



# **Cowlitz Indian Tribe**

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## **FEE-TO-TRUST APPLICATION AND RESERVATION PROCLAMATION REQUEST SUPPLEMENTAL SUBMISSION**

**on**

***CARCIERI'S "UNDER FEDERAL JURISDICTION" REQUIREMENT***

**JUNE 18, 2009**

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**SUBMITTED TO  
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## INTRODUCTION

In its recent opinion in *Carvieri v. Salazar*, 555 U.S. \_\_\_\_ , 129 S.Ct. 1058 (2009), the Supreme Court held that the Secretary of the Interior did not have authority to acquire trust title to land for the Narragansett Indian Tribe under the Indian Reorganization Act because that tribe was not “under Federal jurisdiction” when the Indian Reorganization Act (IRA) was enacted in 1934. This submission addresses the Supreme Court’s holding and the meaning of the phrase “under Federal jurisdiction” in the context of the Secretary’s authority under Sections 5 and 7 of the IRA to acquire trust land and issue a reservation proclamation for the Cowlitz Indian Tribe.

As discussed in detail in **Part I** below, the United States Constitution endows the United States Congress with plenary authority – *i.e.*, plenary legal *jurisdiction* – over all Indian tribes. It is true that Congress sometimes chooses to exercise its authority over Indian tribes in greater or lesser ways, or sometimes declines to exercise its authority at all. But because it is constitutionally-endowed, Congress’s jurisdiction over an Indian tribe cannot cease to exist unless, as was the concern of the IRA’s framers, the tribe has ceased to exist (or unless the Constitution itself is amended). Accordingly a tribe that can be shown to have existed as a tribe in 1934, by definition, is a tribe that was under federal jurisdiction in 1934. (In the case of the Narragansett Tribe, the Supreme Court accepted as fact the State’s uncontested – and unbriefed – assertion that the Narragansett Tribe was not under federal jurisdiction in 1934; the Court never discussed or considered Congress’ plenary jurisdiction over tribes or how it would apply to the Narragansett Tribe.) Through the Federal Acknowledgment Process (25 C.F.R. Part 83), the Department has confirmed that the Cowlitz Indian Tribe existed in 1934; accordingly, as a matter of law the Tribe was under federal jurisdiction in 1934. Because the Cowlitz Indian Tribe was under federal jurisdiction in 1934, and because the Cowlitz Indian Tribe is now federally recognized, the Secretary has authority under Sections 5 and 7 of the Indian Reorganization Act to acquire trust title to the Tribe’s Clark County land and to issue a reservation proclamation for that same land.

Although the legal rule that all tribes that existed in 1934 were under federal jurisdiction in 1934 is alone adequate to address the Court’s ruling as it relates to the Cowlitz fee-to-trust<sup>1</sup> and reservation proclamation applications,<sup>2</sup> in **Part II** below the Cowlitz Indian Tribe also submits factual evidence demonstrating the United States’ specific *exercise* of that federal jurisdiction over the Tribe during the general time period in which the Indian Reorganization Act was enacted. This factual evidence compels a finding that the Cowlitz Indian Tribe was under federal jurisdiction when the IRA was enacted, and accordingly further underscores the Secretary’s authority to acquire trust title and issue a reservation proclamation for the Tribe.

Based on the information provided in this Supplemental Submission, the Cowlitz Indian Tribe urges the Department of the Interior to act with all due haste to complete the fee-to-trust and reservation proclamation processes begun by this landless tribe *more than seven years ago*. The continuing fact of the Tribe’s landlessness has caused it great hardship, made it ineligible for a wide

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<sup>1</sup> The Cowlitz Indian Tribe’s request that the Secretary acquire trust title to ±151 acres of land in Clark County, Washington pursuant to Section 5 of the Indian Reorganization Act (25 U.S.C. § 465) originally was filed on January 4, 2002, and has been amended and supplemented on several occasions since.

<sup>2</sup> The Cowlitz Indian Tribe’s request for a reservation proclamation pursuant to Section 7 of the Indian Reorganization Act (25 U.S.C. § 467) originally was submitted in March 2004, and has been supplemented on several occasions thereafter.

array of federal programs that are tied to a reservation land base,<sup>3</sup> and prevented it from applying for much of the funding set aside for Indian tribes in the American Recovery and Reinvestment Act. By way of contrast, the Snoqualmie Indian Tribe of Washington State, recognized through the Department's Federal Acknowledgment Process (25 C.F.R. Part 83) at about the same time as Cowlitz, has for several years now already benefited from trust land and a reservation proclamation. That tribe now is running reservation-based tribal businesses that are paying for essential governmental services. To force the Cowlitz Indian Tribe to wait any longer before putting it on a level playing field with other federally recognized tribes would be violative of the Department's responsibilities for the Tribe.

## PART I FEDERAL JURISDICTION OVER INDIANS AND INDIAN TRIBES IS PLENARY AND CONTINUOUS AS A MATTER OF LAW

### A. THE CARCIERI DECISION

#### 1. *Brief Summary of the Court's Holding in Carcieri v. Salazar*

The Department's general familiarity with the Court's February 24, 2009 holding in *Carcieri v. Salazar* is assumed, but for the convenience of the reader a summary is provided here. *Carcieri* involved a challenge by the State of Rhode Island to the authority of the Secretary of the Interior to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465. (The Narragansett Tribe previously had obtained formal federal recognition in 1983 pursuant to the Department's administrative Federal Acknowledgment Process (25 C.F.R. Part 83).) In 1998, relying on Section 5 of the IRA, the Department granted the Narragansett Tribe's request to have 31 acres of land taken in trust for housing. The State brought a series of challenges to the fee-to-trust decision before the Interior Board of Indian Appeals, the U.S. District Court, and the U.S. Court of Appeals for the First Circuit (for both panel and *en banc* decisions). These all rejected the State's argument that Interior is prohibited from acquiring trust lands for the Narragansett Tribe under the IRA unless the Tribe was federally recognized and under federal jurisdiction at the time Congress enacted the IRA in 1934. The United States, conversely, had argued that the Tribe need only be federally recognized at the time the Secretary exercised his Section 5 authority to take the land in trust.

In an 8-1 decision, the Supreme Court reversed the First Circuit and held that application of Section 5 of the IRA is limited to tribes that were "under Federal jurisdiction" when the Indian Reorganization Act was enacted in 1934. The Court's reasoning can be summarized as follows. First, Section 5 of the IRA provides in relevant part that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire ... any interest in lands ... for the purpose of providing land for Indians ... Title to any lands acquired ... shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired.

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<sup>3</sup> Some of the federal programs for which the Tribe is not eligible because of its landless status are identified in the Tribe's August 11, 2006 Amended Request for a Reservation Proclamation at 7, Tab H.

25 U.S.C. § 465. In turn, the Court insists that Section 5 must be read in concert with Section 19 of the IRA (25 U.S.C. § 479) which defines “Indian” as including:

... all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of an Indian reservation, and shall further include all other persons of one-half or more Indian blood ... The term “tribe” as used in sections ... 465, 466 to 470, ... of this title shall be construed to refer to any Indian tribe, organized band, pueblo, of the Indians residing on one reservation....

Justice Thomas, writing for the majority, focused on the Section 19 definition of “Indian” when he insisted that the term “now” in the phrase “now under Federal jurisdiction” is unambiguous and therefore must be read to limit the application of the Secretary’s Section 5 authority only to those tribes that were “under Federal jurisdiction” in 1934 when the IRA was enacted.<sup>4</sup> *Carcieri*, 129 S.Ct. 1058, 1064-65. (*But see* footnote 4 below concerning half-blood community tribes and tribes that had reservations in 1934.) The Court highlighted Rhode Island’s assertion that the Narragansett Tribe was not under federal jurisdiction in 1934, and based on the Tribe’s and the United States’ failure to object to that assertion, found that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted and therefore not entitled to the benefits of the IRA.<sup>5</sup>

Justice Thomas and the majority did not adopt -- or even discuss -- the second half of Rhode Island’s argument, *i.e.*, that a tribe had to be federally recognized in 1934 (as well as being under federal jurisdiction) in order for the Secretary’s Section 5 authority to be applicable. Indeed, the majority opinion does not address “recognition” at all; rather, it focuses entirely on the phrase “under federal jurisdiction,” finding that “§ 479 limits the definition of ‘Indian,’ and therefore limits the exercise of the Secretary’s trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted.” *Carcieri*, 129 S.Ct. at 1065. Justice Thomas concludes: “[w]e hold that the term ‘now under Federal jurisdiction’ in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.” *Id.* at 1068.

Justice Breyer, however, wrote a concurring opinion rejecting Rhode Island’s position that a tribe must be both federally recognized and under federal jurisdiction in 1934, specifically clarifying that Indian tribes not “federally recognized” until after 1934 nonetheless may still have been “under

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<sup>4</sup> It is important to underscore the obvious point, addressed only somewhat by the majority, that the definition of “Indian” also includes persons of one-half or more Indian blood (without the limiting language “now under Federal jurisdiction”), and that therefore a tribe made up of a group of such people, even if not formed or organized until after 1934, would not be subject to the “now under federal jurisdiction” requirement. Justice Breyer clarifies this point in his concurring opinion at 129 S.Ct. 1069-70. In addition, the definition of “Indian” also includes descendants of tribal members “who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.” A tribe composed of such people need not be concerned with the “now under federal jurisdiction” requirement because tribes resident on reservations in 1934 set aside by the federal government by definition were tribes under federal jurisdiction in 1934.

<sup>5</sup> 129 S.Ct. at 1068.

federal jurisdiction” in 1934 (and therefore may still be eligible for the benefits conferred by the IRA). As examples he points to instances in which the Department has made a mistake about whether a tribe had continued to exist, or in which a tribe enjoyed continuing rights under a federal statute or treaty even though the United States had not extended formal recognition to the tribe at that time. 129 S.Ct. at 1069-70 (Breyer, J., concurring). To further illustrate this point Justice Breyer also noted that the IRA’s Section 5 authority can be used to take land into trust for a tribe made up of persons “who fall under that portion of the statute that defines ‘Indians’ to include ‘persons of one-half or more Indian blood’” (in other words, the IRA contemplates acquiring trust land for a group of “half-blood” Indians who organize themselves and become formally recognized as a tribe *after* the enactment of the IRA).<sup>6</sup> *Id.* at 1070.

Justices Souter and Ginsburg explicitly concurred with Justice Breyer’s analysis that federal recognition can follow at a later time. 129 S.Ct. at 1071 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part) (*see* discussion below). At no point does the majority opinion contradict Justices Breyer’s, Souter’s and Ginsburg’s conclusion that “*federal recognition*” and “*under federal jurisdiction*” are not synonymous, or that federal recognition may follow at a date after 1934. In contrast, the majority explicitly rejected portions of Justice Stevens’ dissent (*see* 129 S.Ct. at 1067 n.8).

Although concurring with the majority that a tribe must have been under *federal jurisdiction* in 1934, and further joining with Justice Breyer’s clarification that *federal recognition* could follow at a later time, Justices Souter and Ginsburg strongly dissented from the majority on the question of whether the Narragansett Tribe and the United States ought to be given an opportunity to brief the Court on the meaning of “under Federal jurisdiction.” 129 S.Ct. at 1071 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part). Rather than simply relying on Rhode Island’s uncontested representation in its petition for *writ of certiorari* that the Tribe was not under federal jurisdiction in 1934, these Justices would have given the Tribe and the United States an opportunity to refute Rhode Island’s assertion and make the case that the Narragansett Tribe was under federal jurisdiction in 1934. Justices Souter and Ginsburg explained:

During oral argument, however, respondents explained that the Secretary's more recent interpretation of this statutory language had “understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same.” Tr. of Oral Arg. 42. *Given the Secretary's position, it is not surprising that neither he nor the Tribe raised a claim that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present. The error was shared equally all around, and there is no equitable demand that one side be penalized when both sides nodded.*

*Carcieri*, 129 S.Ct. at 1071 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part) (emphasis added).

Finally, Justice Stevens dissented from the entirety of the majority opinion, finding that there is “no temporal limitation on the definition of ‘Indian tribe’” within the Indian Reorganization Act. 129 S.Ct. at 1072 (Stevens, J., dissenting). Unlike the majority, Justice Stevens recognized and

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<sup>6</sup> See note 4 above.

applied the well-established principle of statutory construction that “statutes are to be construed liberally in favor of the Indians.” 129 S.Ct. at 1078-79 (Stevens, J., dissenting). Justice Stevens’ general understanding of these provisions of the Indian Reorganization Act is much better grounded within the greater context -- and long history -- of Indian jurisprudence. Nevertheless, the Cowlitz Indian Tribe addresses the majority’s opinion in order to assist the Department with moving forward with the Tribe’s fee-to-trust and reservation proclamation applications.

## ***2. The “Facts” Before the Carcieri Court Were Unique to the Narragansett Tribe***

As discussed above, the majority opinion concluded that the Narragansett Tribe was not under federal jurisdiction in 1934 even though the question of what the phrase “under Federal jurisdiction” *means* was never briefed -- or even raised -- by either side. Rather, the Court relied on Rhode Island’s representation in its petition for *writ of certiorari* -- uncontested by either the Tribe or the United States -- that the Tribe was not under federal jurisdiction in 1934. The Court held that:

*None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed. Reg. 6177. Moreover, the petition for writ of certiorari filed in this case specifically represented that “[i]n 1934, the Narragansett Indian Tribe ... was neither federally recognized nor under the jurisdiction of the federal government.” Pet. for Cert. 6. The respondents’ brief in opposition declined to contest this assertion. See Brief in Opposition 2-7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court’s Rule 15.2.*

*Carcieri*, 129 S.Ct. 1068 (emphasis added). It is clear from the italicized language that the Court’s finding that the Narragansett Tribe was not under federal jurisdiction in 1934 is based upon the parties’ own assertions (and lack of counter-assertions), rather than on a consideration of the underlying law or facts which otherwise would have guided the Court’s analysis of whether the Narragansett Tribe actually was under federal jurisdiction in 1934.

The fact that the Court did not consider in any real way the law or facts specific to the Narragansett Tribe is highlighted by the few passing references the Court made about “evidence in the record.” The first is the odd reference in the block quotation above to the 1983 Federal Register notice formally acknowledging the Narragansett Tribe, which the Court cites in support of its comment that there is “evidence in the record” that the Tribe was not under federal jurisdiction in 1934. Although this federal register notice does refer to the fact that the State of Rhode Island recognized the group in 1934, *see* 48 Fed. Reg. at 6178, that reference is hardly dispositive on the question of federal jurisdiction. As discussed at length below, federal “recognition” and federal “jurisdiction” are not synonymous terms -- a tribe most certainly can be recognized by a state and yet still be under federal jurisdiction. (For example, federally recognized tribes in New York State, which unquestionably were under federal jurisdiction in 1934, also unquestionably were recognized by the State of New York in 1934. *See* N.Y. Indian Law Art. 1–15 (Consol. 2009)). In fact, because state recognition tends to confirm the Tribe’s continuous existence, the state of Rhode Island’s recognition of the Narragansett Tribe would actually *support* a finding that the Narragansett existed as a tribe in 1934 and therefore was a tribe under federal jurisdiction in 1934. (*See* discussion in Part I, Subpart B below concerning the legal rule that all tribes that have continuously maintained tribal relations are under Congress’ plenary jurisdiction regardless of whether they are federally recognized.)



The Court's second passing reference to the record is in footnote five, wherein the Court discusses a 1937 letter from Commissioner Collier "in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. App. 23a-24a." Although the Court suggests that this letter is "persuasive," it continues to insist that it is not deferring to Collier's interpretation of "this unambiguous statute." *Carvieri*, 129 S.Ct. at 1065, n. 5. If the Court had considered the letter on its own merits (and had the United States and the Tribe addressed the letter in its response briefs), it would become obvious that the letter is not particularly persuasive at all. First, Collier's description of the extent of the federal government's jurisdiction over the Narragansett Tribe is completely at odds with existing judicial precedent. As explained at length later in this memorandum, the federal courts explicitly have held that federal protections like those granted by the Nonintercourse Act (which restricts tribal lands from alienation without congressional consent) are applicable even to tribes whose primary intergovernmental relationships have been with a state, rather than the federal, government. *See, e.g., United States v. John*, 437 U.S. 634, 652-53 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them."); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 378 (1<sup>st</sup> Cir. 1975) ("Congress' unwillingness to furnish aid when requested [by the Tribe] did not, without more, show a congressional intention that the Nonintercourse Act should not apply"). Second, the Collier letter must be viewed in context and in light of its purpose. The letter clearly is an effort to avoid federal responsibility for payment of a potential Narragansett claim against the United States; it is not an objective or independent explication of the meaning of the relevant IRA language or the Narragansett Tribe's status under it.

In any event, not anticipating that the case would turn on the question of whether the Narragansett Tribe was under federal jurisdiction in 1934, the Tribe and the United States failed to counter Rhode Island's assertion that the Tribe was not under federal jurisdiction, failed to articulate the difference between the existence of federal jurisdiction as a matter of law and the *exercise* of that jurisdiction as a matter of fact, and failed to provide the Court with the legal and factual information the Court would have needed to consider fully and fairly the question of whether the Narragansett Tribe actually was or was not under federal jurisdiction in 1934. We trust that had the United States understood that the case would turn on the question of whether the Tribe was under federal jurisdiction, the United States certainly would have argued that it was. Indeed, for the reasons discussed at length later in this memorandum, there was ample legal basis for such an argument on behalf of the Narragansett Tribe.<sup>7</sup>

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<sup>7</sup> First, as the First Circuit confirmed in *Passamaquoddy*, the Passamaquoddy Tribe was entitled to the protections of the federal Nonintercourse Act, even though the Tribe's intergovernmental relationships primarily had been with the State of Maine, not the federal government – even though "Maine has enacted approximately 350 laws which related specifically to the Passamaquoddy Tribe" and "[i]n contrast, the federal government's dealings with the Tribe have been few", 528 F.2d 370, 374. The fact that the federal Nonintercourse Act has been held applicable to tribes without formal relationships with the federal government is a clear indication that Congress holds continuing legal jurisdiction over those tribes regardless.

Second, the Narragansett Tribe was federally acknowledged through the Department's Federal Acknowledgement Process in 1983. By its explicit terms, that process requires the applicant tribe to demonstrate that it can trace its tribal existence continuously from the time of "first white contact" (or from the date of prior unambiguous acknowledgment). *See, e.g.,* 25 C.F.R. § 83.3 (part 83 "intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present"); 25 C.F.R. 83.7(b) (requiring petitioner to show it comprises a distinct community that has existed from historical times to present); 25

In short, *the Court did not determine, as either a legal or factual matter, whether the Narragansett Tribe was under federal jurisdiction in 1934, rather it accepted at face value the parties' apparent agreement that it was not.* Accordingly, the Department of the Interior must be mindful that the exact *Carieri* fact pattern is not likely applicable to many (maybe *any*) other tribes. The only tribe that would share the same fact pattern as the Narragansett Tribe in *Carieri* would be a tribe that has stipulated to a federal court that it was not a tribe under federal jurisdiction in 1934 or otherwise has conceded that it did not exist (had no tribal relations) in 1934. In other words, because the Court did not define what “under federal jurisdiction” means, and because the Court relied on the Narragansett Tribe’s apparent concession that it was not under federal jurisdiction in 1934, there is next to nothing in the majority opinion to help guide the Department’s implementation of the “under Federal jurisdiction” requirement as it relates to other tribes. Therefore, in considering how the requirement of “now under Federal jurisdiction” applies to other tribes, the Department must look to the extraordinarily well established principles of Indian law that speak directly to the legal question of what “federal jurisdiction” means, and it must apply the Indian canons of construction (*see* discussion at Subsection E below) to those principles.

## **B. FEDERAL JURISDICTION IS PLENARY AND CONTINUING**

### **1. “Under Federal Jurisdiction” is Not the Same Thing as “Federally Recognized”; Federal Recognition in 1934 is Not Required**

Although there is no guidance in the majority opinion about what “under federal jurisdiction” means, in Justice Breyer’s, Souter’s and Ginsburg’s concurring opinions, there is clear guidance as to what it *does not mean*: it does not mean “federally recognized.” These concurring opinions also make clear the collateral point -- that a showing of federal recognition *in 1934* is not required:

[A]n interpretation [of “under federal jurisdiction”] that reads “now” as meaning “in 1934” may prove somewhat less restrictive than it at first appears. *That is because a tribe may have been “under Federal jurisdiction” in 1934 even though the Federal Government did not believe so at the time.* We know, for example, that following the Indian Reorganization Act’s enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off that list. See Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22-24; Quinn, Federal Acknowledgment of American Indian Tribes: The Historical development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356-359 (1990). The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. *And the Department has sometimes considered that*

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C.F.R. § 83.8 (in cases where evidence of unambiguous federal acknowledgement exists, requiring that petitioner show continuous identification as an Indian group since date of last federal acknowledgement). The very fact that the Narragansett Tribe successfully completed the Federal Acknowledgement Process means that the Department’s files hold extensive evidence of the Narragansett’s existence as a tribe in 1934, which evidence could have been provided to the Court to demonstrate that the Tribe was under federal jurisdiction even if the federal government was not actively exercising that jurisdiction at the time.

*circumstance sufficient to show that a tribe was “under Federal jurisdiction” in 1934 – even though the Department did not know it at the time.*

*The statute, after all, imposes no time limit upon recognition. See § 479 (The term ‘Indian’ ... shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction ...) (emphasis added)). And administrative practice suggests that the Department has accepted this possibility. The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855 ...*

In my view, this possibility – that later recognition reflects earlier “Federal jurisdiction” – explains some of the instances of early Department administrative practice to which Justice Stevens refers.

*Carrieri*, 129 S.Ct. 1058, 1069-70 (Breyer, J., concurring) (emphasis added). In the concurring portions of their opinion, Justices Souter and Ginsburg make the same observation:

*The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, “any recognized Indian tribe now under Federal jurisdiction.” Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As JUSTICE BREYER makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at the time. See Memorandum from Associate Solicitor, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory construction.*

129 S.Ct. at 1071 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part) (emphasis added). Again, it is important to underscore that the majority took no issue with any of these pronouncements (in contrast, it explicitly rejected some of the reasoning in Justice Steven’s dissent). *Id.* at 1067 n.8 (majority opinion). And, as noted earlier, the majority opinion nowhere indicates a requirement of both recognition and federal jurisdiction; instead, the majority only addresses the fact that tribes must be “under Federal jurisdiction” in 1934 to be eligible for the benefits of the IRA. *Id.* at 1068.<sup>8</sup>

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<sup>8</sup> Given the fact that the State framed the question presented in the Supreme Court as “[w]hether the Indian Reorganization Act of 1934 authorizes the Secretary to take land into trust on behalf of an Indian tribe that was neither federally recognized nor under federal jurisdiction at the time of the statute’s enactment”, and repeatedly argued that the Secretary’s authority under the IRA was restricted to tribes that were both “federally recognized *and* under federal jurisdiction in 1934” throughout its Supreme Court papers, *see, e.g.*, Brief for Petitioner at 13, 14, 15, 17, 18, 19, 20, 23, 26, 31, 32, 34), it is fair to conclude that the Court would have used similarly clear statements to express its holding if it in fact intended to address federal recognition in addition to federal jurisdiction.

Federal courts routinely rely upon concurring opinions for guidance in applying a majority opinion. See *Rodriguez v. Bennett*, 303 F.3d 435, 438-39 (2d Cir. 2002) (Justice Stevens' concurring opinion made "explicitly clear" the "Court's narrow holding"); *Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (concurring opinion "furnishes support for the view that, in an appropriate case, equitable tolling may be available"); *Flores v. Demskie*, 215 F.3d 293, 304 (2d Cir. 2000) (rejecting broader application of Supreme Court case based on Justice O'Connor's concurring opinion identifying the narrow application of majority holding); *In re Possible Violations of 18 U.S.C. §§ 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977) (Justice Powell's concurrence "emphasized" and "elaborated" the majority opinion). Because they provide invaluable assistance in interpreting the majority opinion, concurring opinions often become more authoritative than the majority opinion itself. See Igor Kirman, *Standing Apart To Be A Part: the Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995) (identifying numerous Supreme Court concurring opinions treated as authoritative in part because they clarify majority opinion). The federal courts reviewing the Department's interpretation of *Carieri* undoubtedly will rely on the Breyer, Souter, and Ginsberg concurrences for guidance, and accordingly so should the Department.

The concurring Justices' view that federal jurisdiction and federal recognition are two different things is consistent with prior federal court analyses. For example, in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F. 2d 370 (1<sup>st</sup> Cir. 1975), the First Circuit explicitly found that even though the Passamaquoddy Tribe was not federally recognized, Congress nevertheless intended that it be protected by the Indian Trade and Intercourse Act (25 U.S.C. § 177) (more commonly known as the "Nonintercourse Act") because that statute protects from unauthorized alienation the tribal lands of *all* tribes regardless of whether they have been formally recognized. The court found that the Passamaquoddy Tribe continued to be under federal jurisdiction for the purposes of the Nonintercourse Act even though for many years the federal government had allowed the Tribe's primary intergovernmental contacts to be with the State of Maine rather than with the federal government -- even though "Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe" and "[i]n contrast, the federal government's dealings with the Tribe have been few." 528 F.2d at 374. The First Circuit further explained, "[s]imilarly, Congress' unwillingness to furnish aid when requested [by the Tribe] did not, without more, show a congressional intention that the Nonintercourse Act should not apply". *Id.* at 378. Like Justices Breyer, Souter and Ginsburg, the First Circuit explicitly contemplated that full federal recognition might follow later:

We emphasize what is obvious, that the 'trust relationship' [between the United States and the Passamaquoddy Tribe] we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act . . . Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities.

*Id.* at 379 (emphasis added). The fact that the federal Nonintercourse Act has been held applicable to tribes without formal relationships with the federal government is a clear indication that the courts understand Congress to hold continuous legal jurisdiction over tribes regardless of when those tribes achieve full or formal federal recognition.

The year after *Passamaquoddy* was decided, the Supreme Court issued an opinion in *United States v. John*, 437 U.S. 634 (1978), which applied the same basic legal analysis to a different fact pattern. There, the Court rejected the State's argument that the federal government's abandonment

of its supervisory authority and the concomitant lapse in federal recognition of the Mississippi Choctaw meant that Congress' constitutional authority over Indians tribes could no longer provide a basis for federal jurisdiction over that tribe. The Court held:

We assume for the purposes of argument, as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But, particularly in view of the elaborate history, recounted above, of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. *Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.* *United States v. Wright*, 53 F.2d 300, (4<sup>th</sup> Cir. 1931), *cert. denied*, 285 U.S. 539 (1932).

437 U.S. at 652-53 (emphasis added). In other words, the Court held that the federal government enjoyed continuing jurisdiction over the Mississippi Choctaw even during periods in which the Tribe was not formally recognized. Here again, the Court indicates that federal jurisdiction and federal recognition are two different things.

Similarly, the Ninth Circuit in *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), held that unrecognized tribes signatory to a federal treaty reserving fishing rights maintained those rights despite the lack of formal federal acknowledgment by the Department. The Ninth Circuit held that:

Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. . . . Once a tribe is determined to be a party to a treaty, its rights under the treaty may be lost only by unequivocal action of Congress. Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations.<sup>9</sup>

*Id.* at 692-93 (internal citations omitted). *See also* the 1929 edition of Ruling Case Law (a legal encyclopedia that is the predecessor to American Jurisprudence 2d) ("And, in the absence of Congressional action, the fact that a state has conferred on certain Indians the right of suffrage and other rights that ordinarily belong only to citizens, does not alter their relation to the United States (citations omitted)."). 14 Ruling Case Law § 34 (1929 ed.) at 138.

Another example of Congress' exercise of jurisdiction over unrecognized tribes is its mandate that Interior review and approve contracts with Indian tribes. *See* 25 U.S.C. § 81. Although recently amended by Congress to apply only to federally recognized tribes, for more than a century

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<sup>9</sup> As discussed at length later in this memorandum, there is a critical distinction between tribes that are unrecognized (*i.e.* tribes to which the United States has not extended a formal relationship), and tribes that have ceased to maintain tribal relationships (*i.e.*, tribes that effectively have ceased to exist as tribal entities).

the original statute applied to “*any* tribe of Indians.” R.S. § 2103 (Acts Mar. 3, 1871, c. 120 § 3, 16 Stat. 570) (emphasis added). Interior’s regulations implementing this statute established two sets of approval procedures, one for tribes organized under the IRA, and a second, more extensive set of regulations for tribes not organized under the IRA. *See* 25 C.F.R. section 15.7 - 15.25 (1949) (governing approval of attorney contracts with tribes not organized under the IRA). Consistent with Congress’ mandate, Interior applied these regulations in its review and approval of attorney contracts entered into by tribes “without Official recognition”. *See, e.g.*, April 15, 1932 Commissioner of Indian Affairs Approval of Cowlitz Indian Tribe Contract with Attorneys; January 6, 1951 Letter from Superintendent Raymond Bitney to Commissioner of Indian Affairs regarding approval of proposed attorney contract with the Cowlitz Tribe of Indians (which includes the “without Official recognition” reference). These documents are described in more detail in Part II, Section 2, below; copies are provided on the attached CD, in the “Section 2” pdf file, identified as Cowlitz Tribe 000069, and Cowlitz Tribe 000079-81.

The *Carcieri* majority opinion which focuses only on federal jurisdiction, the explicit language in the three *Carcieri* concurring opinions, and explicit language from existing case law, all together make clear that “under federal jurisdiction” and “federal recognition” cannot be construed to be synonymous, and that Congress’ jurisdiction over tribes is not tied to, or limited by, formal federal recognition. The explicit language of these sources of law also make clear that no temporal limitations on formal recognition can be read into the IRA and that the word “now” in Section 19 (25 U.S.C. § 479) applies only to the concept of “under federal jurisdiction.” Accordingly, to be eligible for IRA benefits, a tribe that was under federal jurisdiction in 1934 need *not* also show that it was federally recognized in 1934.

## 2. *The Plain Meaning of “Under Federal Jurisdiction”*

If “under federal jurisdiction” does not mean “federally recognized,” then what does it mean? The key of course is the word “jurisdiction.” In *Carcieri*, the Court begins its analysis of the word “now” in Section 19 by consulting definitions of “now” found in dictionaries published contemporaneously with enactment of the IRA.<sup>10</sup> Following the Court’s lead, to define the word “jurisdiction” we look to the same 1934 edition of Webster’s Dictionary on which the Court relied:

Jurisdiction –

1. Law. The legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to a particular matter; legal power to interpret and administer the law in the premises. The Jurisdictions of different courts are classified as: original or appellate; exclusive or concurrent; civil or criminal; common-law or equitable; in rem or in personam; etc.

2. *Authority of a sovereign power to govern or legislate; power or right to exercise authority; control.*

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<sup>10</sup> The Court highlighted that when the IRA was enacted in 1934, the primary definition of “now” was “[a]t the present time; at this moment; at the time of speaking.” Webster’s New International Dictionary 1671 (2d ed. 1934); the Court also cited to Black’s Law Dictionary 1262 (3d ed. 1933) (defining “now” to mean “[a]t this time, or at the present moment” and noting that “[n]ow” as used in a statute *ordinarily* refers to the date of its taking effect ....” (emphasis added)). *Carciere*, 129 S.Ct. 1058, 1064.

3. Sphere of authority; the limits, or territory, within which any particular power may be exercised.

*Syn. - Jurisdiction, authority are often interchangeable.* But jurisdiction applies esp. to authority exercised within limits; as, paternal authority is paramount within its jurisdiction. Cf. power, influence, ascendance.

Webster's New International Dictionary 1347 (2d ed. 1934) (emphasis added). The 1934 dictionary definition specifically lists "authority" as a synonym for jurisdiction, and the second (non-judicial-branch) definition specifically defines "jurisdiction" as "authority of a sovereign power to govern or legislate[.]" Of importance also is the definition of "jurisdiction" in the 1933 edition of Black's Law Dictionary on which the *Carvieri* Court also relied:

"The power and authority *constitutionally conferred upon (or constitutionally recognized as existing in)* a court or judge to pronounce the sentence of law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal . . . ."

Black's Law Dictionary p. 1038 (3d ed. 1933). While Black's Law Dictionary addresses the legal concept of "jurisdiction" in the context of the judicial branch, this definition is important because it underscores that in our American legal structure the jurisdiction of any branch of government ultimately is conferred upon that branch by the *Constitution*.

Although the tenor and substance of the laws governing American Indians has varied significantly over the course of this Nation's history, there is one central tenet of that jurisprudence that has remained constant and undeniable: the United States' Congress has *plenary authority* -- plenary *federal jurisdiction* -- over Indians and Indian tribes. "The courts have recognized that Congress has 'plenary and exclusive authority' over Indian affairs." Felix S. Cohen, Handbook of Federal Indian Law, § 5.02, *citing United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979). This plenary authority is grounded on constitutional provisions including the Indian Commerce Clause,<sup>11</sup> the Treaty Clause,<sup>12</sup> and the Property Clause.<sup>13</sup> *See United States v. Lara*, 541 U.S. 193, at 200 (2004); *see also* Felix S. Cohen, Handbook of Federal Indian Law, § 5.01[1] at 392-93, § 5.02.

The premise of plenary authority over Indian Tribes has been underscored over and over again throughout the history of American jurisprudence, from the earliest days of the Republic

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<sup>11</sup> The Indian Commerce Clause provides Congress with authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

<sup>12</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>13</sup> The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting *the Territory or other Property* belonging to the United States." U.S. Const. art. IV, § 3, cl. 2 (emphasis added).

without interruption to the modern day. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831) (Justice John Marshall recognized that the Constitutional Convention intended “to give the whole power of managing those [Indian] affairs to the government about to be instituted, the [Constitutional] convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it . . . .”); *United States v. Lara*, 541 U.S. 193, 200 (2004) (Congress’ authority pursuant to the Indian Commerce Clause is “broad,” “plenary and exclusive”); *see also Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (because the Constitution provides Congress with plenary authority over Indian tribes, Congress possesses “substantive legislative jurisdiction” over Indian Affairs); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (If Congress possesses “legislative jurisdiction” then the question is “whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction[.]”); *Bugenis v. Hoopa Valley Tribe*, 266 F.3d 1201, 1218-19 (9<sup>th</sup> Cir. 2001) (portion of legal analysis entitled “Congress has Plenary Jurisdiction over the Reservation”).

Based on the plain meaning of the word “jurisdiction,” as well as on a long line of cases that consider the matter, it is clear that Congress’ well-established plenary authority is synonymous with plenary legal jurisdiction. As discussed in more detail immediately below, Congress’ jurisdiction over Indian tribes is, as a legal matter, continuous and uninterruptable unless the tribe itself ceases to exist (which unfortunately was a prevalent occurrence in the decades leading up to the enactment of the IRA, *see* discussion at Part I, Subsection C.1. below), or unless the Constitution some day is amended to say otherwise. Accordingly, a group of Indians that reasonably can be understood to have existed as a “tribe” that had maintained tribal relations in 1934, was, as a legal matter, a tribe under federal jurisdiction in 1934. Congress of course has the power to speak to whether or not a group is a “tribe” that has maintained tribal relations, as discussed at Part I, Subsection C below. But if the tribe met the applicable legal definition of tribe in 1934, then the tribe as a matter of law was under federal jurisdiction in 1934.

The *Carvieri* Court found that the word “now” is clear on its face and that a consideration of the legislative history of the statute is not necessary to understand its meaning. *Carvieri*, 129 S.Ct. at 1063-64 (“[W]e must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms.”) (internal citations omitted). The meaning of the phrase “under federal jurisdiction” is equally plain and unambiguous, and accordingly the Department need not parse legislative history in order to define the phrase. If the tribe meets the legal definition of “tribe,” then it is under federal jurisdiction.

### **3. Congress Cannot Divest Itself of the Jurisdiction Conferred Upon it by the Constitution**

Because Congress’ jurisdiction over Indian tribes is constitutionally-based, Congress’ general jurisdiction cannot be interrupted or modified except by constitutional amendment. “The conditions under which congressional powers are exercised will not change the nature of those powers, although powers ordinarily dormant may be called into action.” 16A Am. Jur. 2d Constitutional Law § 235 (1998); *see also United States v. Quinn*, 27 F.Cas. 673, 679 (C.C.N.Y. 1870) (“there are numerous powers conferred by the constitution upon [C]ongress, which, for a time remained dormant in their hands . . . their neglect to exercise the power in no sort defeats the power itself.”). In *United States v. Nice*, 241 U.S. 591, 600 (1916), the Court explained that Congress’ constitutional authority over tribes is “a continuing power of which Congress . . . [can]not divest itself. It [can] be exerted at any time and in various forms during the *continuance of the tribal relation*” (emphasis added). In other words, Congress’ jurisdiction over a tribe continues to exist at all times unless and until the tribe itself (the “tribal relation”) no longer exists. In *McClanahan v. State Tax*



*Comm'n of Arizona*, 411 U.S. 164, 173 n.12 (1973), the Court explained that the provision of state services for “these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary *abandonment of their tribal organization*.”) (quoting *The Kansas Indians*, 5 Wall. 737, 757 (1867) (emphasis added). “Abandonment of tribal organization” or “abandonment of tribal relations” are the phrases often used to describe the de facto “extinction” of a tribal entity.

The fact that the United States may not have extended formal federal recognition to a tribe during some time period, or that it has not otherwise exercised its jurisdiction during some time period, does not destroy the continuance of the underlying federal jurisdiction. See *United States v. John*, 437 U.S. 634, 653 (1978) (discussed above in Part I, Section B.1.), in which the Supreme Court held that “the fact that federal supervision over [. . . the Mississippi Choctaw] has not been continuous” does not “destroy the federal power [under the Indian Commerce Clause] to deal with them”. See also *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 374 (1<sup>st</sup> Cir. 1975), also discussed above, in which the First Circuit confirmed that the Passamaquoddy Tribe was entitled to the protections of the federal Nonintercourse Act even though the United States had not extended formal recognition to that tribe and even though the United States routinely had ignored the tribe for decades. In other words, the United States’ long failure to *exercise* its jurisdiction over the Mississippi Choctaw and Passamaquoddy Tribes did not destroy the United States’ underlying legal jurisdiction over the Tribes. That federal jurisdiction over tribes does not dissipate from non-use was understood in years leading up to enactment of the IRA as well, as evidenced by the following entry from a 1929 legal digest:

Under the constitution of the United States the power “to regulate commerce with the Indian tribes” is expressly vested in Congress. By virtue of this clause, traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress . . . *The power is broad and as free from restrictions as that to regulate commerce with foreign nations, and is in nowise affected by the magnitude of the traffic or the extent of the intercourse. As long as the Indians remain a distinct people, with existing tribal organizations, recognized by the political department of the government, Congress has the power to say with whom, and on what terms they shall deal, and what articles shall be contraband.*

14 Ruling Case Law § 42 (1916 ed.) at 144.

Congress’ failure to *exercise* jurisdiction over a tribe might be based on a conscious decision to withdraw supervisory services (e.g., the termination statutes discussed below), might be based on ignorance of the tribe’s existence (see Justice Breyer’s discussion at 129 S.Ct. 1058, 1069-70 (Breyer, J., concurring), or it might be based on a mistaken belief that the tribe no longer exists (*id.* at 1070; see also *Grand Traverse Bay Band v. Office of U.S. Attorney*, 369 F.3d 960, 961 (6<sup>th</sup> Cir. 2004). In all of these situations, Congress has continuing authority to modify or correct its posture vis-à-vis the affected Indian tribe.

Accordingly, the fact that Congress’ failure (or disinclination) to exercise its legal authority over a tribe does not diminish the continued existence of that legal authority is easily illustrated by the Congressional actions that terminated, and then later restored, the formal federal recognition of various tribes. In these statutes, Congress terminated the United States’ *supervisory activities* (i.e., the

exercise of jurisdiction), but Congress did not terminate the actual *existence* of the tribe<sup>14</sup> and it certainly did not limit its own continuing constitutional jurisdiction over the tribe. The termination statutes codified in Title 25 of the United States Code<sup>15</sup> fall into this category and all use language that makes clear that it is the United States' *supervision* that is being terminated -- *not* the United States' continuing legal jurisdiction, and *not* the physical existence of the tribe itself. A typical example is the Klamath Tribe's termination statute:

#### SUBCHAPTER XIII--KLAMATH TRIBE: TERMINATION OF FEDERAL SUPERVISION

The purpose of this subchapter is to provide for the termination of *Federal supervision over the trust and restricted property* of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, *and of the individual members thereof*, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a *termination of Federal services furnished such Indians because of their status as Indians*.

Even though this statute terminated the United States' provision of federal services to the Klamath (and effectively terminated its status as a "federally recognized tribe"), the fact that the federal

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<sup>14</sup> That the existence of a "tribe" is not dependent on the formal act of conferring federal recognition or acknowledgment of the tribe is well established. *See, e.g.*, May 11, 2005 Testimony of R. Lee Fleming, Director, Office of Federal Acknowledgment, Office of the Assistant Secretary – Indian Affairs, Department of the Interior, Before the Senate Committee on Indian Affairs, Hearing on the Federal Acknowledgment Process, <http://www.doi.gov/ocl/2005/FedAcknowledgement.htm> ("The Department's regulations are intended to apply to groups that can establish a substantially continuous tribal existence and that have functioned as autonomous entities throughout history until the present. When the Department acknowledges an Indian tribe, it is acknowledging that an inherent sovereign continues to exist. The Department is not 'granting' sovereign status or powers to the tribe, nor creating a tribe made up of Indian descendants."); March 31, 2004 Testimony of R. Lee Fleming, Director, Office of Federal Acknowledgment, Office of the Assistant Secretary-Indian Affairs, Department of the Interior, Before the House Resources Committee, Oversight Hearing on Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs, H. Hrg. 108-89 at 78 ("The Federal acknowledgment process regulations at 25 C.F.R. Part 83 govern the Department's administrative process for determining which groups are Indian tribes within the meaning of Federal law. A final determination that a group is an Indian tribe means, among other things, that it has continuously existed as a tribe . . .").

<sup>15</sup> *See* 25 U.S.C. §§ 564–564x ("Klamath Tribe: Termination of Federal Supervision"); 25 U.S.C. §§ 677–677aa ("Ute Indians of Utah: Distribution of Assets between Mixed-Blood and Full-Blood Members; *Termination of Federal Supervision* over property of mixed-blood members"); 25 U.S.C. §§ 691–708 ("Western Oregon Indians: *Termination of Federal Supervision*"); 25 U.S.C. §§ 721–728 ("Alabama and Coushatta Indians of Texas: *Termination of Federal Supervision*"); 25 U.S.C. §§ 741–760 ("Paiute Indians of Utah: *Termination of Federal Supervision*"); 25 U.S.C. §§ 971–980 ("Ponca Tribe of Nebraska: *Termination of Federal Supervision*") (emphasis added). We note there is one instance in which Congress used the term "termination of federal *jurisdiction*" rather than "termination of supervision." Congress entitled the Menominee termination statute, 68 Stat. 250 (1954) 25 U.S.C. §§ 891–902, "Withdrawal of the Menominee Tribe from Federal Jurisdiction." This phraseology is not repeated in the text of statute itself, which instead consistently uses the phrase "termination of Federal supervision," and when Congress restored the Tribe's recognition it described the restoration legislation as "an act to repeal the act terminating Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." 87 Stat. 770 (1973).

government continued to exercise legal jurisdiction over the terminated tribe is evidenced by Congress' express reservation of certain water and hunting and fishing rights for the Tribe:

564m. [Klamath] Water and fishing rights.

(a) Water rights; laws applicable to abandonment

*Nothing in this subchapter shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 564q of this title.*

(b) Fishing rights or privileges

*"Nothing in this subchapter shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty."*

25 U.S.C. § 722 (emphasis added). This language makes clear that the United States has terminated its supervisory role (and hence the Tribe's federally recognized status), but also makes clear that the Klamath tribe will continue to enjoy certain treaty-based fishing privileges. Congress clearly contemplates that the Tribe continues to exist, continues to enjoy certain rights directly related to its status as an Indian tribe, and continues to be under federal jurisdiction.

Probably the ultimate expression of Congress' continuing, uninterrupted jurisdiction over Indian tribes is Congress' exercise of its authority to undo termination – to *restore* federal recognition (by restoring the provision of services and establishing a government-to-government relationship) to previously terminated tribes. When Congress restores supervision and reestablishes a government-to-government relationship with a terminated tribe, by definition it is exercising its continuing legal jurisdiction over that tribe. Again using Klamath as a typical example, Congress enacted restoration legislation now codified at 25 U.S.C. §§ 566 - 566h, which provided that "Notwithstanding any provision of law, Federal recognition is hereby extended to the tribe and to members of the tribe. Except as otherwise provided in this subchapter, all laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians which are not inconsistent with any specific provision of this subchapter shall be applicable to the tribe and its members." 25 U.S.C. § 566(a). If Congress did not hold continuing legal jurisdiction over the Klamath Tribe after termination, Congress would not have had the authority to reverse course and restore formal recognition to that Tribe.<sup>16</sup>

The same analysis applies to explain the legal underpinnings of the Department's Federal Acknowledgement Process (FAP) by which tribes administratively may be federally acknowledged and/or restored to federal recognition. (25 C.F.R. Part 83.) Here too the United States relies on its continuing federal jurisdiction over *all* tribes regardless of whether those tribes are federally recognized. (*See* 25 C.F.R. Part 83, which identifies 25 U.S.C. § 2 as a basis for the authority to

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<sup>16</sup> Congress also has restored federal recognition of tribes for which the particular termination legislation did not expressly reserve usufructory rights or eligibility for federal services based on their status as Indians or an Indian tribe. *See* 25 U.S.C. §§ 971 - 980 (Ponca Tribe of Nebraska: Termination of Federal Supervision); 25 U.S.C. §§ 931-938 (Catawba Tribe of South Carolina: Division of Assets).

promulgate acknowledgment regulations). Unless Congress has continuing, plenary federal jurisdiction over all existing Indian tribes, even unrecognized tribes,<sup>17</sup> there can be no authority delegated to the Department<sup>18</sup> to use its Part 83 process to extend federal acknowledgment (recognition) to those petitioning groups that Interior finds to be tribes that have existed continuously without abandonment of tribal relations. Thus, the legal authority on which the Department relies to implement its Federal Acknowledgment Process is based entirely on the federal government's continuing legal jurisdiction over unrecognized tribes. *See also* discussion in Part I, Subpart D below.

In sum, Congress has no power to divest itself of the authority granted to it by the Constitution. Accordingly, federal jurisdiction over tribes continues whether or not the United States exercises that jurisdiction, it continues whether or not the tribe has been formally recognized by the United States, and it ceases to exist only if the tribe no longer exists as a tribe (*see* discussion in Part I, Subpart C).

#### ***4. The Federal Government Has Adopted the Same Legal Analysis as it Relates to Tribal Jurisdiction***

This analysis of *federal jurisdiction* is consistent with the federal government's long standing analysis of *tribal jurisdiction*. The federal agencies repeatedly have determined that whether property or a particular matter is under tribal jurisdiction is a *legal* question distinct from the factual question of whether that jurisdiction is being exercised.

For example, in order to conduct a gaming operation on off-reservation land under the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701 *et seq.*) a tribe must be able to demonstrate that the off-reservation property is land "within such tribe's jurisdiction" and "over which an Indian tribe *exercises* governmental power". 25 U.S.C. §§ 2710(b)(1) and 2703(4)(B) (emphasis added). The National Indian Gaming Commission (NIGC) consistently has explained that the exercise of jurisdiction (the exercise of governmental power) is necessarily predicated on the underlying existence of legal jurisdiction. "In order to exercise governmental power over its land, the Band, like any other government, must first have jurisdiction to do so." *See* January 20, 2009, Letter from NIGC Chairman Hogen to Seneca Nation President Snyder approving Nation's Class III Gaming Ordinance, at 8. In its Mechoopda Indian Lands Opinion, NIGC explained under the heading of "Jurisdiction":

Because the land at issue is off-reservation, the Tribe has the additional burden of establishing that it exercises "governmental power" over the parcel it intends to use for gaming purposes. *See* 25 C.F.R. § 502.12(b). "*Tribal jurisdiction*" is a threshold requirement to the exercise of governmental power. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701- 703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C.Cir.1998) (In

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<sup>17</sup> Again, an unrecognized tribe must be understood as fundamentally different from a group that calls itself a "tribe" but has been found to have abandoned federal relations. *See* discussion below.

<sup>18</sup> Interior and the courts have relied on the authority granted by Congress in 25 U.S.C. § 2 to conclude that Congress provided the Department with legal jurisdiction to extend acknowledgment to tribes through this process.

addition to having jurisdiction a tribe must exercise governmental power in order to trigger [IGRA]); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1217-18 (D.Kan.1998) (*Mami II*) (A tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan.1996) (*Miami I*) (the NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D.Kan. 2000), *aff'd and remanded*, *Kansas v. United States*, 249 F.3d 1213 (10<sup>th</sup> Cir. 2001).

March 14, 2003 NIGC Indian Lands Memorandum Regarding Mechoopda, at 3 (emphasis added). NIGC has reiterated this analysis in numerous other legal opinions, including: April 23, 2008 Letter from NIGC to Principal Chief A.D. Ellis, Muscogee (Creek) Nation; Oct. 22, 2007 NIGC Memorandum Regarding Ponca Tribe of Nebraska, Site Specific Gaming Ordinance, *rev'd in part by In re: Gaming Ordinance of the Ponca Tribe of Nebraska* (NIGC Dec. 31, 2007); Oct. 18, 2007 NIGC Memorandum re: Mooretown Rancheria Restored Lands; January 20, 2009, Letter from NIGC Chairman Hogen to Seneca Nation President Snyder approving Nation's Class III Gaming Ordinance, at 8; Sept. 6, 2006 NIGC Memorandum Regarding Gaming by the Big Sandy Rancheria on the McCabe Allotment; Nov. 15, 2005 NIGC Memorandum Regarding Kiowa Indian Tribe of Oklahoma – Gaming Site; July 19, 2004 NIGC Memorandum Regarding Legality of Gaming Under IGRA on the Shriner Tract owned by the Wyandotte Tribe; Aug. 5, 2002 NIGC Memorandum Regarding Bear River Band of Rohnerville Rancheria; Sept. 29, 2000 Letter from NIGC to Chief Jim Henson, United Keetoowah Band of Cherokee Indians of Oklahoma.

The Department of the Interior has adopted the same analysis in analogous contexts. For example, in the Office of the Solicitor's Elk Valley Indian lands opinion (provided in the context of a fee-to-trust application), the Department explained:

[t]he Tribe has the burden of establishing it has jurisdiction and exercises “governmental power” over the parcel in order for the land to qualify as “Indian lands.” See 25 U.S.C. § 2703(4)(b) and 25 C.F.R. § 502.12(b). “Tribal jurisdiction” is a threshold requirement for the exercise of governmental power. See, e.g., *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1<sup>st</sup> Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C.Cir. 1998); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D.Kan. 1998); *State ex rel. Graves v. United States*, 86 F. Supp. 2d 1094 (D.Kan. 2000), *aff'd and remanded*, *Kansas v. United States*, 249 F.3d 1213 (10<sup>th</sup> Cir. 2001).

July 13, 2007 Dept. of the Interior Elk Valley Indian Lands Determination, at 3 (*emphasis added*); see also October 31, 2002 Dept. of the Interior Memorandum Regarding Maria Christiana Reserve (“analysis of the ‘Indian lands’ definition is not necessary if the Tribe does not possess the requisite jurisdiction over the Reserve.”).

The federal courts have agreed with the agencies that existence of jurisdiction is a matter of law. Jurisdiction is not created by its exercise, but rather exists in its own right. See *Kansas v. United*

*States*, 249 F.3d 1213, 1229 (10<sup>th</sup> Cir. 2001) (Whether tribe has jurisdiction is a “threshold question” and by “concluding that the Tribe exercised governmental power over the tract without first establishing the Tribe’s jurisdiction over the tract, the NIGC, in effect, put the cart before the horse.”); *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 905 (9<sup>th</sup> Cir. 1994) (“Tribal jurisdiction . . . is a question of federal law reviewed de novo.”); *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10<sup>th</sup> Cir. 1996) (applying de novo review standard to “the legal question of tribal jurisdiction over allotted lands.”); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D.Kan. 1998) (a tribe must have jurisdiction in order to be able to exercise governmental power).

The point is that expressions of the federal government’s exercise of its jurisdiction over a tribe – identifying the tribe on a list, providing services to the tribe and its members, etc. – certainly are indicators of the federal government’s own view that it has jurisdiction over a particular tribe (*see* Part II below for a discussion about the factual indicators of the federal government’s exercise of jurisdiction over the Cowlitz Indian Tribe). But the factual inquiry as to whether jurisdiction has been exercised cannot supplant the fundamental principle of law that *Congress has continuous plenary jurisdiction over Indian tribes whether or not it is exercising that jurisdiction*.

### **C. CONGRESS LIMITED THE SECRETARY’S AUTHORITY BY IMPOSING MORE RESTRICTIVE DEFINITIONS OF “INDIAN” AND “TRIBE”**

Congress of course may delegate its authority over Indian matters to the federal agencies. The various authorities provided to the Secretary under the IRA are authorities delegated by Congress and therefore derive from Congress’ plenary authority over Indians. Congress, however, imposed very real restrictions on this delegation of authority. More specifically, Congress consciously imposed limitations on who the Department could consider an “Indian” and on what groups of Indians the Department could consider a “tribe.” Who is an “Indian” and which groups are “tribes” may seem obvious – and not particularly limiting – to us today when we have an official list of recognized tribes and an administrative acknowledgment process for tribes seeking federal recognition, but in 1934, which groups should be considered tribes, and which should not, was not nearly so clear.

The Indian Reorganization Act of 1934 signaled a major shift in federal relations with Indians, and a rejection of the damaging policies of assimilation that had guided federal policies since the early days of our Nation. When Congress debated the language of the IRA it clearly understood that many tribes in fact had ceased to exist (whether through extinction, assimilation into non-Indian culture, or absorption into other tribes), and that the status of many others was in doubt. There was no comprehensive list of tribes, and there was no standard definition of a “tribe” – in fact, to the best of our knowledge Congress had never attempted to define either term prior to its efforts to do so in the Indian Reorganization Act.<sup>19</sup> As discussed in more detail below, BIA Commissioner John Collier and Senate Indian Affairs Committee Chairman Burton Wheeler clashed over how inclusive these terms would or would not be. Ultimately Commissioner Collier was forced to accept definitional language that was significantly more restrictive than that for which he originally advocated, and that accordingly limited the Department’s authority to those individuals and groups which could meet *Congress’* – rather than Commissioner Collier’s – definition of “Indian” or “tribe.”

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<sup>19</sup> *See, e.g.*, 14 Ruling Case Law § 1 (1929 ed.) at 110 (“1. Who Are Indians - No precise, all-inclusive definition of ‘Indians’ has been attempted by the courts or by Congress.”).

## 1. *Historical Backdrop: A Long History of Forced Assimilation*

For the entire period of American history preceding the enactment of the IRA in 1934, the United States' policy toward Indian tribes had been unendingly and unabashedly one of forced assimilation, wholesale removal, and even extinction. *See generally*, Cohen, Handbook of Federal Indian Law, at § 1.04 (2005 ed.). Early in our Nation's history, Thomas Jefferson wrote to tribal leaders that their tribes should "form one people with us, and we shall all be Americans; you will mix with us by marriage, your blood will run in our veins, and will spread with us over this great island [or instead face] the gloomy prospect you have drawn of your total disappearance from the face of the earth. . . ." <sup>20</sup> A decade later, a congressional House Report recommended the establishment of a "Civilization Fund" to "educate" Indian children, and explained: "In the present state of our country one of two things seems to be necessary. Either that those sons of the forest should be moralized or exterminated." Alice C. Fletcher, Indian Education and Civilization, Bur. of Educ. Special Report, 48th Cong. 2d Sess., S. Exec. Doc. No. 95, 162 (GPO 1888) (cited in Cohen, 2005 ed., at 1356) (emphasis added).

The idea that Indian people should be assimilated into non-Indian culture and that continued tribal organization should be discouraged was epitomized by the federal government's Indian boarding school system. During the nineteenth century, the United States *intended* that generations of Indian children would become less and less "Indian." *See* Cohen, Handbook of Federal Indian Law § 22.03[1][a] (2005 ed.) ("federal officials sanctioned removing young children from their homes (citation omitted), punishing them for speaking their Native languages, and even denying parents subsistence rations if they did not send their children to school" (citing 25 U.S.C. § 283)).

The pressure to assimilate individual Indians and to break up tribal relations was particularly intense in the later half of the nineteenth century, as described by Felix Cohen in the 1941 edition of his Handbook of Federal Indian Law:

The decade of the 1880's was marked by the rapid settlement and development of the West. As an incident to this process, legislation providing for acquisition of lands and resources from the Indians was demanded. *Ethical justification for this was found in the theory of assimilation.* If the Indian would only adopt the habits of civilized life he would not need so much land, and the surplus would be available for white settlers. . . . *The most important statute of the decade is, of course, the General Allotment Act.*"

*Id.*, at 78 (1941 ed.) (emphasis added). That the General Allotment Act was used as a weapon of assimilation was discussed by Cohen at some length in that same 1941 Handbook: "The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in the concepts of property was fundamental in the contrast between the two ways of life. So . . . allotment was counted on to *break up tribal life* . . . ." *Id.* at 208 (emphasis added). *See also* 14 Ruling Case Law § 30 (1916 ed.) at 128 ("In *pursuance of a policy favoring*

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<sup>20</sup> Advice to Indian Chiefs: To Captain Hendrick, The Delawares, Mohicans, And Munries, Dec. 21, 1808, *as reprinted in* Letters And Addresses Of Thomas Jefferson 188 (William B. Parker and Jonas Viles ed., Unit Book Publishing Company) (1905) (emphasis added).

*the separation of the Indian from his tribal relations*, various treaties have been made for the extinguishment of the Indian title and the conveyance to individual Indians of the fee held by the United States.”) (emphasis added); E. Rusco, *A FATEFUL TIME, THE BACKGROUND AND HISTORY OF THE INDIAN REORGANIZATION ACT* (2000) at 8 (“The Commissioners of Indian Affairs from D.C. Atkins (who was in office when the [General Allotment Act] was passed) to [the Commissioner in office in] 1929 had been united in their belief that their task was to bring about the assimilation of American Indians into general American culture.”).

It is in the context of this very real history of assimilation, and the damage assimilationist policies had done to tribal structure, that Commissioner Collier set out to reverse the General Allotment Act policies through enactment of the IRA. Many tribes in fact had been irrevocably broken up in the preceding century and a half, and as discussed below, many in Congress, including Senate Indian Affairs Committee Chairman Wheeler, were not interested in entirely “undoing” the assimilation that already had been accomplished.

## ***2. Tribes Without Reservations: Congress Strictly Limited the Application of the IRA to “Half-Blood” Communities and Tribes Found Still Maintaining Tribal Relations***

For the reasons discussed in the previous section, when Congress took up the Indian Reorganization Act in 1934, it certainly understood that many former tribes no longer existed,<sup>21</sup> and that others were on the verge of extinction.<sup>22</sup> It also understood that through intermarriage with non-Indians some Indian groups were less and less racially “Indian” even though those groups maintained tribal relations. And finally, Congress understood that there were tribes for which the United States held no reservation lands – Congress knew this in part because one of Commissioner Collier’s main focuses had been on the provision of federally protected lands to “homeless” Indians.<sup>23</sup> The legislative history of the IRA evidences a fair amount of initial disagreement about

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<sup>21</sup> The Bureau of American Ethnology, established by Congress in 1879, conducted field research on Indian tribes and Indian people until 1933. The Bureau’s annual reports detailed the threats to tribal languages and cultures and the impending dissolution of Indian tribes caused by rapid population reduction and economic pressures. *See Annual Reports of the Bureau of American Ethnology, 1881-1933. The Indian Tribes of North America*, by John R. Swanton, 1953, Bureau of American Ethnology, Bulletin 145, U.S. Government Printing Office, Washington, D.C., further recounts the tragic history of the 1860-1920 time period that resulted in the extinction of many tribes. For example, the Bureau of American Ethnology explained that the Yana Tribe constituted “a distinct linguistic family, formerly occupying the territory from Round mountains near Pit river, Shasta County, to Deer creek, Tehama County, California . . . . In Aug. 1864 the neighboring miners organized a massacre of the whole tribe, then numbering about 3,000, of whom all but about 50 were slaughtered in the course of a few days. In 1902 Dixon reported only about half a dozen remaining.” *Handbook of American Indians North of Mexico*, Bureau of American Ethnology, Bulletin 30, Part II, 987 (1910).

<sup>22</sup> *See, e.g.*, the transcript from a Senate Indian Affairs Subcommittee Hearing that took place on March 28, 1930 in Rock Hill, South Carolina, to discuss the present state of the Catawba Tribe. (This was one of a series of Subcommittee field hearings held in 1930 by the Senate Committee on Indian Affairs to ascertain the status of certain Indian tribes.) Senator Elmer Thomas of Oklahoma requested of Mr. Lesesne, the principal of the local high school, “I wish you would put into the record the tendency of the tribe as to increasing or decreasing their number.” Upon Mr. Lesesne’s response Senator Thomas further inquired, “At the present rate of decrease, how long will it be before they become extinct[?]” *Survey of Conditions of the Indians in the United States: Hearing before the Subcomm. of the Senate Committee on Indian Affairs, 71st Cong., 3d Sess., p. 7542 (1930). Id.* This dialogue, coupled with the focus of these field hearings themselves, is an example of Congress’ awareness that many Indian tribes were in danger of, as Senator Thomas put it, becoming “extinct.”

<sup>23</sup> One of Collier’s goals for the Indian Reorganization Act was to create a mechanism by which landless Indians could obtain land and have the ability to organize into some form of self-governing group. The initially proposed version of



who should and should not be considered an “Indian” or a “tribe” eligible for IRA benefits. Accordingly, fashioning definitions of “Indian” and “tribe” was no easy or obvious task, and the effort demonstrated some of the profound differences in outlook between the Chairman of the Senate Indian Affairs Committee, who still held assimilationist views, and BIA’s Commissioner, who seems to have been determined to restore self-government to a wider array of people he considered to be Indian. *See generally* E. Rusco, *A FATEFUL TIME, THE BACKGROUND AND HISTORY OF THE INDIAN REORGANIZATION ACT* (2000).

Although Congress did not have the power to divest itself of its general, constitutionally-based legal jurisdiction over Indian tribes, it did have the power to limit the IRA’s application by adopting more restrictive definitions of “Indian” and “tribe”<sup>24</sup> than had been advocated by Collier, and it had the power to require federal confirmation that a particular group is a “tribe” (*i.e.* to require federal recognition) before that tribe would be eligible for the IRA’s benefits. While Senate Indian Affairs Committee Chairman Wheeler ultimately was willing to allow enactment of legislation to halt the assimilation process, he was opposed to enacting legislation that he thought might interfere with assimilation that he considered to already have taken place.<sup>25</sup> Consistent with these views, he sought

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the IRA provided for the issuance of charters to Indian groups. Within the Act a “charter” was defined as “any grant of power by the United States, whether or not such power includes the privilege of corporate existence,” and these charters were to serve as the basic legal structure for Indian communities’ self-governance/organization. Title 1 §13(d). H.R. 7902, 73<sup>rd</sup> Congress, 2<sup>nd</sup> Session. The draft legislation defined “Indian” as “persons to whom charters may be issued... [and] shall further include all other persons of one-fourth or more Indian blood.” *Id.* at Title 1 §13(b). This draft of the IRA allowed the Secretary of the Interior to issue charters to two distinct groups of Indians; “Indians residing upon any Indian reservation or reservations or subdivision thereof,” and to landless Indians. *Id.* at Title 1 §2. The act also authorized the Secretary to acquire lands, “for Indians whom reservation or other land is not now available.” *Id.* at, Title III §7. Through these provisions the Secretary would be able to purchase land for landless Indians, allow those Indians to move to this newly purchased land, and then issue them a charter (provided of course that they fulfill the one-fourth blood quantum requirement). Rusco, *A Fateful Time*, at 221 (2000). In a letter to W.A. Frisbie of the *St. Paul Dispatch*, Collier explained the charter will help to organize various Indian communities. However, Collier stressed “[w]e do not believe that there can or will be a rapid, universal organization of Indian communities. As we see it, they will be formed initially on a small scale here and there, primarily to take care of at least a part of the Indians who are now entirely landless and destitute.” Rusco, at 217. There was no provision that the landless Indians, which these charters sought to bring together “be of the same cultural or genetic background and heritage, so in effect new ‘tribes’ were to be created that were ‘Indian’ in a racial sense but shared little else in common.” Deloria, *The Indian Reorganization Act; Congresses and Bills*, at xii (2002).

<sup>24</sup> *See United States v. Sandoval*, 231 U.S. 28, 46 (1913), in which the Supreme Court articulated the parameters of Congress’ authority to legislate for “tribes” (in that case pueblos) under the Indian Commerce Clause: “Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.” *See also Montoya v. United States*, 180 U.S. 261, 266 (1901) in which the Court defined “tribe” as “a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”

<sup>25</sup> During the Senate Committee on Indian Affairs hearing on the proposed Indian Reorganization Act, Chairman Wheeler declared, “What we are trying to do is get rid of the Indian problem rather than to add to it.” *S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise*, Hearing before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 264 (1934). Chairman Wheeler was adamantly opposed to extending Federal services to Indians who, in his view had assimilated either by virtue of their blood quantum or their societal status. He asserted that it is “perfectly idiotic in my judgment for the Government of the United States to continue to manage the property of Indians who are of the one-eighth blood.” *Id.* Further, he exclaimed “Why should the Government of the United States be managing the property of a lot of Indians who are practically white and hold office [referring to former Vice-President of the United States Charles Curtis, who was Indian and as such had his property held in trust by the United States] and do everything else...?” *Id.*

to define “Indian” and “tribe” in ways that would encompass fewer “assimilated” Indians than would have Commissioner Collier’s original definition.

For both Collier and Wheeler, tribes (and tribal members) resident on federal reservations were easy enough to identify, and the fact that they lived on reservations made it clear that they *already* were under federal jurisdiction and supervision.<sup>26</sup> Accordingly, definitional language that included Indians (and their descendants) living on reservations is found both in the original legislative language proposed by Collier,<sup>27</sup> and in the final version of the Indian Reorganization Act accepted by Wheeler.<sup>28</sup>

More difficult was the question of whether the IRA should be extended to tribes and individual Indians for which/whom there was no reservation. More specifically, should persons and groups not currently under federal supervision be made eligible for the IRA, and if so, where would be the limit? The legislative history contains exchanges among Chairman Wheeler, other members of the Senate Indian Affairs Committee, and Commissioner Collier which evidence how they struggled with these questions. As discussed below, by limiting the definition of “Indian” (and collaterally the definition of *Indian* “tribe”), Congress imposed real limitations on the IRA’s availability to “homeless” (reservation-less) Indians.

First, non-reservation persons were to be brought within the definition of “Indian” if they had a certain amount of Indian ancestry. Commissioner Collier (and the House of Representatives<sup>29</sup>) believed that any person who could demonstrate one-quarter Indian ancestry should be considered an Indian even if the person was not an enrolled member of a tribe or did not live on a reservation. Chairman Wheeler strongly disagreed. Following is an excerpt from a Senate Indian Affairs Committee hearing which illustrates, among other things, Chairman Wheeler’s discomfort with bringing persons he believed were already assimilated under federal supervision as Indians:

Senator Thomas of Oklahoma. That distinction is not made here. For example, roaming bands of Indians are not covered by this provision [the way it is currently written]. If they are not a tribe of Indians they do not come under it. And we have in my State a great many numbers of Indians that are practically lost. They are not registered; they are not enrolled; they are not supervised. They are remnants of a band. Yet as I see it they could not come under this act because they are not under the authority of the Indian Office, and

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<sup>26</sup> Chairman Wheeler effectively conceded that while there were persons who he personally no longer deemed “Indian” living on reservations, that the purpose of this statute was not to revisit whether Indians and tribes already under federal supervision should continue to be. *Id.* at 266-67.

<sup>27</sup> H.R. 7902, 73<sup>rd</sup> Cong. (1934) (“Section 13(b) The term ‘Indian’ as used in this title . . . shall include all persons of Indian descent who are members of any recognized tribe, band or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-fourth or more Indian blood . . . .”)

<sup>28</sup> The term “Indian” in the final version of section 479 includes persons who are descendants of tribal members living on a reservation in 1934.

<sup>29</sup> H.R. 7902, 73<sup>rd</sup> Cong. § 13(b) (1934).

Mr. Wilbur, when he was Secretary, said he was not looking for more Indians. The policy then was to not recognize Indians except those already under authority. They refused to enroll any more, and the Indians outside could not come into the rolls, even full-bloods.

The Chairman. Of course this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of at the present time.

Senator Frazier. Those other Indians have got to be taken care of though.

The Chairman. Yes; but how are you going to take care of them unless they are wards of the Government at the present time?

Senator Thomas of Oklahoma. Take, for example, the Catawbias in South Carolina where we visited. I think that is the most pathetic and deplorable Indian tribe that I have discovered in the United States. I think the Seminoles in Florida should be taken care of. They are in bad circumstances. They are just as much Indians as any others.

The Chairman. There is a later provision in here [in the proposed legislation] I think covering that [*i.e.*, covering tribes like the Catawbias], and defining what an Indian is.

Commissioner Collier. This is [the] more than one-fourth Indian blood [provision].

The Chairman. That is just what I was coming to. As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half.

In other words, I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.

*S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise*, Hearing before the Senate Committee on Indian Affairs, 73d Cong., p. 263-64 (1934). This exchange among the members of the Senate Indian Affairs Committee demonstrates two things. The first is that Chairman Wheeler would not tolerate providing IRA benefits to groups of homeless Indians – particularly the benefit of allowing them to organize as a tribe under the IRA -- unless they possessed a greater measure (one-half instead of one quarter) of Indian ancestry. The definition of “Indian” in the final version of Section 479 reflects

this further limitation: “The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and *shall further include all other persons of one-half or more Indian blood.*”<sup>30</sup>

Secondly, also evident from the exchange above is the strong concern expressed by other Committee members (Senators Thomas and Frazier) that there were yet reservation-less Indians who might not meet Senator Wheeler’s higher blood quantum requirement, but who had not abandoned tribal relations and who ought also to be made eligible for IRA benefits. Senator Thomas points to the Catawbas as a tribe of Indians that is “just as much Indians as any others” as such a group. The Senators understood that no federal reservation was set aside for the Catawbas (*see Survey of Conditions of the Indians in the United States*, Hearing before the Subcomm. of the Senate Committee on Indian Affairs, 71<sup>st</sup> Cong., 3d Sess., p. 7543-44, 7547-48 (1930)), and they also understood that many of the Catawbas would not meet the “half-blood” requirement:

The Chairman. (reading [from the draft legislative text]): The term “tribe” wherever used in this act shall be construed to refer to any Indian tribe, band, nation, pueblo[.] . . .

Senator Thomas of Oklahoma. Under this language would this not cover into the Department under its jurisdiction the Catawbas[?] . . .

The Chairman. If they are half bloods. If they are half-blood Indians under this law, as I understand it, it would permit the Government to take those over.

Senator Thomas of Oklahoma. They are living on a [state, not federal] reservation and they are descendants of Indians and *they are not half bloods.*

The Chairman. If they are not half-blood Indians we should not take them in.

Senator Thomas of Oklahoma. Some of them are practically white. They have 500 acres of the poorest land in South Carolina. The Indians always got the poorest land.

Commissioner Collier. Are they living on it?

Senator Thomas of Oklahoma. They are living on it, and that is all they are doing, in the State of South Carolina. The Government has not found out they live yet, apparently.

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<sup>30</sup> There are numerous federally recognized tribes that organized as tribes under IRA based on this half-blood community provision, *e.g.*, the Jamul Indian Village of California, the Duckwater Shoshone Tribe of the Duckwater Reservation, the St. Croix Chippewa Indians of Wisconsin, the Quartz Valley Indian Community of the Quartz Valley Reservation, the Yomba Shoshone Indians, the Sokaogan Chippewa Indians and the Mississippi Band of Choctaw Indians.

The Chairman [Wheeler]. [referring to the Act's application to the Catawbas] *They would not be affected [i.e. would not be eligible for the IRA] unless they are half-blood Indians. If they are half-blood Indians they [Interior] would have to take them over under this act.*

Senator Thomas of Oklahoma. *Some of them presumably are half bloods, but most of them are not.*

Senator O'Mahoney. *You are sure about that, Mr. Chairman? The first sentence of this section says, "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe" – comma. There is not limitation of blood so far as that is concerned.*

Senator Frazier. That would depend on what is construed membership.

Senator O'Mahoney. "The term 'tribe' wherever used in this act" – and that means up above – "shall be construed to refer to any Indian tribe, band, nation, pueblo." *Now, the Catawbas certainly are an Indian tribe.*

The Chairman [Wheeler]. *You would have to have a limitation after the description of the tribe.*

Senator O'Mahoney. *If you wanted to exclude any of them you certainly would in my judgment.*

The Chairman [Wheeler]. *Yes; I think so. You would have to.*

Senator O'Mahoney. *But I know of no reason why the benefits of the act, if they are benefits, should not be extended.*

The Chairman [Wheeler]. *Providing that they are half-blood Indians.*

Senator O'Mahoney. *Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the [federal] reservation?*

The Chairman [Wheeler]. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Senator O'Mahoney. If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but [we] must have a general definition.

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

*S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise*, Hearing before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 265-66 (1934) (emphasis added). Commissioner Collier offered this suggestion as compromise language to address both Senator O'Mahoney's (and Senator Thomas') concern that the tribes like the Catawba *be included*, and Chairman Wheeler's concern that groups which have abandoned tribal relations *not be included* in the definition of Indian tribe. In other words, Commissioner Collier offered – and Congress accepted -- the phrase "now under federal jurisdiction" to address the situation in which a tribe was not currently under federal supervision (meaning the Department was not at that time exercising its authority over and providing services to the tribe),<sup>31</sup> and its members might not meet the half-blood quantum requirement, but the federal government nevertheless views the tribe as one that has maintained tribal relations and therefore is still under federal jurisdiction. Members of such tribes are included within the definition of "Indian," and accordingly tribes composed of such persons are Indian "tribes."

Further underscoring the idea that the only reservation-less tribes which would be made eligible for the IRA would be ones that the federal government agreed still maintained tribal relations (and hence were still under federal jurisdiction) is the requirement that the tribe be recognized by the United States ("*recognized* tribe now under federal jurisdiction"). (As discussed earlier, such recognition did not have to be extended in 1934.) By limiting the Secretary's authority under the IRA only to those tribes that are federally recognized, Congress ensured that there would have to be some sort of federal acknowledgment of tribal status before a landless tribe could become eligible for IRA benefits. This recognition limitation continues to be a significant one today. There are *approximately 330 unrecognized* petitioners that still await review and potential acknowledgment under the Department's Part 83 Federal Acknowledgment Process. These groups are not eligible for IRA benefits, despite the fact that some smaller number of them likely meet the legal definition of a tribe set forth by the Supreme Court in *Montoya v. United States* and/or will achieve acknowledgment through the Part 83 process.<sup>32</sup> None of these groups can become eligible for the IRA until the United States makes a determination that they have continuously maintained tribal relations (which in turn demonstrates that they have been under federal jurisdiction). *See* 25 C.F.R. § 83.3 (the regulations are "intended to apply to groups that can establish a substantially

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<sup>31</sup> That the Senate Committee on Indian Affairs understood that the Catawbas were not currently under federal supervision is clear from the Report from Subcommittee Field Hearing *Survey of Conditions of the Indians in the United States*: Hearing before the Subcomm. of the Senate Committee on Indian Affairs, 71<sup>st</sup> Cong., 3d Sess., p. 7546-48 (1930), and also clear from a 1944 Memorandum from Interior's Solicitor, Memorandum for the Assistant Secretary, Catawba Tribe – Recognition Under IRA (Mar 20, 1944).

<sup>32</sup> *Montoya v. United States*, 180 U.S. 261, 266 (1901) (a tribe is "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory").

continuous tribal existence and which have functioned as autonomous entities throughout history [defined as first white contact] until the present”). Therefore, the requirement that a tribe must be federally recognized continues to be a genuinely meaningful limitation on the Secretary’s authority under the IRA.

Because the IRA (and its goal of actually *preserving* tribal governments) was such a radical departure from the previous century and a half of federal Indian policy, and because Commissioner Collier and Chairman Wheeler sometimes seemed to be working at cross-purposes, it is understandable that these definitions of “Indian” and “tribe” were not artfully drafted (the definitions of the two words unquestionably are circular) and that the Department would have to take some time to fully consider and digest Congress’ meaning and intent. Further, Collier clearly chafed at the more restrictive limitations Congress imposed on the definition of Indian. While “under federal jurisdiction” is a crystal clear legal concept, the fact-based exercise of determining which tribes had maintained tribal relations (and therefore were under federal jurisdiction) was an exercise for which the Department had little or no existing guidance. It took officials at the Department of the Interior a little bit of time fully to work through how to implement the requirement. However, as discussed immediately below, soon after the enactment of the IRA the Department accomplished that task and came to a clear conclusion when it considered the specific case of the Catawba Tribe of South Carolina. (Much later the Department would resolve the problem on a more global basis with the adoption of its Federal Acknowledgment Process, *see* Part I, Subpart D below.)

The Department’s dealings with the Catawba Tribe soon after enactment of the IRA underscore that Congress and the Department both understood that there were some landless tribes under *federal jurisdiction* in 1934 that might not achieve *federal recognition* until a later time, and that these tribes would still be eligible for the IRA. When the IRA was enacted the Catawba Tribe was resident on land owned by the State of South Carolina rather than on a federal reservation, and while there were some mid-19<sup>th</sup> century removal treaties to which the Tribe was signatory, prior to the enactment of the IRA the United States had never provided any benefits whatsoever to the Catawba people.<sup>33</sup> In fact, as was discovered in a Senate Indian Affairs Committee Subcommittee Field Hearing conducted in South Carolina, the Department of the Interior did not even seem to be aware that the Catawba still existed. It is for this reason that in a full Committee hearing, in response to a question from Commissioner Collier regarding whether the Catawbas still live on lands set aside for their use, Senator Thomas of Oklahoma (who conducted the Field Hearing) quipped: “They are living on it, and that is all they are doing, in the State of South Carolina. The Government has not found out they live yet, apparently.” *S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise*, Hearing before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 266 (1934).

Only ten years after passage of the IRA, Department of the Interior Solicitor Fowler Harper and BIA Commissioner Collier recommended that the Assistant Secretary authorize the Catawba Tribe to organize under the IRA even though, as discussed above, the Tribe had no federal reservation at the time the IRA was enacted and its members were not half-blood Indians. Solicitor Harper notes that only federally recognized tribes could “take advantage of the act of June 18, 1934”

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<sup>33</sup> *See Survey of Conditions of the Indians in the United States*; Hearing before the Subcomm. of the Senate Committee on Indian Affairs, 71<sup>st</sup> Cong., 3d Sess., p. 7542-3, 7549, 7551 (1930); *see also* Solicitor Harper Memorandum Regarding Questions of the Catawbas’ Identity and Organization as a Tribe and Right to Adopt IRA Constitution (April 11, 1944).

and explains that eligibility for the IRA must be broken down into two parts: continuous tribal existence and federal recognition.

The problem can be broken down into two questions. *In the first place, is there a political organization which can properly be characterized as a tribe in the commonly accepted meaning of that term? In the second place, has there been Federal recognition of tribal existence?* The files are full of evidence which is conclusive that a tribal organization has been continuously maintained by these Indians over a long period of time. . . . There can be no doubt that the Catawba Indians now exist as a tribe and have had a known tribal existence for almost a century [hence they have been under federal jurisdiction].

[Regarding the second question] [t]he Congress has recognized the existence of the Catawba Indian Tribe in two enactments, the act of July 29, 1848 (9 Stat. 252, 264), and the act of July 31, 1854 (10 Stat. 315, 316). These acts appropriated funds for the removal of these Indians west of the Mississippi River, apparently for settlement among the Choctaw and Chickasaw tribes in the Indian Territory. The monies thus appropriated were never used. *Had the plan been carried out, it might well have been that the Catawba Indians would have lost their identity as a tribe by becoming adopted or amalgamated with other tribes. As it turned out, however, they did not lose their identity and have retained their tribal organization ever since.*

Solicitor Harper Memorandum Regarding Questions of the Catawbas' Identity and Organization as a Tribe and Right to Adopt IRA Constitution (April 11, 1944) (emphasis added). The Solicitor concluded that the Tribe was eligible to organize under the Act, stating:

I am persuaded, therefore, that the Catawba Indian Tribe exists, as such, and that it has received recognition by the Federal Government. The Catawba Indians are therefore entitled to vote on the constitution which would be submitted to them by the attached letter of transmittal.

*Id.* Thus, the Department's application of the IRA to the Catawba Tribe, only ten years after enactment of the IRA and with some of the same federal officials involved, demonstrates that the "under federal jurisdiction" phrase was intended to encompass tribes that had maintained tribal relations in 1934 even if they were not resident on federal reservations and even if they were not a "half blood" community. The Department's application of the IRA also demonstrated that the question of whether a tribe is "recognized" did not have to be conclusively answered in 1934, but rather could be determined at a later date.

#### **D. TRIBES RECOGNIZED THROUGH THE FEDERAL ACKNOWLEDGMENT PROCESS, BY DEFINITION, WERE UNDER FEDERAL JURISDICTION IN 1934**

In the modern era, the Department no longer wrestles with the question of whether a tribe has maintained tribal relations on an ad hoc, case-by-case basis in the context of implementing the IRA. Rather, since 1979, the Department has relied on a standardized set of criteria, applied



through a standardized process, to determine whether a group has maintained tribal relations and therefore falls under federal jurisdiction. These criteria and this process is what makes up the administrative Federal Acknowledgement Process (FAP), with governing regulations published at 25 C.F.R. Part 83. The regulations themselves are entitled “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.” 43 Fed. Reg. 39361 (Sept. 5, 1978).<sup>34</sup>

Tribes that have been acknowledged (or restored to recognition) through the Federal Acknowledgement Process are, by the Department’s own definition, Indian groups which continuously have maintained their tribal identities since the time of first white contact or since previous federal acknowledgment. See 25 C.F.R. § 83.3 (regulations are “intended to apply to groups that can establish a *substantially continuous tribal existence* and which have functioned as autonomous entities *throughout history until the present*.”) (emphasis added); see also May 11, 2005 Testimony of R. Lee Fleming, Director, Office of Federal Acknowledgment, Office of the Assistant Secretary – Indian Affairs, Department of the Interior, Before the Senate Committee on Indian Affairs, Hearing on the Federal Acknowledgment Process, <http://www.doi.gov/ocl/2005/FedAcknowledgement.htm> (“When the Department acknowledges an Indian tribe, it is acknowledging that an inherent sovereign continues to exist. The Department is not “granting” sovereign status or powers to the tribe, nor creating a tribe made up of Indian descendants.”); March 31, 2004 Testimony of R. Lee Fleming, Director, Office of Federal Acknowledgment, Office of the Assistant Secretary-Indian Affairs, Department of the Interior, Before the House Resources Committee, Oversight Hearing on Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs, Hrg. 108-89 at 78 (“A final determination that a group is an Indian tribe means, among other things, that it has *continuously existed* as a tribe, has inherent sovereignty, and is entitled to a government-to-government relationship with the United States.”) (emphasis added). For example, with respect to the Cowlitz Indian Tribe, the Department’s final determination to acknowledge the Tribe specifically noted the continuous existence of the Cowlitz as a tribe from 1855 (the date of unambiguous prior federal acknowledgment) to the present. See Summary under the Criteria for Final Determination for Federal Acknowledgement of the Cowlitz Indian Tribe and Technical Report, Final Determination, Cowlitz Indian Tribe, dated February 14, 2000 at 5; Final Determination to Acknowledge the Cowlitz Indian Tribe, 65 Fed. Reg. 8436 (Feb. 18, 2000).<sup>35</sup>

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<sup>34</sup> In promulgating the regulations, the Department explained:

Various Indian groups throughout the United States have requested that the Secretary of the Interior officially acknowledge them as Indian tribes. Heretofore, the limited number of such requests permitted an acknowledgment of the group’s status on a case-by-case basis at the discretion of the Secretary. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable the Department to take a uniform approach in their evaluation ...

[The regulations are] a project in which the Congress, the administration, the national Indian organizations, and many tribal groups are cooperating to find an equitable solution to a longstanding and very difficult problem.

43 Fed. Reg. 39361 (Sept. 5, 1978).

<sup>35</sup> Of course, the Office of Federal Acknowledgement Director’s consistent explanation that the Federal Acknowledgement Process does not “grant” sovereign status to a tribe, but rather just formally acknowledges the continuing existence of a tribe, further underscores the continuing, uninterrupted nature of federal jurisdiction over tribes. As discussed in Part I, Subsection C.3. above, the Department simply would not have the legal authority to implement the Federal Acknowledgment Process if the United States did not hold continuing legal jurisdiction over those tribes that are acknowledged through that process.

In fact, tribes are not even *eligible* for recognition under the Part 83 process unless the Department determines that the group continuously has existed as a tribe. *See* 25 C.F.R. § 83.3 (the regulations are “intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history [defined as first white contact] until the present”); 25 C.F.R. 83.7(b) (requiring petitioner to show it comprises a distinct community that has existed from historical times to present); 25 C.F.R. § 83.8 (in cases where evidence of unambiguous federal acknowledgement exists, requiring that petitioner show continuous identification as an Indian group since date of last federal acknowledgement).<sup>36</sup>

Accordingly, any tribe that successfully has completed the Part 83 process in the modern era is a tribe for which the Department has made a determination that the tribe maintained tribal relations through some time period that predates 1934. Consequently, any tribe that has completed the Part 83 process, as a matter of law, certainly was “under Federal jurisdiction” in 1934 for the same reason that the Solicitor found the Catawbas to have been “under Federal jurisdiction” when he considered the matter in 1944: Part 83 tribes have been found to have maintained tribal relations on a continuing basis, and they have been accorded federal recognition. As a tribe that has successfully completed the Part 83 process, the Cowlitz Indian Tribe in the year 2009 is similarly situated to the Catawba Tribe in 1944. For all of these reasons, the Cowlitz Indian Tribe, as a matter of law, was under federal jurisdiction in 1934.

## **E. IN AMENDMENTS TO THE IRA CONGRESS DIRECTED INTERIOR TO TREAT TRIBES EQUALLY; THE INDIAN CANONS OF CONSTRUCTION**

### ***1. Interior Must Treat Tribes Equally***

In implementing the *Carvieri* decision the Department must be mindful of Congressional direction in the 1994 Federally Recognized Indian Tribe List Act that the federal agencies may not “differentiate between federally recognized tribes as being ‘created’ or ‘historic’” (*see* H. Rep. 103-781, at 3-4). It must also be mindful of Congress’ 1994 amendment to the IRA, codified at 25 U.S.C. § 476(f), which prohibits the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes.<sup>37</sup> These more recently enacted statutory provisions evidence

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<sup>36</sup> As Justice Breyer observed in his explanation of how later recognition could reflect the fact that a tribe was under federal jurisdiction in 1934 even if the federal government did not appear to be aware of it at the time. He explained:

[I]n 1934, the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for Western District of Mich.*, 369 F.3d 960, 961, and n.2 (C.A.6 2004). But later the Department recognized the Tribe, *considering it to have existed continuously since 1675*. 45 Fed. Reg. 19321 (1980).

*Carvieri*, 129 S.Ct. at 1070, (Breyer, J., concurring).

<sup>37</sup> The text of section 476(f) reads: “Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 *et seq.*, 48 Stat. 984) as amended [the Indian Reorganization Act], or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”

Congress' intention that the Department make every effort to apply the Indian Reorganization Act equally to all tribes regardless of how or when the tribes have obtained federal recognition. As a general matter, the fact that the *Carcieri* decision should be read very narrowly as only applicable to the Narragansett Tribe (*see* Part I, Subsection A.2. above), coupled with this unequivocal direction from Congress, dictates that the Department refrain from implementing the *Carcieri* decision in a way that would create disparate classes of tribes. The Cowlitz Indian Tribe has been found to have maintained tribal relations and is federally recognized. Accordingly, it is similarly situated to the Catawba Tribe (*see* discussion in Part I, Subpart D above), and the Department must apply the statute to the Cowlitz Indian Tribe in the same manner in which it applied it to the Catawba Tribe.

## **2. *Indian Canons of Construction***

The Department also should be mindful of the Indian canons of construction as it implements the *Carcieri* decision, particularly since the *Carcieri* majority failed to recognize their application due to its single-minded focus on the word “now” as being unambiguous. It is well established that the “basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians.” Cohen, § 2.02[1], p. 119. If there are any doubtful expressions or ambiguities within the statute, they are to be resolved in favor of the Indian parties. *See McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Winters v. United States*, 207 U.S. 564, 567-77 (1908); *see also*, 14 Ruling Case Law § 32 at 136 (1916 ed.) (“As in the case of the construction of treaties with the Indian tribes, the construction of statutes of Congress relating to the Indians, instead of being strict, is liberal. . . .”) (citations omitted).

While the phrase “under federal jurisdiction” has a clear legal meaning (all tribes were under federal jurisdiction), the question of how to determine which groups met the legal definition of a “tribe” (*i.e.*, which groups had maintained tribal relations in 1934), may be less clear since there was at that time no formal Federal Acknowledgment Process. In accord with these very fundamental canons of statutory construction, the Department must interpret the IRA in connection with the *Carcieri* decision in a manner that is consistent with the larger underlying principles of the trust relationship. This is particularly true here, where Congress enacted the IRA as remedial legislation for the benefit of tribes and individual Indians, and where Congress has directed the Department not to treat tribes disparately.

## **F. LEGAL ANALYSIS APPLIED TO THE COWLITZ INDIAN TRIBE**

It is entirely clear that the Cowlitz Indian Tribe existed as a tribe in 1934 when the IRA was enacted. The Department explicitly recognized this fact in the course of its administrative acknowledgment proceedings, which resulted in the Tribe’s formal federal recognition in 2002. *See, e.g.*, Summary Under the Criteria for Final Determination for Federal Acknowledgement of the Cowlitz Indian Tribe and Technical Report, Final Determination, Cowlitz Indian Tribe, dated February 14, 2000, at 5 (noting continuous existence of Cowlitz from 1855 “date of unambiguous prior federal acknowledgement to present”); Final Determination to Acknowledge the Cowlitz Indian Tribe, 65 Fed. Reg. 8436 (Feb. 18, 2000). Indeed, under the Federal Acknowledgment Process, Cowlitz would not even have been eligible for recognition had the Department not found that it had been a tribe continuously from 1855 to the present. *See* 25 C.F.R. § 83.7 (requiring petitioner to be identified as an American Indian entity on a substantially continuous basis since 1900); 25 C.F.R. § 83.8 (in cases where evidence of unambiguous federal acknowledgement exists,

requiring that petitioner show continuous identification as an Indian group since date of last federal acknowledgement).

Thus, for the reasons explained above, the BIA-confirmed continuous existence of the Cowlitz Indian Tribe from 1855 to modern times demonstrates that the Tribe was “under Federal jurisdiction” as a matter of law at the time of the IRA’s enactment. Further, the Tribe is federally recognized. Accordingly, the Indian Reorganization Act is fully applicable to the Cowlitz Indian Tribe and the Secretary of the Interior has authority to acquire land for the Tribe under Section 5 and to proclaim that land to be the Tribe’s reservation under Section 7.

## **PART II**

### **FACTUAL ANALYSIS:**

#### **EVIDENCE OF THE EXERCISE OF FEDERAL JURISDICTION OVER THE COWLITZ INDIAN TRIBE**

As discussed in Part I above, there is ample support to determine that the Cowlitz Indian Tribe was under federal jurisdiction as a matter of law. At the same time, there also is a very strong factual record of the United States’ actual *exercise* of jurisdiction over the Cowlitz Indian Tribe during the time period in which the IRA was enacted. Because there is so much information relating to BIA’s exercise of jurisdiction, *i.e.*, federal supervision over the Cowlitz, for the reader’s convenience the Tribe has not endeavored to provide every single document that might be relevant, and the documents that are provided are grouped into categories and are described in short summaries.<sup>38</sup> The majority of these documents were obtained from the files of the Office of Federal Acknowledgment relating to the Tribe’s Federal Acknowledgment petition. While there certainly are some documents that describe BIA’s declination to provide certain services at certain times to the Tribe,<sup>39</sup> the sheer volume of documents that evidence BIA’s positive exercise of jurisdiction over the

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<sup>38</sup> Each document cited within Part II is provided on the attached CD for the Department’s convenience. The documents provided with this submission are bates marked with the identifier “Cowlitz Tribe” and are numbered Cowlitz Tribe 000001 through Cowlitz Tribe 000496. The pdf files on the attached CD are organized to correspond to each of the twelve sections within this Part and each “Section” pdf file contains all of the documents cited within that particular section.

<sup>39</sup> *See, e.g.*, October 25, 1933 Letter from Commissioner of Indian Affairs Collier to Lewis Layton, of Tacoma, Washington, in response to his application for enrollment in the Cowlitz Tribe, in which Commissioner Collier states:

No enrolments [sic] are now being made with the remnants of the Cowlitz tribe which in fact, is no longer in existence as a communal entity. There are, of course, a number of Indians of Cowlitz descent in that part of the country, but they live scattered about from place to place, and have no reservation under Governmental control. Likewise, they have no tribal funds on deposit to their credit in the Treasury of the United States, in which you and your relatives might share if enrolled.

Only Indians who have the status of Federal wards are entitled to free hospitalization at a Government Indian hospital.

Office of Federal Acknowledgment (formerly Branch of Acknowledgment and Research, or BAR), Cowlitz Historical Technical Report (HTR), at 123. BIA itself found that Collier’s writing here is at odds with the numerous assertions of jurisdiction by BIA, not to mention the explicit and repeated exercise of such jurisdiction by BIA during this same time period. BAR’s HTR notes this inconsistency, and explains the Collier letter as going to the question of whether the Tribe was recognized (as opposed to the question of federal jurisdiction), saying the letter makes “quite explicit that under the standards applied by BIA at that date, the Cowlitz Indians were not officially regarded as a tribe.” *Id.*, but *see* Part II, Section 12, below (BIA considering termination of Cowlitz in the 1950’s). What is clear is that the vast weight of

Tribe make clear that BIA understood itself to have had legal jurisdiction over the Cowlitz Indian Tribe and that BIA exercised that jurisdiction at the time of the IRA's enactment. Therefore, there is no question that the Secretary has authority to acquire trust title and issue a reservation proclamation for the Cowlitz Indian Tribe.

### ***1. General assertions of federal jurisdiction over Cowlitz***

Maybe the most striking evidence of the exercise of federal jurisdiction over the Cowlitz Indian Tribe are the repeated assertions by the various branches of the Office of Indian Affairs during the 1920s and 1930s that the Cowlitz Tribe is “under this agency’s jurisdiction” or “authority.” There are numerous pieces of official correspondence from the Taholah Indian Agency in western Washington from the 1920s through the 1940s in which the federal government explicitly asserts jurisdiction over the Cowlitz Tribe. Although the Taholah Superintendent often notes that the Cowlitz are “unattached” – meaning the Tribe does not have a reservation – and that the Tribe is therefore somewhat scattered, he repeatedly asserts that his jurisdiction includes the Cowlitz Tribe, and the actions taken by the agency bear out that assertion. In addition, there are letters and memoranda from the 1940s and 1950s that include the Cowlitz Tribe as one of the tribes under the jurisdiction of the Western Washington Agency. These explicit assertions of jurisdiction by Bureau officials clearly demonstrate that the Bureau possessed, and was exercising, jurisdiction over the Cowlitz Tribe during the relevant time period. The following documents are examples of the Bureau’s assertion and exercise of jurisdiction over the Cowlitz Tribe, and copies are provided within the “Section 1” pdf file on the CD accompanying this submission:

- 12/28/1917 Letter from Superintendent, Cushman Indian School, Tacoma, WA to Commissioner of Indian Affairs, stating that the following Indians under his jurisdiction are serving in the military; includes Eugene Cloquette, Cowlitz. Cowlitz Tribe 000001.
- 1923 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, providing a map that “outlined the reservations under this jurisdiction,” including the “Cowlitz Reservation located in the Cowlitz River Valley.” Cowlitz Tribe 000002 through 000003.
- 1/12/1923 Letter from Superintendent (Sams), Taholah Indian Agency to Chief Medical Supervisor, Bureau of Indian Affairs re: Cowlitz “reservation” under his jurisdiction. (note: the Superintendent refers to a Cowlitz “reservation” which is not technically correct; these were probably allotments, *see* Bureau of Acknowledgment (BAR), Cowlitz Historical Technical Report (HTR) at 121-22). Cowlitz Tribe 000004 through 000007.

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the documentary evidence clearly demonstrates that the federal government was exercising jurisdiction and federal supervision over the Cowlitz Indian Tribe and its members in the 1934 time period, despite the few letters that could be interpreted as suggesting otherwise, and that the Cowlitz Indian Tribe today is officially recognized by the federal government, pursuant to the Department’s 2002 final determination under 25 C.F.R. Part 83. Whether or not the Cowlitz Tribe was federally recognized in 1934, and/or the exact date on which the federal government effectively terminated its federal supervision of the Cowlitz Tribe is not relevant to the *Carveiri* analysis for the reasons described above in Part I.

- 4/12/1923 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, stating that the "Cowlitz Reservation located in the Cowlitz River Valley" is one of the "reservations under this jurisdiction." Cowlitz Tribe 000008 through 000009.
- 7/24/1924 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, noting that the tribes under his jurisdiction that had members serving in the military included "The Cowlitz Tribe, who are living on the public domain in the Cowlitz River Valley." Cowlitz Tribe 000010.
- 10/8/1924 Letter from the Taholah Indian Agency to State Central Committee Chairman Fitzgerald. The Agency advised that "[w]hile it appears that there are 719 Indians on the Quinalt Reservation, you are advised that less than 150 live on the reservation. The others are scattered around at Bay Center, Seattle, Tacoma, Portland and all over the northwest, and I have no way of reaching them as their addresses are not known to me. . . . Among the unattached Indians, I note the Cowlitz Indians – 490. They are under my jurisdiction, but I can advise you that they are scattered all over the northwest, and there are not more than thirty or forty of them in the Cowlitz country." Cowlitz Tribe 000011.
- 9/28/1925 Letter from Superintendent, Taholah Indian Agency to Colonel T.J. McCoy, noting that Indians in this jurisdiction include the Cowlitz, and they live very much as white people do. Cowlitz Tribe 000012 through 000013.
- 5/14/1926 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, regarding salary/grade increase, notes that "[t]his jurisdiction covers the entire Southwest Washington, including the small reservations of . . . Cowlitz [and listing other tribes] . . . and the unattached Indians scattered all through the jurisdiction." Cowlitz Tribe 000014 through 000015.
- 12/31/1926 Letter from Superintendent, Tulalip Indian Agency referring question about a settlement with the Cowlitz Indians to the Superintendent, Taholah Indian Agency, "under whose jurisdiction the Cowlitz Indians are." Cowlitz Tribe 000016.
- 1/3/1927 Letter from Superintendent, Taholah Indian Agency to Mrs. Abraham Holmes, advising her that "[t]he Cowlitz band are under the Taholah Agency. The Superintendent further advised that the Cowlitz had held a meeting "... for the purpose of initiating steps to try to secure something from the Government. . . . If the Cowlitz people bring a suit against the Government and secure a certain amount of funds for damages, loss of lands, etc., that fund will then be divided to those to whom it rightfully belongs and a roll will be made up." Cowlitz Tribe 000017.
- 6/20/1927 Letter from Superintendent, Taholah Indian Agency to Principal of Schools, White Swan, requesting information about Cowlitz children at the school. "My jurisdiction includes all those Indians belonging to the . . . Cowlitz [and other]... Tribes. Cowlitz Tribe 000018.

- 8/19/1927 Letter from Superintendent (Sams), Taholah Indian Agency, to Registrar, Washington State Board of Health, requesting assistance in developing a mechanism by which the Superintendent could receive “copies of all birth and death certificates of Indians under the Jurisdiction of the Taholah Indian Agency[.]” The Superintendent informs the Registrar that the “administration of the Taholah Agency embraces the following tribes: . . . Cowlitz.” Cowlitz Tribe 000019.
- 9/7/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Salem Indian School, Chemawa, Oregon, enclosing letter from Mrs. Eugene Cottonware, “who claims to be of Indian blood, belonging to the Cowlitz Tribe. The Cowlitz Tribe is under this jurisdiction.” The letter also asks if Salem will send forms so the Cottonware children can attend the school, because the parents claim not to have money to buy books for the local high school. Cowlitz Tribe 000020.
- 5/23/1929 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs: “the following Indian tribes of unattached Indians, some of whom have Indian homesteads, are under this jurisdiction: Cowlitz Tribe, estimated about 800.” Cowlitz Tribe 000021.
- 6/5/1929 Letter from Deputy Disbursing Agent, Taholah Indian Agency to E.G. Potter, Puyallup, WA. “...the Cowlitz Tribe of Indians are within my jurisdiction but I do not have anything to do with the papers in connection with establishing the claim of the Cowlitz.” Cowlitz Tribe 000022.
- 11/22/1940 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, noting great need for a field social worker, and that many of “our Indians” do not live on reservations and are scattered through western Washington, especially the Cowlitz and Chinook tribes. Cowlitz Tribe 000023 through 000024.
- 10/27/1942 Letter from Superintendent, Taholah Indian Agency to Administrator, Lewis County Welfare Department, advising that Taholah does not have birth or other records for two girls named “Eyley”. “The mother is an unallotted member of the Cowlitz tribe and as such is entitled to any help that this office can offer.” Cowlitz Tribe 000025.
- 1950s Various memoranda sent by Superintendent (Bitney) to “[e]ach Tribe, Band or Group Under the Jurisdiction of the Western Washington Agency”, providing updates on various matters affecting the tribes. The Cowlitz Tribe was included in the distribution of these memoranda. Cowlitz Tribe 000026 through 000035.
- 10/31/1951 Letter to Area Director Pryse from Superintendent, Western Washington Agency, providing information in response to a congressional inquiry regarding the tribes serviced by his agency. Regarding the Cowlitz Tribe, the Superintendent explained that although “[t]here is no Reservation in Lewis

County . . . there is quite a settlement of Indians, many belonging to the remnants of the Cowlitz Band around Morton, Castle Rock, some around Toledo, LeCamas and Riff. . . . As I stated before, we extend service to some 2,600 unenrolled, unallotted Indians . . . who are members of the . . . Cowlitz [and other tribes] . . . who have suddenly become active in hiring attorneys and presenting claims against the Government under the [ICC].” After explaining that many tribes had not forwarded recent enrollment records and that many of the censuses were completed eight years ago, the Superintendent stated his reluctance to increase staff to take care of such functions, because:

... it has been my experience that when we build up a staff and take care of many of the things that Indians should handle themselves, that we will never be able to withdraw from ... the Indian business.

Cowlitz Tribe 000036 through 000038.

*11/16/1951* Letter from Commissioner of Indian Affairs to Rep. Russell Mack, responding to his request for a statement of actual and proposed activities under the Western Washington Agency for the period from 1949 through 1952. The Commissioner provided a list of tribes residing on reservations “under the jurisdiction of the Western Washington Indian Agency” followed by a list of “Indian Tribes (members not enrolled) to whom the Western Washington Indian Agency extends service: . . . Cowlitz.” Estimated Cowlitz population: 200 members. The Commissioner also stated that the Bureau held \$4,774.74 in trust funds for members of the Cowlitz Tribe. Cowlitz Tribe 000039 through 000043.

*6/5/1953* Memorandum from Superintendent, Western Washington Agency to “each Tribe, Band or Group Under the Jurisdiction of the Western Washington Agency” soliciting assistance in responding to a Congressional questionnaire re: practices under the tribal organization clauses of the IRA. The Cowlitz Tribe is a listed recipient of this memorandum. Cowlitz Tribe 000044.

*6/26/1953* Letter from the Department to Chairman A. L. Miller, Committee on Interior and Insular Affairs, in response to a congressional questionnaire. The Cowlitz Tribe is identified as one of the “tribes, groups or bands under the Western Washington Indian Agency, Washington”. The response to the questionnaire explained that:

[t]he questionnaire received from the . . . Committee . . . listed only recognized Indian Tribal Organizations. There are in addition to these, numerous Indian groups and Reservations that must be taken into account in considering any program looking to withdrawal of Government supervision of Indian Affairs in Western Washington. These various groups as well as the listed groups, are so intermingled that it is impossible to consider one without the other.



Not listed in the Questionnaire are the . . . Cowlitz, the Hoh, the Squaxin, and others.

\* \* \*

There are numerous Indian groups and sub-groups in Western Washington. Such tribes or bands as the Cowlitz . . . and others are not organized as separate tribes or bands, but have joined forces with the Chinooks, the Chehalis or others for the purpose of pressing claims.

(note: the assertion that Cowlitz is not organized as a separate tribe is incorrect; it is inconsistent with BAR's conclusions regarding Cowlitz continuous existence as a group in its Final Determination for Federal Acknowledgement of the Cowlitz Indian Tribe (Feb. 14, 2000), as well as other Departmental statements, *see, e.g.*, 1/6/1951 letter from Western Washington Agency to Commissioner, recommending approval of Cowlitz attorney contract for ICC litigation). Cowlitz Tribe 000045 through 000051.

## ***2. BIA Approval of Attorney Contracts***

Another manner in which federal jurisdiction was exercised over the Cowlitz Indian Tribe during the relevant time period of the 1920s and 1930s (and continuing even up through the mid 1960s) was through the Bureau's review and approval of contracts between the Tribe and its attorneys, and through the Bureau's approval of payments to those attorneys. Attorney work appears to have included everything from defending Cowlitz members against criminal charges to assisting the Tribe with its claim for compensation for its aboriginal lands taken by the United States without payment in the mid-nineteenth century.<sup>40</sup> There are multiple instances in the record of the United States having exercised this supervisory role with the Tribe. Obviously, BIA would not have routinely exercised this oversight over the Tribe's contractual relationship with attorneys if the BIA did not believe that it had the legal jurisdiction to do so. *See, e.g.*, the following documents (which include later examples from the 1960s as well to demonstrate the consistent pattern of federal oversight), contained within the "Section 2" pdf file on the CD accompanying this submission:

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|-----------|---|
| 5/22/1911 | Letter from prospective Cowlitz attorney to Secretary of the Interior, providing requested information regarding the basis of the Cowlitz Tribe's land claim and concluding it is valid, for purposes of being allowed to negotiate an attorney contract to represent the Tribe in these claims. Cowlitz Tribe 000052 through 000056. |
| 4/22/1926 | Letter from Superintendent, Taholah Indian Agency to County Game Warden, Chehalis, WA requesting the return of property (fishing equipment) seized from two Cowlitz Indians, noting that they were fishing in usual and   |

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<sup>40</sup> The Tribe began pursuing these claims in the very early 1900s, eventually brought a case before the Indian Claims Commission, and finally, in 2004 the United States paid those claims when it enacted the Cowlitz Indian Tribe Distribution of Judgment Funds Act, Pub. L. 108-222, 118 Stat. 623 (April 30, 2004). *See* discussion of Congressional actions re: Cowlitz land claim and ICC settlement in Part II, Section 6, below; *see also* discussion of the Tribe's pursuit of its land claims and related legislation in the Cowlitz Indian Tribe's Request for a Restored Lands Opinion (March 15, 2005).

- accustomed places for own use. "I hope that it will not be necessary to bring an action in the courts to enforce the return of the webbs belonging to these Indians, and the rain coats which were also taken." Cowlitz Tribe 000057 through 000058.
- 6/22/1928 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, requesting approval of payment for a lawyer who successfully defended Peter Satanas, a Cowlitz Indian, in a felony case, and authorizing payment from the funds held to his credit at the Agency. Cowlitz Tribe 000059.
- 1/23/1932 Letter from Jas. E. Sareault (Cowlitz) to Mr. H.O. Nicholson, U.S. Indian Agent, Hoquiam, Washington (*i.e.*, Superintendent, Taholah), notifying him that "[t]he Cowlitz tribe of Indians are to call a meeting in this city (Chehalis) in the near future for the purpose of entering into a contract with a group of attorneys who are to represent them in pressing their claims against the United States government, and requesting his attendance. Cowlitz Tribe 000060.
- 2/5/1932 Letter from Jas. E. Sareault (Cowlitz) to Superintendent, Taholah Indian Agency re: Cowlitz Tribal meeting to be held on February 15, 1932, asking for his attendance to certify matters presented, especially executing the Tribe's attorney contract. Cowlitz Tribe 000061.
- 2/10/1932 Telegram from Commissioner of Indian Affairs Rhoads, directing Superintendent Nicholson to "attend Cowlitz Indian council . . . to negotiate attorney contract[.]" Cowlitz Tribe 000062.
- 2/16/1932 Report from Superintendent, Taholah Indian Agency to the Commissioner of Indian Affairs. The Superintendent advised that he had attended the Cowlitz Indian Council meeting held on February 15, 1932 ". . . in accordance with Office wire of February 10." (see above document) He reported that the Tribe agreed to a resolution, election of delegates, and an attorney contract to hire an attorney to bring suit on behalf of the Cowlitz Tribe. In addition, the Superintendent reported that he subsequently accompanied the Cowlitz delegates to meet with a Superior Court Judge to affirm that the resolution and contract represented the sentiment of the Tribe. The Superintendent explained that "I, on behalf of the Department, made a statement [to the Judge] of the fact that this meeting was a duly advertised and regularly called meeting of the Cowlitz Tribe for these special purposes and that the papers brought before the Judge for execution were entirely in order and that the persons signing such papers as delegates on behalf of the Cowlitz Indians had been duly elected as such." The Superintendent advised that the papers, including the attorney contract, the Tribal resolution, and an affidavit from him stating "that these matters were taken up at a regular council meeting of the Cowlitz Tribe, together with other papers necessary for the completion of these transactions," would be "submitted to the Department for consideration." Cowlitz Tribe 000063 through 000065.

- 3/18/1932 Letter from Superintendent, Taholah Indian Agency to Mr. Jas. E. Sareault (Cowlitz), advising that he reported on the action taken by the Cowlitz Council on March 15<sup>th</sup>, but that the Indian Office in Washington is withholding any further action with respect to the approval of the attorney contract until all the required papers are submitted. Cowlitz Tribe 000066.
- 3/26/1932 Letter from Jas. E. Sareault to Superintendent, Taholah Indian Agency explaining circumstances that have resulted in delay in the approval of the Cowlitz attorney contract; further noting that the contract has received preliminary approval by the Department. Cowlitz Tribe 000067.
- 4/1/1932 Letter from Superintendent, Taholah Indian Agency to Mr. Jas. E. Sareault, advising that Cowlitz attorney contract will be completed and forwarded to the proper authorities in due time, and there is nothing further for his office to do. Cowlitz Tribe 000068.
- 4/15/1932 Commissioner of Indian Affairs Rhoads and the First Assistant Secretary from the Department's Office of the Secretary approve Cowlitz attorney contract. The approvals state that the contract was approved "in accordance with section 2105 [subsequently codified at 25 U.S.C. § 81] of the United States revised statutes." Cowlitz Tribe 000069.
- 4/16/1932 Letter from Superintendent, Taholah Indian Agency to Frank A. Cloquet, in response to his letter (A-281), advising that he does not know when the next Cowlitz meeting will be held, and has not been advised that the Cowlitz attorney contract has been approved. Cowlitz Tribe 000070.
- 7/5/1932 Letter from Acting Commissioner Rhoads informing attorneys that their contracts with the Cowlitz Tribe "were approved by the Department April 15, 1932." Cowlitz Tribe 000071.
- 7/11/1932 Letter from Superintendent, Taholah Indian Agency to one of the Cowlitz Tribe's attorneys, to advise him that the contract with the Cowlitz Tribe of Indians was approved. Cowlitz Tribe 000072.
- 5/10/1950 Letter from Acting Superintendent Keeler, Taholah Indian Agency to Jas. E. Sareault (now the Cowlitz Tribe's attorney for claims), confirming receipt of his letter and advising that if possible the Agency will have staff present at the upcoming tribal meeting to discuss the Tribe's claims in the Indian Claims Commission. The Superintendent advised the Tribe's attorney on the proper procedure for approval of an attorney contract, stating:

It might be helpful in this connection to have a copy of the recent Departmental Regulations governing tribal contract with attorneys and we are taking the liberty of loaning you our office copy of the rules to be returned when same has served the purpose.

As the Cowlitz and affiliated tribes never had a treaty with the Government and are not organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) the procedure outlined beginning on page two (2) of the enclosed regulations should be followed.

Cowlitz Tribe 000073.

*10/2/1950* Letter from President Forest of the Cowlitz Tribe to Superintendent Bitney, explaining that the Tribe wished to select attorneys and delegates of the tribe to execute a contract with those attorneys. President Forest stated, in relevant part:

Since this Tribe is not organized under the Indian Reorganization Act, we are informed that we must follow strictly the laws relating to employment of counsel, and must give notice to your office asking that you call a meeting of the Tribe for that purpose . . . We ask that this letter be regarded as the Notice required by Sec. 15.8.

Cowlitz Tribe 000074.

*10/7/1950* Departmental notice re: "General Meeting of the Cowlitz Tribe." The notice from the Superintendent "urged that all members of the Cowlitz Tribe make an effort to attend this meeting." Cowlitz Tribe 000075.

*10/14/1950* Minutes of Cowlitz General Meeting on 10/14/1950, which the Bureau official certified as "substantially correct," and which document that the Bureau official made the following statement at the meeting:

Under the rules and regulations of the Department of Indian Affairs, there must be a representative from the Agency present at the meeting in order to supervise and make a report back to the Washington, D.C. office. . . . Under the rules prescribed by the Department of Indian Affairs the lawyer or lawyers must be hired on a purely contingent basis. The Department will not recognize a contract in which the Tribe agrees to pay a retainer fee . . . I have requested the Secretary to keep an accurate record of the minutes of this meeting, as they must be sent to Washington, D.C. so that the Office will know what took place at this meeting. . . . My only duty here is to

be present and see that the meeting is conducted properly, and to verify what took place.

The Bureau official that attended the meeting, “detailed by Superintendent Raymond H. Bitney” certified that “quite a large number of members of the Cowlitz Tribe were present” at the meeting. Cowlitz Tribe 000076 through 000078.

- 1/6/1951 Letter from Superintendent Bitney, Western Washington Agency to Commissioner of Indian Affairs, forwarding Cowlitz attorney contract for approval. The Superintendent explained that he “caused to be called a general meeting of the Cowlitz Tribe” for the purpose of selecting attorneys to prosecute the Tribe’s claim and to enter into an attorney contract, that the contract was “executed in accordance with the Federal Statutes,” that “the group has always and still do maintain their tribal organization for the mutual welfare of its members,” and that “while this tribe is landless and without Official recognition of its tribal status, it nevertheless is, and has been an existing and identifiable group within the meaning of the Act of August 13, 1946[.]” The Superintendent concluded by stating “it is recommended that the agreement between the Cowlitz Tribe and the attorneys mentioned be accorded early and favorable consideration.” (note: The Act of August 13, 1946 established the Indian Claims Commission to hear claims on behalf of any tribe, band “or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska.” 25 U.S.C. § 70a. The ICC ruled that Cowlitz constituted a tribe under the Act. *See Simon Plamondon, on relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 152 (1969)). Cowlitz Tribe 000079 through 000081.
- 3/14/1951 Letter from a Western Washington Agency official to Superintendent Bitney providing a summary of the “tribes who have retained or are arranging to retain attorneys to present claims against the United States[.]” The letter listed the Cowlitz Tribe and explained that the summary “concerns tribes under the jurisdiction of former Taholah Agency, Hoquiam, Washington which have taken action towards filing claims in the Claims Commission. Cowlitz Tribe 000082.
- 3/16/1951 Approval of Cowlitz Attorney Contract by Commissioner of Indian Affairs. Cowlitz Tribe 000083.
- 2/12/1962 Notice issued by Superintendent, Western Washington Agency, re: a general meeting of the Cowlitz Tribe “for the purpose of considering renewal of the attorney’s contract between the Cowlitz Tribe and James E. Sareault, which expired March 15, 1961[.]” Cowlitz Tribe 000084.
- 3/2/1962 Cowlitz Tribal resolution selecting delegates and renewing the Tribe’s attorney contract to pursue its claim against the United States, with space for BIA signature to certify resolution. Cowlitz Tribe 000085.

1963

Bureau document summarizing the status of attorney contracts with tribes. 1963 General Tribal Data on Attorney Contracts, Box 3, File 51, RG 75: Western Washington, National Archives, Seattle, Washington. The document lists two Cowlitz attorney contracts and provides the following status update:

Cowlitz general attorney contract with Messrs. McLeod and Sareault (proposed) for prosecution of case against City of Tacoma for loss of fishing rights resulting from dam on the Cowlitz River. Attorneys failed to submit contract for approval in accordance with Bureau regulations and we are awaiting reply from Area Office as to further action to be taken, if any.

Cowlitz claims attorney contract with Mssrs. McLeod and Sareault expired March 15, 1961. As a result of a misunderstanding between the parties concerned, several meetings were held with the tribe and attorneys to negotiate this contract. Renewal contract submitted to Area Office June 5, 1963 with our recommendations for approval. No reply to date.

Cowlitz Tribe 000086.

3/22/1965

Memorandum to Superintendent summarizing the Cowlitz quarterly meeting held on March 13, 1965. The memorandum notes that the attendees "[f]rom the Portland Area Office were D. Paul Weston, Tribal Operations Officer, P.A.O., Carl Coad, attorney from the Regional Solicitor Office, and Chester J. Higman, Tribal Operations Officer, Western Washington Agency." The memorandum recounts the details of the meeting, including the following observations:

- Correspondence between the Bureau and the Tribe regarding the Tribe's claims and attorney contract was read at the meeting ... "Vice Chairman Norbert I. Bouchard ... said the Bureau is still running everything and that the Tribe has no voice in the selection of an attorney."
- Mr. McLeod, the Tribe's attorney, "made the same charges against the Bureau as at previous meetings I have attended ... that he has requested documents from the Bureau needed in connection with the Cowlitz Claim Case, and the Bureau has refused to release them."

Cowlitz Tribe 000087 through 000088.

6/7/1965

Letter from Superintendent Babby, Western Washington Agency to Chairman Wilson of Cowlitz Tribe of Indians, asking when the next Cowlitz

meeting will be held, noting need to have BIA representative there to certify acceptance of attorney contract; also requesting meeting minutes from March meeting and providing suggestions for recording of Tribal minutes. Cowlitz Tribe 000089.

### ***3. Cowlitz Allotments on Quinault Reservation/Halbert v. United States***

Federal jurisdiction also was exercised over the Cowlitz Indian Tribe beginning in 1911 and continuing during the 1920s and 1930s in connection with a 1911 statute authorizing the Secretary of the Interior to make allotments on the Quinault reservation to members of certain tribes in Washington “who are affiliated with the Quinault and Quileute tribes” in the 1855 and 1856 treaties, and “who may elect to take allotments on the Quinault Reservation rather than on the reservations set aside for these tribes....” Act of March 4, 1911, 36 Stat. 1345. There apparently had been confusion among some federal bureaucrats regarding which tribes’ members were entitled to allotments on the Quinault Reservation under this Act. A lawsuit was brought by members of the Chehalis, Chinook and Cowlitz Tribes and ultimately a 1931 Supreme Court opinion clarified the matter. See *United States v. Halbert*, 283 U.S. 753 (1931). In *Halbert*, the Supreme Court held that the Chehalis, Chinook and Cowlitz Tribes were “affiliated with” the Quinault and Quileute under the 1855 and 1856 treaties in conjunction with an 1873 Executive Order enlarging the Quinault reservation for the use of the Quinault, Quileute, Hoh, Quilt, and “other coastal tribes of fish-eating Indians in that locality,” and that members of the Cowlitz Tribe therefore were entitled to take allotments on the Quinault reservation if they did not have allotments elsewhere. *Halbert*, 283 U.S. at 759-60.

The Supreme Court noted that its opinion regarding the right of Cowlitz members to allotment on Quinault was in accord with a Solicitor’s Opinion construing the relevant treaties, executive order and statute which had been issued earlier as a guide for making further allotments by the Department. *Id.* at 760. The Supreme Court also noted that the Indian Bureau, in response to a bill introduced in 1913 to designate Cowlitz and some other tribes as specifically entitled to allotment under the Act of 1911, stated that no further legislation was necessary because Cowlitz members already were entitled to allotment under the Act. *Id.* The Supreme Court also held that the right to the allotments was based on tribal membership, as opposed to blood quantum, and while noting that the Cowlitz, Chinook and Chehalis “are not the usual reservation Indians”, the Court makes no suggestion whatsoever that the Cowlitz Tribe is not a legitimate tribal entity or that it is not under federal jurisdiction. See *Halbert*, 283 U.S. at 761-764. Indeed, it would be difficult to conclude otherwise, given the shared view of all three branches of the federal government during the relevant time period that the Cowlitz Tribe was among those tribes for whose benefit the 1855 and 1856 treaties, the 1873 executive order, and the Act of 1911 were enacted.

The Bureau’s actions in making allotments on the Quinault reservation for members of the Cowlitz Tribe, as well as its activities trying to keep track of those Cowlitz allottees further demonstrate the federal government’s exercise of jurisdiction over the Tribe, and are documented at a number of places in the record. Copies of the 1855 treaty, the 1873 executive order, the 1911 statute and the *Halbert* case, as well as documents regarding the BIA’s allotment activities with respect to Cowlitz Tribal members under the 1911 Act are contained within the “Section 3” pdf file on the CD accompanying this submission:

- 1855 Treaty of Olympia of 1855, 12 Stat. 971. Created a 10,000 acre reservation for the Quinaielt (Quinault) and Quillehute (Quileute) Tribes and authorized the President to consolidate the Quinault, Quileute and other friendly tribes. Cowlitz Tribe 000090 through 000092.
- 11/4/1873 Executive Order of November 4, 1873. Created a larger reservation “for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast.” Cowlitz Tribe 000093 through 000094.
- 3/4/1911 Act of March 4, 1911 (36 Stat. 1345, Ch. 246). Authorized the Secretary of the Interior to make allotments on the Quinault reservation to all members of the Hoh, Quileute, Ozette, or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the 1855 and 1856 treaties, and who may elect to take allotments on Quinault rather than on reservations set aside for these tribes. Cowlitz Tribe 000095 through 000096.
- 12/4/1911 Letter from Superintendent, Cushman Indian School to Commissioner of Indian Affairs, offering suggestions to facilitate enrollment of Indians eligible for allotment under the Act of March 4, 1911. In it, he explains that he held a council with the Cowlitz Tribe a few months ago, which “brought out clearly that they were considered as affiliated with the Quinaielts and Quileutes in the treaties cited above. The Indians state that the Government tried to force them to move to the Quinaielt reservation many years ago, probably shortly after the issuance of the Executive Order on November 4, 1873. I recommend that I be also authorized to hold a council with the Cowlitz Indians and that a roll be prepared in the same manner as suggested above for the Clallam tribe.” Cowlitz Tribe 000097 through 000102.
- 6/18/1932 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs w/attachments, regarding completion of census roll information for the 1932 Annual Statistical Report. The letter notes that the Superintendent did not complete a separate sheet for members of the Chinook, Chehalis and Cowlitz Tribes enrolled on the Quinaielt Reservation, for the reason that they were put on the Quinaielt roll in 1932 and had not been enrolled with any tribe prior to that time. Attachments show 7 Cowlitz enrolled on Quinault Reservation; all of these Cowlitz listed as “mixed blood”, and 6 listed as “ward”. Cowlitz Tribe 000103 through 000105.
- 1/23/1933 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, asking whether the Commissioner really wants Taholah to keep separate census rolls for the Cowlitz, Chinook and Quinault Tribes. The Superintendent notes that as a result of the *United States v. Halbert* case, 62 members of Cowlitz, Chinook and Chehalis were listed on the rolls of the Quinault Tribe (7 Cowlitz are listed as “Cowlitz Indians, allottees of the Quinault Reservation”). “There has never been, as the Office is aware, a census roll of the Chinook Tribe nor of the Cowlitz Tribe, and this agency never reported them on the census roll up until the time they were granted allotments on the Quinault Reservation.” Cowlitz Tribe 000106 through 000107.



#### ***4. Cowlitz Public Domain Allotments/Homesteads/Trust Land and BIA Management***

During the 1920s and 1930s, the Bureau exercised jurisdiction over the Cowlitz Indian Tribe by managing the public domain allotments, Indian homesteads and/or trust land held for the benefit of its members. BIA management of lands on behalf of Cowlitz Indians took different forms, from recording title information, issuing patents, approving and enforcing leases, offering the lands for sale and distributing proceeds, and in some cases, asserting a federal trust interest to protect the lands from State or local attempts at taxation or foreclosure. In many cases the local BIA Superintendent acted as the primary agent for sale or lease of the lands, working with the Cowlitz Tribe's Chairman to locate and obtain signatures from Cowlitz heirs, obtaining approval of the sales from Washington, D.C., and distributing the proceeds to heirs or other beneficiaries. In some cases the BIA Superintendent interceded on behalf of Cowlitz Tribal members to ensure that they received payment for rights of way, or to enforce lease obligations and the payment of rent by lessees.

There are multiple instances in the record of the United States exercising these supervisory responsibilities in connection with the allotments, trust patents and other land interests owned by members of the Cowlitz Tribe. BIA would not have exercised this kind of oversight, including approvals from the Indian Office in Washington, D.C., if it did not have legal jurisdiction over the Cowlitz Tribe. Indeed, BIA's own allotment regulations from that time period clearly demonstrate that the allotment of land was based on membership in a tribe, not Indian blood quantum or race. *See* 43 C.F.R. § 176.3 (1938); *see also* the following documents for examples of BIA's exercise of jurisdiction in connection with Cowlitz allotments and other land interests, contained within the "Section 4" pdf file on the CD accompanying this submission:

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| <i>1888-1945</i>                          | List of Cowlitz Public Domain Allotments and Homesteads. BAR, Cowlitz Genealogical Technical Report (GTR), Appendix III, at 111-112. Cowlitz Tribe 000108 through 000109.  |
| <i>Undated (but probably early 1920s)</i> | (incomplete document) Patent from United States to James Satanas, an Indian of the Cowlitz Klickitat tribe or band, of land allotted to him under the General Allotment Act (see related correspondence below, from May 9, May 29, June 2, 7, 20 and 22, 1923). Cowlitz Tribe 000110 through 000118.   |
| <i>4/6/1923</i>                           | Letter from Superintendent, Taholah Indian Agency to B. F. Meade, lessee of Bat Kiona (Cowlitz) property, advising him that John Ike (Cowlitz Chairman) has complained that he has not lived up to his obligations under the lease agreement and requesting explanation, noting that his office must address the situation because the Indians have appealed to him. Cowlitz Tribe 000119. |
| <i>4/19/1923</i>                          | Letter from Superintendent, Taholah Indian Agency to B. F. Meade, asking for statement of payments made on account of rent for Bat Kiona property. Cowlitz Tribe 000120.   |
| <i>5/9/1923</i>                           | Letter from Superintendent, Taholah Indian Agency to Annie Satanas, re: advertising for sale the James Satanas and Spearcheachen claims (Cowlitz   |

homesteads/trust patents, see GTR, App. III, and 11/9/1925 letter from Superintendent). Cowlitz Tribe 000112.

- 5/29/1923 Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Tribal Chairman, see BAR HTR at 121), enclosing acceptance of sale form for James Satanas Homestead, explaining that approval in Washington, D.C. is required, that once approved, he will issue checks to heirs, who include, *inter alia*, Dick, George, Annie, Peter, Harvey, and Lucy Satanas, Mattie Ike Kinswa; and Jack and Sarah Castoma; and requesting that John Ike obtain signatures from the heirs and return the form to the Superintendent. Also noting with respect to two heirs that are minors, if their parents are deceased, that the Superintendent can sign for them. Cowlitz Tribe 000113.
- 5/29/1923 Letter from Superintendent, Taholah Indian Agency to Superintendent of Yakima Indian Agency, requesting that he obtain signatures from some of the James Satanas (Cowlitz) heirs that live there. Cowlitz Tribe 000114.
- 6/2/1923 Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman, see HTR at 121), asking if he knows the whereabouts of Jack Castoma and Harvey Satanas, in relation to sale of James Satanas homestead. Cowlitz Tribe 000116.
- 6/7/1923 Letter from Superintendent, Taholah Indian Agency to Annie Satanas (one of James Satanas heirs), advising that he cannot advance her any money or send her any funds until the sale of the land is approved in Washington, D.C. Cowlitz Tribe 000115.
- 6/20/1923 Letter from Superintendent, Taholah Indian Agency to John Ike, (Cowlitz Chairman) requesting that he send the papers back to him when he has a majority of the James Satanas heirs' signatures; also asking re: whereabouts of Harvey and Lucy Satanas. Cowlitz Tribe 000117.
- 6/22/1923 Letter from Superintendent, Taholah Indian Agency to Annie Satanas, explaining that he cannot send her money from sale of James Satanas claim until all the heirs have signed and he sends the papers to Washington, D.C. for approval. Cowlitz Tribe 000118.
- 6/27/1923 Letter from Superintendent, Taholah Indian Agency to Mr. Ballard Meade, asking that he give up his lease because he has not paid his rent to Ida Kiona (for Bat Kiona property), and does not have an approved lease. Cowlitz Tribe 000122.
- 3/17/1924 Letter from Superintendent, Taholah Indian Agency to Treasurer of Lewis County, Chehalis, WA, regarding threat to sell for taxes the former Indian homestead of Isaac Kinswa (Cowlitz). "You are respectfully advised that the title to this property rests in the United States as no fee patent has ever issued to the property ... Any attempt to dispose of this property by tax deed will result with a case in the court to set the deed aside." Notes that there was another proceeding regarding the property in which the "Indian Office

held that the property was still in trust and not subject to mortgage, encumbrance or taxes.” Cowlitz Tribe 000123.

- 10/29/1925 Letter from Superintendent, Taholah Indian Agency to Mr. Wannassy (Cowlitz), explaining that “I was in Kelso a few days ago and took up the matter with the County Treasurer to have the taxes cancelled on your property. I just received a letter from him and inclose you a copy of the same.” Cowlitz Tribe 000124.
- 12/22/1925 Letter from Chief Clerk, Office of Indian Affairs to Superintendent, Taholah Indian Agency, approving application of Mary Angello (1/2 Cowlitz) for a certificate of eligibility for allotment, and with respect to her son, explaining that eligibility for allotments is based on membership in a Tribe, not quantum of Indian blood. Attached affidavit of Mary Angello, which states that her mother was full blood Cowlitz, and while she never enrolled, she was a member of and always lived with her Tribe. Cowlitz Tribe 000125 through 000126.
- 12/24/1925 Letter from Superintendent, Taholah Indian Agency to Mr. Stuart Elliott (Examiner of Inheritance), advising that Superintendent has no record of land owned by Dick Satanas, and assumes that the land was a fee patent. The letter further notes that “Dick Satanas owns trust interests in the Yakima Reservation.” Cowlitz Tribe 000127.
- 2/18/1926 Letter from Superintendent, Taholah Indian Agency to Mr. John Ike (Cowlitz Tribal Chairman), requesting that he find out “who has the Trust Patent issued to Dixon Jim or Dick Satanas and send to my office for examination?” The letter also discusses property owned by John Ike, notes that the Indian Office in Washington, D.C. has advised that the property was fee patented years ago, and so he needs to answer the lawsuit that has been filed; the Superintendent cannot help him further because there is no trust patent. Cowlitz Tribe 000128.
- 3/24/1926 Letter from Superintendent, Taholah Indian Agency to Centralia Savings & Loan, regarding the sale of a portion of Sam Eyley (Cowlitz) property. Cowlitz Tribe 000129.
- 6/5/1926 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, re: offering his father’s property for sale. Cowlitz Tribe 000130.
- 10/1/1926 Letter from Superintendent Taholah Indian Agency to John Ike (Cowlitz Tribal Chairman, see HTR p. 121), requesting information re: heirs of Mary LaQuash Satanas homestead (including, *inter alia*, Peter Satanas and estate of Jack Castoma). Cowlitz Tribe 000131.
- 10/1/1926 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency re: Indian Homestead formerly belonging to Mary La Quash Satanas (Cowlitz), who had a “daughter who belonged at Yakima.” Cowlitz Tribe 000132.

- 1926-1927 1926, 1927 correspondence from the Superintendent, Taholah Indian Agency regarding the sale of the Sam Eyley (Cowlitz) property, holding funds from the sale for the heir (son), and paying debts for him from the proceeds. Cowlitz Tribe 000133 through 000143.
- Undated (but appears to be 1927)* Letter from Superintendent, Taholah Indian Agency to Mr. O. A. Tucker, Chehalis, re: George Spearcheachen Indian homestead, noting that title to the property is still held in trust by the Government and the heirs have been determined, including a number of Cowlitz Indians. Cowlitz Tribe 000144.
- 1/3/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, stating that the letter regarding the Dick Satanas property has been referred to Taholah "as the Cowlitz people are under this jurisdiction" and providing the names of the heirs of Dick Satanas. Cowlitz Tribe 000146.
- 3/30/1927 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, explaining that he has to obtain the required signatures on certain papers, and obtain approval of the sale (of his father's property) from Washington, D.C., and that he cannot disburse funds until the sale has been approved. Cowlitz Tribe 000136.
- 4/20/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company re: charges to Sam Eyley; noting that there are no funds to his credit at the Taholah Agency and there will not be for 60-90 days, assuming the sale of the property (for which Eyley is heir) goes through; further stating that when the Superintendent is authorized, that he will send a check for Mr. Eyley to endorse, to pay you for his groceries and supplies. Cowlitz Tribe 000137.
- 4/21/1927 Letter from Superintendent, Taholah Indian Agency to William Botzer, MD, regarding his bill against Sam Eyley, an Indian, noting that the sale of the land (for which Eyley is heir) has occurred and that Eyley likely will have money to his credit in a few months. Cowlitz Tribe 000138.
- 4/23/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company, enclosing papers for signature by Sam Eyley and his wife in regard to the sale of his father's property. Cowlitz Tribe 000139.
- 6/1/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company, enclosing a check payable to Sam Eyley, instructing Toler to have Eyley sign the check, take your share, also send a check to pay Dr. Botzer, and then give Mr. Eyley the balance. Cowlitz Tribe 000140.
- 9/14/1927 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, noting that he is sending money to him monthly in accord with the regulations, and that he cannot send more. Cowlitz Tribe 000141.

- 1/7/1928 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, advising that there is no money at Taholah Agency to his credit, but that another payment is due to him on March 17, 1928; and that this letter will authorize the grocer to furnish Eyley with groceries, to be paid for when the money is placed to his credit on March 17<sup>th</sup>. Cowlitz Tribe 000142.
- 2/16/1928 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company regarding a check to cover the account of Sam Eyley, noting that the Superintendent will send a check when money is placed to the credit of Mr. Eyley on March 17, 1928. Cowlitz Tribe 000143.
- 12/11/1928 Letter from Superintendent, Taholah Indian Agency to George N. Marks, Grays Harbor Railway & Light Co. re: Indian homestead of Mary LaQuash, deceased (Cowlitz), and the heirs, and securing the signatures of the heirs on a warranty deed for sale of property. Cowlitz Tribe 000147.
- 12/19/1928 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, enclosing a petition and describing the procedures for the sale of the Mary LaQuash allotment. Cowlitz Tribe 000148 through 000149.
- 7/9/1935 Letter from Superintendent Nicholson to Mr. Wannassay (Cowlitz), advising as follows with respect to property held in trust on his behalf:
- [I]f you will have the purchaser send a full statement of the agreement, the price and terms he will deal on and if it proves to be a good deal for you, I will then submit the whole matter to the Indian Office at Washington for consideration.
- I might say however, that under the present administration it is not an easy matter to secure the Office approval of sales, and only in cases of special circumstances are we able to put thru outright sales.
- Cowlitz Tribe 000150.
- 3/20/1939 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, stating that two heirs of the Spearcheachen homestead, John Ike (Cowlitz Chairman) and George Satanas, have inquired regarding payment for a right of way across the homestead. Cowlitz Tribe 000151.
- 4/13/1976 Letter from Superintendent, Western Washington Agency to City of Tacoma, advising that a particular tract of land was held as a public domain allotment of Sally Ike (Cowlitz), that there were probably numerous owners of the property and that "all must concur in the use of the land." Cowlitz Tribe 000152.

## ***5. BIA heirship determinations/probate proceedings for Cowlitz members***

As described above, BIA's exercise of jurisdiction over the Cowlitz Tribe involved management of allotments and other land interests for Cowlitz Tribal members, and as a consequence, BIA's management also often extended to handling the estates of deceased Cowlitz members, which in many cases included trust or restricted interests in land. BIA maintained heirship information, and was involved in making heirship determinations and conducting probate proceedings on behalf of Cowlitz Tribal members, including appraisal of land interests that were part of the estates that ultimately would be distributed to the heirs through probate. BIA also approved Cowlitz wills, and paid funeral expenses and other outstanding bills from the estates of deceased Cowlitz Tribal members. The BIA Superintendent at the Taholah Indian Agency worked regularly with Examiners of the Inheritance in Washington State, providing heirship information about Cowlitz members "under his jurisdiction." The Taholah Superintendent also worked with the Cowlitz Tribal Chairman and with other BIA officials to locate and obtain the approval of heirs of deceased Cowlitz members regarding the sale of estate assets, and to distribute proceeds in connection with Cowlitz heirship determinations and probate proceedings (which required approval from Washington, D.C.).

There are many examples in the record of BIA exercising this kind of supervision over the Cowlitz Tribe and its members, and these examples naturally overlap, in some cases, with the examples of BIA's management of land interests noted above. *See, e.g.*, the following documents, contained within the "Section 5" pdf file on the CD accompanying this submission:

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| 7/30/1913  | Notice of Hearing to Determine Heirs of Charles LaDue issued by the Superintendent. Cowlitz Tribe 000153.  |
| 7/21/1916  | United States Indian Service's Notice of Hearing to Determine Heirs of Annie Wannassay. Cowlitz Tribe 000154.  |
| 2/20/1919  | Certificate from Examiner of Inheritance re: heirship proceedings for the estate of Isaac Kinswa, deceased Cowlitz Indian homesteader. Shows relationship of John Ike Kinswa (son of Isaac Kinswa), and Hattie Kinswa (widow), and notes that other Cowlitz members Sam Eyley and Dick Satanas (mentioned in other documents) were present. Cowlitz Tribe 000133.                              |
| 7/12/1922  | Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, noting that a Cowlitz representative has protested the action of Stuart Elliott, Examiner of Inheritance, in scheduling Cowlitz heirship hearings too far away from where the Cowlitz live, and requesting that the hearings be held in Mossy Rock, which is more central for them. Cowlitz Tribe 000155. |
| 10/26/1922 | Heirship determination for Bat or Baptiste Kiona, Cowlitz Tribe; notes that he was not allotted, but held an undivided 1/2 interest in the estate of his father, Columbus Kiona, deceased Cowlitz Indian homesteader. Cowlitz Tribe 000156.  |

- 5/29/1923 Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman, see HTR at 121), enclosing acceptance of sale form for James Satanas Homestead, explaining that approval in Washington, D.C. is required, but that once approved, he will issue checks to the heirs who include, *inter alia*, Dick, George, Annie, Peter, Harvey, and Lucy Satanas, Mattie Ike Kinswa; Jack and Sarah Castoma; and requesting that John Ike obtain signatures from the heirs and return the form to the Superintendent. Also noting that for the two heirs that are minors, if their parents are deceased, the Superintendent can sign for them. Cowlitz Tribe 000113.
- 5/29/1923 Letter from Superintendent, Taholah Indian Agency to Superintendent of Yakima Indian Agency, requesting that he obtain signatures from some of the James Satanas (Cowlitz) heirs that live there. Cowlitz Tribe 000114.
- 6/2/1923 Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman, see HTR at 121), asking if he knows the whereabouts of Jack Castoma and Harvey Satanas, in relation to the sale of the James Satanas homestead. Cowlitz Tribe 000116.
- 6/7/1923 Letter from Superintendent, Taholah Indian Agency to Annie Satanas (one of James Satanas heirs), advising that he cannot advance her any money or send her any funds until the sale of the land (James Satanas homestead) is approved in Washington, D.C. Cowlitz Tribe 000115.
- 6/20/1923 Letter from Superintendent, Taholah Indian Agency to John Ike, (Cowlitz Chairman) requesting that he send the papers back to him when he has a majority of the James Satanas heirs' signatures; also asking about the whereabouts of Harvey and Lucy Satanas. Cowlitz Tribe 000117.
- 6/20/1923 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, regarding the determination of the heirs of Bat Kiona (Cowlitz), and requesting approval of his will. Cowlitz Tribe 000157.
- 6/20/1923 Letter from Superintendent, Taholah Indian Agency to Examiner of Inheritance, enclosing report on the will of Bat Kiona and appraisal of land involved. Cowlitz Tribe 000158.
- 6/22/1923 Letter from Superintendent, Taholah Indian Agency to Annie Satanas, explaining that he cannot send her money from the sale of the James Satanas claim until all the heirs have signed and he sends the papers to Washington, D.C. for approval. Cowlitz Tribe 000118.
- 4/28/1924 Letter from Superintendent, Taholah Indian Agency to John Ike re: dividing up the estate of Columbus Kiona (deceased Cowlitz Indian homesteader); notes that Mary Kiona has a claim "approved by the Indian Office" against the estate; also notes the interest of John Ike's mother in the estate. Cowlitz Tribe 000159.

- 7/23/1924 From Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman) re: distribution of funds to heirs from a claim, enclosing statement of heirs and amounts for Chairman's information (enclosure missing). Cowlitz Tribe 000160.
- 9/6/1924 Letter from Superintendent, Taholah Indian Agency to Examiner of the Inheritance, Nespelem, WA. Enclosing data for heirship finding in re: the estate of Jack Castoma, deceased Cowlitz Indian; the letter notes that "His name is carried on our books and he has money to his credit" with the Agency. Cowlitz Tribe 000161.
- 4/27/1925 Letter from Superintendent, Taholah Indian Agency to Sam Eyley (Cowlitz), noting that he cannot disburse money from the estate of Dick Satanas until he has approval from Washington, D.C. of the determination of heirship matters. Cowlitz Tribe 000162.
- 11/7/1925 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, regarding the heirship determination for John Satanas, Jr., and the money to his credit being distributed to his heirs. The letter also mentions Dick Satanas, asking if he has an allotment at Yakima, because that would affect the location of the heirship determination, and noting that a bill pending for Dick Satanas will be paid "from funds here [Taholah]." Cowlitz Tribe 000163.
- 11/9/1925 Letter from Superintendent, Taholah Indian Agency to George Satanas, re: the death of his brother Dick (both Cowlitz), noting that the Agency will pay Dick's hospital bill, and asking that any funeral expenses be submitted for payment "from Dick Satanas' funds." The letter also asks about Dick's wife and children (heirs); and about taking George's boys to school at Chemawa Indian School, noting that it is a "very serious matter" that they attend school. Cowlitz Tribe 000164.
- 11/9/1925 Letter from Superintendent, Taholah Indian Agency to Mr. Stuart H. Elliott, Attorney, re: estate of Dick Satanas, advising that the "homestead" is "evidently a fee patented claim" so there is no record in the Agency. The letter also notes that Dick Satanas owns an interest in the George Spearcheachen homestead which is a trust patented claim; and that he has a small amount of funds in the Taholah Agency, from which the hospital bill will be paid, but that the Agency has not yet received a bill for funeral expenses. Cowlitz Tribe 000145.
- 11/12/1925 Letter from Superintendent, Taholah Indian Agency to St. Helens Hospital, enclosing payment of the bill for Dick Satanas. Cowlitz Tribe 000165.
- 11/14/1925 Letter from Superintendent, Taholah Indian Agency to Mr. F. P. Close, instructing him to submit a statement to the Examiner of Inheritance re: amounts due from the estate of Dick Satanas. Cowlitz Tribe 000166.



- 11/17/1925 Letter from Superintendent, Taholah Indian Agency to Examiner of Inheritance, Portland, OR, enclosing heirship data for Charley Pete, Quinault allottee, and Dick Satanah, Unallotted Cowlitz-Klickitat (note that 10/28/25 death of Dick Satanah, Cowlitz, is listed in vital statistics records of Taholah Agency) Cowlitz Tribe 000167.
- 11/17/1925 Letter from Superintendent, Taholah Indian Agency to Examiner of Inheritance, Portland, enclosing information from Yakima Agency re: trust property owned by Dick Satanah, who recently died. The letter notes that relatives and heirs of Dick Satanah live near Mossy Rock and Randle, so he suggests a location near there for the heirship hearing. Cowlitz Tribe 000170.
- 12/3/1925 Letter from Superintendent, Taholah Indian Agency to Mr. George Satanah, advising that Dick Satanah's heirs have not been determined, and that his funds cannot be issued until they are. Cowlitz Tribe 000171.
- 12/23/1925 Letter from Superintendent, Taholah Indian Agency to Mr. Stuart Elliott re: a request of Sam Eyle, informing him that he has told Mr. Eyle repeatedly that there is very little money to the credit of Dick Satanah at the Agency, and that no money can be disbursed until the heirs have been determined. You "must know that I cannot use the funds of deceased Indians except to pay for their funeral expenses and last doctor and hospital bills ... when the money is available, I would take pleasure in taking care of the children." Cowlitz Tribe 000172.
- 12/26/1925 Letter from Superintendent, Taholah Indian Agency to Sam Eyley regarding the children of Dick Satanah, noting that he cannot use any of Dick Satanah's money until his heirs have been determined; and that Dick Satanah has very little money to his credit at Taholah. Cowlitz Tribe 000173.
- 3/24/1926 Letter from Superintendent, Taholah Indian Agency to Centralia Savings & Loan, re: the sale of a portion of the Sam Eyley property. Cowlitz Tribe 000129.
- 6/5/1926 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, re: offering his father's property for sale. Cowlitz Tribe 000130.
- 10/1/1926 Letter from Superintendent Taholah Indian Agency to John Ike (Cowlitz Tribal Chairman), requesting information re: heirs of Mary LaQuash Satanah homestead (including, *inter alia*, Peter Satanah and estate of Jack Castoma). Cowlitz Tribe 000131.
- 10/1/1926 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency re: Indian Homestead formerly belonging to Mary La Quash Satanah (Cowlitz), who had a "daughter who belonged at Yakima." Cowlitz Tribe 000132.

- 1926-1927 1926, 1927 correspondence from the Superintendent, Taholah Indian Agency regarding the sale of the Sam Eyley (Cowlitz) property, holding funds from the sale for the heir (son), and paying debts for him from the proceeds. Cowlitz Tribe 000133 through 000143.
- Undated (but appears to be 1927)* Letter from Superintendent, Taholah Indian Agency to Mr. O. A. Tucker, Chehalis, re: George Spearcheachen Indian homestead, noting that title to the property is still held in trust by the Government and the heirs have been determined, including a number of Cowlitz Indians. Cowlitz Tribe 000112, 000144, 000145.
- 1/3/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, stating that the letter regarding the Dick Satanas property has been referred to Taholah "as the Cowlitz people are under this jurisdiction" and providing the names of the heirs of Dick Satanas. Cowlitz Tribe 000146.
- 3/30/1927 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, explaining that he has to obtain the required signatures on certain papers, and obtain approval of the sale (of his father's property) from Washington, D.C., and that he cannot disburse funds until the sale has been approved. Cowlitz Tribe 000136.
- 4/20/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company re: charges to Sam Eyley; noting that there are no funds to his credit at the Taholah Agency and there will not be for 60-90 days, assuming the sale of the property (for which Eyley is heir) goes through; further stating that when the Superintendent is authorized, that he will send a check for Mr. Eyley to endorse, to pay you for his groceries and supplies. Cowlitz Tribe 000137.
- 4/21/1927 Letter from Superintendent, Taholah Indian Agency to William Botzer, MD, regarding his bill against Sam Eyley, an Indian, noting that the sale of the land (for which Eyley is heir) has occurred and that Eyley likely will have money to his credit in a few months. Cowlitz Tribe 000138.
- 4/23/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company, enclosing papers for signature by Sam Eyley and his wife in regard to sale of his father's property. Cowlitz Tribe 000139.
- 6/1/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company, enclosing check payable to Sam Eyley, instructing Toler to have Eyley sign the check, take your share, also send a check to pay Dr. Botzer, and then give Eyley the balance. Cowlitz Tribe 000140.
- 10/29/1927 Letter from the Yakima Indian Agency Examiner of Inheritance providing the record of hearing for Minnie Sonewah, Vancouver allottee #70. Cowlitz Tribe 000174.

- 3/2/1928 Letter from Superintendent, Taholah Indian Agency to George Satanash, re: Spearcheachen claim (trust patent/homestead). Cowlitz Tribe 000175.
- 12/11/1928 Letter from Superintendent, Taholah Indian Agency to George N. Marks, Grays Harbor Railway & Light Co. re: Indian homestead of Mary LaQuash, deceased (Cowlitz), and the heirs, and securing the signatures of the heirs on a warranty deed for sale of property. Cowlitz Tribe 000147.
- 12/19/1928 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, enclosing a petition and describing the procedures for the sale of the Mary LaQuash allotment. Cowlitz Tribe 000148 through 000149.
- 8/15/1931 Office of Indian Affairs Summary of Report on Heirs issued for Katie Talikish, a deceased Cowlitz homesteader. Cowlitz Tribe 000176 through 000178.
- 2/26/1936 Letter in which Superintendent Alley of the Tacoma Hospital explained to Superintendent Nicholson that he was returning a \$20.00 check which was the "balance in the I.I.M Account of Anthony Cloquet, deceased patient." Superintendent Alley explained that "[a]s I understand that Mr. Cloquet had an allotment in the Cowlitz reservation, I believe your agency is the proper place for the deposit of this money, and that same may be disposed of by you in accordance with the rules on inheritance." Cowlitz Tribe 000179.
- 3/20/1939 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, stating that two heirs of the Spearcheachen homestead, John Ike (Cowlitz Chairman) and George Satanash, have inquired regarding payment for a right of way across the homestead. Cowlitz Tribe 000151.
- 3/7/1944 Letter from Superintendent LaVatta of the Taholah Indian Agency to Mrs. Virgie Satanash Case explaining that she has a 1/6 interest in the homestead allotment of Mary Satanash. Cowlitz Tribe 000180
- 1941-1944 Probate and Estate Settlement Records from 1941-1944. Documents show the estate of Ida Kiona (Hattie Kinswa), unallotted Cowlitz, settled in 1944. Cowlitz Tribe 000181 through 000183.
- 5/25/1945 Notice from Commissioner of Indian Affairs to Superintendent LaVatta of the Tahola Agency reporting death of Harry Cheholts, "an Indian of your jurisdiction." Cowlitz Tribe 000184 through 000185.

## **6. Congressional Actions re: Cowlitz land claim and ICC settlement**

The Cowlitz Indian Tribe first initiated land claims against the United States in 1908 by submitting affidavits to the Department of the Interior for certain lands on Cowlitz Prairie, and filed an expanded petition for its aboriginal lands in 1909. *See* Bureau of Acknowledgment (BAR),

Cowlitz Historical Technical Report (HTR) at 106-108. This 1909 petition was the impetus for the 1910 McChesney Report, in which Special Indian Agent Charles McChesney reported to the Commissioner of Indian Affairs: “As the result of my investigation, I am of the opinion that the claim of the Cowlitz Indians is a just one, and that they should receive compensation for the land they occupied, and recommend that the necessary action be taken with such end in view.”

In addition to presenting its claims to the Department, the Cowlitz continuously pursued federal legislation that would enable the Tribe to present its claims in the federal courts. From 1915 through 1929, twelve bills were introduced in Congress to provide the Court of Claims with jurisdiction over the Cowlitz claim. HTR at 126. In 1928, Congress finally passed legislation only to have it vetoed by President Coolidge. HTR at 127. It was not until after Congress enacted legislation in 1946 establishing the Indian Claims Commission that the Cowlitz would be able to pursue its claims against the United States. A schedule and copies of the Cowlitz legislation from 1915 through 1946 are attached (*see* documents below).

In 1973, the Cowlitz Indian Tribe finally received a judgment from the ICC, entitling it to receive compensation for its aboriginal lands. In 1975 the House and Senate took up legislation to give effect to the ICC settlement and to provide for an award distribution plan. However, it took numerous Congressional hearings and years of the Tribe insisting that the legislation should include funds for the acquisition of replacement lands, before the Tribe and the Department finally agreed to federal legislation implementing a distribution plan for the Tribe’s ICC claim award. In 2004 (after the Tribe was formally recognized by the Department), Congress enacted, and President George W. Bush signed, the Cowlitz Indian Tribe Distribution of Judgment Funds Act, Pub. L. 108-222; 118 Stat. 623 (April 30, 2004).

Although it took the Cowlitz Indian Tribe many years to achieve its legislative goals, the fact that Congress continually introduced bills and enacted legislation on behalf of the Cowlitz Indian Tribe beginning in 1915 and continuing steadily through 1946, and again took legislative action beginning in 1975 to implement the Tribe’s ICC judgment, demonstrates that Congress understood itself to have federal jurisdiction over the Tribe during the 1934 time period (and later as well). Numerous examples of the Congressional exercise of jurisdiction over Cowlitz are included in the record,<sup>41</sup> *see, e.g.*, the following documents, contained within the “Section 6” pdf file on the CD accompanying this submission:

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| <i>1915-1946</i> | Synopsis and copies of legislation introduced on behalf of Cowlitz Tribe, to allow Cowlitz to pursue claims, including S. 2458 (1915), H.R. 6862 (1916), H.R. 224 (1917), S. 3663, H.R. 9611 (1918), H.R. 15480, S. 1521 (1919), H.R. 2424 (1921), H.R. 71 (1923), S. 2557 (1924), H.R. 2694 (1925), H.R. 167 (1927), and Indian Claims Commission Act, 60 Stat. 1049 (1946); and related Congressional reports and correspondence. Cowlitz Tribe 000186 through 000266. |
| <i>6/21/1916</i> | (excerpt from above documents) H.R. No. 829, including favorable report from Interior Secretary Franklin Lane on S. 2458, to allow Cowlitz to submit claims to Court of Claims, and Report of Special Indian Agent Charles McChesney to Commissioner of Indian Affairs (1910): “At the present time,   |

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<sup>41</sup> There is a detailed discussion of the Congressional action pertaining to the Tribe’s ICC claims award in the Cowlitz Indian Tribe’s Request for a Restored Lands Opinion (March 15, 2005).

without an accurate census, the Cowlitz Indians claim to number 400 people, about equally divided between full and mixed bloods... As the result of my investigation, I am of the opinion that the claim of the Cowlitz Indians is a just one, and that they should receive compensation for the land they occupied, and recommend that the necessary action be taken with such end in view.” Cowlitz Tribe 000200 through 000205.

- 1921 Congressional Record documents that legislation was introduced in the House and the Senate to authorize the Cowlitz Tribe to submit claims to the Court of Claims. 61 Cong. Rec. 99,423 (1921). Cowlitz Tribe 000267 through 000269.
- 3/26/1975 S. 1334, to provide for distribution of funds appropriate to pay judgment in favor of the Cowlitz Tribe by the Indian Claims Commission (ICC). Cowlitz Tribe 000270 through 000272.
- 4/17/1975 Hearing on HR 5090 before Subcommittee on Indian Affairs, House Committee on Interior and Insular Affairs, re: disposition of funds appropriated in favor of the Cowlitz Tribe in the ICC, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1975). Cowlitz Tribe 000273 through 000305.

## ***7. Cowlitz attending BIA schools/BIA education and other social services/financial aid***

BIA also exercised jurisdiction over the Cowlitz Tribe during the relevant time period (and into the 1950s and 1960s) by extending education services and financial aid to Cowlitz children. Cowlitz children attended BIA schools, and the BIA Superintendent endeavored to make sure that all Cowlitz children were attending school, whether public or BIA-run, and to keep records of their attendance, because the “Washington Office” required him to “keep track of all Indian children of school age under this jurisdiction.” The Superintendent helped to enroll Cowlitz children at BIA schools, helped to make transportation arrangements to get Cowlitz children to BIA schools in other areas, and helped to make sure they had money for supplies. BIA also provided other services, such as health care and social services to Cowlitz children and other Cowlitz Tribal members during this same time frame. While not every Cowlitz request for assistance from BIA was granted, the amount of assistance that BIA provided is significant.

Evidence of BIA’s exercise of supervision and jurisdiction over Cowlitz Tribal members through the provision of educational and other services can be found in the following documents contained within the “Section 7” pdf file on the CD accompanying this submission:

- 1880-1928 List of selected enrollees at Chemawa Indian School, including Cowlitz children. BAR, Cowlitz Genealogical Technical Report (GTR), Appendix V, at 114-116. Cowlitz Tribe 000306 through 000308.
- 1910 Members of the Cowlitz Tribe submitted applications for enrollment at the Chemawa Indian School. Cowlitz Tribe 000309 through 000318.
- 1924 Excerpt from 1924 Statistical Report, Tulalip Indian School shows two Cowlitz children enrolled there. Cowlitz Tribe 000319.

- 9/4/1924 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, noting that Taholah sent Cowlitz children Joseph Suterlick and two Satanas boys to Tulalip School. Cowlitz Tribe 000320 through 000322.
- 9/11/1924 Letter from Superintendent, Tulalip Indian Agency, to Superintendent, Taholah Indian Agency, responding to his inquiry re: Joseph Suterlick, Adam and Daniel Satanas, reports that these are good boys and taking an interest in their work. Cowlitz Tribe 000323.
- 9/17/1924 Letter from Superintendent, Taholah Indian Agency to Dick Satanas, noting that he has three children of school age, asking for information about what school they are attending. The letter further notes that: "The Washington Office requires us to keep track of all Indian children of school age under this jurisdiction" until they are eighteen. Cowlitz Tribe 000324.
- 6/5/1925 Handwritten letter(s) from George Satanas to Superintendent, Taholah Indian Agency, providing information about picking up his children from Tulalip Indian School, and Joseph Suterlick attending his mother's heirship determination. Date stamped by BIA 6/5/1925. Cowlitz Tribe 000325 through 000326.
- 6/5/1925 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, re: bringing school children home who have no funds; notes that George Satanas will be at Tulalip for his sons on June 10<sup>th</sup>; and that Joseph Suterlick must attend his mother's heirship determination hearing. Cowlitz Tribe 000327.
- 10/21/1925 Letter from Superintendent, Taholah Indian Agency to George Satanas, advising that there is an opening for his two boys at Chemawa Indian School, and offering to take the boys there from Chehalis: "It is absolutely necessary that these boys go to school somewhere." (note: notation at bottom of letter reads "George Satanas, Cowlitz-Klickitat"). Cowlitz Tribe 000328.
- 11/5/1925 Letter from Superintendent, Taholah Indian Agency to Mr. George Satanas; writing to tell him not to take his boys to school at Tulalip because it is full, suggesting that they go to Chemawa Indian School, and enclosing letter to Superintendent Hall at Chemawa (see below). Cowlitz Tribe 000329.
- 11/5/1925 Letter from Superintendent, Taholah Indian Agency to Superintendent Hall of Chemawa Indian School, introducing George Satanas and sons Daniel and Adam and asking for the boys to attend school there. Cowlitz Tribe 000330.
- 6/17/1926 Letter from Superintendent, Taholah Indian Agency to George Satanas (Cowlitz), advising him that Joseph Suterlick ran away from the Tulalip School, was assisted by Eddie Phillips at Mossy Rock, and that if he does not return Suterlick to school, the sheriff will arrest both the boys and take them

- to jail. (Note: George Satanash is an heir of James Satanash, Cowlitz). Cowlitz Tribe 000331.
- 9/24/1926 Letter from Superintendent, Taholah Indian Agency to McDonald's Mercantile Agency, Chehalis, stating that he has referred their claim "to Pete Satanash, who is now at Tulalip Indian School. When I get a report from him I will communicate with you further." (Note: notation at bottom of letter "Pete Satanash, Cowlitz-Klickitat"). Cowlitz Tribe 000332.
- 2/23/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, regarding the health of Peter Satanash and the request to put him in the Pyramid Lake Sanatorium for treatment. "You have my authority to send him to the sanatorium in order that he may recover his health. He has sums in my hand to the extent of \$480.42. I am sending you \$100 today, under regulation No. 12, to his credit in your care." (see following document enclosing check). Cowlitz Tribe 000333.
- 2/23/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, providing a check payable to the Tulalip Superintendent transferring funds from the account of Peter Satanash (Cowlitz), to enable him to go to the sanatorium. (Note: handwritten notation at bottom of letter, "Peter Satanash, Cowlitz-Klickitat"). Cowlitz Tribe 000334.
- 2/24/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, noting that he sent \$100 yesterday to the credit of Peter Satanash, to be used for his expenses. The letter notes that he cannot send additional funds without authority from Washington, D.C., because Peter is a minor, but that the funds already sent should be sufficient to cover his treatment at Pyramid Lake. Cowlitz Tribe 000335.
- 6/20/1927 Letter from Superintendent, Taholah Indian Agency to Principal of Schools, White Swan, requesting information about two Indian children (Mary and Nicholas Satanash) attending your schools. The letter notes that the "United States Indian Office requires me to keep in touch with the Indian children of school age ... My jurisdiction includes all those Indians belonging to the ... Cowlitz [and other] ... Tribes." Cowlitz Tribe 000118.
- 9/7/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Salem Indian School, Chemawa, Oregon, enclosing letter from Mrs. Eugene Cottonware, "who claims to be of Indian blood, belonging to the Cowlitz Tribe. The Cowlitz Tribe is under this jurisdiction." The letter also asks if the Salem Superintendent will send forms so the Cottonware children can attend the school, because the parents claim not to have money to buy books for the local high school. Cowlitz Tribe 000020.
- 11/2/1927 Letter from Superintendent, Taholah Indian Agency to Peter Satanash, asking him where he is attending school this year. Cowlitz Tribe 000336.

- 11/3/1927 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, asking where May Satanah is attending school this year and what grade; further noting that he needs the information for the Agency's school records. Cowlitz Tribe 000337.
- 11/3/1927 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, re: May Satanah, asking where she is attending school and in what grade, for "my school records." Cowlitz Tribe 000338.
- 5/15/1928 Letter from Superintendent, Taholah Indian Agency to Principal, Tulalip Indian School, requesting information on all Indian school children who attend schools off the reservations. "The Taholah Indian Agency embraces the Quinalt, Quileute, Nisqually, Chehalis, Skokomish, Cowlitz and Squaxin Island Tribes." Cowlitz Tribe 000339.
- 11/22/1940 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, noting that his office has a great need for a field social worker, and that many of "our Indians" do not live on reservations and are scattered through western Washington, especially the Chinook and Cowlitz. Cowlitz Tribe 000023 through 000024.
- 12/16/1940 Letter from a field aid at the Dalles, Oregon, to Superintendent, Taholah Indian Agency, enclosing an application for enrollment of "Charles Pete Eyle of Battleground, Wash., in the Chemawa Indian School." The field aid advised that his mother was the owner of a ranch "between LaCenter and Battleground, Washington." Cowlitz Tribe 000340 through 000345.
- 10/27/1942 Letter to the Lewis County Welfare Department, in which Superintendent Phillips explained that he did not have records relating to two Indian girls but that "[t]he mother is an unallotted member of the Cowlitz tribe and as such is entitled to any help that this office can offer." Cowlitz Tribe 000025.
- 2/10/1966 Letter from BIA, Portland Area Office, through Superintendent, Western WA Agency, to Chief Wilson of Cowlitz Tribe re: availability of federal higher education aid through BIA. The letter notes that aid is limited to enrolled members of tribes resident on or adjacent to reservations, and that many Cowlitz are not enrolled. The letter further states that Cowlitz members enrolled at Quinalt and Yakima would be eligible, so long as they could meet the other criteria, *e.g.*, residence on or near reservation, 1/4 Indian blood, demonstrated need, etc. Cowlitz Tribe 000346
- 8/5/1975 Affidavit of Joseph Cloquet, Cowlitz Tribe member, which states that he received BIA educational benefits and attended Chemawa Indian School (federal/BIA boarding school). Cowlitz Tribe 000347.



**8. *BIA holding and managing funds for Cowlitz Tribal members/handling financial claims against Cowlitz members***

BIA exercised supervisory authority and jurisdiction over the Cowlitz Tribe during the 1920s to 1930s time period by holding and managing funds for Cowlitz Tribal members and by dealing with claims for amounts owing that were presented against Cowlitz members by merchants and/or other third parties. Some of the funds held and managed by BIA on behalf of Cowlitz Tribal members were held in connection with heirship determinations and probate proceedings, including the sale of trust or other restricted property from the estates of deceased Cowlitz Tribal members. In these cases, BIA's money management activities would include things like payment of the hospital and funeral expenses from the account of the deceased, or payments to Cowlitz heirs as part of the distribution of proceeds from the estate. BIA held and managed funds for Cowlitz Tribal members who were minors, and would distribute these funds to purchase needed supplies such as clothes, or other basic requirements like medical care. BIA distributed funds on a monthly basis to Cowlitz Tribal members, including minors; the frequency and amount of these payments were dictated by BIA regulation. There also are several examples in the record of the local BIA Superintendent interacting with third parties on behalf of a Cowlitz Tribal member, to advance funds from an expected sale of property as the result of a probate proceeding, allowing the Cowlitz member to repay the amount due when the proceedings were finally completed (including approval from Washington, D.C.) and the sale was transacted. Because BIA was responsible for accounting for the funds held on behalf of the Cowlitz Tribal members, the Superintendent typically would pay any amounts due directly to the third party or merchant on behalf of the Cowlitz member.

The management of funds for Cowlitz members is a quintessential example of the exercise of federal jurisdiction over the Cowlitz Tribe and its members, and is documented at numerous places in the record. Because the management of funds for Cowlitz often involved funds related to trust or restricted property, these examples overlap, in some cases, with the examples of BIA's management of land interests and heirship proceedings noted above. *See* the following documents contained within the "Section 8" pdf file on the CD accompanying this submission:

- 9/6/1924 Letter from Superintendent, Taholah Indian Agency to Examiner of the Inheritance, Nespelem, WA. Enclosing data for heirship finding in re: the estate of Jack Castoma, deceased Cowlitz Indian; the letter notes that "His name is carried on our books and he has money to his credit" with the Agency. Cowlitz Tribe 000161.
- 11/7/1925 Letter from Superintendent, Taholah Indian Agency to Superintendent, Yakima Indian Agency, regarding the heirship determination for John Satanas, Jr., and the money to his credit being distributed to his heirs. The letter also mentions Dick Satanas, asking if he has an allotment at Yakima, because that would affect the location of the heirship determination, and noting that a bill pending for Dick Satanas will be paid "from funds here [Taholah]." Cowlitz Tribe 000163.
- 11/9/1925 Letter from Superintendent, Taholah Indian Agency to George Satanas, re: the death of his brother Dick (both Cowlitz), noting that the Agency will pay Dick's hospital bill, and asking for any funeral expenses be submitted for payment "from Dick Satanas' funds." The letter also asks about Dick's wife and children (heirs); and about taking George's boys to school at Chemawa

Indian School, noting that it is a “very serious matter” that they attend school. Cowlitz Tribe 000164.

- 11/9/1925 Letter from Superintendent, Taholah Indian Agency to Mr. Stuart H. Elliott, Attorney, re: estate of Dick Satanas, advising that the “homestead” is “evidently a fee patented claim” so there is no record in the Agency. The letter also notes that Dick Satanas owns an interest in the George Spearcheachen homestead which is a trust patented claim; and that he has a small amount of funds in the Taholah Agency, from which the hospital bill will be paid, but that the Agency has not yet received a bill for funeral expenses. Cowlitz Tribe 000145.
- 11/12/1925 Letter from Superintendent, Taholah Indian Agency to St. Helens Hospital, enclosing payment for the bill in connection with Dick Satanas. Cowlitz Tribe 000165.
- 12/23/1925 Letter from Superintendent, Taholah Indian Agency to Mr. Stuart Elliott re: the request of Sam Eyle, informing him that he has told Mr. Eyle repeatedly that there is very little money to the credit of Dick Satanas at the Agency, and that no money can be disbursed until the heirs have been determined. You “must know that I cannot use the funds of deceased Indians except to pay for their funeral expenses and last doctor and hospital bills ... when the money is available, I would take pleasure in taking care of the children.” Cowlitz Tribe 000172.
- 9/24/1926 Letter from Superintendent, Taholah Indian Agency to Pete Satanas, Tulalip Indian Agency, enclosing a letter regarding a claim for money due against him and asking whether he wishes to pay the claim. Cowlitz Tribe 000348.
- 9/24/1926 Letter from Superintendent, Taholah Indian Agency to McDonald’s Mercantile Agency, Chehalis, stating that he has referred their claim “to Pete Satanas, who is now at Tulalip Indian School. When I get a report from him I will communicate with you further.” (Notation at bottom of letter: “Pete Satanas, Cowlitz-Klickitat”). Cowlitz Tribe 000332.
- 1/8/1927 Letter from Superintendent, Taholah Indian Agency to Peter Satanas, c/o Tulalip Indian Agency, enclosing a check for \$25. The Superintendent’s letter notes that he can only send him \$100 per year unless he has special authority from the Indian Office in Washington, D.C.; and further advises that he will send him money when he needs it and to please make requests a month in advance. Cowlitz Tribe 000349.
- 2/16/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, providing a check payable to Peter Satanas (Cowlitz), together with a bill to be paid out of the check. Cowlitz Tribe 000350.
- 2/23/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, regarding the health of Peter Satanas and the request to put him in the Pyramid Lake Sanatorium for treatment. “You have my

authority to send him to the sanatorium in order that he may recover his health. He has sums in my hand to the extent of \$480.42. I am sending you \$100 today, under regulation No. 12, to his credit in your care.” (see following document). Cowlitz Tribe 000333.

- 2/23/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, providing a check payable to the Tulalip Superintendent, transferring funds from the account of Peter Satanias (Cowlitz) to enable him to go to the sanatorium. Cowlitz Tribe 000334.
- 2/24/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, noting that he sent \$100 yesterday to the credit of Peter Satanias, to be used for his expenses. The letter notes that he cannot send additional funds without authority from Washington, D.C., because Peter is a minor, but that the funds already sent should be sufficient to cover his treatment at Pyramid Lake. Cowlitz Tribe 000335.
- 4/5/1927 Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Indian Agency, regarding a bill incurred by Peter Satanias (Cowlitz). Cowlitz Tribe 000351.
- 4/11/1927 Letter from Superintendent, Taholah Indian Agency to Peter Satanias, enclosing a check. (Notation at the bottom of letter: “Cowlitz”). Cowlitz Tribe 000352.
- 4/20/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company re: charges to Sam Eyley; noting that there are no funds to his credit at the Taholah Agency and there will not be for 60-90 days, assuming the sale of his father’s property (for which Eyley is heir) goes through; further stating that when the Superintendent is authorized, that he will send a check for Mr. Eyley to endorse, to pay you for his groceries and supplies. Cowlitz Tribe 000137.
- 4/21/1927 Letter from Superintendent, Taholah Indian Agency to William Botzer, MD, regarding his bill against Sam Eyley, an Indian, noting that the sale of the land (for which Eyley is heir) has occurred and that Eyley likely will have money to his credit in a few months. Cowlitz Tribe 000138.
- 5/2/1927 Letter from Superintendent, Taholah Indian Agency to Dr. M. N. Garhart, Seattle, enclosing a check drawn from the account of Peter Satanias, for payment of various bills. Cowlitz Tribe 000353.
- 5/3/1927 Letter from Superintendent, Taholah Indian Agency to Lucinda Satanias, enclosing a check for her to buy clothing. Cowlitz Tribe 000354.
- 6/1/1927 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company enclosing a check payable to Sam Eyley, instructing Toler to have Eyley sign the check, take your share, also send a check to Dr. Botzer, and then give Mr. Eyley the balance. Cowlitz Tribe 000140.

- 9/14/1927 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, noting that he is sending money to him monthly in accord with the regulations, and that he cannot send more. Cowlitz Tribe 000141.
- 1/7/1928 Letter from Superintendent, Taholah Indian Agency to Sam Eyley, advising that there is no money at Taholah Agency to his credit, but that another payment is due to him on March 17, 1928; and that this letter will authorize the grocer to furnish Eyley with groceries, to be paid for when the money is placed to his credit on March 17<sup>th</sup>. Cowlitz Tribe 000142.
- 2/16/1928 Letter from Superintendent, Taholah Indian Agency to Toler Trading Company regarding a check to cover the account of Sam Eyley, noting that he will send a check when money is placed to credit of Mr. Eyley on March 17, 1928. Cowlitz Tribe 000143.
- 10/10/1928 Letter from Superintendent, Taholah Indian Agency to Virginia Satanas, regarding money disbursed to her, and how much money remains in her account. Cowlitz Tribe 000355.
- 11/7/1928 Letter from Superintendent, Taholah Indian Agency to Dr. Fred Barteau, Ft. Spokane Hospital, transmitting a check payable to the order of Nicholas Satanas, to buy clothes. "This amount closes his account on the books of this office." Cowlitz Tribe 000356.
- 11/30/1928 Letter from Superintendent, Taholah Indian Agency to Dr. Wm. Botzer regarding medical attention for Peter Satanas; noting that Satanas gets monthly checks from Taholah and should be able to pay the amounts owed to Dr. Botzer. Cowlitz Tribe 000357.
- 12/22/1928 Letter from Superintendent, Taholah Indian Agency to Dr. Wm. Botzer, following up on the Superintendent's November 30<sup>th</sup> letter (above) regarding the payment of Dr. Botzer's bill for medical treatment for Peter Satanas. Cowlitz Tribe 000358.

## ***9. BIA attending Cowlitz tribal meetings/taking minutes/discussing Cowlitz claim***

As discussed in section 2 above, on a number of occasions throughout the 1920s and continuing into the 1960s, BIA exercised jurisdiction over the Cowlitz Indian Tribe in connection with its review and approval of attorney contracts for the Tribe. In many cases, this included attendance by BIA representatives at Cowlitz Tribal Council meetings to certify the attorney contracts. In addition to attendance at meetings related to attorney contracts, however, BIA representatives attended (and in some cases took minutes of) Cowlitz Tribal meetings for other purposes as well, such as generally certifying the matters discussed, providing information or documents to the Tribe, or submitting matters (*e.g.*, questions re: hunting/fishing rights, timber sales, etc.) to the Department for consideration as appropriate. In some cases, BIA representatives ensured that adequate notice of Tribal meetings was provided, and provided advice to Cowlitz Tribal

officials regarding how to keep proper minutes. BIA also held meetings with the Cowlitz Indian Tribe to discuss particular issues (*e.g.*, allotment on Quinault).

The Department and BIA officials also took a number of actions in connection with the Cowlitz land claims beyond approving attorney contracts that further evidence the exercise of jurisdiction over the Tribe. The Department initially ordered an investigation of the claim (which yielded the favorable McChesney report discussed in section 6 above), and subsequently followed the progression of the related legislation in Congress, at times reporting on this to the Tribe. Later, BIA provided information to the Tribe on claims procedures, availability of funding for expert witnesses, maps, and other issues related to the prosecution of the Tribe's claims. And while the Department in some instances tried to distance itself from the Cowlitz land claims (*e.g.*, the Superintendent stated that he could not pass on the merits), the fact that BIA was so involved in evaluating, monitoring, and funding prosecution of the Tribe's claims from the outset until the eventual litigation in the Indian Claims Commission is strong evidence that the Department was exercising jurisdiction over the Cowlitz Indian Tribe during the 1930s and continuing into the 1950s and 1960s. *See* the following documents for some examples of this type of exercise of jurisdiction, which are contained within the "Section 9" pdf file on the CD accompanying this submission:

- 3/15/1910 Letter from Assistant Commissioner F.H. Abbott to Special U.S. Indian Agent Charles McChesney, Esq., which directed McChesney to "make a thorough investigation of the claims of the Cowlitz Indians and submit a report thereon, suggesting such relief, if any, as you think appropriate." The Assistant Commissioner provided a brief history of the Tribe based on the files and records of his office. Cowlitz Tribe 000359 through 000364.
- 12/4/1911 Letter from Superintendent, Cushman Indian School, Tacoma, WA, to Commissioner of Indian Affairs, explaining that he had held a council with the Cowlitz Tribe a few months ago regarding allotments on Quinault under the 1911 Act. The letter further requests authority to hold another council with the Cowlitz Indians and recommends that a roll be prepared for purposes of making allotments. Cowlitz Tribe 000097 through 000102
- 6/21/1916 H.R. No. 829, including a favorable report on S. 2458 from Interior Secretary Franklin Lane, to allow the Cowlitz Tribe to submit its claims to the Court of Claims, and the Report of Special Indian Agent Charles McChesney to the Commissioner of Indian Affairs (1910): "At the present time, without an accurate census, the Cowlitz Indians claim to number 400 people, about equally divided between full and mixed bloods... As the result of my investigation, I am of the opinion that the claim of the Cowlitz Indians is a just one, and that they should receive compensation for the land they occupied, and recommend that the necessary action be taken with such end in view... These Indians are industrious and self-supporting and reasonably intelligent, and would make good use of any money that might be paid them." Cowlitz Tribe 000200 through 000205.
- 1/31/1919 Letter from Charles Roblin to Commissioner of Indian Affairs, reporting on his assigned enumeration and enrollments of the unattached Indians of western Washington. With respect to Cowlitz, in connection with the belief held by many Cowlitz regarding potential compensation for claims, he notes

that “[t]his is probably due to the fact that the Cowlitz tribe seems to have a better foundation for a claim than the other tribes of western Washington. No treaty was ever made and concluded with the Cowlitz Indians and no benefits were ever received by this tribe in return for being dispossessed of their lands.” ... “There are very few full-blood Cowlitz Indians left ...” and the vast majority are mixed bloods, scattered over Washington and Oregon. (note: missing page). Cowlitz Tribe 000365 through 000369.

- 11/17/1919* Letter from Assistant Commissioner, Office of Indian Affairs to Superintendent, Taholah Indian School, regarding preparation of the Roblin Roll of 4,000 unattached Indians of northwestern Washington, noting that Roblin discusses the status of eight of the large tribes covered by the roll, including Cowlitz, and that bills have been introduced in Congress to allow the Cowlitz Tribe, among others, to present their claims against the United States. For that reason, “no further action will be taken” on any of the claims of these “unattached” Indians. Cowlitz Tribe 000370 through 000371.
- 3/30/1925* Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman), advising that the Cowlitz Tribe was not included in the Act that permits certain tribes to bring claims in Court of Claims; and that the bill to compensate the Cowlitz (for lands taken) did not become law. Asks when next tribal meeting will occur, so he can “deliver the certificates of appreciation issued by President Coolidge for the services of the Cowlitz boys in the late war.” Cowlitz Tribe 000372.
- 3/8/1927* Letter from Assistant Commissioner, Indian Affairs to Superintendent, Yakima Agency, regarding the claims of the Cowlitz Tribe of Indians, the status of the pending Cowlitz bills in Congress, and requesting information about “any persons collecting money from individuals of the Cowlitz tribe, in order to finance the presentation of the Cowlitz’ claims...” Cowlitz Tribe 000373 through 000374.
- 1/28/1932* Letter from Superintendent Taholah Indian Agency (Nicholson) to Jas. E. Sareault (Cowlitz), noting that he cannot pass on the merits of the Cowlitz Tribe’s claim, but will be glad to attend a Cowlitz Tribal Meeting to certify as to matters taken up at meeting or to submit matters to the Department for action “as the facts may warrant.” Cowlitz Tribe 000375.
- 2/5/1932* Letter from Jas. E. Sareault to Superintendent, Taholah Indian Agency regarding the Cowlitz meeting to be held on February 15, 1932, asking for the Superintendent’s attendance to certify matters presented, especially executing the attorney contract (to pursue Cowlitz claims). Cowlitz Tribe 000061.
- 2/6/1932* Letter from Superintendent, Taholah Indian Agency to Mr. Jas. E. Sareault, advising that he will be pleased to be present at the Cowlitz meeting and will have with him Mr. Roblin, who is in this locality on some special work. The Superintendent reiterates that will be able to certify only as to matters taken

up at the meeting and could not in any way pass on any claims of the Cowlitz Indians....” Cowlitz Tribe 000376.

- 2/16/1932 Report from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs. The Superintendent advised that he had attended the Cowlitz Indian Council meeting held on February 15, 1932, and he reported on the status of the attorney contract and related documents. In addition, he noted that he examined the minutes kept by the Cowlitz Secretary to ensure that there was adequate notice of the meeting. Cowlitz Tribe 000063 through 000065.
- 1/31/1947 Letter from Superintendent, Taholah Indian Agency to Mr. Wilson (Cowlitz Chairman), providing information on the pending Court of Claims suit in which the court held that Cowlitz and other tribes had an interest in the Quinalt reservation. Cowlitz Tribe 000377.
- 5/4/1950 Letter from Acting Superintendent, Taholah Indian Agency (Keeler) to Mrs. E.R. Goulter, responding to a request for information regarding the Cowlitz Tribe’s claims and stating that “[t]he Cowlitz Tribe never had a treaty with the Government, but there has been some information that this tribe may take steps to hire an attorney for the purpose of filing a claim in their behalf with the United States Claim Commission against the United States. Cowlitz Tribe 000378.
- 5/10/1950 Letter from Acting Superintendent, Taholah Indian Agency to Jas. E. Sareault (now the Cowlitz Tribe’s attorney), confirming receipt of this letter and the time and date of the next Cowlitz meeting, and advising that the Agency will try have BIA staff present at the meeting to discuss the Tribe’s filing of claims in the ICC. The letter also mentions and encloses a copy of the Departmental regulations governing the procedures for tribal contracts with attorneys, and indicates which procedures the Cowlitz Tribe should follow. Cowlitz Tribe 000073.
- 5/22/1950 Letter from Acting Superintendent Keeler to other tribes, asking if they would like copies of a map showing the location of Tribes in the Territory of Washington made under the direction of Governor Isaac Stevens. (note: this map was submitted as part of the Cowlitz Indian Tribe’s Request for a Restored Lands Opinion, March 15, 2005). The Superintendent explained that “[w]hile in attendance at a recent meeting of the Cowlitz Tribe of Indians . . . this agency was shown” the map. The Acting Superintendent explained that “this map would be indispensable and of incalculable value to any tribe or group of Indians . . . who have claims pending or who intend to file claims against the Government, especially claims for the taking of Indian lands without payment of just and fair compensation.” Cowlitz Tribe 000379.
- 5/23/1950 Letter from Commissioner of Indian Affairs Myer to Congressman Anderson, informing him that the Court of Claims found that “the Cowlitz

Tribe, among other tribes, was entitled to recover” in *Quinaielt Tribe of Indians v. United States*. Cowlitz Tribe 000380.

- 6/1/1963 Cowlitz Tribal resolution regarding prosecuting the Tribe’s claim in the ICC and hiring attorneys for that purpose, certified and signed by the Superintendent, Western Washington Agency. Cowlitz Tribe 000381 through 000383.
- 1964 Letter from Cowlitz Chairman Clifford Wilson to BIA, Everett, Washington, announcing that the Cowlitz Tribe is holding a special meeting on September 19, 1964, and requesting that BIA representative attend. Cowlitz Tribe 000384.
- 8/20/1964 Letter from Acting Superintendent W.D. Babby, BIA Western Washington Agency to Cowlitz Chairman Clifford Wilson, indicating that a BIA “representative from our Tribal Operations Office will attend” the Cowlitz special meeting on September 19, 1964. Cowlitz Tribe 000385.
- 3/22/1965 Memorandum from Tribal Operations Officer to Superintendent, Western Washington Agency re: Cowlitz Quarterly Meeting on March 13, 1965. The memorandum notes that Departmental representatives attended from the Portland Area Office, the Regional Solicitor Office, and the Western Washington Agency; and that the Cowlitz claims were discussed, as well as possible BIA approval of contracts for certain experts and attorneys. In addition, the BIA representative at the meeting explained the conditions under which loans from BIA are available to expert witnesses; and indicated that “[a]s soon as an attorney is selected, we expect the Tribe to make an application for a loan.” Cowlitz Tribe 000386 through 000389.
- 6/7/1965 Letter from Superintendent Babby, Western Washington Agency to Chairman Wilson of Cowlitz Tribe of Indians, asking when the next Cowlitz meeting will be held, noting need to have BIA representative there to certify acceptance of attorney contract; also requesting meeting minutes from March meeting and providing suggestions for recording of Tribal minutes. Cowlitz Tribe 000089.
- 12/19/1966 BIA memorandum from Tribal Operations Assistant to file, re: General Council meeting of the Cowlitz Tribe. The memorandum reports that BIA attended the December 10, 1966 semi-annual special meeting of the General Council of the Cowlitz Tribe, by invitation of the Cowlitz Chairman, to hear a report on the Tribe’s claims case. The memorandum notes that the Cowlitz had applied for an expert witness loan, and that the Tribe also had questions for the BIA attendees about non-treaty fishing/hunting rights and information about timber sales. The memorandum further notes that the Cowlitz Tribe agreed to provide a list of names of deceased Cowlitz members for BIA probate purposes. Cowlitz Tribe 000390.
- 6/24/1967 Minutes of Cowlitz Tribe special meeting re: government loan for expert witness in Cowlitz claims case. The minutes report that the meeting was



attended by Mr. Vincent Little, BIA Everett Area office. The minutes also state that the Tribe's attorney spoke to Paul Weston in the BIA Portland Area Office about the budget of \$50,000 for experts in the valuation phase of the case, and that if the amount is allocated by BIA, it would be a loan. Cowlitz Tribe 000391.

#### ***10. BIA interceding with State and Local Governments regarding Cowlitz fishing rights***

BIA exercised jurisdiction over the Cowlitz Tribe during the time period from the late 1920s to the mid-1930s by interceding with State and local government entities to represent the interests of the Cowlitz Indian Tribe in connection with Tribal fishing rights. In fact, the Superintendent of the Taholah Indian Agency wrote several letters to the County game warden and the Washington State Attorney General, setting out the federal and tribal position that Cowlitz members were entitled to fish in the usual and accustomed places for their own use. In his letter to the County game warden, the Superintendent requested the return of the Cowlitz members' fishing gear that the game warden had confiscated, and expressed his desire that the matter be resolved without bringing an action in court to enforce their return. In his letter to the Attorney General, the Superintendent noted that he had appeared in the case of a Cowlitz Indian who had been arrested for illegal fishing, and that the Justice of the Peace had ruled that the Cowlitz Tribal members have a right to fish for their own use. The Superintendent also offered to provide whatever help he could if any of the Cowlitz Tribal members got into trouble for fishing.

Unfortunately for the Cowlitz, the State disagreed with the Superintendent's view, and in a 1928 letter to John Ike (John Isaac Kinswa), then-Cowlitz Tribal Chairman (*see* BAR Proposed Finding, Summary Under the Criteria at 18, 35, 36, 43; *see also* HTR at 121), the Superintendent explains that the Attorney General's position is that the Cowlitz effectively have only the same rights to fish as white people, primarily because the Cowlitz do not have a treaty or reservation, and that the Attorney General is going to enforce that interpretation against the Cowlitz Tribe. Despite this letter from the State, the extent and scope of the Cowlitz Tribe's fishing rights continued to be an issue. The Superintendent continued to advocate on behalf of the Tribe and its members, and in 1934, the Tribe filed a petition for recognition of its fishing rights.

The Superintendent's efforts on behalf of the Cowlitz Tribe and its members, whether or not ultimately successful, demonstrate a clear example of the exercise of federal jurisdiction over the Cowlitz Tribe during the relevant time period. Not only did he assert a federally protected right on the Tribe's behalf in dealing with State and local entities, but he expressed his intent to enforce such rights in connection with the confiscation of Tribal members' property, he participated on behalf of a Tribal member in a legal proceedings against him for State fishing violations, and he continued to advocate for the Tribe even after the State continued to arrest and prosecute Cowlitz Tribal members. This evidences BIA's understanding that it had jurisdiction over the Cowlitz Indian Tribe. *See* the following documents for examples of the Bureau's assertion and exercise of jurisdiction over the Cowlitz Tribe in connection with the assertion of tribal fishing rights, contained within the "Section 10" pdf file on the CD accompanying this submission.

4/22/1926	Letter from Superintendent, Taholah Indian Agency to County Game Warden, Chehalis, WA requesting the return of property (fishing equipment) seized from two Cowlitz Indians, noting that they were fishing in the usual and accustomed places for their own use. "I hope that it will not be
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necessary to bring an action in the courts to enforce the return of the webbs belonging to these Indians, and the rain coats which were also taken.”  
Cowlitz Tribe 000057 through 000058.

- 3/14/1928 Letter from Superintendent, Taholah Indian Agency to Attorney General, State of Washington, regarding the fishing rights of tribes in the Cowlitz River area. The Superintendent explained that he appeared in the case of a Cowlitz Indian who was arrested for illegal fishing, and the Justice of the Peace ruled that the Indians have a right to fish for their own use, but not sell the fish. Reflecting his close interaction with the Cowlitz Tribe, the Superintendent explained that “[t]he Indians depend on fish as the main part of their food supply, and have always lived on fish. In fact, the old Indians tell me that when they are deprived of fishing for a considerable length of time they become ill and their health fails them.” The Superintendent requests concurrence in his view that “Indians living in the vicinity of the Cowlitz River are entitled to take fish to eat ... for their own use – at any time” so that he can take the matter up with the local game wardens.  
Cowlitz Tribe 000392 through 000393.
- 3/18/1928 Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman) stating that he has contacted the Attorney General regarding Cowlitz fishing rights “and if I can get any help from him I will notify you promptly. If any of you get into trouble for fishing, I will come over and do what I can to help you.” Cowlitz Tribe 000394.
- 3/19/1928 Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman), explaining that the Attorney General’s position is that Cowlitz can fish only at the same time and in the same manner as the white people, and only for their own use. He notes that the State appears to be taking that position because the Cowlitz do not have a treaty or reservation – the reservation Indians can fish for their own use at any time, but can only sell fish during the market season of white people. Cowlitz Tribe 000395.
- 10/27/1928 Letter from Superintendent, Taholah Indian Agency to Secretary, State Fisheries Board, stating that: “I am writing to again ask you for authority in writing, if possible, to allow the old Indians [of the Cowlitz River country] to fish for the use of themselves and their families.” Cowlitz Tribe 000396.
- 9/8/1934 Letter from Director, WA Department of Fisheries to Superintendent, Taholah Indian Agency, in response to letter re: Frank Wannassay, Cowlitz Indian, who asks permission to take fish for his own use. The State Director explains his view of that law, that whenever Indians fish outside of their reservations they become subject to the same laws as other persons; Indians are permitted to take fish for person use only in rivers flowing through or bordering reservations within 5 miles of boundaries. Cowlitz Tribe 000397.
- 10/15/1934 Fishing petition signed by 63 members of the Cowlitz Tribe; requesting legislative recognition from both Washington State and Washington DC that Indians of any WA Tribe may take fish from any body of water in the State,

in the usual manner, for themselves and their families, either in or out of season, provided that the Indian has obtained a fishing permit from the State at no charge. Signators include, *inter alia*, Frank and other Wannassys, Plamondons, J.B. Sareault, President of Cowlitz Tribe, Jas. E. Sareault, Sam and Sammy Eyle (and other Eyles) Cheholtz's, Jim Kiona, Joe Suterlick, John Ike, and Frank Iyall. Cowlitz Tribe 000398 through 000400.

#### ***11. BIA census/enrollment/vital statistics record-keeping re: Cowlitz***

BIA also kept census, enrollment and other vital statistics information for members of the Cowlitz Tribe during the 1920s and 1930s, and extending into the 1940s and 1950s, which is another indicator that BIA was actively exercising jurisdiction over the Cowlitz Tribe. While it is technically correct that BIA never kept an “official” census or roll for the Cowlitz Tribe, despite several efforts at the local level to do so, BIA’s collection and maintenance of this large amount of statistical information regarding the age, gender, residence, blood quantum, “ward” status and genealogy of Cowlitz Tribal members is far better evidence that BIA in fact was asserting and exercising jurisdiction over the Tribe. The first BIA census of Cowlitz members was the Roblin roll of 1919, in which Roblin reported on the numbers and tribal enrollment of the “unattached Indians (*i.e.*, landless tribes) of western Washington. This roll was used as a basis for subsequent record-keeping activities of the Taholah Indian Agency with respect to Cowlitz Tribal members. As the Taholah Superintendent noted in a 1927 letter, obtaining information about births, deaths, and other vital statistics for the members of tribes under his jurisdiction, which included Cowlitz, was essential for “properly administering the business of the agency in the matter of making allotments, probate work, and keeping accurate records of individual Indians.”

The Superintendent of the Taholah Indian Agency also contributed information about Cowlitz Tribal members as part of the completion of various census roll documents for the Commissioner of Indian Affairs’ Annual Statistical Report. Excerpts from this Report were found for the years 1932 through 1938, and there was significant discussion between the Commissioner’s staff and the Taholah staff in 1935 regarding how properly to record Cowlitz Tribal members (in light of the fact that Cowlitz did not have a reservation but had members allotted on the Quinault reservation). The local BIA Office also responded to inquiries regarding the enrollment status of certain individuals in the Cowlitz Tribe, and it could not have answered such inquiries if it had not kept sufficiently-documented records regarding membership in the Cowlitz Tribe unless it had a sufficiently close relationship with the Cowlitz Tribal leadership. In short, it would be incongruous for the Bureau to have made this kind of effort to keep track of Cowlitz membership and other vital statistics if the Bureau had not been actively asserting jurisdiction over the Tribe. There are a number of documents in the record which illustrate BIA’s maintenance of census data and other related record-keeping activities in connection with the Cowlitz Indian Tribe. *See* the following documents, which are contained within the “Section 11” pdf file on the CD accompanying this submission.

1/31/1919 Letter from Cash Roblin to Commissioner of Indian Affairs, reporting on his assignment to prepare an enumeration and enrollments of the unattached Indians of western Washington, and to “prepare and submit schedules of such Indians, arranged by families and tribes.” With respect to Cowlitz, in connection with the belief of many Cowlitz regarding potential compensation for claims, he notes that “[t]his is probably due to the fact that

the Cowlitz tribe seems to have a better foundation for a claim than the other tribes of western Washington. No treaty was ever made and concluded with the Cowlitz Indians and no benefits were ever received by this tribe in return for being dispossessed of their lands.” ... “There are very few full-blood Cowlitz Indians left ...” and the vast majority are mixed bloods, scattered over Washington and Oregon. Roblin further notes that the Tribe’s strong claim “brought forth a horde of claimants” some of which he viewed as having questionable ties to the Tribe, and he “tried to eliminate all those from the schedule submitted, as well as I could.” The schedule of unenrolled Indians of the Cowlitz Tribe, dated as received by the Office of Indian Affairs on February 8, 1919, lists 222 members of ½ or more Indian blood. Cowlitz Tribe 000401 through 000406.

- 11/17/1919* Letter from Assistant Commissioner, Office of Indian Affairs to Superintendent, Taholah Indian School, regarding preparation of the Roblin Roll of 4,000 unattached Indians of northwestern Washington, noting that Roblin discusses the status of eight of the large tribes covered by the roll, including Cowlitz, and that bills have been introduced in Congress to allow the Cowlitz Tribe, among others, to present their claims against the United States. For that reason, “no further action will be taken” on any of the claims of these “unattached” Indians. Cowlitz Tribe 000370 through 000371.
- 1920s* Register of Vital Statistics for Taholah Indian School (Agency), 1920s, Deaths. Deaths include three individuals listed as 4/4 degree of blood, Cowlitz Tribe (including Dick Satanas, 10/28/25). Cowlitz Tribe 000407 through 000412.
- 11/1/1920* A November 1, 1920 “Report on the Indians of Western Washington, by Malcolm McDowell” contained within the Fifty-Second Annual Report of the Board of Indian Commissioners to the Secretary of the Interior for the Fiscal Year Ended June 30, 1921, stated that there were 490 Cowlitz Indians. The report also discussed the Cowlitz Tribe’s efforts to obtain a bill from Congress to submit their claims to the Court of Claims, and stated:
- There are only a few hundred Cowlitz Indians in Washington and some of them are called Chehalis . . . The majority of these Indians living in Washington are classed as mixed bloods.
- Cowlitz Tribe 000413 through 000420.
- 4/15/1922* Letter from Superintendent, Taholah Indian Agency to Superintendent, Tulalip Agency, asking for the census list of Cowlitz Indians from the Roblin Roll, so he can check which Cowlitz are dead, married, born, etc. Cowlitz Tribe 000421.
- 5/3/1922* Letter from Superintendent, Taholah Indian Agency to John Ike (Cowlitz Chairman), requesting that he provide information to prepare “a list of all the

Cowlitz Indians by families, what is called a census ... I want a roll of just the Cowlitz Indians who live in that section of the country or who are not on any other roll, or allotted anywhere else.” The letter also discusses arrangements to meet with Chairman Ike to prepare same: “I wish to do what I can to help you people as you are under my jurisdiction.” Cowlitz Tribe 000422.

- 8/19/1927 Letter from Superintendent, Taholah Indian Agency to Registrar, Washington State Board of Health, requesting assistance in developing a mechanism by which the Superintendent could receive “copies of all birth and death certificates of Indians under the jurisdiction of the Taholah Indian Agency[.]” This is essential for “properly administering the business of the agency in the matter of making allotments, probate work, and keeping accurate records of individual Indians.” The Superintendent informs the Registrar that the “administration of the Taholah Agency embraces the following tribes: ... Cowlitz.” Cowlitz Tribe 000423.
- 1930s Register of Vital Statistics for Taholah Indian School (Agency), early to mid-1930s, Deaths. Deaths include eight individuals listed as Cowlitz, (*inter alia*, Sam Eyle/1936, full blood; Marion Ike/1933, full blood, daughter of John Ike; Pete Satanas/1933, full blood, son of Harry Satanas; Mary Satanas Saluskin/1933, full, daughter of Dick Satanas). Cowlitz Tribe 000424 through 000437.
- 2/9/1931 Letter from Superintendent Nicholson, Taholah Indian Agency, to an individual Indian, advising him that “[w]e have no record of you being a member of the Cowlitz Tribe.” Cowlitz Tribe 000438.
- 1932 1932 Annual Statistical Report, Section II, Population, Quinalt Reservation, Taholah Agency includes 7 mixed blood Cowlitz, 6 of whom listed as “ward”. Cowlitz Tribe 000439.
- 6/18/1932 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs w/attachments, regarding completion of census roll documents for the 1932 Annual Statistical Report. Notes that he did not complete a separate sheet for Chinook, Chehalis and Cowlitz Tribes enrolled on the Quinalt Reservation, for the reason that they were put on the Quinalt roll in 1932; they had not been enrolled with any tribe prior to that time. Shows 7 Cowlitz enrolled on Quinalt Reservation; all of these listed as “Mixed blood”, and 6 listed as “Ward”. Cowlitz Tribe 000103 through 000105.
- 8/13/1932 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs re: corrections to census roll documents for 1932 Annual Statistical Report. Notes that number of Indians deducted from estimate of unattached Indians comports with those allotted on the Quinalt Reservation, namely the Cowlitz, Chinook and Chehalis. Cowlitz Tribe 000440 through 000441.

- 1933 1933 Annual Statistical Report, Section II, Population, Quinalt Reservation, Taholah Agency includes 22 mixed blood Upper Chinook-Cowlitz, of which 22 are listed as “ward”. Cowlitz Tribe 000442.
- 1933 Revised Copy, 1933 Report, Section II, Population, Quinalt Reservation, Taholah Agency includes:
- 15 Quinalt-Cowlitz, 4 residing at jurisdiction where enrolled, 11 residing elsewhere
  - 2 Quinalt-Cowlitz-Puyallup, residing elsewhere
  - 22 Upper Chinook-Cowlitz, 1 residing at jurisdiction where enrolled, 21 residing elsewhere.
- Cowlitz Tribe 000443 through 000444.
- 1933 1933 Report, Section II, Population, Quinalt Reservation, Taholah Agency (appears to be continuation of 1933 population report in above document, includes:
- 1 full blood Chehalis-Cowlitz, listed as “ward”
  - 1 full blood and 18 mixed blood Cowlitz, all 19 listed as “ward”
- Cowlitz Tribe 000445.
- 1933 Census Recapitulation Sheet (draft) for 1933 Annual Statistical Report, Census of combined Quinalt, Quileute, Chinook, Chehalis, and Cowlitz Tribes of the Quinalt Reservation, Taholah Agency: Total number = 1050 Cowlitz Tribe 000446.
- 1933 1933 Annual Statistical Report, Section II, Population (Taholah Agency/draft) includes:
- 22 mixed blood Chinook-Cowlitz, 22 are “ward”
  - 1 full blood and 18 mixed blood Cowlitz, all 19 listed as “ward”
  - 15 mixed blood Quinalt-Cowlitz, all 15 listed as “ward”
- Cowlitz Tribe 000447 through 000449.
- 1/23/1933 Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, asking whether the Commissioner really wants the Agency to keep separate census rolls for the Cowlitz, Chinook and Quinalt Tribes. Noting that as a result of the *United States v. Halbert* case, 62 members of Cowlitz, Chinook and Chehalis were listed on the rolls of the Quinalt Tribe (7 Cowlitz are listed as “Cowlitz Indians, allottees of the Quinalt Reservation”). “There has never been, as the Office is aware, a census roll of the Chinook Tribe nor of the Cowlitz Tribe, and this agency never reported them on the census roll up until the time they were granted allotments on the Quinalt Reservation.” Cowlitz Tribe 000106 through 000107.

- 1934 1934 Annual Statistical Report, Quinaielt Reservation, Taholah Agency includes:
- 15 Quinaielt-Cowlitz, 3 residing at jurisdiction where enrolled, 1 residing at another jurisdiction, 11 residing elsewhere
  - 1 Quinaielt-Cowlitz-Dwamish, residing at another jurisdiction
  - 2 Quinaielt-Cowlitz-Puyallup, residing elsewhere
  - 1 Chehalis-Cowlitz, residing at jurisdiction where enrolled
  - 19 Cowlitz, 6 residing at jurisdiction where enrolled, 13 residing elsewhere
  - 22 Upper Chinook-Cowlitz, 3 residing at jurisdiction where enrolled, 19 residing elsewhere.
- Cowlitz Tribe 000450 through 000453.
- 3/16/1934 Letter from Commissioner Collier to Taholah Indian Agency Superintendent Nicholson, directing him to make a census of the tribes occupying the Quinaielt Reservation. In explaining the effect of the Supreme Court's decision in the *Halbert* case, Commissioner Collier explained that Cowlitz members "were not made Quinaielt Indians by the decree of the court, and they should be enrolled, if under your jurisdiction, as . . . Cowlitz Indians. The rolls should be maintained separate and distinct from those of the Quinaielt Indians." Commissioner Collier also explained that "the Cowlitz Tribe is endeavoring to obtain jurisdiction for the Court of Claims to adjudicate its claims." Cowlitz Tribe 000454.
- 4/1/1934 1934 Annual Statistical Report, Census Recapitulation Sheet, Census of Upper Chinook-Cowlitz of Quinaielt Reservation, Taholah Agency: Total=22. Cowlitz Tribe 000455.
- 4/1/1934 1934 Annual Statistical Report, April 1, 1934, Section V, Population, Quinaielt Reservation, Taholah Agency BIA population records, Quinault, includes:
- 1 full blood Chehalis-Cowlitz, listed as "ward"
  - 1 full blood and 18 mixed blood Cowlitz, all 19 listed as "ward"
- Cowlitz Tribe 000456.
- 1/11/1935 Another Letter from Commissioner Collier to Superintendent Nicholson regarding preparation of a census and tribal membership roll of tribal members residing on the reservations within his jurisdiction. Commissioner Collier explained that he should "keep a separate census for each reservation under your charge, but, at the same time, you should maintain at the agency a tribal roll for each different tribe entitled to tribal rights thereon, such as the Quinaielts, Quileutes, etc. In other words, the census is by reservations, regardless of tribe, that is it shows all Indians of a particular reservation, while the tribal membership roll contains the names of all Indians entitled to

tribal rights therewith.” Commissioner Collier also addressed tribal members not residing on a particular reservation, stating:

“You say that there are Indians living on or adjacent to the reservations under your charge, who have been at such places for many years, but are not carried on any census. In preparing the census at your agency, after enumeration for the regularly enrolled Indians as shown by the tribal rolls, any other Indians there should be listed under a separate subhead, such as – ‘Not enrolled at this or possibly any other agency.’ with information as to tribe and degree of Indian blood in each case.”

Cowlitz Tribe 000457 through 000458.

- 8/3/1935* Letter from May M. Reed, Statistician, Office of Indian Affairs to Superintendent, Taholah Agency, returning for correction pages for Annual Statistical Report, pages include those for Cowlitz. Cowlitz Tribe 000459.
- 8/13/1935* Letter from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs, returning corrected pages for Annual Statistical Report , including those for Cowlitz enrolled on Quinalt Reservation. Cowlitz Tribe 000460.
- 10/8/1935* Deaths Roll (attachment to 8/13/1935 Letter, above): Raymond A. Provoe, 1/2 degree blood, Cowlitz Tribe. Cowlitz Tribe 000461.
- 1936-1940* Register of Vital Statistics for Taholah Indian Agency, 1936-1940, Deaths. Deaths include 4 individuals listed as Cowlitz (including a Lewis(?) Castoma, 11/4/39, and Kenneth Kinswa, 12/9/36, full blood). Cowlitz Tribe 000462 through 000465.
- 9/1/1937* Taholah Indian Agency, draft narrative section for Annual Statistical Report: This jurisdiction further includes, approximately, 500 unattached Indians, largely of the Cowlitz Tribe, residing throughout Southwest Washington. Cowlitz Tribe 000466.
- 9/1/1938* Taholah Indian Agency, draft narrative section for Annual Statistical Report: This jurisdiction further includes, approximately, 500 unattached, unenrolled (unenrolled is a handwritten edit) Indians, largely of the Cowlitz Tribe, residing throughout Southwest Washington. Cowlitz Tribe 000467.
- 9/17/1941* Letter from Superintendent, Taholah Indian Agency responding to a letter asking for verification of degree of Indian blood for an individual Cowlitz member. The Superintendent explains that “I am sorry to advise you that in going through the files of the Cowlitz Tribe, I am unable to find any reference to the boy’s mother . . . or to yourself, as being listed on the Cowlitz roll. Cowlitz Tribe 000468.



- 1941-1947 Register of Vital Statistics for Taholah Indian Agency, 1941-1947, Deaths. Deaths include 3 individuals listed as Cowlitz, one listed as Chinook-Cowlitz. Cowlitz Tribe 000469 through 000472.
- 9/6/1941 Letter from Superintendent, Taholah Indian Agency to Mrs. John Burr. “We have checked the records of the Cowlitz Tribe and find that we have no record of the enrollment of your husband, John P. Burr.” Cowlitz Tribe 000473.
- 10/1/1953 Letter from Jas. Elias Sareault, Attorney to Superintendent, Western Washington Agency, re: issuance of “blue cards issued to various Indians who are recognized as members of certain tribes.” The letter notes that blue cards have come to be known as identification cards, primarily issued for hunting and fishing under the Stevens Treaties, and requesting that the Superintendent issue blue cards to Cowlitz members (in particular, Mrs. Mary L. King) upon certification from the appropriate Tribal authority that the person asking for the card is an enrolled member. Cowlitz Tribe 000474 through 000475.
- 12/19/1966 BIA memorandum from Tribal Operations Assistant to file, re: General Council meeting of the Cowlitz Tribe. The memorandum notes that BIA attended the December 10, 1966 semi-annual special meeting of the General Council of the Cowlitz Tribe, by invitation of Cowlitz Chairman, to hear a report on the Tribe’s claims case. The memorandum also notes that the Tribe will provide a list of names of deceased Cowlitz members for BIA probate purposes. Cowlitz Tribe 000390.

## ***12. BIA Considering Termination of Cowlitz and Other Tribes in 1950s***

Finally, the evidence in the record demonstrates that in 1953, BIA considered legislative termination of the tribes in western Washington. Among the tribes named in the draft termination legislation was the Cowlitz Indian Tribe. In addition, BIA notified and conducted consultation sessions with the named tribes, which included at least two meetings with Cowlitz Tribal representatives. If BIA was not exercising jurisdiction over the Cowlitz Indian Tribe at that point in time there would be no need to explicitly terminate those services. (Although Congress did not in fact act to terminate the Cowlitz Indian Tribe, by the 1970s the Department had begun to take the position that the Tribe was unrecognized and therefore no services were owed to it.) Documents pertaining to BIA’s proposed termination of the Cowlitz Tribe are contained within the “Section 12” pdf file on the CD accompanying this submission:

- 9/23/1953 Letter from Commissioner of Indian Affairs to Area Director (Portland), directing him to consult with tribes in western Washington regarding a preliminary draft of legislation to terminate federal supervision. The Bureau’s draft legislation proposed to terminate “Federal supervision over the property of the following Indian tribes, bands, communities, organizations, or groups, and the individual members thereof: . . . Cowlitz Tribe[.]” Cowlitz Tribe 000476 through 000477; 000494 through 000496.

- 9/30/1953 Letter from Western Washington Agency to the Portland Area Director, setting out how and when it planned to present the termination legislation to the tribes in the area. Regarding the Cowlitz Tribe, the letter states that the Chairman had been contacted and a meeting has been scheduled for 1 pm on October 3<sup>rd</sup>. Cowlitz Tribe 000478 through 000483.
- 10/7/1953 Memorandum from BIA Forest Manager to Superintendent, Western Washington Agency, summarizing consultations with the named tribes. The memorandum reports that “Mr. James Sareault of Chehalis was the only Cowlitz Indian to attend any of the meetings. He was at the Oakville meeting. As you know, this group is widely scattered and it was not possible to get word to many of them. However, Mr. Sareault now has a good understanding of the matter and will present it to the Cowlitz people.” Cowlitz was not the only tribe that did not send significant numbers of members to these meetings; the report states that “some of the meetings were not well attended and some groups were not represented or were poorly represented.” Cowlitz Tribe 000484 through 000486.
- 10/29/1953 Letter from Western Washington Agency to Commissioner of Indian Affairs, providing a summary of the outreach with tribes in western Washington to discuss the draft termination legislation. The letter indicates a meeting was held with the Cowlitz Tribe on October 1, 1953 and explains that the “tribe is scattered throughout southwest Washington. . . . The principle points of interest expressed at this meeting were requests for a longer period to prepare roll, tax exemption during life of timber sales contracts, preservation of hunting and fishing rights, settlement of claims before termination.” Cowlitz Tribe 000487 through 000493.

**CONCLUSION:**  
**THE FEDERAL GOVERNMENT HAD JURISDICTION OVER THE**  
**COWLITZ INDIAN TRIBE AS A MATTER OF LAW**  
**AND**  
**IT EXERCISED THAT JURISDICTION AS A MATTER OF FACT**

Any tribe that still maintained tribal relations when the IRA was enacted, regardless of whether the federal government had extended formal recognition to the tribe, regardless of whether the tribe had a reservation, regardless of whether the tribe’s members were of one-half or more Indian descent, and regardless of whether the federal government even knew of the tribe’s existence, is a tribe that was under federal jurisdiction in 1934. Because the federal government has confirmed through the Federal Acknowledgment Process that the Cowlitz Indian Tribe maintained tribal relations from a time that predates the enactment of the IRA continuously through the present day, the Cowlitz Indian Tribe, as a matter of law, was under federal jurisdiction in 1934.

Further, there is an incredibly strong factual record that underscores that BIA (through its supervision of the Tribe’s affairs), Congress (through its repeated consideration and enactment of legislation related to the Cowlitz’s land claims) and the federal courts (through their consideration

and determination of the existence of Cowlitz allotment rights) all *exercised* that jurisdiction over the Cowlitz Tribe during the time period in which the IRA was enacted.

Because the Cowlitz Indian Tribe was so clearly “under Federal jurisdiction” when the IRA was enacted, and because of course the Tribe is federally recognized, the Department should complete, with all due haste, the Tribe’s fee-to-trust and reservation proclamation process for the Tribe’s Clark County land so that this Tribe, landless for more than a century and a half, will finally have a reservation.