



United States Department of the Interior


OFFICE OF THE SOLICITOR

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Memorandum

To: Regional Solicitors
Field Solicitors
SOL-Division of Indian Affairs

From: Daniel H. Jorjani, Solicitor 

Subject: Procedure for Determining Eligibility for Land ~~into Trust~~ under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act

On March 9, 2020, I withdrew¹ Solicitor's Opinion M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("Sol. Op. M-37029"), after concluding that its interpretation of Category 1 of Section 19 of the Indian Reorganization Act ("IRA") 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." Following the United States Supreme Court's decision in *Carcieri v. Salazar*,² the Department of the Interior ("Department") memorialized its procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934. Having withdrawn Sol. Op. M-37029, this memorandum provides a four-step procedure for determining tribal eligibility under Category 1. It derives from an interpretation of Category 1's terms that is more consistent with how Congress and the Department would have understood them in 1934. Attorneys in the Solicitor's Office shall adhere to this procedure going forward. A copy of the memorandum setting forth this interpretive analysis is attached to provide additional guidance and understanding.³

The procedure consists of up to four steps. As explained below, it will often not be necessary to proceed through each of the procedure's steps. To aid in this determination, the procedure identifies forms of evidence that presumptively satisfy each of the first three steps. 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. This guidance does not eliminate the need for a fact-specific inquiry for each applicant tribe. Nor does it provide an exhaustive list of the forms of evidence that may be relevant, which necessarily vary by tribe, by region, and by the relevant federal policy era at issue. However, by identifying certain forms of

¹ Sol. Op. M-37055, *Withdrawal of Solicitor's Opinion, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act"* (Mar. 9, 2020).

² 555 U.S. 379 (2009).

³ *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum, Deputy Solicitor for Indian Affairs, to the Solicitor (Mar. 5, 2020).

PROCEDURE FOR DETERMINING ELIGIBILITY UNDER
CATEGORY 1 OF THE INDIAN REORGANIZATION ACT OF 1934.

evidence that may satisfy its steps, this guidance should reduce the amount of evidence that applicants must submit in some cases. Eligibility determinations rendered under Sol. Op. M-37029 remain in effect and need not be revisited.

Step 1. Post-1934 Legislation Making the IRA Applicable.

Step One determines whether or not Congress enacted legislation after 1934 making the IRA applicable to a particular tribe. Writing for the majority in *Carcieri*, Justice Thomas observed that Congress has enacted such legislation to make tribes eligible for the IRA's benefits who might not otherwise come within Section 19's definitions.⁴ *Carcieri* included several examples of such authority,⁵ and the Department has since identified others.⁶ Because the existence of such legislation effectively moots any need to determine a tribal applicant's eligibility under Category 1, the Solicitor's Office should determine whether such authority exists for an applicant tribe at the outset. In the absence of such authority, the Solicitor's Office should proceed to Step Two.

Step 2. "Under Federal Jurisdiction" In 1934.

Step Two determines whether an 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. This criterion derives from understanding the meaning of the phrase "under federal jurisdiction" as referring to the federal government's administration of its Indian affairs authority with respect to particular groups of Indians, as described above. The following forms of evidence may demonstrate such administration in and immediately around 1934, for which reason they may be presumed to show that the applicant tribe was "under federal jurisdiction" in 1934. In the absence of a form of evidence that presumptively demonstrates that the tribal applicant was under federal jurisdiction in 1934, the analysis should proceed to Step Three.

A. Section 18 Elections.

Section 18 of the IRA, as amended, directed the Secretary to conduct votes to allow Indians residing on a reservation to vote on whether to reject the application of the IRA.⁷ During

⁴ *Carcieri*, 555 U.S. at 391-92; M-37029 at 20, n. 124. In rejecting the claim that the definitions of "Indian" in Section 19 of the IRA were not exclusive, Justice Thomas reasoned it would not otherwise have been necessary for Congress later to enact legislation expanding the Secretary's authority to particular tribes "not necessarily encompassed" within Section 19.

⁵ See *Carcieri*, 555 U.S. at 392, n. 6 (citing 25 U.S.C. § 473a (Territory of Alaska); § 1041e(a) (Shawnee Tribe); § 1300b-14(a) (Texas Band of Kickapoo Indians); and § 1300g-2(a) (Ysleta del Sur Pueblo). In 2016, the U.S. House of Representatives Office of Law Revision Counsel reclassified certain chapters of Title 25, resulting in the renumbering or omission of these provisions from Title 25.

⁶ See, e.g., Oklahoma Indian Welfare Act, § 13, 49 Stat. 1967 (1936); Pub. L. 93-375, 92 Stat. 712 (Sep. 18, 1978) (Pascua Yaqui Tribe); Pub. L. 92-470, 86 Stat. 783 (Oct. 6, 1972) (Tonto Apache Tribe); Pub. L. 97-391, 96 Stat. 1960 (Dec. 29, 1982), as amended, Pub. L. 100-139, 101 Stat. 827 (Oct. 26, 1987) (Cow Creek Band of Umpqua Tribe of Indians); Pub. L. 98-134, 97 Stat. 855 (Oct. 18, 1983) (Mashantucket Pequot Tribe); Pub. L. 100-411, 102 Stat. 1097 (Aug. 22, 1988) (Coushatta Tribe of Louisiana); Pub. L. 101-42, 103 Stat. 91 (Jun. 28, 1989) (Coquille Indian Tribe); Pub. L. 103-116, 107 Stat. 1118 (Oct. 27, 1993) (Catawba Tribe of South Carolina).

⁷ IRA, § 18 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application").