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Legal Sidebar

BIA's New Take on Taking Land into Trust for Indians

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The Department of the Interior (DOI) recently released Solicitor's Opinion M-37055 and new guidance on taking land into trust under Section 5 of the Indian Reorganization Act (IRA) of 1934. The IRA is the major law under which the Secretary of the Interior (Secretary) acquires land in trust for the benefit of federally recognized Indian tribes. M-37055 withdrew an earlier interpretation that had guided the DOI's land-into-trust process under the IRA since the Supreme Court's 2009 *Carcieri v. Salazar* decision.

In *Carcieri*, the Court ruled that, for the Secretary to take land into trust, Section 5 required tribes to have been "under Federal jurisdiction" when Congress enacted the IRA. As a result, *Carcieri* cast doubt on the Secretary's authority to take land into trust for tribes that were added to DOI's list of federally recognized tribes after 1934. DOI's earlier interpretation laid out a process for evaluating whether a tribe was "under Federal jurisdiction" in 1934. The new guidance requires tribes to have been both "recognized" and "under Federal jurisdiction" in 1934 and outlines a four-step process for meeting those requirements. The new guidance does not disturb completed land acquisitions under the earlier interpretation.This Sidebar analyzes distinctions between the two interpretations and suggests possible considerations for Congress.

Background

Congress enacted the IRA in 1934 "to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination." To remedy losses of tribal land under earlier federal policies, Section 5 of the IRA delegated discretion to the Secretary "to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians." Section 19 of the IRA defines "Indian" to "include[] all persons of Indian descent who are members of any *recognized* Indian tribe *now under Federal jurisdiction*." (Emphasis added). Until *Carcieri*, DOI interpreted Section 5 to apply to all tribes federally recognized at the time of the trust acquisition. *Carcieri* invalidated that interpretation, overturning a DOI decision to take land into trust for a tribe not federally recognized until 1983. *Carcieri* held that "*now* under Federal jurisdiction" in the IRA referred to 1934 rather than the time of trust acquisition.

In a concurring opinion in *Carcieri*, Justice Breyer addressed the related issue of whether the word "now" in the IRA not only restricts land-into-trust *acquisition* authority, but also restricts DOI's authority to

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recognize tribes. Justice Breyer stated that the statute "imposes no time limit on recognition," thus, indicating that he did not interpret "now" as modifying "recognized" in the IRA.

The 2014 Solicitor's Opinion M-37029

After *Carcieri*, DOI issued Solicitor's Opinion M-37029, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act." The M-37029 Opinion created post-*Carcieri* standards to determine whether a tribe applying to have land taken into trust was "under Federal jurisdiction" in 1934. In that opinion, the DOI Solicitor cited Justice Breyer's concurring opinion in *Carcieri* as leaving open the possibility that a tribe recognized after 1934 still could establish that it was "under Federal jurisdiction" in 1934. According to Opinion M-37029, the statutory language "now under Federal jurisdiction" is ambiguous and therefore should be analyzed under the Supreme Court's *Chevron* test. As discussed in this CRS Report, *Chevron* calls for deference to agencies' reasonable interpretation of certain statutes when the statutes are ambiguous with respect to a specific issue. Opinion M-37029 reasoned that:

> Because the IRA does not unambiguously give meaning to the phrase 'now under [F]federal jurisdiction,' Congress 'left a gap for the agency to fill' [and] . . . the Secretary's reasonable interpretation of the phrase should be entitled to deference.

M-37029 interpreted the phrase against the backdrop of the IRA's legislative history, the comprehensive nature of federal power in Indian affairs, and the recurring periodic shifts in federal Indian policy. M-37029 also referred to "canons of construction" that courts use to resolve ambiguities in Indian treaties and statutes in favor of Indians and as the Indians would have understood them. The opinion then concluded that "'under [F]ederal jurisdiction' . . . meant that the recognized Indian tribe was subject to the Indian Affairs' authority of the United States, *either expressly or implicitly.*" (Emphasis added). According to M-37029, tribes could satisfy this standard if they (1) had held a vote between 1934 and 1936 on adopting an IRA constitution, or (2) could show a course of dealing prior to 1934 that established "federal obligations, duties, and responsibility for or authority over the tribe" as well as indications that the tribe still had jurisdictional status in 1934.

M-37029 interpreted the IRA not to require formal tribal recognition by 1934, but rather by the time of the trust acquisition. In other words, as long as a tribe could show that it was "under Federal jurisdiction" in 1934, it could qualify for trust acquisition even if it was not formally recognized at that time. At least two federal appellate courts—the D.C. Circuit and the Ninth Circuit—upheld the M-37029 standards

2020 Solicitor's Opinion M-37055 Withdraws M-37029 and Establishes Four Steps for Tribes to Qualify for Trust Acquisition

Although federal courts' upheld M-37029's legal standards, DOI Solicitor's Opinion M-37055 withdrew M-37029, determining it "was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding" of the statutory text. However, trust acquisition determinations previously made under the M-37029's interpretation remain valid.

The Solicitor issued two memoranda clarifying the legal standards and "to provide clarity to federally recognized tribes seeking to place land into trust." The first interprets the jurisdictional and recognition elements of the statutory phrase "any recognized Indian tribe now under Federal jurisdiction" based on language, grammar, legislative history, and "administrative understanding." The second memorandum establishes a four-step process for DOI Office of the Solicitor attorneys to use when considering tribal land-into-trust applications under the IRA.

New Legal Interpretation

According to the first memorandum, "in 1934, Congress and the Department would more likely have understood the phrase 'recognized Indian tribe now under Federal jurisdiction' as referring to tribes previously placed under federal authority through congressional or executive action who remained under federal authority in 1934." The new interpretation, unlike the one it replaces, does not read the statutory language as ambiguous; rather, it implicitly argues that the new interpretation "reflects a plain construction of the language of the IRA." It also asserts authority to reassess the agency's interpretation by invoking a Supreme Court holding that "[a]n initial agency interpretation is not carved in stone, and an agency 'must consider varying interpretations and the wisdom of its policy on a continuing basis' in response to changed factual circumstances or a change in administrations."

New Four-Step Process

Under the new interpretation of the IRA requirements, DOI outlines a four-step procedure for determining a tribe's eligibility for trust acquisition.

***Step One*:** Whether there is post-1934 legislation that makes Section 5 applicable. If so, there is no need to continue to other steps and the trust acquisition may proceed. An example of a Step One statute is Section 2870 of P.L. 116-92, which provides that "[t]he Secretary may acquire additional land for the benefit of the [Little Shell] Tribe [of Chippewa Indians of Montana] pursuant to section 5 of the Act of June 18, 1934."

***Step Two*:** Whether there is sufficient evidence to establish that the tribe was "under Federal jurisdiction" in 1934, meaning that the tribe was subject to "the federal government's administration of its Indian affairs authority with respect to that particular group of Indians." If there is sufficient evidence "presumptively demonstrat[ing]" federal jurisdiction, the trust acquisition may proceed. Examples of evidence include IRA elections, constitutions, and charters; continuing treaty rights; presence in the 1934 Indian Population Report; U.S. efforts to obtain land for the tribe; and identification in a widely used compilation of Indian laws and executive agency materials from 1927-1934.

***Step Three*:** Whether the tribe was "recognized" before 1934 and remained under federal jurisdiction in 1934. If Step Three is satisfied, the trust acquisition may proceed. To satisfy this step, DOI considers evidence such as "ratified treaties still in effect in 1934; tribe-specific Executive Orders; tribe-specific legislation, including termination legislation enacted after 1934, which acknowledges the existence of a government-to-government relationship with a tribe at the time it is enacted."

***Step Four*:** If a tribe does not satisfy prior steps, Step Four analysis is required. Step Four asks whether the "totality of an applicant tribe's non-dispositive evidence . . . is sufficient to show that the tribe was 'recognized' in or before 1934 and remained 'under [F]ederal jurisdiction' through 1934." This step comes with some caveats: "gaps in the historical record should not necessarily be interpreted to indicate that the tribe lost its jurisdiction status," and recognition or reaffirmation after 1934 "does not in itself preclude a finding that the tribe was under federal jurisdiction in 1934."

Considerations for Congress

DOI's new interpretation of the IRA's language may be an occasion for Congress to consider the fee-to-trust process. DOI indicated it will apply the new four-step process by approving fee-to-trust applications from the Catawba Indian Nation (for parcels in North Carolina) under Step One; the Grand Traverse Band of Chippewa and Ottawa Indians (for parcels in Michigan) under Step Two; and the Snoqualmie Indian Tribe (for parcels in Washington) under Step Three. DOI sees the four-step process as increasing transparency and "decreas[ing] costs and review times for each application." But some tribes have expressed dissatisfaction with DOI's new interpretation, including complaints that it emerged without the

usual tribal consultation process and a charge "that the new 4-part test could serve to disrupt and restrict trust land acquisition."

Congress has faced the question of how to respond to the *Carcieri* decision since 2009. In 2017, the House Subcommittee on Indian, Insular, and Alaska Native Affairs held an oversight hearing on implementing Section 5 of the IRA. More recently, the 116th Congress has been considering two bills, S. 2808 and House-passed H.R. 375, both of which would eliminate the need for tribes to provide evidence on their 1934 status. These bills would authorize "any federally recognized Indian Tribe" to apply for fee-to-trust acquisitions under Section 5. Neither bill would change the current ineligibility of tribes never "recognized" by the United States. Nor would the bills create eligibility for tribes that lost their status through nineteenth century federal policies of "allotment and assimilation" that were aimed at breaking up the Indian reservations (and were later repudiated by the IRA). If courts continue to uphold DOI's determination that Congress excluded such tribes from the land-into-trust process, those tribes' only recourse may be to seek recognition or restoration legislation. For example, a 1956 statute declared that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." S.1368/H.R.1964 would extend federal recognition to the Lumbee Indians of North Carolina.

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