor sales, land transactions, and other various commercial activities occurring in Indian Country. The Trade and Intercourse Acts also established both civil and criminal jurisdiction over non-Indians who violated the Act. Notably, these Acts did not assert such jurisdiction over the internal affairs of Indian tribes or over individual Indians, but over certain interactions between tribes and tribal members and non-Indians.[93] The Indian Contracting Act required the Secretary of the Interior to approve all contracts between non-Indians and Indian tribes or individuals.[94] As a result, any contracts formed between Indian tribes and non-Indians without federal approval were automatically null and void. The Major Crimes Act gave the federal courts jurisdiction for the first time over crimes committed by Indians against Indians in Indian Country.[95] Bolstered by the Supreme Court decision in *United States v. Kagama*,[96] which held that Congress has "plenary authority" over Indians, Congress continued passing legislation that embodied the exercise of jurisdiction over Indians and Indian tribes. Both legislation and significant judicial decisions reflected the move to a more robust "guardian-ward" relationship between the Federal Government and Indian tribes.[97] Additionally, annual appropriations bills listed appropriations for some individually named tribes and reservations.[98] In 1913 Congress passed the Snyder Act, which granted the Secretary authority to direct congressional appropriations to provide for the general welfare, education, health, and other services for Indians.[99]

In what some would consider the ultimate exercise of Congress' plenary authority, the General Allotment Act was enacted to break up tribally-owned lands and allot those lands to individual Indians based on the Federal Government's policy during that time to assimilate Indians into mainstream society.[100] Congress subsequently enacted specific allotment acts for many tribes.[101] Pursuant to these acts, lands were conveyed to individual Indians and the Federal Government retained federal supervision over these lands for a certain period of time. Lands not allotted to individual Indians were held in trust for tribal or government purposes. The remaining lands were considered surplus, and sold to non-Indians. Eventually the Federal Government kept individual allotments in trust or otherwise restricted the alienability of the land. This left federal supervision over Indian lands firmly in place.

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[92] Act of June 30, 1834, 4 Stat. 729.

[93] The courts have held that the Non-Intercourse Act created a special relationship between the Federal Government and those Indians covered by the Act. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[94] Act of March 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71.

[95] Act of Mar. 3, 1885, § 9, 23 Stat. 362. The Major Crimes Act was passed in response to *Ex Parte Crow Dog*, where the Supreme Court held that the federal courts did not have jurisdiction over crimes committed by individual Indians against another Indian. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[96] 118 U.S. 375 (1886).

[97] *See* Comment, *supra* note 45 at 956-60.

[98] For example, the same legislation that contained the Indian Contracting Act also appropriated funds for over 100 named tribes and bands. *See* Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 547 550, 551 (for such purposes as assisting a band in operating its village school, paying a tribal chief's salary, and providing general support of a tribal government). *See also* Act of May 31, 1900, ch. 598, 31 Stat. 221, 224 (appropriating funds for a variety of tribal services, such as Indian police and Indian courts).

[99] Act of Nov. 2, 1921, 42 Stat. 208.

[100] Act of Feb. 8, 1887, 24 Stat. 388 ("Dawes Act").

[101] *See, e.g.*, Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 ("Five Civilized Tribes Act"); Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act'); Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 ("Nelson Act of 1889").

The IRA itself, intended to reverse the effects of the allotment acts and the allotment era as well as the broader purpose of fostering self-governance and prosperity for Indian tribes, was also an exercise in Congress' plenary authority over tribes.[102]

The Executive Branch has also regularly exercised such authority over tribes. The War Department initially had the responsibility for Indian affairs. In 1832, Congress established the Commissioner of Indian Affairs, who was responsible, at the direction of the Secretary of War, for the "direction and management of all Indian affairs, and of all matters arising out of Indian relations . . . ."[103] The Office of Indian Affairs ("Office") was thus charged with implementing and executing treaties and other legislation related to tribes and Indians. The Office was transferred to the Department of the Interior in 1849.[104] With the allotment and assimilation eras, and at the time the IRA was passed, the Office of Indian Affairs and the agents and superintendents of the Indian reservations exercised virtually unfettered supervision over tribes and Indians.[105] The Office of Indian Affairs became responsible, for example, for the administration of Indian reservations, in addition to implementing legislation.[106] The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their land. As part of the exercise of this administrative jurisdiction, the Office produced annual reports, surveys, and census reports on many of the tribes and Indians under its jurisdiction.

This summary of the exercise of authority and oversight by the United States through treaty, legislation, the Executive Branch and the Office of Indian Affairs is intended to serve as a non-exclusive representation of the great breadth of actions and jurisdiction that the United States has held, and at times, asserted over Indians over the course of its history.

C. Defining "Under Federal Jurisdiction"

As noted above, the Supreme Court did not interpret the phrase "under federal jurisdiction" in the IRA. Rather, the Court reached its holding that the Narragansett Tribe was ineligible to have land taken into trust based on the State's assertion in its *certiorari* petition that the Tribe was under state jurisdiction, which the United States, and the Tribe as *amicus*, did not directly

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[102] In addition, since the IRA, Congress has exercised its constitutional jurisdiction in various ways. For example in the 1940s and 1950s, as the termination era began, Congress reversed the policy of the IRA and terminated the federal supervision over several tribes. *See* Act of June 17, 1954, 68 Stat. 250 ("Menominee Indian Termination Act of 1954"); Act of Aug. 18, 1958, 72 Stat. 619 ("California Rancheria Termination Act"); Act of Aug. 13, 1954, 68 Stat. 718 ("Klamath Termination Act"). Then, in the 1970's Congress reversed position again, and restored many of those tribes that had been terminated. And, in a policy consistent with the IRA, in 1975 Congress passed the hallmark Indian Self-Determination and Education Assistance Act. Act of Jan. 4, 1975, 88 Stat. 2203.

[103] Act of July 9, 1832, 4 Stat. 564.

[104] Act of March 3, 1849, 9 Stat. 395.

[105] Meriam Report at 140-54 (recommending decentralization of control); *id.* at 140-41("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity . . . . Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs.").

[106] *See generally* 25 U.S.C. §§ 2, 9.

contest.[107] As such, the issue of whether the Tribe "was under federal jurisdiction" was not litigated before the Court nor had the Department considered that particular question when issuing its land into trust decision in that case. Indeed, Justices Souter and Ginsburg would have reversed and remanded to allow the Department an opportunity to show that the Narragansett Tribe was under federal jurisdiction in 1934. However, the majority of the Court disagreed with them, and thus, neither the Court nor the parties elaborated on what would be necessary to demonstrate that a tribe was under federal jurisdiction in 1934. In that regard, the *Carcieri* decision is unique given the manner in which the "under federal jurisdiction" issue was addressed. Other tribes, therefore, are free to demonstrate their jurisdictional status in 1934 and that that they are eligible to have land taken into trust under the Court's interpretation of the IRA.

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction." Nor does the legislative history clarify the meaning of the phrase. The only information that can be gleaned from the Senate hearing of May 17, 1934, is that the Senators intended it as a means of attaching some degree of qualification to the term "recognized Indian tribe." The addition of the phrase was proposed during an ambiguous and confused colloquy at the conclusion of the Senate hearing, discussed above. Chairman Wheeler queried whether a "limitation after the description of the tribe" was needed.[108] He also noted that "several so-called 'tribes' . . . . They are no more Indians than you or I, perhaps."[109] Based on his reading of this portion of the Senate hearing, Justice Breyer concluded that the Senate Committee adopted this phrase to "resolve[] a specific underlying difficulty" in the first part of the definition of "Indian."[110] The task before the Department in exercising the Secretary's authority to acquire land into trust post-*Carcieri* is to give meaning to this limiting phrase.

Because the IRA does not unambiguously give meaning to the phrase "under federal jurisdiction," I conclude that Congress "left a gap for the agency to fill."[111] In light of this, and the "delegation of authority" to the agency to interpret and implement the IRA, the Secretary's reasonable interpretation of the phrase should be entitled to deference. Moreover, in the wake of *Carcieri*, an understanding of the phrase the "under federal jurisdiction" will guide the Secretary's exercise of the trust land acquisition authority delegated to her under Section 5 of the IRA.

It has been argued that Congress' constitutional plenary authority over tribes is enough to fulfill the "under federal jurisdiction" requirement in the IRA. This argument is based on the assertion that the phrase "under federal jurisdiction" has a plain meaning, and that meaning is synonymous with Congress' plenary authority over tribes pursuant to the Indian Commerce Clause. Proponents of the plain meaning interpretation rely on *United States v. Rodgers*.[112] There the Supreme Court interpreted the term "jurisdiction" as used in a federal criminal code amendment

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[107] The Court in *Carcieri* stated that "none of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary." *Carcieri*, 555 U.S. at 395(citing the Tribe's federal acknowledgement determination).
[108] Senate Hearing at 266 (Statement of Chairman Wheeler).
[109] *Id.*
[110] *Carcieri*, 555 U.S. at 396-97 (Breyer, J. concurring).
[111] *See supra* notes 28-32 and corresponding text (discussing *Chevron*).
[112] 466 U.S. 475, 479 (1984).

enacted the same day as the IRA.[113] Since the term "jurisdiction" was not defined in the statute, *Rodgers* relied on dictionary definitions to discern the term's "ordinary meaning":

> "Jurisdiction" is not defined in the statute. We therefore start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. . . . The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines jurisdiction as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.[114]

Based on this interpretation, when the IRA was enacted in 1934, "jurisdiction" meant the sphere of authority; and "under federal jurisdiction" in Section 19 meant that the recognized Indian tribe was subject to the Indian Affairs' authority of the United States, either expressly or implicitly.

In my view, however, it is difficult to argue that the phrase "under federal jurisdiction" has a plain meaning, and as I noted above, I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction." Nonetheless, the plenary authority doctrine serves as a relevant backdrop to the analysis as to whether a federally recognized tribe today is eligible under the IRA to have land taken into trust. Given plenary authority's long standing, pervasive existence and constitutionally-based origin, as well as the fact that Congress's authority over Indian tribes cannot be divested absent express intent by Congress, it is likely that in showing a tribe was under federal jurisdiction, the Department will rely on evidence of a particular exercise of plenary authority, even where the United States did not otherwise believe that the tribe was under such jurisdiction.[115]

Accordingly, I believe that the Supreme Court's ruling in *Carcieri* counsels the Department to point to some indication that in 1934 the tribe in question was under federal jurisdiction. Having indicia of federal jurisdiction beyond the general principle of plenary authority demonstrates the federal government's exercise of responsibility for and obligation to an Indian tribe and its members in 1934.[116] While the unique circumstances of the *Carcieri* decision did not require the Court to address Congress's plenary authority,[117] given the specific holding that a tribe must have been under federal jurisdiction in the precise year of 1934, and the ambiguous nature of the

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[113] *Id.* at 478.

[114] *Id.* at 479 (internal citations and quotation marks omitted).

[115] This view is consistent with the legislative history in which members of Congress and Commissioner John Collier discussed various other terms that reflected limited federal authority over Indians and rather than choosing one of the more narrow terms, Commissioner Collier suggested and Congress accepted the broader term "under federal jurisdiction." *See supra* note 70

[116] At oral argument the United States asserted that "if the Court is going to take that view of the statute, then . . . a remand is preferable[,]" however, the Court declined and instead concluded that neither the United States nor the tribe (as *amicus*) contested the State's assertion it was not under federal jurisdiction. Oral Argument Transcript at 41-42, *Carcieri v. Salazar*, 555 U.S. 379, No. 07-526 (Nov. 3, 2008).

[117] The Court never addressed the issue of plenary authority because it based its ruling solely on the State of Rhode Island's undisputed position that the Narragansett Tribe was not under federal jurisdiction in 1934.

phrase, a showing must be made that the United States has exercised its jurisdiction at some point prior to 1934 and that this jurisdictional status remained intact in 1934.[118] It is important also to recognize that this approach may prove somewhat less restrictive than it first appears because a tribe may have been under federal jurisdiction in 1934 even though the United States did not believe so at the time.[119]

Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

For example, some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealings with the tribe. Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe. Evidence may also consist of actions by the Office of Indian Affairs, which became responsible, for example, for the administration of the Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. There may, of course, be other types of actions not referenced herein that evidence the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe, which will require a fact and tribe-specific inquiry.

Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.

Indeed, for some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous, thus obviating the need to examine the tribe's history prior to 1934. For such

[118] This opinion does not address those tribes that are unable to make a showing of federal jurisdiction and any legal authority that may exist to address that circumstance.
[119] *See supra* Section II.B (discussing Justice Breyer's concurring opinion in *Carcieri*).

tribes, there is no need to proceed to the second step of the two-part inquiry. For example, tribes that voted whether to opt out of the IRA in the years following enactment (regardless of which way they voted) generally need not make any additional showing that they were under federal jurisdiction in 1934. This is because such evidence unambiguously and conclusively establishes that the United States understood that the particular tribe was under federal jurisdiction in 1934.[120] It should be noted, however, that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status.[121] And evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action.[122] Indeed, there may be periods where federal jurisdiction exists but is dormant.[123] Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

This interpretation of the phrase "under federal jurisdiction," including the two-part inquiry outlined above, is consistent with the legislative history, as well as with Interior's post-enactment practices in implementing the statute.[124]

D. The Significance of the Section 18 Elections Held Between 1934-1936

As discussed above, the Department recognizes that some activities and interactions could so clearly demonstrate federal jurisdiction over a federally recognized tribe as to render elaboration of the two-part inquiry unnecessary.[125] The Section 18 elections under the IRA held between 1934 and 1936 are such an example of unambiguous federal actions that obviate the need to examine the tribe's history prior to 1934.

Section 18 of the IRA provides that "[i]t shall be the duty of the Secretary of the Interior, within one year after the passage [of the IRA] to call . . . an election" regarding application of the IRA to each reservation.[126] If "a majority of the adult Indians on a reservation . . . vote against its

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[120] *See, e.g., Shawano County v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 53 IBIA. 62 (2011). *See generally* Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report") (specifying, in part, tribes that either voted to accept or reject the IRA); *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 67-68 (D.D.C. 2013).

[121] *See* Stillaguamish Memorandum.

[122] It is a basic principle of federal Indian law that tribal governing authority arises from a sovereignty that predates establishment of the United States, and that "[o]nce recognized as a political body by the United States, a tribe retains its sovereignty until Congress [affirmatively] acts to divest that sovereignty. Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1] (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142-43 (D.D.C. 1976)).

[123] *See* Stillaguamish Memorandum at 2 (noting that enduring treaty obligations maintained federal jurisdiction, even if the federal government did not realize this at the time); *United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost 100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

[124] Certain tribes are subject to specific land acquisition authority other than the IRA. *See, e.g.*, Oklahoma Indian Welfare Act, 25 U.S.C. § 501 *et seq.* In such cases it is important to determine whether the *Carcieri* decision applies to that tribe's particular request.

[125] *See supra* Part III.C.

[126] Act of June 18, 1934, 48 Stat. 984, 988 (codified at 25 U.S.C. § 478).

application," the IRA "shall not apply" to the reservation.[127] The vote was either to reject the application of the IRA or not to reject its application. Section 18 required the Secretary to conduct such votes "within one year after June 18, 1934," which Congress subsequently extended until June 18, 1936.[128] In order for the Secretary to conclude a reservation was eligible for a vote, a determination had to be made that the relevant Indians met the IRA's definition of "Indian" and were thus subject to the Act. Such an eligibility determination would include deciding the tribe was under federal jurisdiction, as well as an unmistakable assertion of that jurisdiction.

A vote to reject the IRA does not alter this conclusion. In 1983, Congress enacted the Indian Land Consolidation Act (ILCA).[129] This Act amended the IRA to provide that Section 5 of the IRA applies to "all tribes notwithstanding section 18 of such Act," including Indian tribes that voted to reject the IRA.[130] As the Supreme Court stated in *Carcieri*, this amendment "by its terms simply ensures that tribes may benefit from [Section 5] even if they opted out of the IRA pursuant to Section 18, which allowed tribal members to reject the application of the IRA to their tribe."[131] As such, generally speaking, the calling of a Section 18 election for an Indian tribe between 1934 and 1936 should unambiguously and conclusively establish that the United States understood that the particular tribe was under federal jurisdiction in 1934, regardless of which way the tribe voted in that election.[132]

E. The Interior Department's Interpretation and Implementation of the IRA

The above-discussed approach for defining the phrase "under federal jurisdiction" is consistent with the Department's past efforts to define this phrase. Initially, the Department recognized the difficulty in defining the phrase and only made a passing reference to it in a circular memorandum. Commissioner Collier issued a circular in 1936 that gave direction to Superintendents in the Office of Indian Affairs regarding recordkeeping for enrollment under IRA. The primary purpose of the circular was to give recordkeeping instructions regarding the second two categories under the Section 19 definition of "Indian." He did note that no such recordkeeping need occur for the first category in the definition – members of recognized tribes now under federal jurisdiction – because they would be "carried on the rolls as members of the tribe, which is all that is necessary to qualify them for benefits under the Act."[133] This short statement, standing alone without further analysis, was not the full extent of the Department's view of tribes under federal jurisdiction, particularly given the Solicitor's office simultaneous determination that the phraseology was difficult to interpret.[134]

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[127] *Id.*
[128] Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378.
[129] Act of Jan. 12, 1983, 96 Stat. 2515, 2517-19 (codified at 25 U.S.C. § 2201 *et seq.*).
[130] 25 U.S.C. § 2517.
[131] *Carcieri*, 555 U.S. at 394-95.
[132] *See, e.g., Village of Hobart v. Midwest Reg'l Dir.*, 57 IBIA 4 (2013); *Thurston County v. Acting Great Plains Reg'l Dir.*, 56 IBIA 62 (2012); *Shawano County.*, 53 IBIA 62. *See also* Haas Report (specifying, in part, tribes that either voted to accept or reject the IRA).
[133] Circular No. 3134, Enrollment Under the IRA (1936 Circular) 1 (March 7, 1936).
[134] *See supra* notes 74-75 and accompanying text.

As the Department began to implement the IRA, it began to more closely examine whether a particular tribe was eligible for IRA benefits. At times, this inquiry involved an analysis by the Solicitor's Office. For example, beginning in the first few years after the IRA was enacted, the Solicitor issued several such opinions determining eligibility for IRA benefits.[135] Because those opinions "arise . . . out of requests to organize and petitions to have land taken in trust for a tribe,"[136] both of which require status as a "recognized tribe now under federal jurisdiction" as a "prerequisite,"[137] they are instructive in our analysis.[138] The opinions were of critical importance in the 1930s because "it is very clear from the early administration of the Act that there was no established list of 'recognized tribes now under [f]ederal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups."[139]

For example, beginning with the Mole Lake Band of Chippewas,[140] the Solicitor's Office looked at factors such as whether the group ever had a treaty relationship with the United States, whether it had been denominated as a tribe by an act of Congress or executive order, and whether the group had been treated by the United States as having collective rights in tribal lands or funds, even if the group was not expressly designated as a tribe.[141] In the Mole Lake Band opinion, the Solicitor referenced federal actions such as the receipt of annuities from a treaty, education assistance, and other federal forms of support.[142] Likewise, in a later opinion regarding and reassessing the status of the Burns Paiute Indians, the Associate Solicitor noted that "the United States has, over the years, treated the Burns Indians as a distinct entity, placed them under agency jurisdiction, provided them with some degree of economic assistance and school, health and community services and, for the specific purpose of a rehabilitation grant, has designated them as Burns Community, Paiute Tribe, a recognized but unorganized tribe."[143] The opinion also specifically cited an unratified treaty between the United States and predecessors of the Burns Paiute as "showing that they have had treaty relations with the government."[144] Similarly, in finding that the Wisconsin Winnebago could organize separately, the Solicitor

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[135] *See* Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion, August 31, 1936, I Op. Sol. on Indian Affairs 668 (U.S.D.I. 1979) ("Purchases Under Wheeler-Howard Act"); Solicitor's Opinion, May 1, 1937, I Op. Sol. on Indian Affairs 747 (U.S.D.I. 1979) ("Status of Nahma and Beaver Indians"); Solicitor's Opinion, February 8, 1937, I Op. Sol. on Indian Affairs 724 (U.S.D.I. 1979) ("Status of St. Croix Chippewas"); Solicitor's Opinion, March 15, 1937, I Op. Sol. on Indian Affairs 735 (U.S.D.I. 1979) ("St Croix Indians – Enrollees of Dr. Wooster"); Solicitor's Opinion, January 4, 1937, I Op. Sol. on Indian Affairs 706 (U.S.D.I. 1979) ("IRA – Acquisition of Land"); Solicitor's Opinion, December 13, 1938, I Op. Sol. on Indian Affairs 864 (U.S.D.I. 1979) ("Oklahoma – Recognized Tribes"). In the ultimate irony, the Solicitor issued an opinion that, contrary to Commissioner Collier's belief that "the Federal Government has not considered these Indians as Federal wards," the Catawba Tribe was eligible to reorganize under the IRA. Solicitor's Opinion, March 20, 1944, II Op. Sol. on Indian Affairs 1255 (U.S.D.I. 1979) ("Catawba Tribe – Recognition Under IRA").

[136] Stillaguamish Memorandum at 6, note 1.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 7.

[140] Memorandum from the Solicitor of the Interior to the Comm'r of Indian Affairs, Feb. 8, 1937.

[141] *Id.* at 2-3.

[142] *Id.*

[143] Memorandum from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, Nov. 16, 1967 (M-36759).

[144] *Id.* at 2; *see also* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 3.02[6][d] at 151 (2005 ed.) (citing M-36759).

pointed to factors such as legislation specific to the tribe and the approval of attorney contracts.[145]

A 1980 memorandum from the Associate Solicitor, Indian Affairs, to the Assistant Secretary, Indian Affairs, regarding a proposed trust acquisition for the Stillaguamish Tribe, also discusses Interior's prior interpretation of Section 19 of the IRA.[146] According to this memorandum, the phrase "'recognized tribe now under [f]ederal jurisdiction' . . . 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." The Associate Solicitor ultimately concluded that the Secretary could take land into trust for the Stillaguamish, noting that, "[t]he Solicitor's Office was called upon repeatedly in the 1930's to determine the status of groups seeking to organize. . . . None of these opinions expresses surprise that the status of an Indian group should be unclear, nor do they contain any suggestion that it is improper to determine the status of a tribe after 1934 . . . . Thus it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a 'recognized tribe now under [f]ederal jurisdiction' and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability."[147]

Admittedly, the Department made errors in its implementation of the IRA.[148] As such, as Justice Breyer notes, the lack of action on the part of the Department in implementing the IRA for a particular tribe does not necessarily answer the legal question whether the tribe was "under federal jurisdiction in 1934."[149]

In sum, while the *Carcieri* Court found the term "now" to be an unambiguous reference to the year 1934, the court did not find the phrase "under federal jurisdiction" to be unambiguous. Thus, the Department must interpret the phrase and, while it has a long history in interpreting it, it has always recognized its ambiguous nature and the need to evaluate its meaning on a case by case basis given a tribe's unique history.[150]

F. "Recognition" versus "Under Federal Jurisdiction"

The definition of "Indian" in the IRA not only includes the language which was the focus of the *Carcieri* decision -- "now under federal jurisdiction" – but also language that precedes that

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[145] Memorandum from Nathan R. Margold, Solicitor, to the Comm'r on Indian Affairs, Mar. 6, 1937.
[146] This memorandum, the Stillaguamish Memorandum, was lodged with the Supreme Court as part of the *Carcieri* case and cited by Justice Breyer in his concurrence. *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring).
[147] Stillaguamish Memorandum at 7-8 (citing various decisions by the Department).
[148] *See Indian Affairs and the Indian Reorganization Act: The Twenty Year Record* (W. Kelly ed. 1954).
[149] *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).
[150] Certain tribes may have settlement acts that inform the legal analysis as to whether they can take land into trust. In *Carcieri*, the Court declined to address Petitioners' argument that the Rhode Island Indian Claims Settlement Act barred application of the IRA to the Narragansett Tribe. 555 U.S. at 393, n.7. Petitioners argued that the Rhode Island Indian Claims Settlement Act was akin to the Alaska Native Claims Settlement Act (ANSCA). Recently, in *Akiachak Native Cmty. v. Salazar*, the U.S. District Court for the District of Columbia ruled that ANSCA did not repeal the 1936 inclusion of Alaska into the land acquisition provisions of the IRA. *See* 935 F. Supp. 2d 195, 203-08 (D.D.C. 2013).

clause -- "persons of Indian descent who are members of any recognized Indian tribe."[151] Based on this language, some contend that *Carcieri* stands for the proposition that a tribe must have been both federally recognized as well as under federal jurisdiction in 1934 to fall within the first definition of "Indian" in the IRA, and thus, to be eligible to have land taken into trust on its behalf. That contention is legally incorrect.

The *Carcieri* majority held, rather, that the Secretary was without authority under the IRA to acquire land in trust for the Narragansett Tribe because it was not under federal jurisdiction in 1934, not because the Tribe was not federally recognized at that time.[152] The Court's focused discussion on the meaning of "now" never identified a temporal requirement for federal recognition. As Justice Breyer explained in his concurrence, the word "now" modifies "under federal jurisdiction," but does not modify "recognized." As such, he aptly concluded that the IRA "imposes no time limit on recognition."[153] He reasoned that "a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal Government did not" realize it "at the time." [154]

To the extent that the courts (contrary to the views expressed here) deem the term "recognized Indian tribe" in the IRA to require recognition on or before 1934, it is important to understand that the term has been used historically in at least two distinct senses. First, "recognized Indian tribe" has been used in what has been termed the "cognitive" or quasi-anthropological sense. Pursuant to this sense, "federal officials simply 'knew' or 'realized' that an Indian tribe existed, as one would 'recognize.'"[155] Second, the term has sometimes been used in a more formal legal sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States.[156]

The political or legal sense of the term "recognized Indian tribe" evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s. In 1978, the Department promulgated regulations establishing procedures pursuant to which tribal entities could demonstrate their status as Indian tribes.[157] Prior to the adoption of these regulations, there was no formal process or method for recognizing an Indian tribe, and such determinations were made on a case-by-case basis using standards that were developed in the decades after the IRA's enactment. The federal acknowledgment regulations, as amended in 1994, require that a petitioning entity satisfy seven mandatory requirements, including the following: that the entity "has been identified as an American Indian entity on a substantially continuous basis since 1900"; the "group comprises a distinct community and has existed as a community from

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[151] 25 U.S.C. § 479. Notably, the definition not only refers to "recognized Indian tribe," but also to "members" and "persons."

[152] 555 U.S. at 382-83.

[153] *Id.* at 397-398.

[154] *Id.* at 397. Justice Souter's dissent acknowledged this reality as well: "Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon the recognition, and in the past, the Department has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time." 555 U.S. at 400.

[155] Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW, 268 (1942 ed.) ("The term 'tribe' is commonly used in two senses, "an ethnological sense and a political sense.").

[156] *Id.*

[157] 25 C.F.R. Part 83.

historical times to the present"; and the entity "has maintained political influence or authority over its members as an autonomous entity from historic times to the present."[158] Evidence submitted during the regulatory acknowledgment process thus may be highly relevant and may be relied on to demonstrate that a tribe was under federal jurisdiction in 1934.

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. For example, Senator O'Mahoney noted that the Catawba would satisfy the term "recognized Indian tribe," even though" [t]he Government has not found out that they live yet, apparently."[159] In fact, the Senate Committee's concern about the breadth of the term "recognized Indian tribe" arguably contributed to Congress' adoption the phrase "under federal jurisdiction" in order to clarify and narrow that term.

As explained above, the IRA does not require that the agency determine whether a tribe was a "recognized Indian tribe" in 1934; a tribe need only be "recognized" at the time the statute is applied (e.g., at the time the Secretary decides to take land into trust).[160] The Secretary has issued regulations governing the implementation of her authority to take land into trust, which includes the Secretary's interpretation of "recognized Indian tribe."[161] Those regulations define "tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."[162] By regulation, therefore, the Department only acquires land in trust for tribes that are federally recognized at the time of acquisition.[163]

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[158] 25 C.F.R. § 83.7(a), (b), (c). Moreover, in 1979, the Bureau of Indian Affairs for the first time published in the *Federal Register* a list of federally acknowledged Indian tribes. "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 44 Fed. Reg. 7235 (Feb. 6, 1979). Based on our research, the Department's first efforts to compile and publish a comprehensive list of federally recognized tribes (other than eligible Alaskan tribal entities) did not begin to occur until the 1970s. Although one commenter refers to a post-IRA list of tribes, *see* W. Quinn, *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 334 n.10 (1990), no such list appears to exist. The only list during this time period appears to be a report issued 10 years after the IRA and did not purport to list all recognized or federally recognized tribes. Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report"). The Haas Report listed reservations where Indian residents voted to accept or reject the IRA, Haas Report at 13 (table A), tribes that reorganized under the IRA, *id.* at 21 (table B), tribes that accepted the IRA with pre-IRA constitutions, *id.* at 31 (table C), and tribes not under the IRA with constitutions, *id.* at 33 (table D). Prior to the list published in 1979, the Department made determinations of tribal status on an ad hoc basis. *See* Stillaguamish Memorandum at 7 (stating "It is very clear from the early administration of the Act that there was no established list of 'recognized tribes now under Federal jurisdiction' in existence in 1934 and that determination would have to be made on a case by case basis for a large number of Indian groups.").

[159] *See* Senate Hearing at 266. *See also* Senate Hearing at 80 (Sen. Thomas). Based on this legislative history, the Associate Solicitor concluded that "formal acknowledgment in 1934 is [not] a prerequisite to IRA land benefits." Stillaguamish Memorandum at 1; *id.* at 3.

[160] The misguided interpretation that a tribe must demonstrate recognition in 1934 could lead to an absurd result whereby a tribe that subsequently was terminated by the United States could petition to have land taken into trust on its behalf, but tribes recognized after 1934 could not.

[161] 25 C.F.R. Part 151.

[162] 25 C.F.R. § 151.2.

[163] In 1994, Congress enacted legislation requiring the Secretary to publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a-1).

Moreover, if a tribe is federally recognized, by definition it satisfies the IRA's term "recognized Indian tribe" in both the cognitive and legal senses of that term. Once again, as explained above, pursuant to a correct interpretation of the IRA, the fact that the tribe is federally recognized at the time of the acquisition satisfies the "recognized" requirement of Section 19 of the IRA, and should end the inquiry.

IV. CONCLUSION

The Department will continue to take land into trust on behalf of tribes under the test set forth herein to advance Congress' stated goals of the IRA to "provid[e] land for Indians."[164]

Hilary C. Tompkins

[164] 25 U.S.C. § 465.

CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that, on August 24, 2016, the foregoing UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION OR CLARIFICATION will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Rebecca M. Ross*

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