No. _____

In the Supreme Court of the United States

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as *parens patriae* on behalf of its members,

Applicant,

v.

STATE OF WASHINGTON; and GOVERNOR JAY INSLEE and DEPARTMENT OF FISH AND WILDLIFE DIRECTOR KELLY SUSEWIND, in their official capacities,

Respondent.

APPENDIX

Ninth Circuit Decision (Aug. 8, 2021)

Ninth Circuit Order denying petition for rehearing *en banc* (Nov. 12, 2021)

U.S. Department of the Interior Decision (Mar. 18, 2020)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, *Plaintiff-Appellant*, v. STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director, *Defendants-Appellees*, SAMISH INDIAN NATION, *Intervenor*.	No. 20-35346 D.C. No. 3:19-cv-06227-RBL

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members,
Plaintiff,

and

SAMISH INDIAN NATION,
Intervenor-Appellant,

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director,
Defendants-Appellees.

No. 20-35353

D.C. No. 3:19-cv-06227-RBL

OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted February 5, 2021
Seattle, Washington

Filed August 6, 2021

Before: M. Margaret McKeown and Richard A. Paez, Circuit Judges, and William Horsley Orrick,[*] District Judge.

Opinion by Judge McKeown

SUMMARY[**]

Indian Treaty Rights

The panel affirmed the district court's dismissal, on the ground of issue preclusion, of the Snoqualmie Indian Tribe's complaint seeking a declaration that it is a signatory to the Treaty of Point Elliott and that its reserved off-reservation hunting and gathering rights under the Treaty continue.

The panel held that it was within the district court's discretion to dismiss on the ground of issue preclusion without first establishing subject matter jurisdiction because the dismissal was a non-merits dismissal, and it was reasonable for the district court to conclude that dismissal on the ground of issue preclusion was the less burdensome course.

The panel affirmed the district court's conclusion that the determination in *United States v. Washington* ("*Washington II*"), 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d

[*] The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

1368 (9th Cir. 1981), that the Snoqualmie has no fishing rights under the Treaty precluded a finding that the Tribe has any hunting and gathering rights under the same Treaty. The panel concluded that in *Washington II*, the Snoqualmie actually litigated the identical issue of treaty-tribe status. Further, *United States v. Washington* ("*Washington IV*"), 593 F.3d 790 (9th Cir. 2010) (en banc), did not create an exception to issue preclusion, and no other exception applied.

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

This appeal presents yet another chapter in the litigation of Indian treaty rights in the Pacific Northwest. It involves some of the same tribes—the Snoqualmie Indian Tribe (the "Snoqualmie" or the "Tribe") and the Samish Indian Nation (the "Samish" or the "Nation")—that have been disputing the same treaty—the Treaty of Point Elliott (the "Treaty")—in this court and the district courts for decades. The Snoqualmie's complaint asks the district court to declare that the Tribe is a signatory to the Treaty and that its reserved off-reservation hunting and gathering rights under the Treaty continue.

The only difference between the present appeal and the several prior appeals we have considered over the last nearly half-century is the treaty right at issue: here, hunting and gathering rights; in prior appeals, fishing rights. The factual question underlying both this and prior appeals—whether the Snoqualmie is a treaty tribe under the Treaty—is the same. Because this question was asked and answered—in

the negative—40 years ago, we affirm the district court's dismissal of the Snoqualmie's complaint on the ground of issue preclusion.

FACTUAL AND LEGAL BACKGROUND

The Treaty has been the subject of extensive litigation. Because the Treaty lies at the heart of the parties' dispute and because the parties' prior litigation foretells the result here, we recount the history of this litigation at some length.

The Treaty and Reserved Rights

In the Treaty, which was negotiated between several Indian tribes and federal representatives in the Washington territory, signatory tribes agreed to relinquish much of their land but reserved for themselves fishing, hunting, and gathering rights. Article V of the Treaty provides:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Treaty Between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, 12 Stat. 927, Article V (U.S. Treaty Apr. 11, 1859).

Washington I: Litigating Treaty Fishing Rights

In 1970, the United States filed suit against the State of Washington on behalf of several tribes seeking the declaration and enforcement of off-reservation fishing rights under the Treaty. *See United States v. Washington* ("*Washington I*"), 384 F. Supp. 312, 327 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).[1] *Washington I* "establish[ed] the treaty status" of plaintiff tribes—including seven tribes that the United States initially represented and seven additional tribes that intervened in the litigation—and therefore also established "the right of their members to fish off reservation in common with the citizens of the state." *Id.* at 333.

Washington II: The Snoqualmie and Samish Intervene to Assert Treaty Fishing Rights

In 1979, the Snoqualmie and the Samish—which were not parties to *Washington I*—sought to intervene in the litigation to assert their own treaty fishing rights. *See United States v. Washington* ("*Washington II*"), 476 F. Supp. 1101, 1104 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981).[2] In *Washington II*, the district court concluded that the Snoqualmie and the Samish "do not have and may not confer upon their members fishing rights under the Treat[y] of Point Elliott." *Id.* at 1111. The court's conclusion followed from its findings that neither tribe was "at th[at]

[1] We refer to both the district court opinion and its accompanying appeal as *Washington I* and differentiate between the two by the Federal Reporter volumes in which they appear.

[2] As with *Washington I*, we refer to both the district court opinion and its accompanying appeal as *Washington II* and differentiate between the two by the Federal Reporter volumes in which they appear.

time a treaty tribe in the political sense" because neither was "at th[at] time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the [T]reat[y] of . . . Point Elliott." *Id.* at 1104, 1111.

With respect to the Snoqualmie, the district court found that the Tribe "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmoo Indians[, and who] . . . were named in and a party to the Treaty of Point Elliott." *Id.* at 1108. However, it went on to find that the Tribe "exercises no attributes of sovereignty over its members or any territory" and "is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory." *Id.* Critically, the district court found that "members of the . . . Snoqualmie Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community" and that "members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the [Snoqualmie]." *Id.* at 1109.

The district court's findings with respect to the Samish were similar. It found that the Nation "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott." *Id.* at 1106. However, the court went on to find that the Nation "exercises no attributes of sovereignty over its members or any territory" and "is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory." *Id.* Critically, as with the Snoqualmie, the district

court again found that "members of the . . . Samish Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community" and that "members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the [Samish]." *Id.*

We affirmed the district court's decision in *Washington II*. As an initial matter, we noted that the district court had incorrectly concluded that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." *Washington II*, 641 F.2d at 1371 (quoting *Washington II*, 476 F. Supp. at 1111). We clarified that federal recognition is *not* a prerequisite for the exercise of treaty rights. *Id.* at 1372. We then identified the "proper inquiry" for determining treaty-tribe status: the "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory" is that "the group must have maintained an organized tribal structure." *Id.* After examining the record in light of this controlling principle, we concluded that the district court's factual "finding of insufficient political and cultural cohesion" with respect to the intervening tribes was not "clearly erroneous." *Id.* at 1374; *see also id.* ("[M]aintenance of tribal structure is a factual question, and we have concluded that the district court correctly resolved this question despite its failure to apply the proper standard.").

Greene I and II: Litigating Federal Recognition

Following our affirmance in *Washington II*, both the Snoqualmie and the Samish sought federal recognition.

The Samish's petition for recognition was the subject of litigation in which the Tulalip Tribes—amicus curiae in this appeal—sought to intervene, arguing that their fishing rights under the Treaty would be diluted by the later recognition of the Samish. *See Greene v. United States* ("*Greene I*"), 996 F.2d 973, 976–78 (9th Cir. 1993). We affirmed the district court's denial of the Tulalip Tribes' motion, noting that while the treaty rights and federal recognition inquiries are "similar," "each determination serves a different legal purpose and has an independent legal effect." *Id.* at 976. In other words, "[f]ederal recognition does not self-execute treaty rights claims," and thus, we explained, even if the Samish were to obtain federal recognition, it would still separately have to confront the decisions in *Washington I* and *II* before it could claim fishing rights under the Treaty. *Id.* at 977. For this reason, dilution of the Tulalip Tribes' *treaty fishing rights* was not a protectable interest that justified intervention in the Samish's separate *recognition* proceedings.

In a follow-on appeal, again regarding the Samish's petition for recognition, the Tulalip Tribes appeared as amicus curiae to argue that the Samish was precluded by *Washington II* from litigating any issue of tribal recognition. *Greene v. Babbitt* ("*Greene II*"), 64 F.3d 1266, 1269 (9th Cir. 1995). In *Greene II*, we reiterated that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. Because "our court regards the issues of tribal treaty status and federal [recognition] as fundamentally different," we denied *Washington II* any preclusive effect in the consideration of the Samish's petition for recognition. *Id.* at 1270–71.

The Samish ultimately succeeded in regaining federal recognition in 1996, and the Snoqualmie succeeded one year later.

Washington III: The Samish Seeks Reopening of Washington II and Reexamination of its Treaty Fishing Rights in Light of Recognition

In 2001, the Samish filed a motion in the district court to reopen the judgment in *Washington II* on the basis of its recognition. The district court denied this motion, but we reversed on appeal. Despite our prior articulation in *Greene I* and *II* of the clear distinction between the treaty rights and federal recognition inquiries—and their independence from one another—we held that "federal recognition is a sufficient condition for the exercise of treaty rights." *United States v. Washington* ("*Washington III*"), 394 F.3d 1152, 1158 (9th Cir. 2005), *overruled in later appeal*, 593 F.3d 790 (9th Cir. 2010) (en banc). In light of this change of position, we concluded that the Nation's subsequent federal recognition was an extraordinary circumstance that justified reexamining its treaty fishing rights. *Id.* at 1161.

Washington IV: Overruling Washington III

On remand, the district court again denied the Samish's motion to reopen the judgment in *Washington II*, thus "clearly violat[ing] the mandate of *Washington III*." *United States v. Washington* ("*Washington IV*"), 593 F.3d 790, 798 (9th Cir. 2010) (en banc). The Samish again appealed this second denial.

In *Washington IV*, we convened en banc to address the fundamental inconsistency that had arisen between *Washington III* and the *Greene* cases:

> On the one hand, we have *Greene I* and *II*, which denied treaty tribes the right to intervene in the Samish Tribe's recognition proceedings because recognition could have no effect on treaty rights. On the other hand, we have *Washington III*, which ruled that the fact of recognition of the Samish Tribe was an extraordinary circumstance that justified reopening *Washington II*. *Washington III* further opined that recognition of the Samish Tribe was a *sufficient* condition for the establishment of treaty fishing rights.

Id.

After acknowledging that these "conflicting lines of authority" could not "coexist," we concluded in *Washington IV* "that *Washington III* must yield" and resolved this conflict "in favor of the *Greene* proposition: recognition proceedings and the fact of recognition have no effect on the establishment of treaty rights." *Id.* at 793, 798–99. We elaborated upon this principle, explaining that "treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation." *Id.* at 800. Consistency with *Greene II*, we resolved, requires that the "fact of recognition []not be given *even presumptive weight* in subsequent treaty litigation." *Id.* at 801 (emphasis added). With the significance of the Samish's subsequent recognition finally resolved, we overruled *Washington III* and affirmed the district court's denial of the Nation's motion to reopen the judgment in *Washington II*.

The Samish recognizes that, given our holding in *Washington IV*, it may not revisit *Washington II*'s ruling on

treaty fishing rights. And though the Snoqualmie was not a party to *Washington IV*, the Tribe agrees that it, too, is barred by our decision in that case from relitigating its entitlement to exercise fishing rights under the Treaty.

The Present Appeal: Litigating Treaty Hunting and Gathering Rights

The Snoqualmie maintains, however, that nothing prevents it from litigating its entitlement to exercise *hunting and gathering rights* under the Treaty. Thus, on December 20, 2019, the Snoqualmie filed the complaint at issue here against the State of Washington, the Governor of Washington, and the Washington Department of Fish and Wildlife Director (together, the "State"). The complaint, which purports to focus "solely" on the Snoqualmie's "[t]reaty status in the context of hunting and gathering," seeks a declaration that the Snoqualmie is a signatory to the Treaty and that its reserved off-reservation hunting and gathering rights under the Treaty continue against the United States, Washington State, and its counties, as well as their grantees.

In dismissing the complaint, the district court concluded that *Washington II*'s determination that the Snoqualmie has no fishing rights under the Treaty precluded a finding that the Tribe has any hunting and gathering rights under the same Treaty. The district court reasoned that the factual issue that determined whether the Snoqualmie was entitled to exercise fishing rights under the Treaty in *Washington II*—its maintenance of an organized tribal structure from the time of treaty execution—"is the same gateway question that the [district court] would face . . . when determining hunting and gathering rights." Finding that we had "unequivocally addressed" and resolved that issue against the Snoqualmie in *Washington II*, the district court held that issue preclusion

applied to the Snoqualmie's treaty hunting and gathering rights claims. After assuring itself that no exception applied, the district court dismissed the Snoqualmie's complaint on the ground of issue preclusion and declined to reach the State's other asserted grounds for dismissal. The Snoqualmie timely appealed this dismissal.

Though the Samish was not a party in the district court, it sought leave to intervene for the limited purpose of appeal. Leave was granted, and the Samish also timely appealed the district court's dismissal of the Snoqualmie's complaint. Though the Samish's treaty rights are not directly at issue in this appeal, it argues that the district court's decision, if affirmed, would adversely affect its rights to raise unadjudicated treaty rights under the Treaty in the future. We granted the parties' joint motion to consolidate their appeals and treat them together here.[3]

ANALYSIS

I. The District Court Did Not Err in Dismissing this Case on the Ground of Issue Preclusion Without First Establishing Subject Matter Jurisdiction

As an initial matter, we consider whether the district court erred in dismissing this case on the ground of issue preclusion without first addressing the threshold issue of subject matter jurisdiction.[4] Whether it was within the

[3] The Samish joins only the argument addressed in Section II.B below because it already litigated the other issues the Snoqualmie raises in this appeal in *Washington III* and *IV*.

[4] The Snoqualmie's characterization of both the State's Eleventh Amendment sovereign immunity and Article III standing arguments as jurisdictional is only partly correct. Article III standing is, of course,

district court's discretion to dismiss the Snoqualmie's complaint on the ground of issue preclusion depends on the answers to two questions: first, whether such a dismissal is a non-merits dismissal, and second, whether jurisdictional issues would have been "difficult to determine" such that the district court reasonably invoked issue preclusion as "the less burdensome course." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007); *see Yokeno v. Sekiguchi*, 754 F.3d 649, 651 n.2 (9th Cir. 2014) (explaining that the Supreme Court has supplied courts with "discretionary leeway" to address other threshold issues before subject matter jurisdiction (internal quotation marks and citation omitted)). We answer both questions in the affirmative.

A. Dismissal on the Ground of Issue Preclusion is a Non-Merits Dismissal

Whether dismissal on the ground of issue preclusion is a merits or non-merits dismissal is significant. Although "a federal court generally may not *rule on the merits* of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction)," such a court does have "leeway 'to choose among threshold grounds for *denying audience to a case on the merits*.'" *Sinochem*, 549 U.S. at 430–31 (emphases added) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585

jurisdictional in nature. *See, e.g.*, *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (noting that the "lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)"). However, with respect to state sovereign immunity, "the Eleventh Amendment is not a true limitation upon the court's subject matter jurisdiction." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir.), *amended on denial of reh'g*, 201 F.3d 1186 (9th Cir. 1999).

(1999)). The reason courts are permitted such leeway in the case of non-merits dismissals is because "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Id.* at 431 (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

We acknowledge that the Supreme Court has not expressly identified issue preclusion as a threshold ground for denying audience to a case on the merits, nor have we previously identified it as such. *Cf. Yokeno*, 754 F.3d at 651 n.2 (noting that we have not previously identified claim preclusion—a doctrinal cousin of issue preclusion—as a threshold ground for denying audience to a case on the merits and declining to do so). However, the Court's guidance with respect to related doctrines provides us with sufficient indication that issue preclusion "represents the sort of 'threshold question' [that] . . . may be resolved before addressing jurisdiction." *Sinochem*, 549 U.S. at 431 (alteration in original) (quoting *Tenet v. Doe*, 544 U.S. 1, 7, n.4 (2005)).

The first indication comes from the Court's previous characterization of the doctrine of res judicata—a doctrine that comprises both claim and issue preclusion. As the Court has explained, this doctrine allows courts to dispose of cases "*without reaching the merits of the controversy*." *See C.I.R. v. Sunnen*, 333 U.S. 591, 597 (1948) (emphasis added). This language provides a strong indication that issue (and claim) preclusion dismissals are non-merits dismissals.

Additional support comes from the Court's opinion in *Sinochem*, which was decided in the context of a *forum non conveniens* dismissal but announced principles of broader applicability. In *Sinochem*, the Court counseled that whether a dismissal is on the merits depends on whether resolution of the dismissal motion "entail[s] any assumption by the court

of substantive 'law-declaring power.'" 549 U.S. at 433 (quoting *Ruhrgas*, 526 U.S. at 584–85). Because resolving a *forum non conveniens* motion does not entail such assumption, the Court concluded that a *forum non conveniens* dismissal is not on the merits. *Id.*

Resolution of an issue preclusion motion likewise does not require the court to assume substantive law-declaring power. Just as a *forum non conveniens* dismissal is a determination that the merits should be adjudicated by a different court, an issue preclusion dismissal is a determination that the merits (of at least one issue) *have already been* adjudicated by a different court. *Id.* at 432 ("A *forum non conveniens* dismissal 'den[ies] audience to a case on the merits'; it is a determination that the merits should be adjudicated elsewhere." (alteration in original) (citation omitted)); *cf. Hoffman v. Nordic Nats., Inc.*, 837 F.3d 272, 277 (3d Cir. 2016) (describing claim preclusion as "a determination that the merits have already been adjudicated elsewhere" and concluding that the district court was permitted to "'bypass' the jurisdictional inquiry in favor of a non-merits dismissal on claim preclusion grounds" (citations and alteration omitted)). In each case, the power to declare the substantive law lies—or lay, as the case may be—elsewhere.

In *Sinochem*, the Court also made clear that whether a dismissal is on the merits does *not* necessarily depend on whether the district court considered the merits of the underlying dispute in ruling on the dismissal motion. Indeed, resolution of several threshold issues—including personal jurisdiction and *forum non conveniens*—may "involve a brush with 'factual and legal issues of the underlying dispute.'" *Sinochem*, 549 U.S. at 433 (citation omitted). The "critical point" remains whether the district

court was required to assume substantive law-declaring power to resolve the dismissal motion. *Id.* Here, as in *Sinochem*, it was not. Accordingly, we now conclude, as a matter of first impression, that an issue preclusion dismissal is a non-merits dismissal, and thus issue preclusion may be resolved by a federal court before it addresses its jurisdiction.

B. Jurisdictional Issues Would Have Been "Difficult to Determine," and Dismissing on the Ground of Issue Preclusion was "the Less Burdensome Course"

Our conclusion that issue preclusion dismissals are non-merits dismissals does not end our inquiry. Rather, we must also consider whether jurisdictional issues would have been "difficult to determine" such that dismissing on the ground of issue preclusion was "the less burdensome course." *Id.* at 436.

The leeway courts are afforded in choosing among threshold non-merits grounds for dismissal amounts to an "exception to the general rule that federal courts normally must resolve questions of subject matter jurisdiction *before* reaching other threshold issues." *Potter v. Hughes*, 546 F.3d 1051, 1056 n.2 (9th Cir. 2008) (emphasis added) (internal quotation marks omitted). The contours of this exception are carefully circumscribed. The Court in *Sinochem* admonished district courts that they should avail themselves of this exception only "where subject-matter or personal jurisdiction is difficult to determine," and dismissal on another threshold ground is clear. 549 U.S. at 436. Under such circumstances, judicial economy is served by the court "tak[ing] the less burdensome course" of dismissing on a clear, non-jurisdictional, non-merits ground rather than wading into murkier jurisdictional issues. *Id.* at 435–36.

Conversely, a court ought not apply this exception where it "can readily determine that it lacks jurisdiction over the cause or the defendant." *Id.* at 436.

Here, resolving the threshold jurisdictional issues before the district court would have "involve[d an] arduous inquiry." *Id.* (quoting *Ruhrgas*, 526 U.S. at 587–88). The Snoqualmie's response to the State's facial motion to dismiss included a request to amend its complaint, which would have ultimately triggered a flurry of motions burdening the parties "with expense and delay," and "all to scant purpose: The [d]istrict [c]ourt inevitably would dismiss the case without reaching the merits, given its well-considered [issue preclusion] appraisal." *Id.* at 435. The district court thus acted within its discretion when it took the "less burdensome course" of dismissing on the ground of issue preclusion. *Id.* at 436; *cf. Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008) (recognizing that a federal court may have leeway to dismiss on the ground of res judicata prior to determining standing, but concluding that the court did not have such leeway because "the res judicata analysis [was] no less burdensome than the standing inquiry"). Indeed, the district court's dismissal was consonant with the considerations of judicial economy that motivated the Court's decision in *Sinochem*. *See* 549 U.S. at 435 ("Judicial economy is disserved by continuing litigation in the [district court] given the proceedings long launched in China."); *see also Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009) ("In *Sinochem*, the Supreme Court offered the lower courts a practical mechanism for resolving a case that would ultimately be dismissed.").

Because issue preclusion dismissals are non-merits dismissals, and it was reasonable for the district court to

conclude that dismissing on the ground of issue preclusion was "the less burdensome course," the district court did not abuse its discretion in dismissing the Snoqualmie's complaint before first establishing its subject matter jurisdiction over the Snoqualmie's claims.

II. The Snoqualmie and the Samish are Precluded by this Court's Decision in *Washington II* from Litigating their Treaty Hunting and Gathering Rights Under the Treaty of Point Elliott

We now turn to *de novo* review of the district court's dismissal based on issue preclusion. *See Garity v. APWU Nat'l Lab. Org.*, 828 F.3d 848, 854 (9th Cir. 2016) ("We . . . review the district court's ruling on issue preclusion *de novo*.").

Issue preclusion, which "bars the relitigation of issues actually adjudicated in previous litigation," applies where four conditions are met:

> (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.

Janjua v. Neufeld, 933 F.3d 1061, 1065 (9th Cir. 2019) (citations omitted).

The parties dispute only the first and second conditions.[5] The Snoqualmie argues that issue preclusion does not apply because its treaty hunting and gathering rights were not "actually litigated" in *Washington II*, and, even if issue preclusion were otherwise to apply, exceptions to that doctrine nonetheless permit its claims to proceed. We disagree on both counts and accordingly affirm the district court's issue preclusion dismissal.[6]

A. In *Washington II*, the Snoqualmie Actually Litigated the Identical Issue It Now Seeks to Litigate: Treaty-Tribe Status

The issue the Snoqualmie now seeks to litigate is identical to that actually litigated and decided in *Washington II*. In its complaint, the Snoqualmie seeks a declaration that it "is a signatory to the Treaty of Point Elliott," "has maintained a continuous organized structure since," and is thus "entitled to exercise rights"—including the hunting and

[5] While the State cites *Garity* and identifies a slightly different issue preclusion standard, both parties agree that the only conditions challenged on appeal address whether the Snoqualmie seeks to litigate an issue identical to that actually litigated and decided in *Washington II*. *See Garity,* 828 F.3d at 858 n.8 (noting that issue preclusion applies if "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding" (alteration in original) (citation omitted)).

[6] Our conclusion that the district court's factual finding made in *Washington II* has preclusive effect forecloses the Snoqualmie's argument that the district court exceeded its constitutional authority by abrogating the Tribe's treaty rights. This argument puts the cart before the horse, assuming the very issue on appeal—namely, whether the Snoqualmie has treaty-tribe status under the Treaty.

gathering rights at issue here—under the Treaty. In other words, the Snoqualmie seeks to litigate its treaty-tribe status under the Treaty, a point it makes explicit in its description of its first cause of action: "Declaration of Treaty Status." Absent treaty-tribe status, the Snoqualmie has no claim to any rights under the Treaty.

In *Washington II*, the district court—and this court on appeal—considered and decided this exact issue. In *Washington II*, the Snoqualmie sought to exercise treaty fishing rights under the Treaty, and we made explicit that they could do so only if they had treaty-tribe status. 641 F.2d at 1372–73. We reiterated that treaty-tribe status is established when a group of Indians is "descended from a treaty signatory" and has "maintained an organized tribal structure," and we noted that whether these conditions are met "is a factual question which a district court is competent to determine." *Id.* at 1371 (quoting *Washington I*, 520 F.2d at 693). We then affirmed the district court's factual finding that the Snoqualmie, though descended from a treaty-signatory tribe, *see id.* at 1370, had not maintained an organized tribal structure and thus was not entitled to exercise rights under the Treaty because it lacked treaty-tribe status, *id.* at 1374.

Given our holding in *Washington II*, it was no leap for the district court to conclude that the factual issue actually litigated and decided in that case—the Snoqualmie's treaty-tribe status—is identical to the issue the Snoqualmie now seeks to litigate. The difference in treaty rights at issue—fishing rights in *Washington II*, hunting and gathering rights here—is immaterial to this conclusion. Though only treaty fishing rights claims were asserted in *Washington II*, the treaty-tribe status of the Snoqualmie, among others, was the predicate issue actually litigated and decided in order to

resolve those claims. And though only treaty hunting and gathering rights claims have been asserted in this litigation, the Snoqualmie's treaty-tribe status "is the same gateway question" any court would face when determining its entitlement to exercise those rights under the Treaty.

B. *Washington IV* did not Create an Exception to Issue Preclusion

The Snoqualmie and the Samish (together, the "Tribes") also argue that even if issue preclusion were ordinarily to apply, it does not apply here because our en banc decision in *Washington IV* announced an exception to issue preclusion for newly recognized tribes. This argument fails for the simple reason that *Washington IV* announced no such exception.

The Tribes locate their purported exception in two sentences in *Washington IV*:

> Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated. Such a tribe will have to proceed, however, by introducing its factual evidence anew; it cannot rely on a preclusive effect arising from the mere fact of recognition.

593 F.3d at 800. They parse these sentences and endeavor to derive a rule: (1) a "newly recognized tribe" (2) may present a claim of "treaty rights not yet adjudicated," (3) and, in proving its claim, it will be required to introduce factual evidence "anew." The Tribes claim that they come within this exception because they are newly recognized tribes and

their treaty hunting and gathering rights have not yet been adjudicated. Thus, they argue, they are permitted in this litigation to establish their entitlement to exercise these unadjudicated treaty rights by introducing factual evidence anew.

The Tribes' argument finds no support in *Washington IV*. First, our opinion in *Washington IV* is devoted to reaffirming our prior holdings in *Greene I* and *II* that the treaty rights and federal recognition inquiries are distinct and independent. *See Washington IV*, 593 F.3d at 793 (overruling *Washington III* and holding that "recognition proceedings and the fact of recognition have no effect on the establishment of treaty rights"). Indeed, we convened the court en banc in *Washington IV for the express purpose* of addressing the fundamental inconsistency between *Washington III* and the *Greene* cases—an inconsistency we ultimately resolved "in favor of the *Greene* proposition." *Id.*

The remainder of the paragraph in which the Tribes' purported exception is situated confirms the scope of our holding:

> In *Greene II*, we denied any estoppel effect of *Washington II* on the Samish Tribe's recognition proceeding, because treaty litigation and recognition proceedings were "fundamentally different" and had no effect on one another. Our ruling was part of a two-way street: treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation. Indeed, to enforce the assurance in *Greene II* that treaty rights were "not affected" by recognition proceedings, the fact of recognition cannot be given even

> presumptive weight in subsequent treaty litigation. To rule otherwise would not allow an orderly means of protecting the rights of existing treaty tribes on the one hand, and groups seeking recognition on the other.

Id. at 800–01 (citations omitted).

Reading the entire paragraph in context, it is clear that the focus of the sentences the Tribes rely on is *not* the preclusive effect—or lack thereof, as they argue—of their prior treaty rights litigation in subsequent treaty rights litigation, but rather the preclusive effect—or lack thereof, as we concluded—of *federal recognition* in subsequent treaty rights litigation. This context serves only to underscore the fact that the exception the Tribes seek here—which would grant them an issue preclusion exception in future treaty rights litigation *on the basis of their newly recognized statuses*—turns on its head the *Washington IV* holding that treaty rights litigation and federal recognition proceedings "[have] no effect on one another." *Id.* at 800. We decline—indeed, we are unable—to countenance an exception that adopts a principle *Washington IV* repudiated.

Second, and more specifically, *Washington IV* explicitly reaffirms that the "the Samish tribe"—and the Snoqualmie by extension—"had a factual determination finally adjudicated against [them] in *Washington II*." *Id.* As we explained, this "crucial finding of fact"—"that the [Tribes] had not functioned since treaty times as 'continuous separate, distinct and cohesive cultural or political communities,'" *id.* at 799 (alteration omitted) (quoting *Washington II*, 641 F.2d at 1373)—"justif[ied] the denial of treaty rights" under the Treaty, *id.* We thus recognized that the factual findings affirmed in *Washington II* had the effect

of denying the Tribes treaty-tribe status under the Treaty. Given *Washington IV*'s explicit reaffirmation of the finality of these factual findings, there is no basis to undo that finality by adopting the Tribes' purported exception.

Finally, we consider the practical consequences of the Tribes' purported exception. Embracing this exception would allow for the incongruous result that a tribe could have treaty-tribe status with respect to some treaty rights but not with respect to others—even where, as here, those rights appear in the *very same article* of the treaty. *See* Treaty Between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, 12 Stat. 927, Article V (U.S. Treaty Apr. 11, 1859) (reserving, for the signatory tribes, both fishing and hunting and gathering rights). While our opinion in *Washington IV* was intended to ensure an "orderly means of protecting" treaty rights, recognizing the Tribes' purported exception would have the opposite effect. *See* 593 F.3d at 801. Accordingly, we decline to derive from *Washington IV* an exception that would inject incongruity into the treaty rights regime in Washington.

C. No Other Exception to Issue Preclusion Applies

The Snoqualmie finally argues that even if *Washington IV* does not create an exception, two exceptions identified in the Restatement (Second) of Judgments apply. We disagree.

The Restatement (Second) of Judgments identifies several exceptions to the general rule of issue preclusion. The two exceptions offered by the Snoqualmie provide that "relitigation of [an] issue in a subsequent action between the parties is not precluded" where:

> [1] The issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> [2] A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them[.]

Restatement (Second) of Judgments § 28 (1982).

The Snoqualmie's claim to the first of these exceptions fails for the simple reason that the issue the Snoqualmie seeks to relitigate is a *factual* issue, and this exception applies only to issues of law. *See id.* The Snoqualmie's claim to this exception further fails because it is tethered to *Washington IV*, which the Tribe argues "constitutes a change in the applicable legal context" such that issue preclusion does not apply. But, for reasons we have already articulated, *Washington IV* did not announce an exception to issue preclusion for newly recognized tribes, and thus the applicable legal context remains unchanged.

The Snoqualmie also unsuccessfully stakes its claim to this exception in the decision of the Assistant Secretary of Indian Affairs to take land into trust on its behalf. *See* U.S. Dep't of Interior, Fee-to-Trust Decision (Mar. 18, 2020), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ots/pdf/Snoqualmie_Indian_Tribe.pdf (last visited June 24, 2021). This decision recognizes that the Snoqualmie was a signatory to the Treaty and that the Treaty "remains in effect today." *See id.* at 36, 39. It further recognizes that "the

Snoqualmie Tribe was clearly identified as derived from the treaty-signatory Snoqualmie." *Id.* at 39. These conclusions, the Snoqualmie argues, "markedly alter the applicable legal context for [its] assertion of treaty rights under the new rule of *Washington IV*." Setting to one side whether these *factual* conclusions change the applicable *legal* context, this argument fails because it is simply a repackaged attempt to give administrative rulings effect in subsequent treaty rights litigation, which *Washington IV* explicitly forbids.[7] *See Washington IV*, 593 F.3d at 800 ("The fact that a subsequent administrative ruling for another purpose may have made underlying inconsistent findings is no reason for undoing the finality of the *Washington II* factual determinations.").[8]

The Snoqualmie's claim to the second exception is grounded in the allegedly questionable quality and

[7] The Snoqualmie's suggestion that the district court should have deferred to determinations made in the Tribe's federal recognition decision and that we should defer to determinations made in the fee-to-trust decision would likewise run afoul of our holding in *Washington IV*.

[8] We also reject the Snoqualmie's suggestion that this exception should apply because preclusion "would result in a manifestly inequitable administration of the laws." Restatement (Second) of Judgments § 28. The Tribe argues that preclusion of all of its treaty rights claims under the Treaty on the basis of factual findings made by the district court in *Washington II* in 1979 would cause it irreparable harm. Accepting the Snoqualmie's argument would open the floodgates of relitigation; finality would become elusive as parties continued to relitigate facts whenever future interests were threatened by prior determinations. Elevating parties' claims of harm, valid though they may be, over the finality of legitimate court decisions would deal a fatal blow to principles of res judicata: "If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed." 18 Charles Alan Wright et al., Federal Practice and Procedure § 4426 (3d ed. 2005).

extensiveness of the procedures employed in *Washington II* to determine the factual issue of the Tribe's treaty-tribe status. But as we pointed out in *Washington IV*, the factual finding that lies at the heart of this appeal was "made by a special master after a five-day trial, and . . . again by the district judge de novo after an evidentiary hearing." 593 F.3d at 799. And the Samish—and, by extension, the Snoqualmie, too—had no reason "to hold back any evidence" at those hearings, nor did they lack incentive "to present in *Washington II* all of [their] evidence supporting [their] right to successor treaty status." *Id.* In the face of these conclusions, we cannot countenance the Snoqualmie's argument that "[a] new determination of the issue [of its treaty-tribe status] is warranted by differences in the quality or extensiveness of the procedures followed" in *Washington II*. *See* Restatement (Second) of Judgments § 28.

CONCLUSION

We affirm the district court's issue preclusion dismissal because the issue the Snoqualmie now seeks to litigate—its treaty-tribe status under the Treaty of Point Elliott—is identical to the issue actually litigated and decided in *Washington II*, and no issue preclusion exception applies.

AFFIRMED.[9]

[9] We **DENY** the Tribes' requests that we take judicial notice of—and with respect to one request also supplement the record on appeal with—the administrative decisions and a district court judgment.

FILED

NOV 12 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director,

Defendants-Appellees,

SAMISH INDIAN NATION,

Intervenor.

No. 20-35346

D.C. No. 3:19-cv-06227-RBL
Western District of Washington, Tacoma

ORDER

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members,

Plaintiff,

and

SAMISH INDIAN NATION,

Intervenor-Appellant,

No. 20-35353

D.C. No. 3:19-cv-06227-RBL

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director,

Defendants-Appellees.

Before: McKEOWN and PAEZ, Circuit Judges, and ORRICK,* District Judge.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 18 2020

The Honorable Robert de los Angeles
Chairman, Snoqualmie Indian Tribe
9571 Ethan Wade Way Southeast
Snoqualmie, Washington 98065

Dear Chairman de los Angeles:

This is my decision on the fee-to-trust application dated September 21, 2015, amended by letter dated June 24, 2019, from the Snoqualmie Indian Tribe ("Snoqualmie" or "Snoqualmie Tribe") for an on-reservation, non-gaming acquisition consisting of 16.63 acres, more or less, fully identified below, known as Rebhuhn-Tudor-Meyers Property ("Parcels"), and located in King County, Washington. On June 9, 2015, by Resolution No. 120-2015, the Snoqualmie Tribe requests to have the Parcels taken into trust status.

Although the Bureau of Indian Affairs ("BIA") Regional Offices typically issue decisions for on-reservation fee-to-trust acquisitions, I am issuing this on-reservation decision due to current technical difficulties with the Trust Asset and Accounting Management System Fee-to-Trust Module.

Description of the Land

The land is described as follows:

Tax Parcel No. 780290-0405 ("Rebhuhn Parcel")

Beginning at a point on the South line of the Northwest quarter of Section 31, Township 24 North, Range 8 East, W.M., 1741.29 feet S88°51'11"W of the Southeast corner of the Northwest corner of said Section 31;

Thence N3°02'25"W 627.28 feet to the South line of a 60 foot street;

Thence S86°57'35"W along said street 330.0 feet;

Thence S3°02'25"E 616.36 feet to the South line of said Northwest quarter of said section 31;

Thence N88°51'11"E along said South line of said Northwest quarter of said section 31, 330.18 feet to the point of beginning, in King County, Washington. (4.71 acres)

(also known as Lot 4, Block 3, of the unrecorded plat of si view acre tracts)

Tax Parcel No. 780290-0520 ("Meyers Parcel")

That portion of the Northwest quarter of Section 31, Township 24 North, Range 8 East, W.M., in King County, Washington, described as follows:

Beginning at a point on the section line between Section 31, Township 24 North, Range 8 East, W.M., in King County, Washington and Section 36, Township 24 North, Range 7 East, W.M., in King County, Washington, 628.28 feet N0°30'14"W of the one-quarter corner between said Sections 31 and 36;

Thence N86 °57'35"E 226.80 feet;

Thence N3 °02'25"W 30.0 feet;

Thence N86 °57'35"E 630 feet to the West line of Weathervane Lane Estates, according to the plat thereof recorded in Volume 88 of Plats, page 29, in King County, Washington;

Thence N3 °02'25"W along said West along said West line 660 feet;

Thence S86 °57'35"W to the section line between Sections 31 and 36;

Thence S0 °30'14"E along the section line 690.64 feet to the Point of Beginning; except that portion described as follows:

The West 256 feet in width of that portion of the Northwest quarter of Section 31, Township 24 North, Range 8 East, W.M., in King County, Washington, described as follows:

Beginning at a point on the section line between Section 31, Township 24 North, Range 8 East, W.M., in King County, Washington and Section 36, Township 24 North, Range 8 East, W.M., in King County, Washington, 628.28 feet N0°30'14"W of the one-quarter corner between said Sections 31 and 36;

Thence N86 °57'35"E 226.80 feet;

Thence N3 °02'25"W 30.0 feet;

Thence N86 °57'35"E 374 feet to the True Point of Beginning;

Thence North 86 °57'35" East 586 feet to the west line of that certain tract of land described in deed recorded under recording number 3324383, King County

Building Co., grantor, to Ernest C. Crawford and Helen G. Crawford, his wife, grantees;

Thence N3 °02'25"W, 660 feet to a point N86 °57'35"E 1098.74 feet and S3 °02'25"E; 1305.79 feet from the Northwest corner of said Section 31;

Thence S86 °57'35"W 586 feet;

Thence S0°30'14"E 660 feet to the True Point of Beginning. (9.03 acres)

(also known as Lot 5, and the West 74 feet of Lot 4, Block 4, si view acre tracts, according to the unrecorded plat thereof).

Tax Parcel No. 362047-9001 ("Tudor Parcel 1")

That portion of the South 265.14 feet of the North half of the Southeast quarter of the Northeast quarter of Section 36, Township 24 North, Range 7 East, W.M. in King County, Washington, lying Easterly of County road;

Except the Northern Pacific Railway spur right-of-way. (1.53 acres)

Tax Parcel No. 362407-9082 ("Tudor Parcel 2")

That portion of the North half of the Southeast quarter of the Northeast quarter of Section 36, Township 24 North, Range 7 East, W.M. in King County, Washington, lying Easterly of County road;

Except the South 265.14 feet thereof;

and Except the Northern Pacific Railway spur right-of-way. (1.36 acres)

All Situate in the County of King, State of Washington.

Containing 16.63 acres, more or less.

Compliance with 25 Code of Federal Regulations Part 151

The Secretary of the Interior's ("Secretary") general authority for acquiring land in trust is found in Section 5 of the Indian Reorganization Act.[1] The applicable regulations are set for in the Code of Federal Regulations ("C.F.R.") Title 5, Part 151, ("25 C.F.R. 151"). The regulations specify that it is the policy of the Secretary to accept lands "in trust" for the benefits of tribes.

[1] Act of June 18, 1934, c. 576, § 5, 48 Stat. 984 ("IRA" or "Act"), codified at 25 U.S.C. § 5108 ("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.").

Department's Land Acquisition Policy

Section 151.3 of 25 C.F.R. lays out the Department of the Interior's ("Department") land acquisition policy. Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary. Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[2]

The Snoqualmie Tribe acquired the Parcels as follows:

- **Rebhuhn Parcel**: From Christopher C. and Meredith Rebhuhn, by Statutory Warranty Deed dated April 15, 2013 and recorded the purchase on April 15, 2013 in King County under document number 201304150023[illegible]

- **Meyers Parcel**: From [illegible] Arnold Meyers, by Statutory Warranty Deed dated July 29, 2008 and recorded the purchase on August 8, 2008 in King County under document number 20080806001481.

- **Tudor Parcel 1 and Tudor Parcel 2**: From the estate of Evelyn Bauer Tudor, Personal Representative John W. Clark, by Statutory Warranty Deed dated July 29, 2008 and recorded the purchase on August 8, 2008 in King County under document number 20080806001484.

The Parcels are adjacent to the Snoqualmie Tribe's Reservation. The term "adjacent" is undefined in Part 151. The Interior Board of Indian Appeals ("IBIA") has held that the term "adjacent" "'is a term of flexible meaning" and a conclusion that land is adjacent to a reservation must be supported in the record with 'an exact statement of the lot's location, vis-a-vis the reservation boundary, or a discussion of reasons for the…conclusion.'"[3] Adjacent lands "may be,

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[2] 25. C.F.R. § 151.3(a).

[3] *County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*, 58 IBIA 11, 26 (2013) quoting *Maahs v. Acting Portland Area Director*, 22 IBIA 294, 296 (1992) (footnote omitted) (vacating a BIA decision which concluded without explanation that the land was not adjacent to the tribe's reservation).

but need not be, contiguous."[4] The term "contiguous" is also not defined in 25 C.F.R. Part 151. Yet, the IBIA has held that to be "contiguous" under 25 C.F.R. 151, "at minimum, the lands must touch."[5] Parcels that "adjoin or abut" are contiguous.[6]

A review of the Snoqualmie Tribe's Application shows the following:

- The Rebhuhn Parcel shares a common boundary with the existing Snoqualmie Reservation (Tax Parcel 7802900410).
- The Meyers Parcel shares a common boundary with the existing Snoqualmie Reservation (Tax Parcel 7802900410).
- The Tudor Parcel 1 and Tudor Parcel 2 share a common boundary with the Meyers Parcel, which shares a common boundary with the existing Snoqualmie Reservation (Tax Parcel 7802900410).

Therefore, it is the Department's determination that the Parcels all touch and are therefore not only "adjacent" but also "contiguous" to the Snoqualmie Tribe's Reservation.

It is Department's determination that the acquisition of the Parcels in trust for the Snoqualmie Tribe meet the Department's land acquisition policy because:

(1) the Parcels are adjacent to the Snoqualmie Tribe's Reservation,

(2) the Snoqualmie Tribe owns interest in the land, and

(3) taking the Parcels in trust will provide increased long-term socio-economic security for the Snoqualmie Tribe through land acquisition to benefit the Tribe's efforts to enhance self-determination

On-Reservation Acquisitions

It is the Department's determination that the regulatory requirements of 25 C.F.R § 151.10 applies to this trust acquisition. Section 151.11 of 25 C.F.R. does not apply because the Parcels are, as stated above, contiguous to the Snoqualmie Tribe's Reservation, as the Rebhuhn Parcel and Meyers Parcel shares a common boundary with the existing Snoqualmie Tribe's Reservation (Tax Parcel 7802900410), and the Tudor Parcel 1 and Tudor Parcel 2 share a common boundary with the Meyers Parcel, which shares a common boundary with the existing Snoqualmie Tribe's Reservation (Tax Parcel

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[4] *Id.* at 26 (internal quotations committed) citing *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008) (citing *Maahs*, 22 IBIA at 296).
[5] *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008).
[6] *Id.* at 205. *See also State of Kansas v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 225, 230 (2016) ("Parcels that share a boundary are deemed 'contiguous.'").

7802900410). As such the Parcels will be processed as an on-reservation acquisition.

Pursuant to 25 C.F.R. 151, the Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)[7]

The Department's review of the requirements to evaluate this request as set forth in 25 C.F.R. 151, determined the following:

Section 151.10(a) – Statutory Authority

For the reasons explained below, I conclude that Section 5 of the IRA[8] provides the Secretary with the authority to acquire the Parcels in trust for the Snoqualmie Tribe.

[7] 25 C.F.R. § 151.10.
[8] 25 U.S.C. § 5108.

I. BACKGROUND

The history of federal interactions with the Snoqualmie begins in 1855,[9] when the Snoqualmie and other tribes entered into the Treaty of Point Elliott with the United States.[10] The Treaty of Point Elliott was one of several treaties negotiated by Isaac Ingalls Stevens, Governor of the Territory of Washington ("Territory") from 1853-1857, by which tribes in the Pacific Northwest ceded lands to the United States.[11] The Snoqualmie were a party to the Treaty of Point Elliott.[12] After the Tulalip Reservation[13] was established in 1860, a minority of Snoqualmie relocated there, along with members of various other tribes located in northwest corner of the Territory.[14] The Snoqualmie residing on the Tulalip Reservation maintained close ties with those Snoqualmie who chose to remain off-reservation.[15]

In the years following ratification of the Treaty of Point Elliott, federal officials continued to have dealings with both the on-reservation and off-reservation Snoqualmie. Although additional Snoqualmie relocated to the Tulalip Reservation prior to 1900, a distinct community of Snoqualmie and their descendants declined to move to the Tulalip Reservation or any of the other four reservations set apart by the Treaty of Point Elliott, due primarily to the unavailability of land for allotments.[16] And while the federal government began its interactions with the on-reservation and off-reservation Snoqualmie as more or less a single political entity, as time

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[9] The history of interactions between the federal government and the Snoqualmie Tribe is laid out in numerous federal documents, including a number of Departmental documents during the 1990s when the Snoqualmie Tribe was seeking federal acknowledgment through the Department's administrative process. *See* U.S. Dept. of the Interior, Assistant Secretary, *Summary under the Criteria and Evidence for Proposed Finding for Federal Acknowledgment of the Snoqualmie Indian Tribe* (Apr. 26, 1993) ("Proposed Finding"); U.S. Dept. of the Interior, BIA, *Proposed Finding for Federal Acknowledgment of the Snoqualmie Indian Tribe*, 58 Fed. Reg. 27,162 (May 6, 1993); Assistant Secretary, *Summary under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Snoqualmie Tribal Organization* (Aug., 22, 1997) ("Final Determination"); BIA, *Final Determination to Acknowledge the Snoqualmie Tribal Organization*, 62 Fed. Reg. 45,864 (Aug. 29, 1997). The Proposed Finding included a 408-page summary of evidence under the applicable acknowledgment criteria. The Final Determination included a 139-page technical report ("Technical Report"), which addressed and assessed in detail the evidence on which the decision to acknowledge the Snoqualmie Tribe was based. The conclusion of the Proposed Finding were relied on in the Final Determination and Technical Report and, except as supplemented and modified, were adopted.

[10] Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855); *United States v. State of Washington*, 476 F. Supp. 1101, 1108 (W.D. Wash. 1979) ("*Washington II*"), *aff'd*, 641 F.2d 1368 (9th Cir. 1981); Technical Report at 13.

[11] Technical Report at 13.

[12] Proposed Finding at 32, 116, 138; Final Determination at 1-3, 41, 57-58.

[13] The Tulalip Reservation, as it is referred to today, was created by the Treaty of Point Elliott and was originally referred to as the Bellingham Bay reservation. All of the reservations created by the Treaty of Point Elliott were reserved for *all* of the tribes and bands that were a party to the treaty. *See* Treaty of Point Elliott, Article 2, 12 Stat. 927.

[14] Proposed Finding at 8.

[15] *Ibid.*

[16] Technical Report at 13-14, 20; *Washington II*, 476 F. Supp. at 108 ("most" Snoqualmie Indians remained off the reservations).

passed, these two communities gradually separated, with the federal government increasingly interacting with the off-reservation Snoqualmie independently from their on-reservation kinsmen.[17]

During this period of separation, agents of the federal government began identifying each community separately. In 1913, for example, the jurisdiction of the Tulalip Agency was explicitly extended to non-reservation Indians—those maintaining tribal relations—including the off-reservation Snoqualmie.[18] In 1916, the Assistant Commissioner of Indian Affairs instructed Special Allotting Agent Charles A. Roblin to investigate applications for Quinault enrollment and allotment, and to prepare a list of "unattached Indians of northwest Washington and the Puget Sound area."[19] The so-called Roblin Roll designated the tribal affiliation of those "unattached" Indians, by which it meant landless Indians who did not reside on a reservation,[20] and specifically identified the off-reservation Snoqualmie as having continued to maintain tribal communities.[21]

Recognizing that there were both on-reservation and off-reservation Indians for which the Tulalip Agency was responsible, documents concerning tribes under the Tulalip Agency's jurisdiction between 1913 and 1930 list both reservation tribes and recognized non-reservation tribes, usually under the heading of "public domain" tribes. In 1929, the Tulalip Agency identified the Snoqualmie under both the Tulalip Reservation and the "public domain."[22]

Despite significant differences in the on-reservation and off-reservation experiences, from the Treaty of Point Elliott to 1929, the federal government interacted with both groups "more or less as a single political entity."[23] In the 1920s, for example, the BIA began an effort to organize the various tribal groups whose members were located on the Tulalip Reservation.[24] By at least April 6, 1929, there existed a Snohomish business committee on the Tulalip Reservation.[25] Similarly, a Snoqualmie business committee was established by the Department's Indian Service to deal with the Tulalip Agency Superintendent on matters affecting Snoqualmie interests on the Tulalip Reservation.[26] Notably, this business committee's officers included Jerry Kanim as President and John Johnson as Treasurer, both off-reservation Snoqualmie.[27]

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[17] Technical Report at 14.
[18] *Id.* at 15.
[19] *See* Letter, E.B. Merrit to Otis O. Benson, Supt. Taholah Indian School (Nov. 17, 1919); Letter, Charles E. Roblin, Special Allotting Agent to W.F. Dickens, Superintendent Tulalip (May 10, 1926).
[20] Technical Report at 15.
[21] *Ibid.*
[22] *See* Letter, Aug. F. Duclos to Commissioner of Indian Affairs (May 13, 1929).
[23] Technical Report at 12; Proposed Finding at 26-27 ("Until the 1930s, the Government dealt with the Snoqualmie resident on and off-reservation more or less as a single political entity.").
[24] Technical Report at 17.
[25] *Id.* at 15 (The Tulalip Indian Agency identified the Snoqualmie business committee as the "Business Committee representing the Snoqualmie Tribe on the Tulalip Reservation").
[26] *Id.* at 16.
[27] *Ibid.*

In 1930, however, the BIA organized a *reservation-only* business committee that included representatives of the Skokomish, Snohomish, Snoqualmie, and Stillaguamish Indians. As a part of the BIA's organizing efforts, the issue of whether to include off-reservation Indians was hotly debated.[28] Ultimately, the Superintendent explicitly directed that the business committee would exclude off-reservation Indians, regardless of tribal affiliation.[29] "These councils were apparently formed by the agency in response to new regulations concerning the leasing of Indian lands which evidently were interpreted by the Indian Service as requiring the limitation to reservation Indians."[30] The exclusion of the off-reservation Snoqualmie from participation in the business committee resulted in the splintering of the Snoqualmie into two groups: those who resided on the Tulalip Reservation and those who did not.

Thereafter, the Tulalip Agency dealt with the off-reservation Snoqualmie as an independent tribal entity under the jurisdiction of the Federal government.[31] The Tulalip Agency often referred to this group as the "Jerry Kanim Band of Snoqualmie Indians." This designation was a reference to Jerry Kanim, the former business committee President and longtime Snoqualmie tribal leader. Prior to his death in 1956, the federal government treated Chief Kanim as the authorized representative of the off-reservation Snoqualmie.[32] Thus, beginning in 1930 and for at least two decades following the passage of the IRA, the United States dealt with the off-reservation Snoqualmie as a separate, recognized tribe to which it had obligations and responsibilities.[33]

In 1934, for example, the Superintendent of the Tulalip Agency explicitly identified the Jerry Kanim Band of Snoqualmie. Specifically, the Superintendent responded to a questionnaire from the National Resources Board regarding tribal groups within the region, stating there was "an important band of Snoqualmie Indians under the leadership of Jerry Kanim," and noting that a number of these Snoqualmie "were not enrolled at any agency and have no land."[34] To remedy the situation, the Superintendent suggested establishing a small reservation for the band within the Snoqualmie National Forest, separate and distinct from the Tulalip Reservation.[35]

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[28] *Id.* at 17.
[29] *Ibid.*
[30] *Id.* at 17.
[31] *See, e.g.*, Final Determination at 2 (In the 1930s, the modern-day Snoqualmie Tribe, at issue in this memorandum, was "acknowledged as part of the Snoqualmie tribe as whole." In 1934, the Snoqualmie Tribe was acknowledged as a separate entity from approximately 1934 until 1953. "There were multiple, consistent Federal dealings with the separate non-reservation Snoqualmie Band…between 1934 and 1953 which treated it as a recognized tribe under the jurisdiction of the Federal Government.").
[32] Technical Report at 14, fn. 16 ("…the Federal Government dealt with the Snoqualmie Tribe between 1855 and 1934, and *from 1934 to 1953 specifically dealt with Jerry Kanim's Band of off-reservation Snoqualmie*.") (emphasis added).
[33] Proposed Finding at 27 (federal government continued to recognized Jerry Kanim Band as separate political entity even after Tulalip Reservation residents organized as a tribal government under the IRA in 1936); Final Determination at 3 (noting "consistent Federal dealings" with Jerry Kanim Band "as a recognized tribe under the jurisdiction of the Federal Government" between 1934 and 1953); 62 Fed. Reg. at 45,865 (same); Technical Report at 12.
[34] Proposed Findings at 185.
[35] Technical Report at 18.

Two years later, a majority of the on-reservation Indians on the Tulalip Reservation voted to organize under the IRA as the "Tulalip Tribes of the Tulalip Reservation." From this point on, the United States interacted with those on-reservation Snoqualmie exclusively as part of newly established "Tulalip Tribes."

Building on the aforementioned Superintendent's request from 1934, between 1937 and at least 1944, agents of the federal government continued to pursue a separate reservation for the Jerry Kanim Band of Snoqualmie. In 1937, the Indian Service suggested acquiring approximately 10,000 acres of land northeast of Carnation, Washington in the Told River Valley to enable the Jerry Kanim Band to organize under the IRA.[36] That same year, in a preliminary report entitled "Chief Keenum [*sic*] Band of the Snoqualmie Tribe Project" ("Project Report"), a government Land Field Agent stated that there was a small band of off-reservation Snoqualmie under the leadership of Chief Jerry Kanim for whom the federal government was proposing a reservation in their ancestral lands.[37]

A few weeks later, a Field Agent for the Organization Section of the Central Office responded to the Land Field Agent about the Project Report, stating it was "necessary to establish a reservation or land holdings before organization can take place" so that the Snoqualmie "can avail themselves of the benefits of the IRA."[38] According to the Technical Report that accompanied the Department's Proposed Finding of Federal Acknowledgment:

> [this] reference was to the need under the act for a land base in order to be able to organize a tribal government under the act. Implementation of the act involving a landless tribe required a determination of whether the group was recognized by the Federal government. No mention is made in the available documents of a need to evaluate or clarify the tribal status of the off-reservation Snoqualmie while considering their possible organization under the IRA. This indicates that their status as a tribe with a relationship to the Federal government was not in doubt.[39]

A few years later, in 1941, O.C. Upchurch, Superintendent of the Tulalip Agency, wrote John Collier, Commissioner of Indian Affairs, that the off-reservation Snoqualmie had "a legitimate claim to further lands" and proposed the acquisition of a reservation in the Tolt River Valley for their benefit.[40] Further, the Department's 1944 Preliminary Report on the Ten Year Plan for the Tulalip Indian Agency stated that the Jerry Kanim Band of Snoqualmie Indians were "landless Indians…entitled to fulfillment of the Treaty of 1855 and that a reservation sufficient to assure them a home should in equity be secured for them."[41] Consistent with this understanding, in

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[36] *See* Letter, O.C. Upchurch to J.M. Stewart, Director of Lands, Office of Indian Affairs (Feb. 23, 1937). *See also* Preliminary Report: Chief Keenum [sic] Band of the Snoqualmie Tribe Project, Johnston 1937.
[37] Technical Report at 19. *See also* Project Report.
[38] *Id.* at 19
[39] *Ibid.*
[40] *Id.* at 20.
[41] *Id.* at 20-21.

1947, the Jerry Kanim Band of Snoqualmie were among those "in addition to the Tulalip Tribes" that were listed "under the jurisdiction of the Tulalip Agency."[42]

In the 1950s, federal Indian policy shifted to rapid assimilation through termination. In 1953, Congress adopted House Concurrent Resolution 108, which established Congressional sentiment for termination.[43] As part of the planning for such termination, the Portland Area Office and the Puget Sound Agency compiled lists of tribes in western Washington for which there was federal responsibility.[44] The documents generated during this time include several references to the status of the Jerry Kanim Band of Snoqualmie, which indicate that until at least January 1953 it was acknowledged by the federal government as a tribe.[45] By 1961, however, the Jerry Kanim Band of Snoqualmie were no longer identified by the Western Washington Agency as a recognized tribe, as they did not have a land base.[46]

In 1974, a special BIA panel evaluated the status of the Snoqualmie against specific recognition criteria and, after finding the group to be eligible for Federal recognition, recommended that acknowledgment be extended to the Snoqualmie.[47] However, because the Secretary suspended recognition decisions until the criteria and procedures for federal acknowledgment could be examined and standardized, neither this recommendation nor Snoqualmie's 1976 petition for recognition was acted upon prior to October 2, 1978, the effective date of the new Federal acknowledgment regulations.[48]

In 1993, the Assistant Secretary issued the Proposed Finding under the 1978 regulations acknowledging the Snoqualmie as an Indian tribe.[49] In the Proposed Finding, the Assistant Secretary found that the federal government "clearly and continually" recognized a "government-to-government" relationship with the Snoqualmie from the treaty era until sometime between 1895 and 1900.[50]

In 1994, the Department revised its federal acknowledgment regulations.[51] The revised regulations included new provisions that addressed those applicant groups that could show substantial evidence of "unambiguous previous Federal acknowledgment."[52] The regulations still required such groups to demonstrate historical continuity of existence, but only from the

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[42] *Id.* at 21.
[43] H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).
[44] Technical Report at 23.
[45] *Id.* at 4. *See also* Technical Report at 22 (At least until January 1953, documents "clearly still classified [the Jerry Kanim Band of Snoqualmie] as a recognized tribe").
[46] Technical Report at 24.
[47] Proposed Finding at 5.
[48] *See* Proposed Finding at 5. *See also* 43 Fed. Reg. 39,361 (Aug. 24, 1978).
[49] Final Determination at 2.
[50] *Id.*
[51] 59 Fed. Reg. 9,280 (Feb. 25, 1994). The federal acknowledgment regulations were originally classified at 25 C.F.R. Part 54. The Department amended its acknowledgment criteria again in 2015. *See* 80 Fed. Reg. 37,862 (Jul. 1, 2015).
[52] *See* 25 C.F.R. § 83.8 (1994).

time of last federal acknowledgment.[53] The regulations defined "previous federal acknowledgment" as an "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States."[54]

Although Snoqualmie's petition for federal acknowledgment was already under active consideration, the Department moved to process it under the 1994 regulations.[55] This required the Department to evaluate whether Snoqualmie was a previously acknowledged tribe within the meaning of the regulations.[56] In 1997, the Assistant Secretary issued a Final Determination approving Snoqualmie's petition for federal acknowledgment. The Final Determination adopted the conclusions of the Proposed Finding, determining that the Snoqualmie Tribe had been unambiguously previously federally acknowledged from the Treaty of Point Elliott to at least January 1953, and that the Snoqualmie Tribe was clearly identified as derived from the treaty-signatory Snoqualmie.[57] Based on the evidence before her, the Assistant Secretary concluded that the Snoqualmie Tribe was acknowledged as a separate, non-reservation tribal entity from 1934 until 1953, and prior to that as part of the Snoqualmie Tribe as a whole, without distinction between on-reservation and off-reservation members.[58]

The Tulalip Tribes of Washington sought reconsideration of the Final Determination by the IBIA on several grounds.[59] As to those grounds within its jurisdiction, the IBIA affirmed the Final Determination. To the extent that the Tulalip Tribes relied on grounds beyond the IBIA's jurisdiction, the IBIA referred those issues to the Secretary.[60] By letter dated October 6, 1999, the Solicitor informed the Tulalip Tribes that the Secretary had declined to refer such issues to the Assistant Secretary, thereby exhausting the administrative appeals process.[61]

Since its federal acknowledgment in 1999, the Snoqualmie Tribe has purchased land in its aboriginal territory for various purposes. In 2006 and 2008, the Department acquired property in trust for the Snoqualmie Tribe pursuant to Section 5 of the IRA.[62] At the time, the Department interpreted Category 1 as requiring only a tribal applicant to be "federally recognized" at the time the trust land application was submitted.[63] In 2009, however, the Supreme Court construed the IRA's first definition of "Indian" as requiring tribal applicants also to have been "under

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[53] 59 Fed. Reg. at 9,282; 25 C.F.R. § 83.8(d) (1994).
[54] 25 C.F.R. § 83.1 (1994).
[55] Final Determination at 2; 25 C.F.R. § 83.3(g) (1994).
[56] Final Determination at 2.
[57] *Id.* at 3; Technical Report at 30.
[58] Final Determination at 58.
[59] *In re Federal Acknowledgment of the Snoqualmie Tribal Organization*, 34 IBIA 22 (1999).
[60] *Id.* at 26. The first issue was whether the BIA's decision not to review certain evidence as requested by the Tulalip Tribes violated the Tribes' right to participate in acknowledgment proceedings or its due process rights. The second concerned whether the Final Determination must be modified to reflect certain findings in *Washington II*.
[61] *See* Letter from John D. Leshy, Solicitor, to Chairman of the Tulalip Tribes (Oct. 6, 1999).
[62] 71 Fed. Reg. 5067 (Jan. 31, 2006); Statutory Warranty Deed (approved Feb. 21, 2008).
[63] *See Carcieri*, 555 U.S. at 382.

federal jurisdiction" at the time of the IRA's passage in 1934.[64] Since the Supreme Court's decision in *Carcieri*, the Department has not placed any lands into trust for the Snoqualmie Tribe.

II. STANDARD OF REVIEW

a. Four-Step Procedure to Determine Eligibility.

Section 5 of the IRA provides the Secretary discretionary authority to acquire any interest in lands for the purpose of providing lands in trust for Indians.[65] Section 19 defines "Indian" in relevant part as including the following three categories:

> **[Category 1]** all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and **[Category 2]** all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include **[Category 3]** all other persons of one-half or more Indian blood.[66]

In 2009, the Supreme Court in *Carcieri v. Salazar*[67] construed the term "now" in Category 1 to refer to 1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrase "under federal jurisdiction," however, or whether it applied to the phrase "recognized Indian tribe."

To guide the implementation of the Secretary's discretionary authority under Section 5 after *Carcieri*, the Department in 2010 prepared a two-part procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934.[68] The Solicitor of the Interior ("Solicitor") later memorialized the Department's interpretation in Sol. Op. M-37029.[69] Despite this, however, uncertainty persisted over what evidence could be submitted for the inquiry and how the Department would weigh it, prompting some tribes to devote considerable resources to researching and collecting any and all forms of potentially relevant evidence, in some cases leading to submissions totaling thousands of pages. To address this uncertainty, in 2018 the Solicitor's Office began a review of the Department's eligibility procedures to provide guidance for determining relevant evidence. This prompted questions concerning Sol. Op. M-37029's

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[64] *Id.* at 379.
[65] 25 U.S.C. § 5105.
[66] 25 U.S.C. § 5129 (bracketed numerals added).
[67] 555 U.S. 379.
[68] U.S. Dept. of the Interior, Assistant Secretary, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) ("Cowlitz ROD"). *See also* Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Mar. 7, 2014), *revised* (Jan. 5, 2017).
[69] Sol. Op. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("M-37029").

interpretation of Category 1, on which its eligibility procedures relied. This uncertainty prompted the Solicitor to review Sol. Op. M-37029's two-part procedure for determining eligibility under Category 1, and the interpretation on which it relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029. The Solicitor concluded that its interpretation of Category 1 was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction."[70] In its place, the Solicitor issued a new, four-step procedure for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor ("Solicitor's Office").[71]

At Step One, the Solicitor's Office determines whether or not Congress enacted legislation after 1934 making the IRA applicable to a particular tribe. The existence of such authority makes it unnecessary to determine if the tribe was "under federal jurisdiction" in 1934. In the absence of such authority, the Solicitor's Office proceeds to Step Two.

Step Two determines whether the applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such. If so, the applicant tribe may be deemed eligible under Category 1 without further inquiry. The Solicitor's Guidance describes types of evidence that presumptively demonstrate that a tribe was under federal jurisdiction in 1934. In the absence of dispositive evidence, the inquiry proceeds to Step Three.

Step Three determines whether an applicant tribe's evidence sufficiently demonstrates that the applicant tribe was "recognized" in or before 1934 and remained under jurisdiction in 1934. The Solicitor determined that the phrase "recognized Indian tribe" as used in Category 1 does not have the same meaning as the modern concept of a "federally recognized" (or "federally acknowledged") tribe, a concept that did not evolve until the 1970s, after which it was incorporated in the Department's federal acknowledgment procedures.[72] Based on the Department's historic understanding of the term, the Solicitor interpreted "recognition" to refer to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy. The Solicitor identified forms of evidence that establish a rebuttable presumption that that an applicant tribe was "recognized" in a political-legal sense before 1934 and remained under federal jurisdiction in 1934. In the absence of such evidence, the inquiry finally moves to Step Four.

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[70] Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).
[71] *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 10, 2020) ("Solicitor's Guidance").
[72] 25 C.F.R. Part 83.

Step Four assesses the totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934. Given the historical changes in federal Indian policy over time, and the corresponding evolution of the Department's responsibilities, a one-size-fits-all approach for evaluating the totality of a tribal applicant's evidence is not possible or desirable. Attorneys in the Solicitor's Office must evaluate the evidence on a case-by-case basis within the context of a tribe's unique circumstances, and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

To further assist Solicitor's Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor's Guidance includes a memorandum[73] detailing the Department's revised interpretation of the meaning of the phrases "now under federal jurisdiction" and "recognized Indian tribe" and how they work together.

b. The Meaning of the Phrase "Now Under Federal Jurisdiction."

1. *Statutory Context.*

The Solicitor first concluded that the phrase "now under federal jurisdiction" should be read as modifying the phrase "recognized Indian tribe."[74] The Supreme Court in *Carcieri* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,[75] and the majority opinion focused on the meaning of "now" without addressing whether or how the phrase "now under federal jurisdiction" modifies the meaning of "recognized Indian tribe."[76] In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been "under federal jurisdiction" *in* 1934.[77] By "recognized," Justice Breyer appeared to mean "*federally* recognized"[78] in the formal, political sense that had evolved by the 1970s, not in the sense in which Congress likely understood the term in 1934. He also considered how "later recognition" might reflect earlier "Federal jurisdiction,"[79] and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.[80] Justice Breyer's suggestion that Category 1 does not preclude eligibility for tribes "federally recognized" *after* 1934 is consistent with interpreting Category 1 as requiring evidence of federal actions toward a tribe with whom the United States dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a

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[73] *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor (Mar. 5, 2020) ("Deputy Solicitor's Memorandum").
[74] Deputy Solicitor's Memorandum at 19. *See also Cty. of Amador v. United States Dep't of the Interior*, 872 F.3d 1012, 1020, n. 8 (9th Cir. 2017) (*Carcieri* leaves open whether "recognition" and "jurisdiction" requirements are distinct requirements or comprise a single requirement).
[75] *Carcieri*, 555 U.S. at 382-83.
[76] *Ibid.*
[77] *Id.* at 398 (Breyer, J., concurring).
[78] *Ibid.*
[79] *Id.* at 399 (Breyer, J., concurring).
[80] *Id.* at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

trust responsibility in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington ("Stillaguamish Tribe") shows.[81] It is also consistent with the Department's policies that in order to apply for trust-land acquisitions under the IRA, a tribe must appear on the official list of entities federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as such.[82]

The Solicitor noted that Category 1's grammar supports this view. The adverb "now" is part of the prepositional phrase "under federal jurisdiction,"[83] which it temporally qualifies.[84] Prepositional phrases function as modifiers and follow the noun phrase that they modify.[85] Category 1's grammar therefore supports interpreting the phrase "now under federal jurisdiction" as intended to modify "recognized Indian tribe." This interpretation finds further support in the IRA's legislative history, discussed below, and in Commissioner of Indian Affairs John Collier's statement that the phrase "now under federal jurisdiction" was intended to limit the IRA's application.[86] This suggests Commissioner Collier understood the phrase "now under federal jurisdiction" to limit and thus modify "recognized Indian tribe." This is further consistent with

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[81] *Ibid.*

[82] Federally Recognized Indian Tribe List Act of 1994, tit. I, § 104, Pub. L. 103-454, 108 Stat. 4791, codified at 25 U.S.C. § 5131 (mandating annual publication of list of all Indian tribes recognized by Secretary as eligible for the special programs and services provided by the United States to Indians because of their status as Indians). The Department's land-into-trust regulations incorporate the Department's official list of federally recognized tribe by reference. *See* 25 C.F.R. § 151.2.

[83] *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016) ("*Grand Ronde*"). The *Grand Ronde* court found "the more difficult question" to be which part of the expression "recognized Indian tribe" the prepositional phrase modified. *Ibid.* The court concluded it modified only the word "tribe" "before its modification by the adjective 'recognized.'" *Ibid.* But the court appears to have understood "recognized" as used in the IRA as meaning "federally recognized" in the modern sense, without considering its meaning in historical context.

[84] H. C. House and S.E. Harman, *Descriptive English Grammar* at 163 (New York: Prentice-Hall, Inc. 1934) ("House and Harman") (adverbs may modify prepositional phrases).

[85] L. Beason and M. Lester, *A Commonsense Guide to Grammar and Usage* (7th ed.) at 15-16 (2015) ("Adjective prepositional phrases are always locked into position following the nouns they modify."). *See also* J. E. Wells, *Practical Review Grammar* (1928) at 305. A noun phrase consists of a noun and all of its modifiers. *Id.* at 16.

[86] *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73rd Cong. at 266 (Apr. 26, 1934) ("Sen. Hrgs.") (statement of Commissioner Collier). *See also Carcieri*, 555 U.S. at 389 (citing Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936) ("[IRA Section 19] provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act*…") (emphasis added by Supreme Court)); *Cty. of Amador*, 872 F.3d at 1026 ("…'under Federal jurisdiction' should be read to limit the set of 'recognized Indian tribes' to those tribes that already had *some* sort of significant relationship with the federal government as of 1934, even if those tribes were not yet 'recognized.'" (emphasis original)); *Grand Ronde*, 830 F.3d at 564 (though the IRA's jurisdictional nexus was intended as "some kind of limiting principle," precisely how remained unclear).

the IRA's purpose and intent, which was to remedy the harmful effects of allotment.[87] These included the loss of Indian lands and the displacement and dispersal of tribal communities.[88] Lacking an official list of "recognized" tribes at the time,[89] it was unclear in 1934 which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,[90] left unmodified, the phrase "recognized Indian tribe" could include tribes disestablished or terminated before 1934.

2. *Statutory Terms.*

The Solicitor concluded that the expression "now under federal jurisdiction" in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress's plenary authority91 and is instead better interpreted as referring to tribes with whom the United States had clearly dealt on or a more or less sovereign-to-sovereign basis or as to whom the United States had clearly acknowledged a trust responsibility in or before 1934.

The contemporaneous legal definition of "jurisdiction" defined it as the "power and authority" of the courts "as distinguished from the other departments."[92] The legal distinction between judicial and administrative jurisdiction is significant. Further, because the statutory phrase at issue here includes more than just the word "jurisdiction," its use of the preposition "under" sheds additional light on its meaning. In 1934, BLACK'S LAW DICTIONARY defined "under" as most frequently used in "its secondary sense meaning of 'inferior' or 'subordinate.'"[93] It defined "jurisdiction" in terms of "power and authority," further defining "authority" as used "[i]n government law" as meaning "the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties."[94]

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[87] *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs, House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7902, A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs,* 73d Cong. at 233-34 (1934) ("H. Hrgs.") (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apt. 28, 1934)).

[88] *Ibid.*

[89] In 1979, the BIA 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). *See also Cty. of Amador*, 872 F.3d at 1023 ("In 1934, when Congress enacted the IRA, there was no comprehensive list of recognized tribes, nor was there a 'formal policy or process for determining tribal status.'") (citing William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 429-30 (2016))).

[90] *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

[91] Deputy Solicitor's Memorandum at 9.

[92] BLACK'S LAW DICTIONARY at 1038 (3d ed. 1933) ("BLACK'S").

[93] BLACK'S at 1774.

[94] BLACK'S at 171. It separately defines "subject to" as meaning "obedient to; governed or affected by."

Congress added the phrase "under federal jurisdiction" to a statute designed to govern the Department's administration of Indian affairs and certain benefits for Indians. Seen in that light, these contemporaneous definitions support interpreting the phrase as referring to the federal government's exercise and administration of its responsibilities for Indians. Further support for this interpretation comes from the IRA's context. Congress enacted the IRA to promote tribal self-government but made the Secretary responsible for its implementation. Interpreting the phrase "now under federal jurisdiction" as modifying "recognized Indian tribe" supports the interpretation of "jurisdiction" to mean the continuing administration of federal authority over Indian tribes already "recognized" as such. The addition of the temporal adverb "now" to the phrase provides further grounds for interpreting "recognized" as referring to a *previous* exercise of that same authority, that is, in or before 1934.[95]

3. *Legislative History.*

The IRA's legislative history lends additional support for interpreting "now under federal jurisdiction" as modifying "recognized Indian tribe." A thread that runs throughout the IRA's legislative history is a concern for whether the Act would apply to Indians not then under federal supervision. On April 26, 1934, Commissioner Collier informed members of the Senate Committee on Indian Affairs ("Senate Committee") that the original draft bill's definition of "Indian" had been intended to do just that:[96]

> Senator THOMAS of Oklahoma. (….) In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.
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> Commissioner COLLIER. Yes.
>
> Senator THOMAS. Numerous tribes have been lost (….) It is contemplated now to hunt those Indians up and give them a status again and try do to something for them?
> Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] Government aid.
>
> Senator THOMAS. Without regard to whether or not he is now under your supervision?

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[95] The interpretation of "now under federal jurisdiction" does not require federal officials to have been aware of a tribe's circumstances or jurisdictional status in 1934. As explained below, prior to M-37029, the Department long understood the term "recognized" to refer to political or administrative acts that brought a tribe under federal authority. The Department interprets "now under federal jurisdiction" as referring to the issue of whether such a "recognized" tribe maintained its jurisdictional status in 1934, *i.e.*, whether federal trust obligations remained, not whether particular officials were cognizant of those obligations.

[96] Sen. Hrgs. at 80. *See also Grand Ronde*, 75 F.Supp.3d at 387, 399 (noting same).

> Commissioner COLLIER. Without regard; yes. *It definitely throws open Government aid to those rejected Indians.*[97]

The phrase "rejected Indians" referred to Indians who had gone out from under federal supervision.[98] In Commissioner Collier's view, the IRA "does definitely recognize that an Indian [that] has been divested of his property is no reason why Uncle Sam does not owe him something. It owes him more."[99] Commissioner Collier's broad view was consistent with the bill's original stated policy to "reassert the obligations of guardianship where such obligations have been improvidently relaxed."[100]

On May 17, 1934, the last day of hearings, the Senate Committee continued to express concerns over the breadth of the bill's definition of "Indian," returning again to the draft definitions of "Indian" as they stood in the committee print. Category 1 now defined "Indian" as persons of Indian descent who were "members of any recognized Indian tribe."[101] As on previous days,[102] Chairman Wheeler and Senator Thomas questioned both the overlap between definitions and

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[97] Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).

[98] *See* LEWIS MERIAM, THE INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION at 763 (1928) ("MERIAM REPORT") (noting that issuance of patents to individual Indians under Dawes Act or Burke Act had "the effect of removing them in part at least from the jurisdiction of the national government"). *See also* Sen. Hrgs. at 30 (statement of Commissioner Collier) (discussing the role the Allotment Policy had in making approximately 100,000 Indians landless).

[99] Sen. Hrgs. at 80.

[100] H.R. 7902, tit. III, § 1. *See* Sen. Hrgs. at 20 ("The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. On the contrary, it makes permanent the guardianship services, and reasserts them for those Indians who have been made landless by the Government's own acts.").

[101] Sen. Hrgs. at 234 (citing committee print, § 19). The revised bill was renumbered S. 3645 and introduced in the Senate on May 18, 1934. *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 963 n. 55 (1972) ("*Tribal Self-Government*") (citing 78 CONG. REC. 9071 (1934)). S. 3645 which, as amended, became the IRA, differed significantly from H.R. 7902 and S. 2755, and its changes resulted from discussions between Chairman Wheeler and Commissioner John Collier to resolve and eliminate the main points in controversy. Sen. Hrgs. at 237. The Senate Committee reported S. 3645 out four days after its reintroduction, 78 CONG. REC. 9221, which the Senate debated soon after. The Senate passed the bill on June 12, 1934. *Id.* at 11139. The House began debate on June 15. *Id.* at 11724-44. H.R. 7902 was laid on the table and S. 3645 was passed in its place the same day, with some variations. *Id.* A conference committee was then formed, which submitted a report on June 16. *Id.* at 12001-04. The House and Senate both approved the final version on June 16. *Id.* at 12001-04, 12161-65, which was presented to the President and signed on June 18, 1934. *Id.* at 12340, 12451. *See generally Tribal Self-Government* at 961-63.

[102] *See, e.g.*, Sen. Hrgs. at 80 (remarks of Senator Elmer Thomas) (questioning whether bill is intended to extend benefits to tribes not now under federal supervision); *ibid.* (remarks of Chairman Wheeler) (questioning degree of Indian descent as drafted); *id.* at 150-51; *id.* at 164 (questioning federal responsibilities to existing wards with minimal Indian descent).

whether they would include Indians not then under federal supervision or persons not otherwise "Indian."[103]

The Senate Committee's concerns for these issues touched on other provisions of the IRA as well. The colloquy that precipitated the addition of "now under federal jurisdiction" began with a discussion of Section 18, which authorized votes to reject the IRA by Indians residing on a reservation. Senator Thomas stated that this would exclude "roaming bands" or "remnants of a band" that are "practically lost" like those in his home state of Oklahoma, who at the time were neither "registered," "enrolled," "supervised," or "under the authority of the Indian Office."[104] Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."[105] Chairman Wheeler conceded that such Indians lacked rights at the time, but emphasized that the purpose of the Act was intended "as a matter of fact, to take care of the Indians that are taken care of at the present time,"[106] that is, those Indians then under federal supervision.

Acknowledging that landless Indians ought to be provided for, Chairman Wheeler questioned how the Department could do so if they were not "wards of the Government at the present time."[107] When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were "just as much Indians as any others,"[108] despite not then being under federal supervision, Commissioner Collier pointed out that such groups might still come within Category 3's blood-quantum criterion, which was then one-quarter.[109] After a brief digression, Senator Thomas asked whether, if the blood quantum were raised to one-half, Indians with less than one-half blood quantum would be covered by the Act with respect to their trust property.[110] Chairman Wheeler thought not, "unless they are enrolled at the present time."[111] As the discussion turned to Section 19, Chairman Wheeler returned to the blood quantum issue, stating

[103] *See, e.g.*, Sen. Hrgs. at 239 (discussing Sec. 3), 254 (discussing Sec. 10), 261-62 (discussing Sec. 18), 263-66 (discussing Sec. 19).
[104] Sen. Hrgs. at 263.
[105] *Ibid.* By "tribe," Senator Thomas here may have meant the Indians residing on a reservation. A similar usage appears earlier in the Committee's discussion of Section 10 of the committee print (enacted as Section 17 of the IRA), Sen. Hrgs. at 250-55. Section 10 originally required charters to be ratified by a vote of the adult Indians residing within "the territory specified in the charter." *Id.* at 232. Chairman Wheeler suggested using "on the reservation" instead to prevent "any small band or group of Indians" to "come in on the reservation and ask for a charter to take over tribal property." *Id.* at 253. Senator Joseph O'Mahoney recommended the phrase "within the territory over which the tribe has jurisdiction" instead, prompting Senator Peter Norbeck to ask what "tribe" meant— "Is that the reservation unit?" *Id.* at 254. Commissioner Collier then read from Section 19, which at that time defined "tribe" as "any Indian tribe, band, nation, pueblo, or other native political group or organization," a definition the Chairman suggested he could not support. *Ibid.* As ultimately enacted, Section 17 authorizes the Secretary to issue charters of incorporation to "one-third of the adult Indians" if ratified, however, "by a majority vote of the adult Indians living on the reservation." 48 Stat. 984, 988 (codified at 25 U.S.C. § 5124).
[106] Sen. Hrgs. at 263.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Id.* at 264.
[111] *Ibid.*

that Category 3's blood-quantum criterion should be raised to one-half, which it was in final version of the Act.[112]

Senator Thomas then noted that Category 1 and Category 2, as drafted, were inconsistent with Category 3. Category 1 would include any person of "Indian descent" without regard to blood quantum, so long as they were members of a "recognized Indian tribe," while Category 2 included their "descendants" residing on a reservation.[113] Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.[114] Commissioner Collier then pointed out that at least with respect to Category 2, the descendants would have to reside within a reservation at the present time.[115]

After asides on the IRA's effect on Alaska Natives and the Secretary's authority to issue patents,[116] Chairman Wheeler finally turned to the IRA's definition of "tribe,"[117] which as then drafted included "any Indian tribe, band, nation, pueblo, or other native political group or organization."[118] Chairman Wheeler and Senator Thomas thought this definition too broad.[119] Senator Thomas asked whether it would include the Catawbas,[120] most of whose members were thought to lack sufficient blood quantum under Category 3, but who descended from Indians and resided on a state reservation.[121] Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.[122] Senator O'Mahoney from Wyoming then suggested that Categories 1 and 3 overlapped, suggesting the Catawbas might still come within the definition of Category 1 since they were of Indian descent and they "certainly are an Indian tribe."[123]

Chairman Wheeler appeared to concede, admitting there "would have to [be] a limitation after the description of the tribe."[124] Senator O'Mahoney responded, saying "If you wanted to exclude any of them [from the Act] you certainly would in my judgment."[125] Chairman Wheeler proceeded to express concerns for those having little or no Indian descent being "under the supervision of the Government," persons he had earlier suggested should be excluded from the

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[112] *Ibid.* (statement of Chairman Burton Wheeler) ("You will find here [*i.e.*, Section 19] later on a provision covering just what you have reference to.").
[113] *Id.* at 264-65.
[114] *Id.* at 264.
[115] *Ibid.*
[116] *Id.* at 265.
[117] *Ibid.*
[118] *Compare* Sen. Hrgs. at 6 (S. 2755, § 13(b)), *with* Sen. Hrgs. at 234 (committee print, § 19). The phrase "native political group or organization" was later removed.
[119] Sen. Hrgs. at 265.
[120] *Ibid.*
[121] *Id.* at 266. The Catawbas at the time resided on a reservation established for their benefit by the State of South Carolina. *See* Catawba Indians of South Carolina, Sen. Doc. 92, 71st Cong. (1930).
[122] *Id.* at 264.
[123] *Id.* at 266.
[124] *Ibid.*
[125] *Ibid.* Nevertheless, Senator O'Mahoney did not understand why the Act's benefits should not be extended "if they are living as Catawba Indians."

Act.[126] Apparently in response, Senator O'Mahoney then said, "If I may suggest, that could be handled by some separate provision excluding from the act certain types, but [it] must have a general definition."[127] It was at this point that Commissioner Collier, who attended the morning's hearings with Assistant Solicitor Felix S. Cohen,[128] asked

> Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.[129]

Without further explanation or discussion, the hearings adjourned.

The IRA's legislative history does not unambiguously explain what Congress intended "now under federal jurisdiction" to mean or in what way it was intended to limit the phrase "recognized Indian tribe." However, the same phrase was used in submissions by the Indian Rights Association to the House of Representatives Committee on Indian Affairs ("House Committee"), where it described "Indians under Federal jurisdiction" as not being subject to State laws.[130] Variations of the phrase appeared elsewhere, as well. In a memorandum describing the draft IRA's purpose and operation, Commissioner Collier stated that under the bill, the affairs of chartered Indian communities would "continue to be, as they are now, *subject to* Federal jurisdiction rather than State jurisdiction."[131] Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."[132] Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,[133] described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."[134] These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.

The IRA's legislative history elsewhere shows that Commissioner Collier distinguished between Congress's plenary authority generally and its application to tribes in particular contexts. He noted that Congress had delegated "most of its plenary authority to the Interior Department or the Bureau of Indian Affairs," which he further described as "clothed with the plenary power."[135] But in turning to the draft bill's aim of allowing tribes to take responsibility for their own affairs,

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[126] *Ibid.*
[127] *Ibid.*
[128] *Id.* at 231.
[129] *Id.* at 266.
[130] H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).
[131] *Id.* at 25 (Memorandum from Commissioner John Collier, *The Purpose and Operation of the Wheeler-Howard Indian Rights Bill* (S. 2755; H.R. 7902) (Feb. 19, 1934) (emphasis added)).
[132] *Id.* at 184 (statement of Commissioner Collier) (Apr. 8, 1934).
[133] Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* https://www.justice.gov/osg/bio/charles-fahy.
[134] *Id.* at 319 (statement of Assistant Solicitor Charles Fahy).
[135] *Id.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

Commissioner Collier referred to the "absolute authority" of the Department by reference to "its rules and regulations," to which the Indians were subjected.[136] Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the OIA having direct supervision of Indians.[137]

Construing "jurisdiction" as meaning governmental supervision and administration is further consistent with the term's prior use by the federal government. In 1832, for example, the United States by treaty assured the Creek Indians that they would be allowed to govern themselves free of the laws of any State or Territory, "so far as may be compatible with the general jurisdiction" of Congress over the Indians.[138] In *The Cherokee Tobacco* cases, the Supreme Court considered the conflict between subsequent Congressional acts and "[t]reaties with Indian nations within the jurisdiction of the United States."[139] In considering the 14th Amendment's application to Indians, the Supreme Court in *Elk v. Wilkins* also construed the Constitutional phrase, "subject to the jurisdiction of the United States," in the sense of governmental authority:[140]

> The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.[141]

The terms of Category 1 suggest that the phrase "under federal jurisdiction" should not be interpreted to refer to the outer limits of Congress's plenary authority, since it could encompass tribes that existed in an anthropological sense but with whom the federal government had never exercised any relationship. Such a result would be inconsistent with the Department's understanding of "recognized Indian tribe" at the time, discussed below, as referring to a tribe

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[136] *Ibid.*

[137] *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census, 1919 (May 7, 1919) (directing Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934) (discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.,* field operations); ARCIA for 1900 at 22 (noting lack of "jurisdiction" over New York Indian students); *id.* at 103 (reporting on matters "within" jurisdiction of Special Indian Agent in the Indian Territory); *id.* at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); MERIAM REPORT at 140-41 ("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity…Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs."); Sen. Hrgs. at 282-98 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different OIA "jurisdictions").

[138] Treaty of March 24, 1832, art. XIV, 7 Stat. 366, 368. *See also* Act of May 8, 1906, 34 Stat. 182 (lands allotted to Indians in trust or restricted status to remain "subject to the exclusive jurisdiction of the United States" until issuance of fee-simple patents).

[139] *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870). The Court further held that the consequences of such conflicts give rise to political questions "beyond the sphere of judicial cognizance." *Ibid.*

[140] *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). *See also United States v. Ramsay*, 271 U.S. 470 (1926) (the conferring of citizenship does not make Indians subject to laws of the states).

[141] *Ibid.*

with whom the United States had clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility.

If "under federal jurisdiction" is understood to refer to the application and administration of the federal government's plenary authority over Indians, then the complete phrase "now under federal jurisdiction" can further be seen as resolving the tension between Commissioner Collier's desire that the IRA include Indians "[w]ithout regard to whether or not [they are] now under [federal] supervision" and the Senate Committee's concern to limit the Act's coverage to Indian wards "taken care of at the present time."[142]

c. The Meaning of the Phrase "Recognized Indian Tribe."

Despite suggesting that the term "recognized" meant something different in 1934 than it did in the 1970s, Sol. Op. M-37029 had appeared to use these historically distinct concepts interchangeably. And while today's concept of "federal recognition" merges the cognitive sense of "recognition" and the political-legal sense of "jurisdiction," as *Carcieri* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved.[143] Congress's authority to recognize Indian tribes flows from its plenary authority over Indian affairs.[144] Early in this country's history, Congress charged the Secretary and the Commissioner of Indian Affairs with responsibility for managing Indian affairs and implementing general statutes enacted for the benefit of Indians.[145] Because Congress has not generally defined "Indian,"[146] it left it to the

[142] Sen. Hrgs. at 79-80, 263. The district court in *Grand Ronde* noted these contradictory views. *Grande Ronde*, 75 F.Supp.3d at 399-400. Such views were expressed while discussing drafts of the IRA that did not include the phrase "now under federal jurisdiction."

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

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

[145] 25 U.S.C. § 2 (charging Commissioner of Indian Affairs with management of all Indian affairs and all matters arising out of Indian relations); 43 U.S.C. § 1457 (charging Secretary with supervision of public business relating to Indians); 25 U.S.C. § 9 (authorizing President to prescribe regulations for carrying into effect the provisions of any act relating to Indian affairs). *See also* H. Hrgs. at 37 (remarks of Commissioner Collier) ("Congress through a long series of acts has delegated most of its plenary authority to the Interior Department or the Bureau of Indian Affairs, which as instrumentalities of Congress are clothed with the plenary power, an absolutist power"); *id.* at 51 (Memorandum of Commissioner John Collier) (providing statutory examples of "the broad discretionary powers conferred by Congress on administrative officers of the Government").

[146] U.S. Dept. of Interior, Commissioner of Indian Affairs, "Indian Wardship," Circular No. 2958 (Oct. 28, 1933) ("No statutory definition seems to exist of what constitutes an Indian or of what Indians are wards of the Government."); *Eligibility of Non-enrolled Indians for Services and Benefits under the Indian Reorganization Act*, Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Acting Deputy Commissioner of Indian Affairs (Dec. 4, 1978) ("there exists no universal

Secretary to determine to whom such statutes apply.[147] "Recognition" generally is a political question to which the courts ordinarily defer.[148]

Sol. Op. M-37029 had understood that a tribe could be considered "recognized" for purposes of the IRA so long as it is "federally recognized" when the Act is applied.[149] Arguendo, M-37029 concluded that even if "now" did modify "recognized Indian tribe," the meaning of "recognized" was ambiguous.[150] It described the term as having been used historically in two senses: a "cognitive" or "quasi-anthropological" sense indicating that federal officials "knew" or "realized" that a tribe existed; and a political-legal sense connoting "that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States."[151] The Solicitor concluded that this interpretation departs from the Department's prior, long-held understanding of "recognition" as referring to actions taken by appropriate federal officials toward a tribe with whom the United States clearly dealt on a more-or-less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934.

1. *Ordinary Meaning.*

The 1935 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY first defines the verb "to recognize" as meaning "to know again…to recover or recall knowledge of."[152] Most of the remaining entries focus on the legal or political meanings of the verb. These include, "To avow knowledge of…to admit with a formal acknowledgment; as, to *recognize* an obligation; to *recognize* a consul"; Or, "To acknowledge formally…; specif.: To acknowledge by admitting to an associated or privileged status." And, "To acknowledge the independence of…a

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definition of "Indian"). *See also* Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esq. on behalf of the Stillaguamish Tribe, at 8-9 (Oct. 27, 1976) (suggesting that "recognized Indian tribe" in IRA § 19 refers to tribes that were "administratively recognized" in 1934).

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

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

[149] M-37029 at 25 (interpreting IRA as not requiring determination that a tribal applicant was "a recognized Indian tribe" in 1934).

[150] *Id.* at 24 ("To the extent that the courts (contrary to the views expressed here) deem the term 'recognized Indian tribe' in the IRA to require recognition in 1934.").

[151] Sol. Op. M-37055 at 24.

[152] WEBSTER'S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for "recognize" (v.t.).

community…by express declaration or by any overt act sufficiently indicating the intention to recognize."[153] These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for loans to Indians for tuition and expenses in "recognized vocational and trade schools."[154] While neither the Act nor its legislative history provide further explanation, the context strongly suggests that the phrase "recognized vocational and trade schools" refers to those formally certified or verified as such by an appropriate official.

2. *Legislative History.*

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.[155] Commissioner Collier, himself a "principal author" of the IRA,[156] also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.[157] The IRA's legislative history further suggests that Congress did not intend "recognized Indian tribe" to be understood in a cognitive, quasi-anthropological sense. The concerns expressed by some members of the Senate Committee for the ambiguous and potentially broad *scope* of the phrase arguably prompted Commissioner Collier to suggest inserting "now under federal jurisdiction" in Category 1 as a limiting phrase.[158]

As originally drafted, Category 1 referred only to "recognized" Indian tribes, leaving unclear whether it was used in a cognitive or in a political-legal sense. This ambiguity appears to have

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[153] *Ibid.*, entries 2, 3.c, 5. *See also id.*, entry for "acknowledge" (v.t.) "2. To own or recognize in a particular character or relationship; to admit the claims or authority of; to recognize."

[154] The phrase "recognized Indian tribe" appeared in what was then section 9 of the committee print considered by the Senate Committee on May 17, 1934. Sen. Hrgs. at 232, 242. Section 9 provided the right to organize under a constitution to "[a]ny recognized Indian tribe." It was later amended to read "[a]ny Indian tribe, or tribes" before ultimate enactment as Section 16 of the IRA. 25 U.S.C. § 5123. The term "recognized" also appeared several times in the bill originally introduced as H.R. 7902. In three it was used in legal-political sense. H.R. 7902, 73d Cong. (as introduced Feb. 12, 1934), tit. I, § 4(j) (requiring chartered communities to be "recognized as successor to any existing political powers"); tit. II, § 1 (training for Indians in institutions "of recognized standing"); tit. IV, § 10 (Constitutional procedural rights to be "recognized and observed" in courts of Indian offenses). H.R. 7902, tit. I, § 13(b) used the expression "recognized Indian tribe" in defining "Indian."

[155] *See, e.g.*, Sen. Hrgs. at 263 (remarks of Senator Thomas of Oklahoma) (discussing prior Administration's policy "not to recognize Indians except those already under [Indian Office] authority"); *id.* at 69 (remarks of Commissioner Collier) (tribal customary marriages and divorces "recognized" by courts nationally). Representative William W. Hastings of Oklahoma criticized an early draft definition of "tribe" on the grounds it would allow chartered communities to be "recognized as a tribe" and to exercise tribal powers under section 16 and section 17 of the IRA. *See id.* at 308.

[156] *Carcieri*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

[157] Sen. Hrgs. at 69 (remarks of Commissioner Collier) (Apr. 26, 1934). On at least one occasion, however, Collier appeared to rely on the cognitive sense in referring to "recognized" tribes or bands *not* under federal supervision. Sen. Hrgs. at 80 (remarks of Commissioner Collier) (Apr. 26, 1934).

[158] Justice Breyer concluded that Congress added "now under federal jurisdiction" to Category 1 "believing it definitively resolved a specific underlying difficulty." *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

created uncertainty over Category 1's scope and its overlap with Section 19's other definitions of "Indian," which appear to have led Congress to insert the limiting phrase "now under federal jurisdiction." As noted above, the Department interprets "now under federal jurisdiction" as modifying "recognized Indian tribe" and as limiting Category 1's scope. By doing so, "now under federal jurisdiction" may be construed as disambiguating "recognized Indian tribe" by clarifying its use in a political-legal sense.

3. *Administrative Understandings.*

Compelling support for interpreting the term "recognized" in the political-legal sense is found in the views of Department officials expressed around the time of the IRA's enactment and early implementation. Assistant Solicitor Cohen discussed the issue in the Department's HANDBOOK OF FEDERAL INDIAN LAW ("HANDBOOK"), which he prepared around the time of the IRA's enactment. The HANDBOOK's relevant passages discuss ambiguities in the meaning of the term "tribe."[159] Assistant Solicitor Cohen explains that the term "tribe" may be understood in both an ethnological and a political-legal sense.[160] The former denotes a unique linguistic or cultural community. By contrast, the political-legal sense refers to ethnological groups "recognized as single tribes for administrative and political purposes" and to single ethnological groups considered as a number of independent tribes "in the political sense."[161] This suggests that while the term "tribe," standing alone, could be interpreted in a cognitive sense, as used in the phrase "recognized Indian tribe" it would have been understood in a political-legal sense, which presumes the existence of an ethnological group.[162]

Less than a year after the IRA's enactment, Commissioner Collier further explained that "recognized tribe" meant a tribe "with which the government at one time or another has had a treaty or agreement or those for whom reservations or lands have been provided and over whom the government exercises supervision through an official representative."[163] Addressing the Oklahoma Indian Welfare Act of 1936 ("OIWA"), Solicitor Nathan Margold opined that because tribes may "pass out of existence as such in the course of time, the word "recognized" as used in the [OIWA] should be read as requiring more than "past existence as a tribe and its historical

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[159] U.S. Dept. of the Interior, Office of the Solicitor, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 268 ("Cohen 1942").

[160] Cohen separately discussed how the term "Indian" itself could be used in an "ethnological or in a legal sense," noting that a person's legal status as an "Indian" depended on genealogical and social factors. *Id.* at 2.

[161] *Id.* at 268 (emphases added).

[162] *Ibid.* at 268 (validity of congressional and administrative actions depend upon the historical, ethnological existence of tribes); *United States v. Sandoval*, 231 U.S. 28 (1913) (Congress may not arbitrarily bring a community or group of people within the range of its plenary authority over Indian affairs). *See also* 25 C.F.R. Part 83 (establishing mandatory criteria for determining whether a group is an Indian tribe eligible for special programs and services provided by the United States to Indians because of their status as Indians).

[163] Letter, Commissioner John Collier to Ben C. Shawanesee (Apr. 24, 1935).

recognition as such," but "recognition" of a currently existing group's activities "by specific actions of the Indian Office, the Department, or by Congress."[164]

The Department maintained similar understandings of the term "recognized" in the decades that followed. In a 1980 memorandum assessing the eligibility of the Stillaguamish Tribe for IRA trust-land acquisitions,[165] Hans Walker, Jr., Associate Solicitor for Indian Affairs, distinguished the modern concept of formal "federal recognition" (or "federal acknowledgment") from the political-legal sense of "recognized" as used in Category 1 in concluding that "formal acknowledgment in 1934" is not a prerequisite for trust-land acquisitions under the IRA, "*so long as* the group meets the [IRA's] other definitional requirements."[166] These included that the tribe have been "recognized" in 1934. Associate Solicitor Walker construed "recognized" as referring to tribes with whom the United States had had "a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time*."[167] Associate Solicitor Walker then noted the Senate Committee's concerns for the potential breadth of "recognized Indian tribe." He concluded that Congress intended to exclude some groups that might be considered Indians in a cultural or governmental sense, but not "any Indians to whom the Federal Government had *already* assumed obligations."[168] Implicitly construing the phrase "now under federal jurisdiction" to modify "recognized Indian tribe," Associate Solicitor Walker found it "clear" that Category 1 "requires that some type of obligation or extension of services to a tribe must have existed in 1934."[169] As already noted, in the case of the Stillaguamish Tribe, such obligations were established by the 1855 Treaty of Point Elliott and remained in effect in 1934.[170]

Associate Solicitor Walker's views in 1980 were consistent with the conclusions reached by the Solicitor's Office in the mid-1970s following its assessment of how the federal government had historically understood the term "recognition." This assessment was begun under Reid Peyton Chambers, Associate Solicitor for Indian Affairs, and offers insight into how Congress and the Department understood "recognition" at the time the Act was passed. In fact, it was this historical review of "recognition" that contributed to the development of the Department's federal acknowledgment procedures.[171]

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[164] I OP. SOL. INT. 864 (Memorandum from Solicitor Nathan M. Margold to the Commissioner of Indian Affairs, Oklahoma – Recognized Tribes (Dec. 13, 1938)); Cohen 1942 at 271.
[165] Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe at 1 (Oct. 1, 1980) ("Stillaguamish Memo").
[166] *Id.* at 1 (emphasis added). Justice Breyer's concurring opinion in *Carcieri* draws on Associate Solicitor Walker's analysis in the Stillaguamish Memo. *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).
[167] Stillaguamish Memo at 2 (emphasis added).
[168] *Id.* at 4 (emphasis added). This is consistent with Justice Breyer's concurring view in *Carcieri*.
[169] *Id.* at 6. In the case of the Stillaguamish Tribe, such obligations arose in 1855 through the Treaty of Point Elliott, and they remained in effect in 1934.
[170] Justice Breyer's concurring opinion in *Carcieri* draws on the analysis in the Stillaguamish Memo. *See Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).
[171] 25 C.F.R. Part 83.

Throughout the United States' early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.[172] In 1871, Congress enacted legislation providing that no tribe within the territory of the United States could thereafter be "acknowledged or recognized" as an "independent nation, tribe, or power" with whom the United States could contract by treaty.[173] Behind the act lay the view that though Indian tribes were still "recognized as distinct political communities," they were "wards" in a condition of dependency who were "subject to the paramount authority of the United States."[174] While the question of "recognition" remained one for the political branches,[175] the contexts within which it arose expanded with the United States' obligations as guardian.[176]

After the close of the termination era in the early 1960s, during which the federal government had "endeavored to terminate its supervisory responsibilities for Indian tribes,"[177] Indian groups that the Department did not otherwise consider "recognized" began to seek services and benefits from the federal government. The most notable of these claims were aboriginal land claims under the Nonintercourse Act;[178] treaty fishing-rights claims by descendants of treaty signatories;[179] and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,[180] which included tribes previously recognized

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[172] U.S. CONST., art. II, § 2, cl. 2. *See generally* Cohen 1942 at 46-67.
[173] Act of March 3, 1871, c. 120, § 1, 16 Stat. 544, 566. Section 3 of the same Act prohibited further contracts or agreements with any tribe of Indians or individual Indian not a citizen of the United States related to their lands unless in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Id.*, § 3, 16 Stat. 570-71.
[174] *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).
[175] *Holliday*, 70 U.S. at 419.
[176] *See* Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship). *Compare, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832) *with United States v. Kagama*, 118 U. S. 375 (1886).
[177] *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). *See also* Cohen 2012 at § 1.06 (describing history and implementation of termination policy). During the termination era, roughly beginning in 1953 and ending in the mid-1960s, Congress enacted legislation ending federal recognition of more than 100 tribes and bands in eight states. Michael C. Walsh, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983). Congress has since restored federal recognition to some terminated tribes. *See* Cohen 2012 at § 3.02[8][c], n. 246 (listing examples).
[178] *See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 655 (D. Me.), *aff'd sub nom. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (Nonintercourse Act claim by unrecognized tribe in Maine); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 944 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (Nonintercourse Act claim by unrecognized tribe in Massachusetts).
[179] *United States v. State of Wash.*, 384 F. Supp. 312, 348 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (treaty fishing rights of unrecognized tribes in Washington State).
[180] AMERICAN INDIAN POLICY REVIEW COMMISSION, *Final Report, Vol. I* [Committee Print] at 462 (GPO 1977) ("AIPRC Final Report") ("A number of [unrecognized] Indian tribes are seeking to formalize relationships with the United States today but there is no available process for such actions."). *See also* TASK FORCE NO. 10 ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, *Final Report to the American Indian Policy Review Commission* (GPO 1976) ("*Report of Task Force Ten*").

and seeking restoration or reaffirmation of their status.[181] At around this same time, Congress began a critical historical review of the federal government's conduct of its special legal relationship with American Indians.[182] In January 1975, it found that federal Indian policies had "shifted and changed" across administrations "without apparent rational design,"[183] and that there had been no "general comprehensive review of conduct of Indian affairs" or its "many problems and issues" since 1928, before the IRA's enactment.[184] Finding it imperative to do so,[185] Congress established the American Indian Policy Review Commission[186] to prepare an investigation and study of Indian affairs, including "an examination of the statutes and procedures for granting Federal recognition and extending services to Indian communities."[187] It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."[188]

4. *The Palmer Memorandum*

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on "Federal 'Recognition' of Indian Tribes" (the "Palmer Memorandum").[189] Among other things, it examined the historical meaning of "recognition" in federal law, and of the Secretary's authority to "recognize" unrecognized groups. After surveying statutes and case law before and after the IRA's enactment, as well as its early implementation by the Department, the memorandum notes that "the entire concept is in fact quite murky."[190] The Palmer Memorandum finds that the case law lacked a coherent distinction between "tribal existence and tribal

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[181] Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 LAW & SOC'Y REV. 930 (2017).
[182] Pub. L. No. 93-580, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, ("AIPRC Act"), codified at 25 U.S.C. § 174 note.
[183] *Ibid.* Commissioner John Collier raised this same issue in hearings on the draft IRA. *See* H. Hrgs. at 37. Noting that Congress had delegated most of its plenary authority to the Department or BIA, which Collier described as "instrumentalities of Congress...clothed with the plenary power." Being subject to the Department's authority and its rules and regulations meant that while one administration might take a course "to bestow rights upon the Indians and to allow them to organize and allow them to take over their legal affairs in some self-governing scheme," a successor administration "would be completely empowered to revoke the entire grant."
[184] *Ibid.* (citing MERIAM REPORT).
[185] *Ibid.*
[186] AIPRC Act, § 1(a).
[187] *Id.*, § 2(3).
[188] *See*, *e.g.*, Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate (Jun. 7, 1974) ("Butler Letter") (describing authority for recognizing tribes since 1954); Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, Secretary's Authority to Extend Federal Recognition to Indian Tribes (Aug. 20, 1974) ("Chambers Memo") (discussing Secretary's authority to recognize the Stillaguamish Tribe); Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal "Recognition" of Indian Tribes (Jul. 17, 1975) ("Palmer Memo").
[189] Associate Solicitor Reid P. Chambers approved the Palmer Memo in draft form. *Ibid.* The Palmer Memo came on the heels of earlier consideration by the Department of the Secretary's authority to acknowledge tribes.
[190] *Id.* at 23.

recognition," and that clear standards or procedures for recognition had never been established by statute.[191] It further finds there to be a "consistent ambiguity" over whether formal recognition consisted of an assessment "of *past* governmental action" – the approach "articulated in the cases and [Departmental] memoranda" – or whether it "included authority to take such actions *in the first instance*."[192] Despite these ambiguities, the Palmer Memorandum concludes that the concept of "recognition" could not be dispensed with, as it had become an accepted part of Indian law.[193]

Indirectly addressing the two senses of the term "tribe" described above, the Palmer Memorandum found that before the IRA, the concept of "recognition" was often indistinguishable from the question of tribal existence,[194] and was linked with the treaty-making powers of the Executive and Legislative branches, for which reason it was likened to diplomatic recognition of foreign governments.[195] Though treaties remained a "prime indicia" of political "recognition,"[196] the memorandum noted that other evidence could include Congressional recognition by non-treaty means and administrative actions fulfilling statutory responsibilities toward Indians as "domestic dependent nations,"[197] including the provision of trust services.[198] Having noted the term's ambiguity and its political and administrative uses, the Palmer Memorandum then surveyed the case law to identify "indicia of congressional and executive recognition."[199] It describes these indicia as including both federal actions taken toward a tribe with whom the United States dealt on a "more or less sovereign-to-sovereign basis," as well as

[191] *Id.* at 23-24.
[192] *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.
[193] *Ibid.*
[194] The Palmer Memo noted that based on the political question doctrine, the courts rarely looked behind a "recognition" decision to determine questions of tribal existence per se. *Id.* at 14.
[195] *Id.* at 13. *See also* Cohen 1942 at 12 (describing origin of Indian Service as "diplomatic service handling negotiations between the United States and Indian nations and tribes").
[196] *Id.* at 3.
[197] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* AIPRC Final Report at 462 ("Administrative actions by Federal officials and occasionally by military officers have sometimes laid a foundation for federal acknowledgment of a tribe's rights."); *Report of Task Force Ten* at 1660 (during Nixon Administration "federally recognized" included tribes recognized by treaty or statute and tribes treated as recognized "through a historical pattern of administrative action").
[198] Palmer Memo at 2; AIPRC Final Report at 111 (treaties but one method of dealing with tribes and treaty law generally applies to agreements, statutes, and Executive orders dealing with Indians, noting the trust relationship has been applied in numerous nontreaty situations). Many non-treaty tribes receive BIA services, just as some treaty-tribes receive no BIA services. AIPRC Final Report at 462; Terry Anderson & Kirke Kickingbird, *An Historical Perspective on the Issue of Federal Recognition and Non-Recognition*, Institute for the Development of Indian Law at 1 (1978). *See also Legal Status of the Indians-Validity of Indian Marriages*, 13 YALE L.J. 250, 251 (1904) ("The United States, however, continued to regard the Indians as nations and made treaties with them as such until 1871, when after an hundred years of the treaty making system of government a new departure was taken in governing them by acts of Congress.").
[199] Palmer Memo at 2-14.

actions that "clearly acknowledged a trust responsibility"[200] toward a tribe, consistent with the evolution of federal Indian policy.[201]

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;[202] the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."[203] Specific indicia of Congressional "recognition" included enactments specifically referring to a tribe as an existing entity; authorizing appropriations to be expended for the benefit of a tribe;[204] authorizing tribal funds to be held in the federal treasury; directing officials of the Government to exercise supervisory authority over a tribe; and prohibiting state taxation of a tribe. Specific indicia of Executive or administrative "recognition" before 1934 included the setting aside or acquisition of lands for Indians by Executive order;[205] the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;[206] the establishment of schools and other service institutions for the benefit of a tribe; the supervision of tribal contracts; the establishment by the Department of an agency office or Superintendent for a tribe; the institution of suits on behalf of a tribe;[207] and the expenditure of funds appropriated for the use of particular Indian groups.

The Palmer Memorandum also considered the Department's early implementation of the IRA, when the Solicitor's Office was called upon to determine tribal eligibility for the Act. While this did not provide a "coherent body of clear legal principles," it showed that Department officials closely associated with the IRA's enactment believed that whether a tribe was "recognized" was

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[200] *Id.* at 14.

[201] Having ratified no new treaties since 1868, ARCIA 1872 at 83 (1872), Congress ended the practice of treaty-making in 1871, more than 60 years before the IRA's enactment. *See* Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. § 71. This caused the Commissioner of Indian Affairs at the time to ask what would become of the rights of tribes with which the United States had not yet treated. ARCIA 1872 at 83. As a practical matter, the end of treaty-making tipped the policy scales toward expanding the treatment of Indians as wards under federal guardianship, expanding the role of administrative officials in the management and implementation of Indian Affairs. Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship); *Brown v. United States*, 32 Ct. Cl. 432, 439 (1897) ("But since the Act 3d March, 1871 (16 Stat. L., 566, § 1), the Indian tribes have ceased to be treaty-making powers and have become simply the wards of the nation."); *Kagama*, 118 U.S. at 382 ("But, after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,-to govern them by acts of congress. This is seen in the act of March 3, 1871...").

[202] Butler Letter at 6; Palmer Memo at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).

[203] Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memo at 19.

[204] Butler Letter at 5; Palmer Memo at 6-8 (citing *Sandoval*, 231 U.S. at 39-40, *United States v. Nice*, 241 U.S. 591, 601 (1916), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920)); *id.* at 8-10 (citing *Nice*, 241 U.S. at 601; *Tully v. United States*, 32 Ct. Cl. 1 (1896) (recognition for purposes of Depredations Act by federal officers charged with responsibility for reporting thereon).

[205] Palmer Memo at 19 (citing Cohen 1942 at 271)); Butler Letter at 4.

[206] Palmer Memo at 19 (citing Cohen 1942 at 271).

[207] *Id.* at 6, 8 (citing *Sandoval*, 231 U.S. at 39-40, *Boylan*, 265 F. at 171 (suit brought on behalf of Oneida Indians)).

"an administrative question" that the Department could determine.[208] In making such determinations, the Department looked to indicia established by federal courts.[209] There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.[210] Early on, the factors the Department considered were "principally retrospective," reflecting a concern for "whether a particular tribe or band *had* been recognized, not whether it *should* be."[211] Because the Department had the authority to "recognize" a tribe for purposes of implementing the IRA, the absence of "formal" recognition in the past was "not deemed controlling" *if there were sufficient indicia* of governmental dealings with a tribe "on a sovereign or quasi-sovereign basis."[212] The manner in which the Department understood "recognition" before, in, and long-after 1934[213] supports the view that Congress and the Department understood "recognized" to refer to actions taken by federal officials with respect to a tribe for political or administrative purposes in or before 1934.

d. Construing the Expression "Recognized Indian Tribe Now Under Federal Jurisdiction" as a Whole.

Based on the interpretation above, the phrase "any recognized Indian tribe now under federal jurisdiction" as a whole should be interpreted as intended to limit the IRA's coverage to tribes who were brought under federal jurisdiction in or before 1934 by the actions of federal officials clearly dealing with the tribe on a more or less sovereign-to-sovereign basis or clearly acknowledging a trust responsibility, and who remained under federal authority in 1934.

Each phrase referred to a different aspect of a tribe's trust relationship with the United States. Before and after 1934, the Department and the courts regularly used the term "recognized" to refer to *exercises* of federal authority over a tribe that initiated or continued a course of dealings with the tribe pursuant to Congress' plenary authority. By contrast, the phrase "under federal jurisdiction" referred to the supervisory and administrative responsibilities of federal authorities toward a tribe thereby established. The entire phrase "any recognized Indian tribe now under federal jurisdiction" should therefore be interpreted to refer to recognized tribes for whom the United States maintained trust responsibilities in 1934.

Based on this understanding, the phrase "now under federal jurisdiction" can be seen to exclude two categories of tribe from Category 1. The first category consists of tribes never "recognized" by the United States in or before 1934. The second category consists of tribes who *were*

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[208] *Id.* at 18.
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.* (emphasis in original). *See also* Stillaguamish Memo at 2 (Category 1 includes "all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time").
[212] Palmer Memo at 18.
[213] *See, e.g.*, Stillaguamish Memo. *See also* 25 C.F.R. § 83.12 (describing evidence to show "previous Federal acknowledgment" as including: treaty relations; denomination as a tribe in Congressional act or Executive Order; treatment by Federal government as having collective rights in lands or funds; and federally-held lands for collective ancestors).

"recognized" before 1934 but no longer remained under federal jurisdiction in 1934. This would include tribes who had absented themselves from the jurisdiction of the United States or had otherwise lost their jurisdictional status, for example, because of policies predicated on "the dissolution and elimination of tribal relations," such as allotment and assimilation.[214] Though outside Category 1's definition of "Indian," Congress may later enact legislation recognizing and extending the IRA's benefits to such tribes, as *Carcieri* instructs.[215] For purposes of the eligibility analysis, however, it is important to bear in mind that neither of these categories would include tribes who were "recognized" and for whom the United States maintained trust responsibilities in 1934, despite the federal government's neglect of those responsibilities.[216]

III. ANALYSIS

1. Procedure for Determining Eligibility.

As noted, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.[217] It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.[218] The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.[219] Only in the absence of presumptive evidence should the inquiry proceed to Step Four, which requires the Department to weigh the totality of an applicant tribe's evidence.[220] The Snoqualmie Tribe, as explained below, provided evidence presumptively demonstrating under Step Three that it was "recognized" in or before 1934 and remained "under federal jurisdiction" in 1934. Therefore, the Snoqualmie Tribe is eligible for the benefits of Section 5 of the IRA.

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[214] *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994) ("The 'ultimate purpose of the [Indian General Allotment Act was] to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country.'" (citing *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1151 (D. Utah 1981), *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983), *on reh'g*, 773 F.2d 1087 (10th Cir. 1985)). *See also Montana v. United States*, 450 U.S. 544, 559 (1981) (citing 11 CONG. REC. 779 (Sen. Vest), 782 (Sen. Coke), 783-784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881); SECRETARY OF THE INTERIOR ANN. REP. 1885 at 25-28; SECRETARY OF THE INTERIOR ANN. REP. 1886 at 4; ARCIA 1887 at IV–X; SECRETARY OF THE INTERIOR ANN. REP. 1888 at XXIX–XXXII; ARCIA 1889 at 3-4; ARCIA 1890 at VI, XXXIX; ARCIA 1891 at 3-9, 26; ARCIA 1892 at 5; SECRETARY OF THE INTERIOR ANN. REP. 1894 at IV). *See also* Cohen 1942 at 272 ("Given adequate evidence of the existence of a tribe during some period in the remote or recent past, the question may always be raised: Has the existence of this tribe been terminated in some way?").

[215] *Carcieri*, 555 U.S. at 392, n. 6 (listing statutes by which Congress expanded the Secretary's authority to acquire land in trust to tribes not necessarily encompassed by Section 19).

[216] *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) (improper termination of treaty-tribe's status before 1934).

[217] Solicitor's Guidance at 1.

[218] *Ibid.*

[219] *Ibid.*

[220] *Ibid.*

2. Evidence Presumptively Demonstrating Federal Jurisdiction in 1934.

Having identified neither separate statutory authority making the IRA applicable to the Snoqualmie Tribe under Step One nor clear evidence of any of the dispositive evidence laid out in Step Two,[221] the analysis proceeds to Step Three of the eligibility inquiry, which looks to whether and applicant tribe's evidence sufficiently demonstrates that it was "recognized" in or before 1934 *and* remained "under federal jurisdiction" in 1934.[222]

The phrase "recognized Indian tribe" as used in Category 1 does not have the same meaning as the modem concept of a "federally recognized" (or "federally acknowledged") tribe. In 1941, Assistant Solicitor Felix S. Cohen explained that the term "tribe," when used in a political-legal sense, meant Indian groups that had been recognized "for administrative and political purposes." In 1980, Associate Solicitor Hans Walker, Jr. interpreted the term "recognized" in Section 19 as referring to tribes with whom the United States had "a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time." And in 1975, Alan Palmer, the Acting Associate Solicitor for Indian Affairs, prepared a wide-ranging analysis of how Congress, the courts, and the Department had historically interpreted the meaning of "recognition." Acting Associate Solicitor Palmer concluded that "recognition" referred to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy.

According to the Solicitor's Guidance, ratified treaties still in effect in 1934 presumptively demonstrate the establishment of a political-legal relationship with a tribe and "may be taken as establishing a rebuttable presumption that the applicant tribe remained under federal supervision or authority through 1934" and eligible under Category 1.[223]

a. 1855 Treaty of Point Elliott.

In 1855, the United States negotiated and entered into the Treaty of Point Elliott with numerous Indian groups residing in the northern Puget Sound region of western Washington.[224] The "Snoqualmoo" Indians were specifically named in the Treaty of Point Elliott, and 14 signatories of the treaty were identified as "Snoqualmoo," including their Chief, Patanim.[225] These

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[221] The Solicitor's Guidance at Step Two refers to "Treaty Rights," stating "[t]he continuing existence of treaty rights guaranteed by a treaty entered into by the United States and ratified before the era of treaty-making ended in 1871 may also constitute presumptive evidence that a tribe remains under federal jurisdiction in 1934. Where there is any doubt about continuing treaty obligations, the Solicitor's Office may rely on post-1934 adjudications confirming the continuous existence of such obligations." *Id.* at 4.
[222] Solicitor's Guidance at 6.
[223] *Id.* at 6-8.
[224] 12 Stat. 927. Proclaimed Apr. 11, 1859, ratified Mar. 8, 1859.
[225] *Washington II*, 476 F. Supp. at 1108 ("Snoqualmie [Tribe] is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmoo Indians and of other bands of Indians who resided in the general vicinity of the Snoqualmie River.").

"Snoqualmoo" Indians[226] lived in the general vicinity of the Snoqualmie River, a tributary of the Snohomish River.[227] The signatory tribes to the Treaty of Point Elliott ceded much of northwestern Washington in exchange for four reservations and other reserved rights.[228] Congress ratified the Treaty of Point Elliott in 1859.[229]

Once a government-to-government relationship is established between a tribe and the United States, the absence of probative evidence of termination or loss of a tribe's jurisdictional status suggests that such status is retained.[230] This is consistent with Justice Breyer's concurring opinion in *Carcieri* that a tribe could be "under federal jurisdiction" in 1934 because of a treaty "in effect in 1934."[231] The Treaty of Point Elliott, executed in 1855, and ratified in 1859, remains in effect today.

Thus, the Treaty of Point Elliott presumptively demonstrates the establishment of a political-legal relationship with the Snoqualmie and as such, establishes a rebuttable presumption that the Snoqualmie remained under federal supervision or authority through 1934, and thus eligible for land in trust under Category 1.

b. Effect of United States v. Washington *Line of Cases.*

In 1970, the United States filed suit against the State of Washington seeking a declaratory judgment concerning the off-reservation treaty fishing rights of certain tribes[232] under numerous treaties negotiated between the United States and tribes in the Puget Sound area.[233] In 1974, Judge Hugo Boldt issued his landmark decision in *Washington I*, which determined the off-reservation fishing rights of tribes that were signatories to the various treaties. The Snoqualmie were not a party to *Washington I*, but thereafter intervened to assert off-reservation treaty fishing rights. In *Washington II*, Judge Boldt concluded that while the Snoqualmie had, in fact, been a party to the Treaty of Point Elliott, because they were no longer "federally recognized," they could not be considered successors-in-interest to off-reservation fishing rights guaranteed to the Snoqualmie by treaty.[234] On appeal, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") reversed Judge Boldt's holding that only recognized tribes may exercise treaty

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[226] *See* Letter, Tulalip Indian Agency to Commissioner of Indian Affairs (Nov. 2, 1917) (referring to the Snoqualmoo and Snoqualmie as the same group of Indians).
[227] *Washington II*, 476 F. Supp. at 1108.
[228] 12 Stat. 927, Article 1.
[229] *See* 12 Stat. 927.
[230] *See* Stillaguamish Memo at 2 (enduring treaty obligations maintain federal jurisdiction even where federal government remains unaware at the time); Solicitor's Guidance at 8.
[231] *Carcieri*, 555 U.S. at 399.
[232] *Washington I*, 384 F. Supp. at 327. The original lawsuit included seven tribes, and later seven more tribes intervened.
[233] One of the treaties was the 1855 Treaty of Point Elliott.
[234] *Washington II*, 476 F. Supp. at 1108.

rights,[235] but the divided panel found that Judge Boldt's other factual findings surrounding Snoqualmie supported the denial of relief.[236]

The Department's conclusion that the Snoqualmie Tribe is eligible under Category 1 for statutory benefits under the IRA is not altered by the holding in *Washington II* for two reasons. First, between 1855 and 1953, the Department considered the Snoqualmie Tribe to be a recognized Indian tribe and under federal jurisdiction.[237] By the time Snoqualmie intervened in the *Washington* litigation, however, the Department no longer considered the Snoqualmie "federally recognized," as the phrase was understood in the 1970s.[238] Although this difference resulted from changes in policy with respect to tribes without trust land holdings,[239] it did not alter the fact that the Department had earlier treated the Snoqualmie as recognized and under federal jurisdiction before, in, and after 1934. Similarly, *Washington II*'s holding addressed only Snoqualmie's eligibility to exercise off-reservation treaty fishing rights in 1979, not its jurisdictional status forty years earlier.

Second, in finding Snoqualmie ineligible for off-reservation fishing rights under the Treaty of Point Elliott, *Washington II* ignored a fundamental distinction between treaty rights, and statutory rights available to "federally recognized" (or "federally acknowledged") tribes. Based on Snoqualmie's lack of "federal recognition" in 1979, Judge Boldt concluded it could not hold off-reservation treaty fishing rights for itself or its members.[240] And while the Ninth Circuit affirmed the result in *Washington II*, it rejected Judge Boldt's holding that only "federally recognized" tribes may exercise treaty rights as "clearly contrary to…and…foreclosed by well-settled precedent."[241] The Ninth Circuit panel explained that non-recognition had no impact on vested treaty rights, though it might result in the loss of statutory benefits.[242]

In 2010, a unanimous Ninth Circuit *en banc* panel elaborated on the distinction between eligibility for treaty rights and for federal acknowledgment.[243] The Ninth Circuit explained that federal acknowledgment establishes a "government-to-government relationship" between a

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[235] *United States v. State of Wash.*, 641 F.2d at 1371.
[236] *Id.* at 1373. *See also id.* (Canby, J.) (dissent) (agreeing federal recognition not essential to exercise of treaty rights but rejecting that district court had resolved the determinative question of a tribe's continuity or provided means for doing so).
[237] Final Determination at 4.
[238] *United States v. State of Wash.*, 641 F.2d at 1372. *See also Washington II*, 476 F. Supp. at 1108.
[239] Under the termination policy as it was developed and implemented after 1953, the United States interpreted federal responsibility as limited to tribes having federal trust lands, which the Snoqualmie Tribe then lacked. Final Determination at 4. *See also* Technical Report at 6 (point of last federal acknowledgment of Snoqualmie Tribe coincided with federal policy of termination in the 1950s); Proposed Finding at 5.
[240] *Washington II*, 476 F. Supp. at 1111; *United States v. State of Wash.*, 641 F.2d at 1372.
[241] *Id.* at 1371. *See also Greene v. United States,* 996 F.2d 973, 976-77 (9th Cir. 1993) (same) ("*Greene II*").
[242] *United States v. Washington*, 641 F.2d at 1371. *See also* Final Determination at 4 ("Conclusions concerning previous acknowledgment under section 83.8…are not intended to reflect conclusions concerning successorship in interest to a particular treaty or other rights.").
[243] *United States v. Washington*, 593 F.3d 790.

recognized tribe and the United States and is "a 'prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.'"[244] As such, acknowledgment "brings its own obvious rewards," not least of which is "'the eligibility of federal money for tribal programs, social services and economic development.'"[245]

The purpose of the Department's "under federal jurisdiction" inquiry is to determine the eligibility of a federally recognized tribe for statutory benefits under Section 5 of the IRA. As with the procedures for determining eligibility for federal acknowledgment under Part 83, it is necessarily a historical inquiry. The Solicitor's Guidance at Step Four recognizes this reality in stating that evidence demonstrating prior federal acknowledgment, which includes treaty relations, "constitutes indicia of political-legal 'recognition' in or before 1934," such that "it may also be relevant for determining eligibility under Category 1."[246]

Though I find the Snoqualmie Tribe satisfies the requirements of Category 1 under Step Three of the Solicitor's Guidance, I note that the relationship between Step Four and federal acknowledgment under Part 83 is relevant for tribes like Snoqualmie that were acknowledged through Part 83. As described above, the Snoqualmie were able to demonstrate to the Department that they met the standard of "unambiguous previous federal acknowledgment," which requires applicant groups to provide "*substantial evidence* of *unambiguous action by the Federal government* clearly premised on identification of a tribal political entity and *indicating clearly the recognition of a relationship between that entity and the United States*."[247] Under Step Four of the Solicitor's Guidance, this prior determination by the Department would carry significant weight, as it chronicles dealings between the Snoqualmie Tribe and the United States from 1855 to at least 1953, consistent with the Department's understanding of "recognition" and "under federal jurisdiction" as used in Category 1.[248]

IV. SUMMARY

Consistent with Step Three of the Solicitor's Guidance, a ratified treaty still in effect in 1934 presumptively demonstrates the establishment of a political-legal relationship between the United States and the signatory tribe and "may be taken as establishing a rebuttable presumption that the applicant tribe remained under federal supervision or authority through 1934."[249] The United States entered into the Treaty of Point Elliott with the Snoqualmie and other western Washington tribes in 1855. Congress ratified the Treaty of Point Elliott in 1859, and the treaty

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[244] *Id.* at 790, 801, citing 25 C.F.R. § 83.2.
[245] *Ibid.*, citing *Greene II*, 996 F.2d at 978.
[246] Solicitor's Guidance at 9-10.
[247] 25 C.F.R. §§ 83.1, 83.8 (1994) (emphasis added). *See also* 25 C.F.R. § 83.12(a) (2015) ("…substantial evidence of unambiguous Federal acknowledgment, meaning that the United States Government recognized the petitioner as an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians with which the United States carried on a relationship at some prior date…").
[248] *See* Deputy Solicitor's Memorandum at 23-25.
[249] Solicitor's Guidance at 8.

remains in effect today. Further, I concur with conclusion reached by the Department in the Snoqualmie federal acknowledgment determination that the Snoqualmie Tribe had been "unambiguous[ly] previous[ly] federally acknowledged…based on action[s] by the federal government"[250] from the Treaty of Point Elliott to at least January 1953, and that the Snoqualmie Tribe was clearly identified as derived from the treaty-signatory Snoqualmie. As such, I find that the evidence as a whole presumptively demonstrates that the Snoqualmie Tribe was "under federal jurisdiction" in 1934. For these reasons, I conclude that the Snoqualmie Tribe satisfies Category 1, and that the Secretary has the statutory authority to acquire land in trust for the Snoqualmie Tribe under Section 5 of the IRA.

Section 151.10(b) – Need

As stated above, the Snoqualmie Tribe was a signatory of the Treaty of Point Elliott.[251] The Snoqualmie Tribe lacked a land base until the Snoqualmie Indian Reservation was established in 2008 pursuant to a fee-to-trust acquisition for gaming purposes.[252] The Reservation consists now of a total of 140 acres held in trust for the Snoqualmie Tribe, which is comprised of approximately 600 enrolled members.

Placing the Parcels into trust is important to the Snoqualmie Tribe because it will give the Tribe rights to govern the land. It is important for the Snoqualmie Tribe to have the inherent right to govern its own lands and is one of the most essential powers of any sovereign tribal government. The Tribe would be able to determine its own course in addressing the needs of its government and its members.

The overall purpose of the Snoqualmie Tribe's application is to provide increased long-term socio-economic security for the Tribe through land acquisition to benefit the Snoqualmie Tribe's efforts to enhance self-determination. Once the Parcels are placed in trust, it will put the Snoqualmie Tribe in a better position to bid for grants or to qualify for additional funding from the federal agencies and other agencies who distribute funding based on total tribal acreage, roads, and other reasons. Taking the Parcels in trust will also allow the Snoqualmie Tribe to consolidate and protect the unique Indian land status and ensure its integration back onto the Snoqualmie Tribe's land base. This will further enhance tribal self-determination by ensuring that the Parcels are not used in a manner contrary to the Snoqualmie Tribe's governmental, historical, and cultural interests. Taking the Parcels in trust would provide greater control over land use matters by transferring jurisdiction over land use decisions from the City and County to the Snoqualmie Tribe and federal government. By placing the Parcels in trust, it will further tribal self-determination by allowing the Tribe to exercise its jurisdiction as a sovereign tribal government to maintain and protect the Parcels for future generations.

Based on the above facts, it is the Department's determination that the Snoqualmie Tribe needs this additional land for economic benefits, self-determination, and to increase its land base to better sustain the Snoqualmie Tribe and its tribal members.

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[250] *See* Technical Report at 2.
[251] 12 Stat. 927.
[252] *See* supra n. 62.

Section 151.10(c) - Purposes for which the land will be used

The Parcels currently consist of a single-family home and vacant land. The Snoqualmie Tribe plans no change in use at this time. The Parcels are adjacent to the Snoqualmie Tribe's Reservation, see above, and the Snoqualmie Tribe desires for the Parcels to be made part of the Snoqualmie Indian Reservation. Because the Snoqualmie Tribe does not have any plans to change the use of the Parcels at this time, the proposed use is consistent with the existing County land use and planning for the area.

Section 151.10(d) – Land for individual Indians

This section of the regulations does not apply to this acquisition because this is trust acquisition for a tribe and not an individual Indian.

Section 151.10(e) - Impact on state and local governments' tax base

A Notice of Application (dated August 14, 2015) was sent to the Governor of Washington ("State"), King County Board of Commissioners ("County"), and the City of Snoqualmie ("City") on August 14, 2015. Notices provided 30 days for a written response. The State and County did not respond to the Notice of Application. The City requested, and was granted, a 30 day extension to comment until November 2, 2015. The City's comments were received on November 2, 2015.

A subsequent Notice of Application (dated May 23, 2019) was sent to the State, County, and City. This subsequent Notice of Application provided 14 calendar days to the State, County, and City to update or supplement their previous comments. The County responded on June 21, 2019. The City responded on June 11, 2019, and stated that the proposed fee-to-trust application may affect the City's utility revenue.

After a review of these comments, the Department's determination is that the City's comments do not go to the impact of taking the Parcels off of the *tax tolls*, rather it goes to *utility revenue* and thus should not be considered under 25 C.F.R. 151.10(e). Assuming, *arguendo*, that utility revenue is a tax issue, the Department's determination is that the City's analysis is speculative in nature especially since the Snoqualmie Tribe stated that it has no plans to alter or develop the Parcels. The Department is not required to consider speculation about future potential loss of revenue—or in this case utility revenue—resulting from the trust acquisition.[253] The Department is only required to consider the present impact on the tax rolls of a proposed trust acquisition, not future activities.

The County submitted comments to the Department on the impact of removing the Parcels from the tax rolls. In its comments submitted to the Department on June 21, 2019, the County stated that the property and taxes equate to $14,987.00 for the tax year 2019. The County did not discuss it tax base; however, it appears that the general fund for King County is approximately $11.6 billion; therefore, there will be minimal impact on the County, if the property is acquired

[253] *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 80 (2011).

in trust status. Thus, removal of the subject Parcels from the County tax roll will have minimal, if any, effect on the County's annual property tax revenue.

It is the Department's determination that no significant impact will result from the removal of the Parcels from the County tax rolls given the relatively small amount of tax revenue assessed on the Parcels.

Section 151.10(f) - Jurisdictional problems and potential land use conflicts

Jurisdictional Problems

The acquisition of the Parcels into trust status should not create jurisdictional problems. The State did not respond to the Notice of Application, and thus, they did not raise any jurisdictional problems or land use conflicts. The County submitted comments by letter dated June 21, 2019.

Currently, the Parcels are subject to the State's jurisdiction. After acquisition by the United States in trust for the Snoqualmie Tribe, the Snoqualmie Tribe will have regulatory jurisdiction over the land. It will also have civil and criminal jurisdiction to the full extent of federal law.

Currently, the King County Sheriff provides police service for the Parcels. Once the Parcels are in trust, the Snoqualmie Tribal Police Department will provide police service to the Parcels. The King County Sheriff's Office will provide support services to the Tribal Police.

Potential Land Use Conflicts

The acquisition of the Parcels into trust status should also not create any potential land use conflicts. As stated above, the State did not respond to the Notice of Application, and thus, they did not raise any potential land use conflicts.

With respect to conflict of land use, the County stated that the land is currently zoned as Urban Reserve (one dwelling unit per 5 acres) and the current use of the Parcels is consistent with current zoning. Additionally, the City stated that the Snoqualmie Tribe is actively planning to expand its casino, construct a new hotel and conference center and as part of those development plans, and plans to use the Parcels for operation of a wastewater treatment facility. The City also stated that the Snoqualmie Tribe is attempting to evade the state and federal law through the fee-to-trust application about the intended use to avoid National Environmental Policy Act ("NEPA") compliance. The City concludes that this means there will be land use conflicts. However, the City's concern is based on speculation because the Snoqualmie Tribe has no current plans for any use of the property beyond its existing use (single family home and vacant land).

Thus, based upon what the Department knows now, there is no basis to conclude that jurisdictional problems or potential land use conflicts will arise as a result of the Parcels' acquisition in trust status. Based on the preceding discussion, it is the Department's determination that the criterion in 25 C.F.R. § 151.10(f) weighs in favor of the acquisition of the Parcels.

Section 151.10(g) - Whether the BIA is equipped to discharge additional responsibilities

The BIA does not anticipate that it will incur any additional responsibilities as a result of the conversion of the Parcels to trust status. The Snoqualmie Tribe has contracted (Public Law 93-638 Contract) the realty functions of the BIA. Therefore, the Tribe performs all of the realty functions for approval by the Bureau of Indian Affairs' Office.

The programs at the Northwest Regional Office are capable of handling the additional responsibilities brought about by acquiring the land into trust. The principal programs affected will be Realty, Environmental Services, and the Northwest Title Plant.

It is the Department's determination that the BIA is equipped to discharge any minimal additional responsibilities resulting from the acquisition of the additional 16.63 acre Parcels in trust status.

Section 151.10(h) - Environmental Compliance

In accordance with 516 DM 6, appendix 4, NEPA Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations, the Department is charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability from hazardous substances or other environmental remediation or injury.

The Northwest Regional Office, BIA signed a Categorical Exclusion on May 6, 2019, which indicates that an environmental assessment is not required because the Snoqualmie Tribe indicated that no development, physical alteration, or change in land use after acquisition is planned or known.

Based on this information, it is the Department's determination that the approval of this acquisition falls under 516 DM 10.5(l) and is categorically excluded. Should future development occur, compliance with NEPA and other applicable federal laws and regulations will be required if federal funding or a federal decision is involved.

National Historic Preservation Act (NHPA) Compliance

Since there are no plans for further development of the Parcels, it is the Department's determination that no impact to any historic or archaeological resources may exist on the property. Should future development occur, compliance with laws governing historic properties, if applicable, will be required. In addition, a letter dated June 8, 2015, from the State Department of Archeology & Historic Preservation concurs with the assessment that no historic properties are affected by this action.

Endangered Species Act (ESA) Compliance

Since there are no plans for further development of the Parcels, it is the Department's

determination that there will be no impact to threatened or endangered species. Should future development occur, compliance with the laws governing endangered species, if applicable, will be required.

Phase I Environmental Site Assessment

Prior to deed acceptance, a Phase I Environmental Site Assessment will need to be conducted for the Parcels by a qualified Environmental Professional. Additionally, the Phase I Environmental Site Assessment will need to be conducted according to the current ASTM Standards and 40 C.F.R. Part 312. The Phase I Environmental Site Assessment will need to be reviewed and approved by the Northwest Regional Environmental Scientist or Physical Scientist.

25 C.F.R. 151.13 - Title Examination

A pre-acquisition title review by the Office of the Solicitor, Pacific Northwest Region, was requested by the Pacific Northwest Region, BIA, and a favorable pre-acquisition opinion of title was issued on November 22, 2019. The procedure for acquiring title to the Parcels by the United States of America in trust for the Snoqualmie Tribe is acknowledged and in accordance with the Department's procedures.

Additionally, the legal description for the Parcels have been reviewed by the Bureau of Land Management Indian Lands Surveyor who, on December 5, 2014, has confirmed that the legal land description for the Parcels as written and referenced herein is sufficient and complies with the Department boundary standards.

Decision

The proposed use and purpose of the Parcels is non-gaming, not illegal, and not in conflict with existing land use. In view of the foregoing, all applicable legal requirements have been satisfied and I hereby approve the trust acquisition of the subject 16.63 acres, more or less, of land. This decision constitutes a final agency action under 5 U.S.C. § 704. Consistent with applicable law and Departmental requirements, the Regional Director shall accept the land in trust.

If you have any questions regarding this matter, please contact Ms. Sherry Johns in the BIA's Pacific Northwest Regional Office, Branch of Real Estate Services, at (503) 872-2879.

Sincerely,

Tara Sweeney
Assistant Secretary – Indian Affairs

Enclosure