



# United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

Memorandum

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To: Daniel H. Jorjani, Solicitor

From: Kyle E. Scherer, Deputy Solicitor for Indian Affairs *Kyle Scherer*  
Eric N. Shepard, Associate Solicitor, Division of Indian Affairs *Eric Shepard*  
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Subject: Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934

The Department of the Interior ("Department") may acquire land in trust or restricted status for individual Indians or tribes in accordance with the statutory terms authorizing the Secretary of the Interior ("Secretary") to do so.<sup>1</sup> The Department's policies and procedures for implementing the Secretary's trust-acquisition authority<sup>2</sup> require the Department to evaluate each trust-acquisition request and the underlying statutory authority and any limitations it may contain.<sup>3</sup> Attorneys in the Office of the Solicitor ("Solicitor's Office") play a critical role in this process by ensuring that proposed trust-acquisitions comply with applicable statutory and regulatory requirements and relevant judicial precedent.<sup>4</sup>

Section 5 of the Indian Reorganization Act ("Section 5")<sup>5</sup> authorizes the Secretary to acquire land in trust for "Indians." Section 19 of the Act ("Section 19") defines "Indian" to include several categories of persons.<sup>6</sup> As relevant here, the first definition includes all persons of Indian descent who are members of "any recognized Indian tribe now under federal jurisdiction" (hereafter "Category 1").<sup>7</sup> In 2009, the United States Supreme Court ("Supreme Court") in *Carcieri v. Salazar*<sup>8</sup> construed the term "now" in Category 1 to refer to 1934, the year

<sup>1</sup> 25 C.F.R. § 151.3(a).

<sup>2</sup> See generally 25 C.F.R. Part 151 ("Part 151"); U.S. Dept. of the Interior, Bureau of Indian Affairs, Office of Trust Services, *Acquisition of Title to Land Held in Fee or Restricted Fee Status*, Ver. IV (rev. 1) (Jun. 28, 2016) (hereafter "*Fee-to-Trust Handbook*").

<sup>3</sup> 25 C.F.R. §§ 151.10(a), 151.11(a).

<sup>4</sup> *Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Checklist)*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 7, 2014), revised and updated (Jan. 5, 2017) (hereafter "FTT Checklist").

<sup>5</sup> Act of June 18, 1934, c. 576, § 5, 48 Stat. 984 (hereafter "IRA" or "Act"), codified at 25 U.S.C. § 5108.

<sup>6</sup> IRA, § 19, codified at 25 U.S.C. § 5129.

<sup>7</sup> 25 U.S.C. § 5129.

<sup>8</sup> 555 U.S. 379 (2009) (hereafter "*Carcieri*").

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 *Carrieri*, the Department in 2010 prepared a two-part procedure for determining when an applicant tribe was "under federal jurisdiction" in 1934.<sup>9</sup> The procedure derived from the Department's interpretation of the phrase "under federal jurisdiction" in Category 1 as referring to "an action or series of actions (...) that are sufficient to establish, or that generally reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government."<sup>10</sup> The Solicitor of the Interior ("Solicitor") memorialized the Department's interpretation in a signed M-Opinion in 2014.<sup>11</sup>

Under the Department's policies and procedures, Solicitor's Office attorneys must consult with the Bureau of Indian Affairs ("BIA") in determining the eligibility of tribes applying for trust-land acquisitions under Category 1 of the IRA.<sup>12</sup> Since 2010, the Solicitor's Office has prepared analyses affecting more than 80 tribes using the eligibility procedures memorialized in M-37029. Despite this, however, uncertainty persists over what evidence can be submitted for the inquiry and how the Department will weigh such evidence. Because eligibility assessments are prepared by the Solicitor's Office, they remain privileged legal opinions that are not publicly disclosed, eliminating a possible source of guidance. Given the importance of trust-land acquisitions as a resource for promoting tribal economic and political self-determination, tribes sometimes 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.

In an effort to address these impediments and the burdens they placed on tribes, the Solicitor's Office in 2018 began a review of the Department's eligibility procedures to provide guidance for determining relevant evidence. The review prompted questions concerning M-37029's interpretation of Category 1, on which the Department's eligibility procedures rely. In particular, the review found that M-37029's interpretation of the term "recognition" departed, without explanation, from the Department's previous, long-held understanding of that term. Among other things, the Solicitor Office's review concludes that 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. For these reasons, explained in more detail below, we recommend that M-37029 be withdrawn.

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<sup>9</sup> See U.S. Dept. of the Interior, Assistant Secretary – Indian Affairs, 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) (hereafter "Cowlitz ROD"). See also FTT Checklist.

<sup>10</sup> Cowlitz ROD at 94.

<sup>11</sup> Op. Sol. M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (hereafter "M-37029").

<sup>12</sup> FTT Checklist at ¶ 9.