

# OSAGE LANDS & MINERALS - 1872 to TODAY

## FACT SHEET

Since their beginning, the Osage people have been **connected to the land**: physically, culturally, and spiritually. Despite losing huge amounts of land in the last two centuries, their connection to the land remains alive and powerful.



### RESERVATION IN OKLAHOMA

In **1872**, the Osage made their final move, to what would become the present home of their nation: the Osage Reservation - **1.5 million** acres in **northeast Oklahoma**. This was land they *purchased* from the Cherokee with funds from sale of their land in Kansas. This area is the same as **Osage County**, Oklahoma.

The eastern part of the reservation was **wooded**, with rock-ribbed hills and open meadows (**Cross Timbers** eco-region). The western part was rolling **tallgrass prairie** - the **Flint Hills** eco-region. (See [Map - Eco-systems of Osage Reservation.](#))

After having their lands repeatedly stolen by white squatter-farmers in the past, the Osage felt this area was safer since whites thought it too rocky and hilly for cultivation.



### ALLOTMENT and MINERAL RIGHTS

In the late 1800's, the federal government wanted Native Americans to **assimilate** - give up their way of life and blend in to white society. One way to accomplish this was the Dawes Act in 1887 which divided up the communally-owned reservations into privately-owned **allotments** - a share or piece of land, with "surplus" land sold to non-natives.

For most tribes, this would "end the old **communal** way of life and turn American Indians into private property owners" - and make it possible for whites to buy Indian land (Grann 49). Another reason for allotment was the U.S. wanted to turn the Indian Territories into the state of Oklahoma, but to do this, all land had to be individually owned (Powell 56).

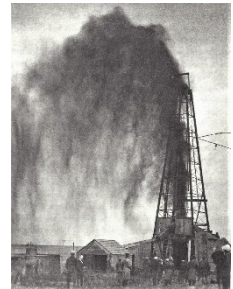
However, because the Osage had *purchased* their own reservation land, they were exempt from these earlier allotments under the Dawes Act. Under the wise leadership of **Chief James Bigheart**, the Osage insisted on the following unique provisions in their **Osage Allotment Act in 1906**:

- (1) **Larger Allotments**: Instead of allotting just 160 acres to each person and selling the rest, as other tribes had been forced to do, the Osage allotted *all* their reservation land *to their people*. This gave **657 acres each** to the 2,229 registered Osage (Grann 52).

**(2) Reserved Communal Mineral rights:**

- (a) They “**reserved**” - held back from allotment - their **mineral rights**: the right to mine or produce oil and gas, rocks, and minerals from under the ground was not allotted, and so was never lost.
- (b) They retained **communal ownership** of these reserved mineral rights, so all subsurface minerals belonged to the entire tribe instead of individuals. Instead of leaving to chance who might get rich later from oil and gas being found on their particular allotment, all tribespeople share equally in any mineral wealth (Wilson 62).

Each received a “**headright**” - right to a share of the whole mineral interest (oil) income - which could be passed on from generation to generation.



Reserving the minerals eventually resulted in the Osage becoming some of the **wealthiest people in America** during the 1920's peak production of the Osage oil fields, among the largest in the world. (Oil income since that time has diminished considerably.)



Although the oil boom reversed the economic misfortune of the Osage, it also resulted in immense suffering during the 1920's “**Osage Reign of Terror.**” Some unscrupulous non-natives cheated and stole from the Osage by being appointed their “legal guardians” and then embezzling their income.

Others attempted to access Osage wealth by marrying into families with oil income. Some then actually *murdered their own family members* to inherit headrights. Estimated numbers of Osage murder victims ranges from 25 into the hundreds though few prosecutions resulted.

David Grann's recent best-selling ***Killers of the Flower Moon*** brought these injustices to national attention. [See in-depth Lesson: “**Reign of Terror: the Osage Indian Murders**”]

Today, the Osage mineral rights are held in trust and managed by the **Osage Minerals Council**. See <https://www.osagenation-nsn.gov/frequently-asked-questions>

SOURCES: Bailey, Garrick Alan and Daniel C. Swan, John W. Nunley, and E. Sean Standing Bear. *Art of the Osage*. Seattle: St. Louis Art Museum in association with University of Washington Press, 2004. Grann, David *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI*. New York: Doubleday, 2017. Wilson, Terry P. *The Osage*. Indians of North American Series. New York: Chelsea House Publ., 1988. Compiled 2018.

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# Frequently Asked Questions

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## **What is the Osage Mineral Estate?**

The Osage Mineral Estate is the oil, gas, and other Minerals sub-surface of the approximately 1.47 million acre Osage Reservation.

## **Who owns the Osage Mineral Estate?**

Section 3 of the 1906 Act establishes that the Osage Nation is the beneficial owner the Osage Mineral Estate. The United States holds title to the Osage Mineral Estate in trust for the Osage Nation. No individual or group of individuals owns the Osage Mineral Estate.

## **What is a “headright”?**

A “headright” is the right to receive a quarterly distribution of funds derived from the Osage Mineral Estate.

## **Do only Osages own headrights?**

No. Indians of other tribes, non-Indians, corporations, churches, and others own headrights today.

## **How many headrights are currently owned by non-Osages?**

According to the BIA's Osage Agency, approximately 25% of the headrights are currently owned by non-Osages.

## **Who manages the Osage Minerals Estate?**

The BIA's Osage Agency manages the Osage Mineral Estate on a day-to-day basis.

## **Whose responsibility is it to collect funds derived from the Osage Minerals Estate?**

The U.S. Department of the Interior acting through the BIA's Osage Agency has the exclusive authority to collect funds from Osage Minerals leases. No Osage Nation entity has authority to collect these funds.

## **Does the Principal Chief, the Osage Nation Congress, the Osage Minerals Council, or some combination thereof have the power to redistribute headrights held by Osages or non-Osages?**

No. A headright is a federally-protected property right.

## **What is an IIM account?**

An IIM account is an “Individual Indian Money” account for trust funds held by the Secretary of the Interior that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary.

**Does every Osage tribal member have an IIM account?**

No. Osage tribal members who do not have a headright interest or do not receive income from an individual trust or restricted asset do not have IIM accounts.

**Does every Osage headright holder have an IIM account?**

No. There are Osage tribal members with headright interests who do not have IIM accounts.

**If a person is an Osage Nation member and a headright holder but not an IIM account holder, can that person get an IIM account?**

Yes. The Superintendent of the Osage Agency has discretion to revoke the competency status of any Osage individual, regardless of blood quantum, and qualify the individual to receive an IIM account.

**What are the roles of the political branches of Osage Nation government – the Executive and Legislative branches -- in management of the Osage Mineral Estate?**

None. But the Osage Nation Congress has power under the Osage Constitution to enact laws within the Osage Nation’s jurisdiction, as long as it does not conflict with federal law.

**Why do Osage headright holders no longer elect their own Principal Chief and Assistant Principal Chief under Section 9 of the 1906 Act?**

The U.S. Congress enacted P.L. 108-431, the Osage Sovereignty Act, which clarifies that the Osage Nation has the inherent sovereign right to determine its own form of government. As a result, the Osage people changed the form of Osage government from a Principal Chief, Assistant Principal Chief, and eight Tribal Council members elected only by Osage headright holders to the current three-branch Osage Constitution with an Osage Minerals Council elected only by headright holders.

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Have Questions?

**Shareholder Payment**

**March 2024:** \$4835

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# The Osage Minerals Council seeks federal legislation facilitating return of Osage Headrights

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Press Release



OSAGE RESERVATION (November 22, 2021 ) – Today, the [Osage Minerals Council](#) (OMC) unanimously voted to seek federal legislation to permit non-Osages who own a “headright” interest in the Osage Mineral Estate to gift or sell those headright interests back to the OMC, the Osage Nation, or Osage individuals. It is believed that approximately 26 percent of all headright interests in the Osage Mineral Estate are held by non-Osages, however, current federal law creates barriers for those who may want to return, gift or sell their interest back to an Osage, the OMC or the Osage Nation from actually doing so. As a result, no non-Osage has utilized the tiered system created by federal law to transfer a headright interest under this rule in over two decades.

OMC Chairman Everett Waller said, “When the United States broke promises to our Osage people and allowed non-Osages to receive the proceeds from minerals from our Reservation, it caused decades of suffering. Today, we begin the process to work for justice and equity for our Osage people.”

From 1906 to 1978, the Secretary of the Interior permitted non-Indians to inherit the right to receive Osage minerals income, otherwise known as headrights. In 1978, Congress acted to prohibit an Osage from transferring a headright through inheritance to a non-Osage. Then, in 1984, Congress again acted to create a tiered system by which non-Osages may devise their headrights outside of probate—a system that effectively prohibited non-Osages from gifting their Osage headrights back to Osages. The 1984 Act not only provided that a non-Osage headright holder may not sell, assign, or transfer their Osage headright without approval of the Secretary of the Interior, it then stated any sale or transfer of the headright must comply with a tiered purchaser preference. The 1984 Act created a first right of purchase for certain heirs of the first Osage Indian to have acquired such headright under an allotment pursuant to the 1906 Osage Allotment Act, so long as the heirs are living and Osage Indians; the second right of purchase belongs to “any other Osage Indian for the benefit of any Osage Indian in his or her individual capacity”; and the third right of purchase belongs to “the Osage Tribal Council on behalf of the Osage Tribe of Indians.”

The OMC—being of one mind that all barriers to non-Osages interested in selling, gifting or transferring their headright interest in the Osage Mineral Estate back to an Osage, the OMC or Osage Nation should be removed—asked Councilwoman Marsha Harlan to lead on preparation for a solution to this problem.

The proposed solution that was presented to the OMC would require Congress enact legislation that would expressly permit a non-Osage who owns an Osage headright to transfer the headright back to the OMC, the Osage Nation, or Osage individuals via gift or sale. While Osages endured tragedy for the sake of headrights being transferred outside of the hands of Osages, Congress did not stop the bleeding until 26 percent of the headrights were owned by non-Osages. The proposal adopted by the OMC today gives Congress a pathway to remedy at least part of the problem by removing restrictions against non-Osages who own headrights who want to return them to Osage ownership.

Councilwoman Harlan said, “I appreciate the trust of every one of my fellow Councilpersons. After much research, thought, prayer, and remembrance, we move forward today to bring home orphaned headrights.”

In 1906, the U.S. Congress enacted the Osage Allotment Act that established a unique trust system that forced the Osage Reservation surface lands to be allotted to individual Osages, reserved the ownership of the subsurface Osage Mineral Estate to the Osage Nation, and directed the Secretary of the Interior to create a list, or roll, of all Osage persons living at the time who would receive the proceeds from oil, gas, and other minerals production from the Osage Mineral Estate.

In 1948, Congress referred to the right to receive such proceeds as a “headright” share or interest, or as a property right. Today, approximately 26 percent of all headrights are owned by non-Osage individuals, churches, universities, and other non-Osage institutions, who can freely bequeath such interests to any person or entity the non-Osage chooses. See Matter of Est. of Little Bear, 1995 OK 134, 909 P.2d 42, 59. Some non-Osage institutions have expressed an interest in gifting their Osage headright ownership back to the Osage Minerals Council, but federal law prohibits such gifts, requiring non-Osages to sell in accordance with a tiered purchasing system.

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**OSAGE HEADRIGHT HISTORY  
1880 - 2030 ACTUAL PRICES**

	Annual Total	Q1	Q2	Q3	Q4		Annual Total	Q1	Q2	Q3	Q4
1880	\$ 10.50	n/a	n/a	n/a	n/a	1956	\$ 7,970.00	2,265.00	2,540.00	1,690.00	1,475.00
1881	\$ 16.00	n/a	n/a	n/a	n/a	1957	\$ 5,930.00	1,330.00	1,660.00	1,470.00	1,470.00
1882	\$ 22.50	n/a	n/a	n/a	n/a	1958	\$ 5,610.00	1,445.00	1,425.00	1,275.00	1,465.00
1883	\$ 51.00	n/a	n/a	n/a	n/a	1959	\$ 5,370.00	1,255.00	1,465.00	1,350.00	1,300.00
1884	\$ 87.00	n/a	n/a	n/a	n/a	1960	\$ 5,450.00	1,340.00	1,410.00	1,350.00	1,350.00
1885	\$ 107.75	n/a	n/a	n/a	n/a	1961	\$ 5,170.00	1,320.00	1,320.00	1,300.00	1,230.00
1886	\$ 62.50	n/a	n/a	n/a	n/a	1962	\$ 4,560.00	1,160.00	1,150.00	1,140.00	1,110.00
1887	\$ 157.85	n/a	n/a	n/a	n/a	1963	\$ 4,250.00	1,070.00	1,060.00	1,060.00	1,060.00
1888	\$ 243.25	n/a	n/a	n/a	n/a	1964	\$ 4,125.00	1,060.00	1,050.00	1,035.00	980.00
1889	\$ 163.30	n/a	n/a	n/a	n/a	1965	\$ 3,800.00	940.00	940.00	960.00	960.00
1890	\$ 165.50	n/a	n/a	n/a	n/a	1966	\$ 3,605.00	955.00	910.00	885.00	855.00
1891	\$ 233.00	n/a	n/a	n/a	n/a	1967	\$ 3,215.00	825.00	795.00	810.00	785.00
1892	\$ 167.50	n/a	n/a	n/a	n/a	1968	\$ 2,975.00	755.00	750.00	740.00	730.00
1893	\$ 412.00	n/a	n/a	n/a	n/a	1969	\$ 2,955.00	730.00	730.00	755.00	740.00
1894	\$ 286.50	n/a	n/a	n/a	n/a	1970	\$ 2,860.00	740.00	720.00	710.00	690.00
1895	\$ 342.00	n/a	n/a	n/a	n/a	1971	\$ 2,780.00	690.00	690.00	700.00	700.00
1896	\$ 217.00	n/a	n/a	n/a	n/a	1972	\$ 2,715.00	685.00	660.00	685.00	685.00
1897	\$ 214.00	n/a	n/a	n/a	n/a	1973	\$ 2,925.00	685.00	680.00	710.00	850.00
1898	\$ 168.00	n/a	n/a	n/a	n/a	1974	\$ 6,090.00	760.00	1,700.00	1,940.00	1,690.00
1899	\$ 251.00	n/a	n/a	n/a	n/a	1975	\$ 7,700.00	1,700.00	1,700.00	1,950.00	2,350.00
1900	\$ 200.00	n/a	n/a	n/a	n/a	1976	\$ 9,040.00	2,070.00	2,330.00	2,210.00	2,430.00
1901	\$ 165.00	n/a	n/a	n/a	n/a	1977	\$ 10,870.00	2,650.00	2,660.00	2,890.00	2,670.00
1902	\$ 174.00	n/a	n/a	n/a	n/a	1978	\$ 11,330.00	2,980.00	2,660.00	2,730.00	2,960.00
1903	\$ 470.32	n/a	n/a	n/a	n/a	1979	\$ 13,800.00	2,880.00	3,160.00	3,200.00	4,560.00
1904	\$ 168.00	n/a	n/a	n/a	n/a	1980	\$ 30,220.00	6,670.00	8,950.00	6,850.00	7,750.00
1905	\$ 343.00	n/a	n/a	n/a	n/a	1981	\$ 34,580.00	8,510.00	10,270.00	7,720.00	8,080.00
1906	\$ 280.00	45.00	45.00	44.00	146.00	1982	\$ 26,145.00	7,510.00	7,065.00	5,610.00	5,960.00
1907	\$ 345.00	41.00	157.00	71.00	76.00	1983	\$ 22,960.00	5,670.00	5,930.00	5,230.00	6,130.00
1908	\$ 345.00	100.00	45.00	100.00	100.00	1984	\$ 23,810.00	6,140.00	6,010.00	5,830.00	5,830.00
1909	\$ 313.00	100.00	80.00	89.00	44.00	1985	\$ 19,995.00	5,415.00	4,830.00	4,750.00	5,000.00
1910	\$ 302.00	70.00	47.00	68.00	117.00	1986	\$ 12,700.00	4,700.00	3,670.00	2,200.00	2,130.00
1911	\$ 436.39	70.42	132.49	97.86	135.62	1987	\$ 9,440.00	2,090.00	2,200.00	2,500.00	2,650.00
1912	\$ 435.31	108.24	104.14	96.34	126.59	1988	\$ 8,810.00	2,400.00	2,140.00	2,220.00	2,050.00
1913	\$ 674.11	86.28	106.43	79.36	402.04	1989	\$ 8,390.00	1,630.00	2,130.00	2,350.00	2,280.00
1914	\$ 513.28	184.56	133.92	102.14	92.66	1990	\$ 9,490.00	2,225.00	2,415.00	2,000.00	2,850.00
1915	\$ 170.25	26.51	51.37	34.81	57.56	1991	\$ 10,300.00	3,400.00	2,360.00	2,300.00	2,240.00
1916	\$ 2,275.86	119.41	173.15	1,186.17	797.13	1992	\$ 8,425.00	2,265.00	1,945.00	2,065.00	2,150.00
1917	\$ 2,608.99	280.00	456.66	450.00	1,422.33	1993	\$ 7,310.00	2,000.00	1,840.00	1,815.00	1,655.00
1918	\$ 3,940.00	1,275.00	525.00	1,085.00	1,055.00	1994	\$ 5,810.00	1,440.00	1,300.00	1,535.00	1,535.00
1919	\$ 4,980.00	525.00	1,265.00	1,400.00	1,790.00	1995	\$ 6,350.00	1,465.00	1,540.00	1,515.00	1,830.00
1920	\$ 9,900.00	2,800.00	2,100.00	2,400.00	2,600.00	1996	\$ 7,520.00	1,540.00	2,070.00	1,775.00	2,135.00
1921	\$ 6,100.00	2,100.00	1,500.00	1,400.00	1,100.00	1997	\$ 7,215.00	2,020.00	1,880.00	1,730.00	1,585.00
1922	\$ 11,700.00	2,200.00	3,000.00	3,100.00	3,400.00	1998	\$ 4,870.00	1,575.00	1,210.00	1,075.00	1,010.00
1923	\$ 11,800.00	1,900.00	4,000.00	4,000.00	1,900.00	1999	\$ 4,925.00	885.00	1,100.00	1,340.00	1,600.00
1924	\$ 12,000.00	1,400.00	4,300.00	3,200.00	3,100.00	2000	\$ 8,480.00	1,795.00	2,065.00	2,120.00	2,500.00
1925	\$ 11,000.00	3,000.00	3,900.00	1,800.00	2,300.00	2001	\$ 10,730.00	2,365.00	2,320.00	2,260.00	3,785.00
1926	\$ 9,300.00	2,500.00	2,900.00	1,800.00	2,100.00	2002	\$ 7,675.00	1,840.00	1,555.00	2,090.00	2,190.00
1927	\$ 7,000.00	2,100.00	1,700.00	1,800.00	1,400.00	2003	\$ 10,450.00	2,315.00	2,985.00	2,480.00	2,670.00
1928	\$ 4,900.00	1,200.00	1,300.00	1,600.00	800.00	2004	\$ 13,380.00	2,990.00	3,045.00	3,365.00	3,980.00
1929	\$ 3,010.00	900.00	750.00	800.00	560.00	2005	\$ 19,380.00	4,175.00	4,330.00	5,060.00	5,815.00
1930	\$ 1,890.00	590.00	530.00	405.00	365.00	2006	\$ 25,390.00	6,260.00	6,505.00	6,490.00	6,135.00
1931	\$ 860.00	350.00	245.00	125.00	140.00	2007	\$ 25,250.00	6,175.00	5,545.00	6,495.00	7,035.00
1932	\$ 712.00	135.00	185.00	200.00	192.00	2008	\$ 40,130.00	8,330.00	8,955.00	11,245.00	11,600.00
1933	\$ 498.00	205.00	122.00	72.00	99.00	2009	\$ 20,945.00	6,155.00	4,030.00	4,835.00	5,925.00
1934	\$ 1,990.00	270.00	600.00	370.00	750.00	2010	\$ 28,320.00	6,820.00	7,115.00	7,320.00	7,065.00
1935	\$ 1,800.00	370.00	440.00	540.00	450.00	2011	\$ 37,375.00	8,550.00	9,345.00	9,145.00	10,335.00
1936	\$ 1,830.00	550.00	540.00	375.00	365.00	2012	\$ 40,780.00	9,915.00	10,740.00	9,465.00	10,660.00
1937	\$ 1,690.00	370.00	485.00	435.00	400.00	2013	\$ 36,990.00	8,580.00	9,110.00	9,035.00	10,265.00
1938	\$ 1,355.00	360.00	365.00	325.00	305.00	2014	\$ 37,545.00	9,275.00	9,335.00	9,445.00	9,490.00
1939	\$ 1,035.00	275.00	265.00	265.00	230.00	2015	\$ 20,155.00	6,585.00	4,405.00	4,805.00	4,360.00
1940	\$ 945.00	235.00	235.00	250.00	225.00	2016	\$ 12,545.00	3,500.00	2,480.00	3,230.00	3,335.00
1941	\$ 1,020.00	230.00	230.00	280.00	280.00	2017	\$ 14,905.00	3,675.00	3,945.00	3,550.00	3,735.00
1942	\$ 1,180.00	330.00	290.00	280.00	280.00	2018	\$ 17,420.00	4,035.00	4,200.00	4,500.00	4,685.00
1943	\$ 1,125.00	280.00	265.00	300.00	280.00	2019	\$ -	-	-	-	-
1944	\$ 1,160.00	320.00	280.00	270.00	290.00	2020	\$ -	-	-	-	-
1945	\$ 1,200.00	300.00	300.00	300.00	300.00	2021	\$ -	-	-	-	-
1946	\$ 1,115.00	280.00	265.00	290.00	280.00	2022	\$ -	-	-	-	-
1947	\$ 1,215.00	280.00	290.00	310.00	335.00	2023	\$ -	-	-	-	-
1948	\$ 1,525.00	340.00	425.00	410.00	350.00	2024	\$ -	-	-	-	-
1949	\$ 1,560.00	380.00	425.00	390.00	365.00	2025	\$ -	-	-	-	-
1950	\$ 1,830.00	380.00	410.00	610.00	430.00	2026	\$ -	-	-	-	-
1951	\$ 1,645.00	380.00	320.00	495.00	450.00	2027	\$ -	-	-	-	-
1952	\$ 1,905.00	390.00	510.00	500.00	505.00	2028	\$ -	-	-	-	-
1953	\$ 2,520.00	535.00	695.00	610.00	680.00	2029	\$ -	-	-	-	-
1954	\$ 3,355.00	695.00	775.00	755.00	1,130.00	2030	\$ -	-	-	-	-
1955	\$ 4,795.00	715.00	885.00	1,210.00	1,985.00	2031	\$ -	-	-	-	-

- Bet 1880-1906, one pmt per year was recorded.

- Bet 1916-1921, more than 1 payment was made per quarter. The amounts reflect the sum of those pmts during each qtr

- Indiv pmts started in 1909



# CONSTITUTION OF THE OSAGE NATION

Ratified: March 11, 2006

Signed: May 6, 2006

Amended: June 2, 2014, June 6, 2016, March 20, 2017, and June 1, 2020

# CONSTITUTION OF THE OSAGE NATION

Fifth Edition copy, printed 2021  
Westwood Printing  
Norman Oklahoma

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Amended: June 2, 2014, June 6, 2016, March 20, 2017,  
and June 1, 2020

# OSAGE NATION CONSTITUTION

## PREAMBLE:

We the Wah-zha-zhe, known as the Osage People, having formed as Clans in the far distant past, have been a People and as a People have walked this earth and enjoyed the blessings of Wah-kon-tah for more centuries than we truly know.

Having resolved to live in harmony, we now come together so that we may once more unite as a Nation and as a People, calling upon the fundamental values that we hold sacred: Justice, Fairness, Compassion, Respect for and Protection of Child, Elder, All Fellow Beings, and Self.

Paying homage to generations of Osage leaders of the past and present, we give thanks for their wisdom and courage. Acknowledging our ancient tribal order as the foundation of our present government, first reformed in the 1881 Constitution of the Osage Nation, we continue our legacy by again reorganizing our government.

This Constitution, created by Osage People, hereby grants to every Osage citizen a vote that is equal to all others and forms a government that is accountable to the citizens of the Osage Nation.

We, the Osage People, based on centuries of being a People, now strengthen our government in order to preserve and perpetuate a full and abundant Osage way of life that benefits all Osages, living and as yet unborn.

## **ARTICLE I - TITLE**

This tribe shall hereafter be referred to as The Osage Nation, formerly known as the Osage Tribe of Indians of Oklahoma.

## **ARTICLE II - TERRITORY AND JURISDICTION**

### **Section 1.**

#### Territory:

The territory of the Osage Nation shall include the Osage Reservation, duly established by the Congress of the United States pursuant to (1) the Treaty between the United States of America and the Great and Little Osage Indians, Sept. 29, 1865, 14 Stat. 687; (2) Article 16 of the Treaty between the United States of America and the Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799; and (3) the Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm to the Great and Little Osage Indians a Reservation in the Indian Territory), and all other lands under federally-restricted status title to which is held by the Nation or the People, or by the United States in trust on behalf of the Nation or the People, and any such additional lands as are hereafter acquired and similarly held by the Nation or the People or by the United States on behalf of the Nation or the People. Territory is defined as, but is not limited to, air, water, surface, sub-surface, natural resources and any interest therein, notwithstanding the issuance of any patent or right of way in fee or otherwise, by the governments of the United States or the Osage Nation, existing and/or in the future.

### **Section 2.**

#### Jurisdiction:

The jurisdiction of the Osage Nation shall extend over all persons, subjects, property, and over all activities that occur within the territory of the Osage Nation and over all Osage citizens, subjects, property and activities outside such territory affecting the rights and laws of the Osage Nation.

Nothing in this Article shall be construed to limit or impair the ability of the Osage Nation to exercise its jurisdiction within or without its territory based upon its inherent sovereign authority as a nation of Osage People.

## **ARTICLE III - MEMBERSHIP**

### **Section 1.**

#### Base Membership Roll:

The base membership of the Osage Nation shall consist of those persons whose names appear on the final roll of the Osage tribe of Indians pursuant to the Act of June 28, 1906 (34 Stat. 539).

## **Section 2.**

### Qualifications for Membership:

All lineal descendants of those Osages listed on the 1906 Roll have the right to membership in the Osage Nation, and those enrolled members shall constitute the citizenry subject to the provisions of this Constitution and to the laws enacted and regulations approved pursuant to this Constitution.

## **Section 3.**

### Dual Enrollment:

An enrolled member of the Osage Nation can choose to be dually enrolled as a member of another Indian tribe without forfeiting Osage membership.

## **Section 4.**

### Membership Laws:

The Osage Nation Congress shall have the power and is required to regulate membership and maintain a correct roll of all Osages enrolled as members of the Osage Nation. The Osage Nation Congress shall enact laws, not inconsistent with this Constitution, prescribing rules and regulations governing membership, including application and appeal procedures, loss of membership, and the adoption of members.

## **ARTICLE IV - DECLARATION OF RIGHTS**

### **Section 1.**

#### Popular Sovereignty:

All political power is vested in and derived from the Osage People. All government of right originates with the Osage People, is founded upon their will only, and is instituted solely for the good of the whole.

### **Section 2.**

#### Self-Government:

The Osage People have the exclusive right of governing themselves as a free, sovereign, and independent nation as done from time immemorial.

### **Section 3.**

#### Inalienable Rights of Osage Citizens:

There shall be certain inalienable rights, which shall not be abridged or denied by any branch/department of the Osage Nation government or by any official of the government. Furthermore nothing in this Constitution shall be interpreted in a way that would diminish the rights and privileges of any person within the jurisdiction of the Osage Nation. The Osage Nation government in exercising sovereign powers shall not:

- A. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech or the press, or the right of the people peaceably to assemble and to petition for redress of grievances;
- B. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- C. subject any person for the same offense to be twice put in jeopardy;
- D. compel any person in any criminal case to be a witness against himself or herself;
- E. take any private property for a public use that is not fully justified as being in the best interest of all the people nor take without just compensation;
- F. deny to any person in criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, and at his or her own expense to have the assistance of counsel for his or her defense;
- G. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any offense any penalty or punishment greater than allowed under federal law;
- H. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- I. pass any bill of attainder or ex post facto law;
- J. deny any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

#### **Section 4.**

##### Remedies:

No person shall be entitled to an award of monetary damages, as a form of relief, in the Osage Trial Court for any violation of these rights; unless the Osage Nation Congress may by law provide for monetary damages as a form of relief for such violations, when relief would best serve the interests of the Osage Nation or that of justice.

#### **Section 5.**

##### Rights of Mineral Royalty Interest Holders:

The Osage Nation Government shall not create any law or ordinance pertaining to the mineral royalties from the Osage Mineral Estate that acts in conflict with Federal law and regulations.

# **ARTICLE V - DISTRIBUTION OF POWERS OF GOVERNMENT**

## **Section 1.**

### Governing Powers:

The powers of the government of the Osage Nation shall be vested in three (3) separate branches: the Legislative, the Executive, and the Judicial.

## **Section 2.**

### Separation of Powers:

The Legislative, Executive and Judicial branches of government shall be separate and distinct and no person or collection of persons, charged with official duties under one of those branches, shall exercise any power properly vested in either of the others except as expressly provided in the Osage Nation Constitution.

## **Section 3.**

### Supremacy Clause:

The Osage Nation Constitution shall be the Supreme law for the Osage Nation over all territory and persons within the jurisdiction of the Osage Nation.

# **ARTICLE VI - LEGISLATURE**

## **Section 1.**

### Legislative Power:

The legislative power of the Osage Nation, except for the initiative and referendum powers reserved to the People as provided in this Constitution, is hereby vested in one legislative body to be called the Osage Nation Congress.

## **Section 2.**

### Composition:

The Osage Nation Congress shall be composed of twelve (12) representatives to be initially elected at large, by qualified Osage voters, without regard to their district of residency. Nothing within this provision prohibits the Osage Nation Congress from equitably apportioning districts for the election of representatives hereafter.

## **Section 3.**

### Term of Office:

For the first election under this Constitution, the twelve (12) positions in the Osage Nation Congress shall be arranged in order to establish a system of staggered terms of office whereby six (6) representatives shall be elected to serve a six (6) year term and six (6) representatives shall be elected to serve a four (4) year term. Thereafter, all members of the Osage

Nation Congress shall be elected to four (4) year terms with elections of half of the positions to be held every two (2) years or biennially commencing in 2010. All elected and/or appointed officials of the Osage Nation Congress shall serve until their successors are duly elected and installed. A person elected to the Osage Nation Congress shall be limited to five (5) full consecutive terms in office plus any initial partial term fulfilled as the result of a vacancy.

#### **Section 4.**

##### Qualifications:

Enrolled members of the Osage Nation, who are at least twenty-five (25) years of age on that date of the election, who have never been convicted of a felony, are eligible to serve as members of the Osage Nation Congress.

#### **Section 5.**

##### Disqualifications:

No member of the Osage Nation Congress shall hold any other tribal office or position of profit under the Osage Nation during the term for which the member is elected or appointed. No member of the Osage Nation Congress shall hold any other tribal office under another Indian nation during his or her term of office. A person shall be disqualified to hold a position as a member of Congress after serving five (5) full terms in that position, plus any initial partial term fulfilled as the result of a vacancy. The Osage Nation Congress may prescribe further disqualifications.

#### **Section 6.**

##### Vacancies:

Any vacancy in the Osage Nation Congress shall be filled for the unexpired term in such manner as may be provided by law, or, if no provision be made by law, by appointment of the Principal Chief for the balance of the term.

#### **Section 7.**

##### Compensation:

The annual salary and expense allowance of members of the Osage Nation Congress shall be fixed at the first session of the legislature held after the Osage Nation Constitution takes effect. Presiding officers may receive increased compensation for their duties. Compensation may be increased or decreased by law from time to time thereafter, but no increase or decrease shall be effective until the legislative year following the next general election for members of the Osage Nation Congress.

## **Section 8.**

### Election of Officers:

The Osage Nation Congress shall select from amongst its members a Speaker, who shall be the Presiding Officer, and such other officers as deemed necessary. The Speaker and other duly elected officers may vote on all matters before the Osage Nation Congress.

## **Section 9.**

### Quorum:

The presence of at least two-thirds (2/3) of the whole number of the members of the Congress shall be necessary to constitute a meeting of the congressional house for the exercise of its powers.

## **Section 10.**

### Sessions:

The Osage Nation Congress shall convene twice annually in regular session, so that six (6) months shall not intervene between the last sitting of the Congress and its first sitting in the next session. Regular sessions shall convene on such day and at such time as the Osage Nation Congress shall determine by law.

The first regular congressional session of each year shall be titled the Hun-kah Session and the second regular congressional session of the year shall be titled the Tzi-sho Session. This schedule shall be in honor of the ancient moiety division of Earth and Sky and serves to remind all Osages of the responsibility to bring balance and harmony to the Nation.

At the written request of two-thirds (2/3) of the members, the Speaker shall convene the Osage Nation Congress in special session. The Principal Chief may convene the Osage Nation Congress in special session.

Regular sessions shall be limited to a period of twenty-four (24) days, and special sessions shall be limited to a period of ten (10) days. Any session may be extended a total of not more than three (3) days. Such extension shall be granted by the Speaker of the House at the written request of two-thirds (2/3) of the members or may be granted by the Principal Chief.

The Osage Nation Congress shall not adjourn during any session of the legislature for more than three (3) days, Sundays excepted, or to any other place.

The Osage Nation Congress may only meet in the interim, the period of time between two sessions, by Interim Committee(s) to study a particular subject or subjects in order to make recommendations to the next regular session of the legislature.

## **Section 11.**

### Rules of Procedure:

The Osage Nation Congress shall adopt uniform rules of procedure for conducting the business of the Congress. The Osage Nation Congress shall keep and publish a journal of its proceedings and the yeas and nays, when taken on any question, shall be entered in the journals. A member may be expelled from the floor for disorderly or contemptuous behavior by a vote of two-thirds (2/3) of all members of the Osage Nation Congress present.

## **Section 12.**

### Enactment of Laws:

The Osage Nation Congress shall establish the procedure for enactment of bills into law. No laws shall be made except by statute and no statute shall be enacted except by bill. No bill shall be passed without the concurrence of a majority of the members of the Osage Nation Congress. Each law shall embrace but one subject, which shall be expressed in its title. The enacting clause of each law of the Osage Nation shall be: "Be it enacted by the Congress of the Osage Nation." Every bill that has passed by an affirmative majority vote shall be signed by the presiding officer of the Osage Nation Congress to certify that the procedural requirements for passage have been met and shall be presented forthwith to the Principal Chief for approval.

## **Section 13.**

### Special Requirements for the Amendment of Laws to Protect Assets:

When a law requires an affirmative supermajority to access Osage Nation assets, the number of votes needed to lower the supermajority requirement shall be equal to or greater than the supermajority threshold established in the law.

## **Section 14.**

### Presentation of Bills to Principal Chief; Veto:

Every bill passed in conformity to the rules of the Osage Nation Congress shall be presented to the Principal Chief. If approved, the Principal Chief shall sign it and notify the Congress of that fact. If a bill is vetoed by the Principal Chief, it shall be returned with objections to the Osage Nation Congress. The objections shall be entered in the journal. If, after reconsideration, at least three-fourths (3/4) or nine (9) members of Congress vote to pass the bill, it shall become law. Any bill not returned by the Principal Chief within five (5) days, Sundays and holidays excepted, after it is presented becomes a law as if signed by the Principal Chief. Any bill passed during the last three (3) days of a session may be presented to the Principal Chief during the three (3) days following the day

of final adjournment, and the Principal Chief may sign or not sign. If not signed, the bill does not become law.

If a bill presented to the Principal Chief contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time the bill is signed, the Principal Chief shall append to it a statement of the items vetoed, and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to Congress a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration, any item is approved by three fourths (3/4) of the members elected to Congress, it is a part of the law notwithstanding the objections.

Laws passed by the legislature become effective sixty (60) days after enactment. The Osage Nation Congress may, by concurrence of two-thirds (2/3) of the membership, provide for another effective date.

### **Section 15.**

#### Presentation of Orders, Resolutions, and Votes to Principal Chief:

Each order, resolution or vote, except such as relate to the business or adjournment of the legislature, shall be presented to the Principal Chief and is subject to a veto with an override provision.

### **Section 16.**

#### Necessary Laws:

The Osage Nation Congress shall pass all laws necessary to carry into effect the provisions of the Osage Nation Constitution.

### **Section 17.**

#### Disclosure of Private Interest:

A member of the Osage Nation Congress who has a personal or private interest in any measure or bill, proposed or pending before the legislature, shall disclose the fact and shall not vote thereon.

### **Section 18.**

#### Power of Removal:

The Osage Congress shall have the power to remove elected and appointed officials of the Osage Nation, and said removal must be conducted in accordance with Article XII of the Osage Nation Constitution

### **Section 19.**

#### Public Proceedings:

All proceedings of the Osage Nation Congress shall be open and public, except in cases that require confidentiality. In such cases, an Executive Session may be convened when duly voted upon in an open meeting.

## **Section 20.**

### Executive Sessions:

The Osage Nation Congress shall establish procedures to convene an Executive Session of its own members.

## **Section 21.**

### Legislative Accountability:

To assist the Osage People in holding their Legislature accountable, at the convening of each regular session of the Osage Nation Congress, the Speaker shall report the legislative priorities of Congress for said session and, at the close of each regular session, report the action taken by Congress.

## **Section 22.**

### Legislative Committees, Commissions, etc.:

The Osage Nation Congress may establish and appoint any subordinate commission, committee or other body. Members of the Osage Nation Congress may be appointed to serve on any such body, excepting any and all Tribal Enterprise Boards.

## **Section 23.**

### Merit Based Employment System:

The Osage Nation Congress shall establish a system under which the merit principle will govern the employment of persons by the Osage Nation excluding executive staff and other appointed positions serving at the will of the Office of the Principal Chief as described in Article VII, Section 14. The Congress shall include, within the merit principal system, a grievance procedure which must be exhausted before seeking review in the Trial Court. The Congress shall establish laws that define and limit nepotism in tribal government and Tribal Enterprise Board employment.

## **Section 24.**

### Annual Budget:

The Osage Nation Congress shall enact, by law, an annual expenditure of funds which shall include an appropriation of operating funds for each branch of the government for each fiscal year. The annual budget of the Osage Nation shall be governed by the principles of transparency and accountability, and the budgetary process encompassing those principles shall be set forth in Osage law. The annual budget shall not exceed projected revenues.

## **Section 25.**

### Legislative Referendum:

The Osage Nation Congress and/or its delegate(s) may voluntarily refer proposed measures to the Osage People for final approval or rejection.

The veto power of the Principal Chief shall not extend to measures voted on by the Osage People.

## **ARTICLE VII - EXECUTIVE**

### **Section 1.**

#### Supreme Executive Power:

The supreme executive power of the Osage Nation is hereby vested in a Principal Chief, who shall be titled "Principal Chief of the Osage Nation", and whose Osage title shall be "Ki-he-kah Dto-dah-ha." These titles shall be reserved exclusively to this office. The Principal Chief shall dutifully support the Constitution and laws of the Osage Nation and shall see that the laws are faithfully executed, administered and enforced.

### **Section 2.**

#### Term of Office:

The Principal Chief shall be elected by qualified Osage voters at a general election to a term of four (4) years and shall serve until a successor has been elected and installed. The Principal Chief shall be elected by a majority of votes. A person elected to the Office of Principal Chief shall be limited to five (5) full terms in office plus any initial partial term fulfilled as the result of a vacancy.

### **Section 3.**

#### Qualifications:

Enrolled members of the Osage Nation, who are at least thirty-five (35) years of age on that date of the election, who have never been convicted of a felony, are eligible to become a candidate for the office of Principal Chief of the Osage Nation.

### **Section 4.**

#### Disqualifications:

The Principal Chief shall not hold any other office or position of profit under the Osage Nation nor hold any office, be it elected or appointed, under any other tribal government or state, county or federal government. A person shall be disqualified to hold the Office of Principal Chief after serving five (5) full terms in that position, plus any initial partial term fulfilled as the result of a vacancy.

### **Section 5.**

#### Composition:

The executive branch shall consist of the elected offices of Principal Chief and Assistant Principal Chief, and all other administrative offices, departments, agencies, and instrumentalities of the Osage Nation including, but not limited to, public trusts, boards, village committees, authorities, and commissions.

## **Section 6.**

### Office of Assistant Principal Chief:

There shall be an Assistant Principal Chief, whose Osage title shall be “Ki-he-kah O-wah-ta,” who shall have the same qualifications as the Principal Chief and serve for the same term and in the same manner. These titles shall be reserved exclusively to this office. The Assistant Principal Chief shall perform such duties as may be prescribed by Osage law and as may be delegated by the Principal Chief. The Assistant Principal Chief, shall, by virtue of his office, be an ex officio member of the Osage Nation Congress and shall have a right, when in committee of the whole, to join in debate; and, whenever the legislature shall be equally divided, the Assistant Principal Chief shall cast the deciding vote.

## **Section 7.**

### Acting Principal Chief:

The Assistant Principal Chief shall serve in the temporary absence of the Principal Chief and when serving will have all the privileges, duties and powers of that office.

## **Section 8.**

### Vacancies; Absences:

In the event of a vacancy to the office of Principal Chief for any reason, the Assistant Principal Chief shall succeed to the office for the remaining portion of the four (4) year term to which the Principal Chief was elected.

In the event of a vacancy to the office of Assistant Principal Chief for any reason, the Principal Chief shall appoint a successor to serve for the balance of the term, by and with the advice and consent of the Osage Nation Congress.

Whenever for a period of six (6) months, the Principal Chief has been continuously absent from office or unable to discharge the duties of the office by reason of mental or physical disability, the office shall be deemed vacant. The procedures for determining absence and disability shall be prescribed by Osage law.

## **Section 9.**

### Further Succession:

Provision shall be made by Osage law for succession to the office of Principal Chief and for an acting Principal Chief in the event that the Assistant Principal Chief is unable to succeed to the office or act as Principal Chief. In the event that the Assistant Principal Chief is unable to succeed to the office or act as Principal Chief the Speaker of the Congress shall act as Principal Chief.

## **Section 10.**

### Compensation:

The annual salary and expense allowance for the offices of Principal Chief and Assistant Principal Chief shall be prescribed by Osage law and shall not be increased or diminished during that term of office.

## **Section 11.**

### Veto:

The Principal Chief may veto bills by the Osage Nation Congress. The Principal Chief may, by veto, strike or reduce items in appropriation bills. The Principal Chief shall return any vetoed bills, with a statement of the objection(s), to the Osage Nation Congress.

## **Section 12.**

### Communicate with Legislature; Convene Legislature:

The Principal Chief shall communicate to the Osage Nation Congress, by message at the opening of each regular session and at such other times as may be deemed necessary, the condition of the Nation, and shall in like manner recommend such measures as may be deemed desirable. The Principal Chief may convene the legislature by proclamation, and shall state when assembled, the purpose for which they shall have been convened in a special session whenever the Osage People's interest shall require.

## **Section 13:**

### Establish Department of the Treasury:

There shall be established, by Osage law, a Department of the Treasury in the Executive Branch and the Principal Chief shall appoint a Treasurer to act as the Chief Financial Officer and administer fiscal policy and ensure financial accountability of the Osage Nation, by and with the advice and consent of the Osage Nation Congress. The powers and duties of the Treasurer of the Osage Nation shall be prescribed by the Osage Nation Congress and will include the mandate that an annual financial statement for the Osage Nation government be audited by a Certified Public Accountant approved by the Congress or by committee of the Congress and presented to the Congress in a timely manner. The Treasurer shall accept, receipt for, keep and safeguard all tribal funds as directed by the Congress and shall maintain and provide an accurate record of such tribal funds.

## **Section 14.**

### Tribal Enterprise Boards:

There shall be established, by Osage law, a Tribal Enterprise Board(s) in the Executive Branch, and the Principal Chief shall appoint qualified professionals to oversee operations of Osage Nation business

enterprises, by and with the advice and consent of the Osage Nation Congress. The Osage Nation Congress shall reserve the right to review any action taken by the Board, and may approve the Annual Plan of Operation for the coming year. No Osage Nation elected official may be appointed to such Board.

## **Section 15.**

### Appointments:

The Principal Chief may appoint executive staff, in accordance with the budget approved by the Congress. The Principal Chief shall also appoint, subject to advice and consent by the Osage Nation Congress, the members of each board, commission or other instrumentality in the executive branch whose election or appointment is not provided by this constitution or by law. All appointees shall serve at the pleasure of the Principal Chief and shall be exempt employees, not subject to the Merit System established at Article VI, Section 22.

Should the legislature be in regular session, the Principal Chief shall submit for confirmation the name of an appointee within forty-eight (48) hours after the appointment is made. Failure of the Osage Nation Congress to confirm the appointment, prior to the end of the session, shall constitute rejection.

If the legislature is not in regular session, the Principal Chief may make interim appointments, which shall expire at the end of the next regular session, unless submitted to and confirmed by the Osage Nation Congress during that session.

A person not confirmed by the Osage Nation Congress shall not be appointed to the same office during any recess of the legislature.

## **Section 16.**

### Removal Power:

The Principal Chief may remove from office a person appointed by the Principal Chief's office, except a person appointed for a term fixed by this Constitution or by Osage law. Removal shall be conducted in accordance with Article XII of the Osage Nation Constitution. If the legislature is not in session when the Principal Chief desires to remove an officer, the Principal Chief shall call a special session for consideration of the proposed removal. The session may not exceed two days in duration.

## **Section 17.**

### Offices and Records of Executive Officers:

The Principal Chief, Treasurer and other Executive Officers shall keep the public records, books and papers at the seat of government in a manner relating to their respective offices as prescribed by Osage law.

## **Section 18.**

### Seal of the Osage Nation:

There shall be a seal of the Osage Nation which shall be officially used by the Principal Chief and shall be called the Great Seal of the Osage Nation.

## **ARTICLE VIII - JUDICIARY**

### **Section 1.**

#### Judicial Powers:

The Judicial powers of the Osage Nation are hereby vested in one Supreme Court, in a lower Trial Court and in such inferior Courts as the Osage Nation Congress may ordain and establish for the development, maintenance and administration of the Tribal Justice System. The judicial branch shall be responsible for interpreting the laws of the Osage Nation and its powers will include, but not necessarily be limited to, the trial and adjudication of certain civil and criminal matters, the redress of grievances, the resolution of disputes and judicial review of certain holdings and decisions of administrative agencies and of the Trial Court.

### **Section 2.**

#### Appellate Jurisdiction:

The appellate jurisdiction of the Supreme Court may extend to all cases of law and equity. The Supreme Court, by appropriate order, may hear appeals, compel inferior Courts or their officials to act in accordance with the law, and exercise such other jurisdiction as may be conferred by statute. The Supreme Court shall promulgate rules and procedures relating to original and appellate jurisdiction. Decisions of the Supreme Court shall be published and indexed and shall be final.

### **Section 3.**

#### Composition of Supreme Court; Qualifications:

The Supreme Court shall consist of one Chief Justice and two Associate Justices. Any member of the Osage Nation, who is at least forty (40) years of age and duly licensed to practice law for no less than ten (10) years, is eligible for the office of Chief Justice. Anyone duly licensed to practice law for no less than five (5) years, is eligible for the office of Associate Justice. The Justices shall serve until their successors are duly appointed and installed.

### **Section 4.**

#### Disqualification:

Judicial officers shall not hold any other office or position of profit under the Osage Nation. A person shall be disqualified to hold the position of Justice or Chief Judge after serving five (5) terms in that position, plus any initial partial term fulfilled as the result of a vacancy.

## **Section 5.**

### Jurisdiction of Trial Court:

The Trial Court shall have original jurisdiction, not otherwise reserved to the Supreme Court, over all cases and controversies arising under the Constitution, laws, and customs and traditions of the Osage Nation. Any such case or controversy arising within the jurisdiction of the Osage Nation shall be filed in Trial Court before it is filed in any other court, unless otherwise provided in this Constitution. This grant of jurisdiction by the Osage People shall not be construed to be a waiver of the Osage Nation's sovereign immunity.

## **Section 6.**

### Composition of Trial Court; Qualifications:

The Trial Court shall consist of one Chief Judge and, as deemed necessary and appropriate, additional Associate Judges. Any member of the Osage Nation, duly licensed to practice law for no less than five (5) years, is eligible for the office of Chief Judge.

## **Section 7.**

### Appointment of Chief Justice, Associate Justices and Chief Judge:

The Principal Chief shall appoint the Chief Justice and Associate Justices of the Osage Nation Supreme Court, as well as the Chief Judge of the Trial Court, by and with the advice and consent of the Osage Nation Congress. After serving one term of four (4) years, each will stand for retention by a vote of the qualified Osage electors and at the expiration of each four (4) year term thereafter until term limited. A person appointed and confirmed as a Justice of Chief Judge shall be limited to five (5) full terms in office in that position, plus any initial partial term fulfilled as the result of a vacancy.

## **Section 8.**

### Appointment of Associate Judges:

Once appointed and installed, the Chief Justice and Chief Trial Court Judge may jointly appoint such subordinate judges as are necessary and proper to carry into effect matters in which the Judicial Department is empowered to act now or in the future.

## **Section 9.**

### Conflict of Interest:

Any Justice or Judge of the Osage Nation who appears to have a direct personal or financial interest in any matter before the judiciary shall recuse himself/herself. Any party who believes that a Judge or Justice may have a personal or financial interest in the issues before the court, may challenge the participation of that Judge or Justice.

**Section 10.**

Compensation:

Supreme Court Justices and Trial Court Judges shall be reasonably compensated. No increase or decrease in compensation shall take effect until after the next General election or appointment to that office.

**Section 11.**

Administration:

The Chief Justice of the Osage Nation Supreme Court shall be responsible for the budget and the administration of all courts.

**ARTICLE IX - OATH OF OFFICE**

All elected and appointed officers of the Osage Nation, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation:

“I, \_\_\_\_\_(name)\_\_\_\_\_,do proudly swear (or affirm) to carry out the responsibilities of the office of \_\_\_\_\_(name of office)\_\_\_\_\_to the best of my ability, freely acknowledging that the powers of this office flow from the Osage People and Wah-Kon-Tah. I further swear (or affirm) always to place the interest of all Osages above any special or personal interests, and to respect the right of future generations to share the rich historic and natural heritage of our Osage People. In doing so, I will always uphold and defend the Constitution of the Osage Nation, so help me God.”

The foregoing oath shall be administered by a member of the Osage Nation Judiciary.

**ARTICLE X - CODE OF ETHICS**

**Section 1.**

Purpose:

Recognizing the desire of the Osage people to establish a government that is fair and equitable to all people; elected or appointed tribal officials and employees of the Osage Nation, putting aside their personal or private interest, shall strive for the common good of the Osage People and shall administrate fair and equal treatment of all persons, claims, and transactions petitioning before the Osage Nation Government.

**Section 2.**

Compliance with Law and Regulations:

In the performance of their duties, all officials and employees of the Osage Nation shall comply with all laws and regulations of the Osage Nation not in conflict with this Constitution.

### **Section 3.**

#### The Conduct of Tribal Officials and Employees:

All tribal officials and employees of the Osage Nation shall avoid even the appearance of impropriety in the performance of their duties.

Officials and employees shall refrain from abusive conduct, personal charges, or verbal affronts upon the character, motives, or intents of other officials or Osage citizens.

Tribal officials and employees shall not hinder or obstruct the proper administration of the Osage Nation government in the administration of their duties.

### **Section 4.**

#### Conflicts of Interest:

In order to assure independence and impartiality, tribal officials and employees are prohibited from using public positions to influence or otherwise effect government decisions for personal gain. Tribal officials and employees shall fully and in a timely manner disclose any conflicts, real or apparent, that might be seen to influence their judgment in the performance of their duties. Tribal officials and employees shall abstain from participation in deliberations or decision-making where any conflicts are deemed to exist.

### **Section 5.**

#### Gifts and Public Favor:

Tribal officials and employees shall not accept any special advantage of services or opportunities for personal gain, by virtue of public office, that is not available to the Osage People. Tribal officials and employees shall not accept any gift, favor, or promise of future benefit for themselves or their relatives in exchange for preferential treatment.

### **Section 6.**

#### Use of Tribal Resources:

Tribal officials and employees shall refrain from the use of tribal resources when not acting in an official capacity.

### **Section 7.**

#### Advocacy:

All official delegates of the Osage Nation shall accurately represent the official policies and positions of the Osage Nation government to the best of their abilities. When called upon to provide their own individual opinions or positions, all such delegates shall state explicitly that such information is not representative of the position of any administrative body within the Osage Nation government and shall not allow such an inference to occur.

## **Section 8.**

### Independence of Boards and Commissions:

Tribal officials and employees shall refrain from using tribal positions to improperly influence the deliberations, administrations, or decisions of established board or commission proceedings.

## **Section 9.**

### Political Subdivisions:

The Osage Nation Code of Ethics shall be applicable to all political subdivisions of the Osage Nation including members of the boards, commissions and other bodies.

## **Section 10.**

### Provisions for Violations:

The Osage Nation Congress shall enact provisions for violations of the above stated code.

## **ARTICLE XI - CITIZEN INITIATIVE, REFERENDUM AND RECALL**

### **Section 1.**

#### Citizen Initiative and Referendum:

The Osage People may propose and enact laws by the initiative or reject acts of the Osage Nation Congress by the referendum.

### **Section 2.**

#### Application of Initiative, Referendum or Recall:

An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than (100) one hundred qualified Osage voters as sponsors and shall be filed with the person authorized by Osage law to receive the same. The application shall be certified, if found in proper form. Denial of certification shall be subject to judicial review.

### **Section 3.**

#### Petition for Initiative or Referendum:

After certification of the application, a petition containing a summary of the subject matter shall be prepared by the person authorized by Osage law to do so for circulation by the sponsors. If signed by qualified Osage voters who are equal in number to at least (15) fifteen percent of the electorate, it may be filed.

### **Section 4.**

#### Initiative Election:

An initiative petition may be filed at any time. The person authorized by Osage law to do so shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first election

held after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

**Section 5.**

Referendum Election:

A referendum petition may be filed only within ninety (90) days after adjournment of the legislative session at which the act was passed. The person authorized by Osage law to do so shall prepare a ballot title and proposition summarizing the act and shall place them on the ballot for the first election held after adjournment of that session.

**Section 6.**

Enactment and Rejection:

If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The person authorized by Osage law to do so shall certify the election returns. An initiated law becomes effective ninety (90) days after certification, is not subject to veto by the Principal Chief, and may not be repealed by the Osage Nation Congress within two (2) years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty (30) days after certification. Additional procedures for the initiative and referendum may be prescribed by Osage law.

**Section 7.**

Restrictions:

The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, or to laws necessary for the immediate preservation of the public peace, health, or safety of the Osage People. No article, section, or provision of the Osage Nation Constitution shall be amended except as provided in Article XX of this Constitution.

**Section 8.**

Recall:

All elected and/or appointed officials of the Osage Nation are subject to recall by the qualified Osage voters. The grounds for recall of a judicial officer shall be established by the Osage Nation Supreme Court. The grounds for recall of an officer other than a judge are serious malfeasance or nonfeasance, during the term of office, in the performance of the duties of the office or a conviction, during the term of office, of a felony or conviction of a misdemeanor involving moral turpitude. After certification of the Application, as set forth in Section 2 of this Article, a petition for

recall shall be prepared by the person authorized by Osage law to do so and the petition shall set forth the specific conduct that may warrant recall. A recall petition may not be issued for circulation by the sponsors until the Osage Nation Supreme Court has determined that the facts alleged in the petition are true and are sufficient grounds for issuing a recall petition. A recall petition must be signed by qualified Osage voters who are equal in number to at least fifteen (15) percent of the electorate. Upon a determination by the person authorized by Osage law to so determine that a petition has been signed by at least the minimum number of eligible voters, a recall election must be conducted in the manner provided by Osage law. The incumbent shall continue to perform the duties of the office until the recall election results are officially declared and, unless the incumbent declines or no longer qualifies, the incumbent shall without filing be deemed to have filed for the recall election. A recall election may not occur less than six (6) months before the end of the officer's term. An officer who is removed from office by a recall election or who resigns from office after a petition for recall issues may not be appointed to fill the vacancy that is created. Additional procedures and grounds for recall may be prescribed by the Osage Nation Congress.

## **ARTICLE XII - REMOVAL**

### **Section 1.**

#### Grounds for Removal:

All elected and appointed officers of the Osage Nation shall be subject to removal from office for cause, including but not limited to willful neglect of duty, malfeasance in office, habitual abuse of alcohol or drugs, inability to meet qualifications to serve, conviction of a felony or conviction of a misdemeanor involving moral turpitude while in office.

### **Section 2.**

#### Rules and Procedures:

Removal of Osage Nation Officers shall originate in the Osage Nation Congress, except as otherwise provided in the Osage Nation Constitution. The motion for removal shall list fully the basis for the proceeding and must be approved by a two-thirds (2/3) vote of the members. Trial on removal shall then be conducted by the Osage Nation Congress with the accused afforded due process and an opportunity to be heard. An Osage Nation Supreme Court Justice, designated by the Supreme Court, shall preside at the trial. Concurrence of five-sixths (5/6) of the members of the Osage Nation Congress is required for a judgment of removal. The judgment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit in the Osage Nation, but shall not prevent proceedings in the courts on the same or related charges.

The Osage Nation Congress may prescribe additional rules and

procedures that are necessary to implement the provisions of this Article.

## **ARTICLE XIII - SUFFRAGE AND ELECTIONS**

### **Section 1.**

#### Qualified Voters:

All enrolled members of the Osage Nation who shall have attained the age of eighteen 18 years and are registered to vote as provided by Osage law shall be qualified to vote under the authority of this Constitution.

### **Section 2.**

#### Election Code:

The Osage Nation Congress shall enact an election code governing all necessary election procedures.

### **Section 3.**

#### Election Board:

The Osage Nation Congress shall enact a law creating an Election Board that shall be charged with conducting both General and Special Elections.

### **Section 4.**

#### General Elections:

General Elections shall be held on the first Monday in June commencing in 2006 and next in 2010 and every even numbered year thereafter.

### **Section 5.**

#### Special Elections:

Special Elections may be held as provided by Osage law. Special Elections shall provide ample notice to Osage voters as provided by Osage law.

### **Section 6.**

#### Contested Elections:

Contested elections shall be determined by a Trial Court of the Osage Nation in such manner as shall be prescribed by Osage law.

### **Section 7.**

#### Secret Ballots:

All elections shall be conducted by secret ballot, and a majority of the votes cast shall determine the action or result thereon unless otherwise provided by this Constitution or Osage law.

## **ARTICLE XIV - VILLAGES**

### **Section 1.**

#### Recognized Villages:

The recognized villages of the Osage Nation are: (a) the Grayhorse

Indian Village, (b) the Pawhuska Indian Village, and (c) the Hominy Indian Village.

The Osage Nation Congress recognizes and respects that each village has its own traditions, customs, and history.

## **Section 2.**

### Reserved Status:

The Grayhorse Indian Village, the Pawhuska Indian Village and the Hominy Indian Village shall be reserved exclusively for the use and benefit of the Osage Indians pursuant to the act of June 28, 1906 (34 Stat. 539), as amended by the act of June 24, 1938 (52 Stat. 1034).

## **Section 3.**

### Governance:

The laws enacted by the Osage Nation Congress apply with equal force to all territory located within the jurisdiction of the Nation, including the three villages, and to the extent any action taken by a village is inconsistent with the laws of the Nation, such action shall be deemed void.

## **ARTICLE XV - NATURAL RESOURCES & MINERALS MANAGEMENT**

### **Section 1.**

#### General Authority:

The legislature of the Osage Nation shall provide for the utilization, development and conservation of all natural resources within the territory of the Nation for the maximum benefit of the Osage People.

### **Section 2.**

#### Osage Mineral Estate:

The oil, gas, coal, and/or other minerals within the boundaries of the Osage Reservation are hereby reserved to the Osage Nation pursuant to the Act of June 28, 1906, (34 Stat. 539), as amended, and is hereby designated the Osage Mineral Estate.

### **Section 3.**

#### Osage Mineral Royalties:

The right to income from mineral royalties shall be respected and protected by the Osage Nation through the Osage Minerals Council formerly known as the Osage Tribal Council and composed of eight (8) members elected by the mineral royalty interest holders.

### **Section 4.**

#### Management of the Osage Mineral Estate:

The Mineral Estate of the Osage Reservation is reserved to the Osage Nation. The government of the Osage Nation shall have the perpetual obligation to ensure the preservation of the Osage Mineral Estate. The

government shall further ensure the rights of mineral royalty interest holders of Osage descent, as set forth in the Osage Allotment Act of June 28, 1906, as amended, to income derived from the Mineral Estate are protected.

To discharge those obligations, the Osage Nation hereby creates a minerals management agency, designated the Osage Minerals Council, consisting of members of the Osage Nation who are entitled to receive mineral royalty income from the Osage Mineral Estate, as provided by federal law. Only Osage mineral royalty interest holders shall be entitled to vote in electing the Osage Minerals Council.

The Osage Minerals Council is recognized by the Osage Nation government as an independent agency within the Osage Nation established for the sole purpose of continuing its previous duties to administer and develop the Osage Mineral Estate in accordance with the Osage Allotment Act of June 28, 1906, as amended, with no legislative authority for the Osage Nation government. As an independent agency within the Osage Nation, the Osage Minerals Council may promulgate its own rules and regulations as long as such rules and regulations are not inconsistent with the laws neither of the Osage Nation nor with the rules and regulations established by the United States Congress in the 1906 Allotment Act.

The Osage Minerals Council shall have the power to consider and approve leases and to propose other forms of development of the Osage Mineral Estate. Mineral leases approved and executed by the Council shall be deemed approved by the Osage Nation unless, within five (5) working days, written objection is received from the Office of the Principal Chief that the executed lease or other development activity violates Osage law or regulation. Any dispute that arises through this process may be heard before the Supreme Court of the Osage Nation Judiciary.

All leases or other forms of agreement for development of the Osage Mineral Estate shall comply with applicable federal law and all laws and regulations of the Osage Nation. The Osage Minerals Council shall exercise the administrative authority delegated under this Constitution, the laws of the Osage Nation, and as permitted by federal law.

## **Section 5.**

### Preservation of Hunting and Fishing:

Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the Osage People and shall be managed by Osage law and regulation for the public good.

## **ARTICLE XVI - OSAGE CULTURE AND LANGUAGE**

### **Section 1.**

#### Preservation of Linguistic and Cultural Lifeways:

The Osage People have the inherent right to preserve and foster their historic linguistic and cultural lifeways.

The Osage Nation shall protect and promote the language, culture and traditional ways of the Osage People.

## **ARTICLE XVII - OSAGE HEALTH, EDUCATION, AND WELFARE**

### **Section 1.**

#### Health Care:

The Osage Nation shall provide for the protection and advancement of a health care system for the Osage People by the ongoing development of services for the treatment, management and prevention of illnesses and chronic diseases, and of services that promote mental and physical well-being.

### **Section 2.**

#### Care of the Elders:

The Osage Nation shall provide for the security of Osage elders by establishing and promoting programs to contribute to their economic, physical, and social well-being.

### **Section 3.**

#### Care of Our Children:

The Osage Nation shall provide for the care and safety of Osage children by establishing and promoting programs that contribute to protecting, nurturing, and developing the minds, bodies and spirits of our children.

### **Section 4.**

#### Education:

The education of Osage People is recognized as being essential to building a prosperous and self-determining society. The Osage Nation shall protect and promote education by providing for and supporting a system of high quality early childhood learning programs for its children, advocating on behalf of Osage students for improvements in the public elementary and secondary school systems within the Osage Reservation through intergovernmental agreements, and developing effective tribal education programs that allow Osage students to obtain the skills and resources necessary for a post-secondary education.

## **ARTICLE XVIII - RESERVED POWERS**

The powers enumerated in this Constitution are not exclusive, and the remaining sovereign powers of the Osage Nation are reserved to the

Osage People. Adoption of this Constitution does not constitute an agreement on the part of the Osage Nation to limit the exercise by the Osage Nation of any right or power it may otherwise be entitled to exercise.

## **ARTICLE XIX - SOVEREIGN IMMUNITY**

### **Section 1.**

#### Immunity of Osage Nation from Suit:

As a sovereign Indian nation, the Osage Nation and all administrative offices, departments, agencies, and instrumentalities of the Osage Nation shall be immune from suit or process in any forum except to the extent that the Osage Nation Congress expressly waives its sovereign immunity. The Osage Nation's sovereign immunity shall extend to officials and employees of the Osage Nation when acting within the scope of their duties and authority.

## **ARTICLE XX - AMENDMENT OF CONSTITUTION**

### **Section 1.**

#### Amendment by Legislature:

Amendments to this Constitution may be proposed by the Osage Nation Congress. Proposed amendments agreed to by five-sixths (5/6) of the members in Congress shall be put before the Osage People for their approval or rejection at the next general election, except when the legislature shall order a special election for that purpose.

If at least sixty-five percent (65%) of Osage electors voting on a proposed amendment approve the same, it shall become part of the Constitution and shall abrogate or amend existing provisions of the Constitution at the end of thirty (30) days after the date of the election at which it was approved.

### **Section 2.**

#### Amendment by Petition:

Amendments may be proposed to this Constitution by petition of the qualified electors of the Osage Nation. Every petition shall include the full text of the proposed amendment, and be signed by qualified electors of the Osage Nation equal in number to at least twenty-five (25%) percent of the electorate. Such petitions shall be filed with the person authorized by law to receive the same at least ninety (90) days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by Osage law.

The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof

at least sixty (60) days prior to the election at which the proposed amendment is to be voted upon.

Any amendment proposed by such petition shall be submitted, not less than ninety (90) days after it was filed, to the Osage electors at the next general election. Such proposed amendment, existing provisions of the Constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by Osage law. Copies of such publication shall be prominently posted in each polling place, at tribal administration offices, and furnished to news media as provided by Osage law.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than one hundred (100) words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person who is so authorized by Osage law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

If the proposed amendment is approved by sixty-five percent (65%) of the electors voting on the question, it shall become part of the Osage Constitution, and shall abrogate or amend existing provisions of the Constitution at the end of thirty (30) days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

### **Section 3.**

#### No Veto Power:

No proposal for amendment of the Osage Nation Constitution adopted in either manner provided by this article shall be subject to veto by the Principal Chief.

## **ARTICLE XXI - SEVERABILITY**

If any provision of the Osage Nation Constitution shall, in the future, be declared invalid or unconstitutional by the Osage Nation Judiciary, the invalid portions shall be severed and the remaining provisions shall remain in full force and effect.

## **ARTICLE XXII - SAVINGS CLAUSE**

### **Section 1.**

#### Savings Clause:

All laws, resolutions, ordinances and acts of the Osage Nation, formerly known as the Osage Tribe of Indians of Oklahoma, taken before the effective date of this Constitution, including elections and terms of office, shall remain in full force and effect to the extent that said action is consistent with the Osage Nation Constitution and until said laws,

resolutions, ordinances and acts are altered by the Osage Nation government, as organized under this Constitution, after the effective date of this Constitution.

## **Section 2.**

### Continuity of Governmental Authority and Jurisdiction:

Upon the adoption of this Osage Nation Constitution by a vote of the Osage people, and the election of the members of the Osage Nation Congress and the Executive Officers, all powers, rights, responsibilities, and obligations of a government of, by, and for the Osage people shall pass from the Osage Tribal Council to the Osage Nation government established by this Constitution.

All officers of the Osage Nation, formerly known as the Osage Tribe of Indians of Oklahoma, on the effective date of this Constitution shall continue to perform the duties of their offices in a manner not repugnant of this Constitution until those officers are superseded by newly elected or appointed officers as organized under this Constitution.

Until the Osage Nation Supreme Court and Trial Court provided for in Article VIII of this Constitution are organized and established, the existing courts of the Osage Nation, formerly known as the Osage Tribe of Indians of Oklahoma, its jurisdiction, and the judicial system shall remain as constituted before the effective date of this Constitution, in a manner consistent with this Article.

## **ARTICLE XXIII - RATIFICATION OF CONSTITUTION**

This Constitution, when ratified by a majority vote of the qualified voters of the Osage Nation voting in an election called for that purpose by the Osage Government Reform Commission, shall be effective from the date of approval by the Osage People. It shall be signed by the Principal Chief, the Assistant Principal Chief, members of the 31st Osage Tribal Council and the Osage Government Reform Commission, and sacredly preserved as the fundamental law of the Osage Nation.

**ARTICLE XXIV - CERTIFICATE OF ADOPTION**

**Section 1. Certification of Election:**

**Osage Nation  
Constitutional Referendum  
Election Results**

March 11, 2006

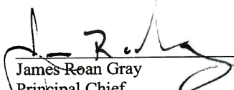
SHALL THE CONSTITUTION BE APPROVED?	YES	NO	EARLY VOTING	ON-PRESENCE	ABSENTEE	HAND COUNT	TOTAL	PERCENT
	67	306	67	306	997	34	1454	66.64%
	73	301	73	301	354	20	726	33.36%

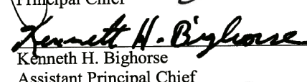
**ELECTION CERTIFICATION**

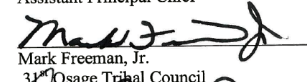
We, the undersigned election officials of the Osage Nation do hereby certify the above to be a true and accurate abstract of the votes cast in the Referendum Election held on the 11th day of March, 2006.

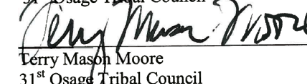
Caroleen Salmon Gary S. Weyl

**Section 2. Authorizing Signatures:** We, the undersigned, members of the Osage Government Reform Commission, the 31<sup>st</sup> Osage Tribal Council, the Assistant Principal Chief and the Principal Chief do hereby certify the adoption of this Constitution, duly ratified by a vote of the Osage People on March 11, 2006, and declare this Constitution to be the fundamental law of the Osage Nation.

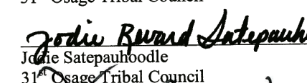
  
James Roan Gray  
Principal Chief

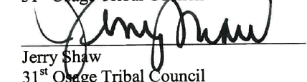
  
Kenneth H. Bighorse  
Assistant Principal Chief

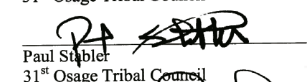
  
Mark Freeman, Jr.  
31<sup>st</sup> Osage Tribal Council

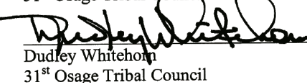
  
Terry Mason Moore  
31<sup>st</sup> Osage Tribal Council

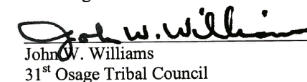
  
Harry Roy Red Eagle  
31<sup>st</sup> Osage Tribal Council

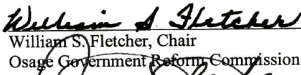
  
Jodie Satepauhoodle  
31<sup>st</sup> Osage Tribal Council

  
Jerry Shaw  
31<sup>st</sup> Osage Tribal Council

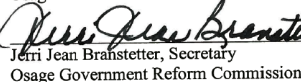
  
Paul Stabler  
31<sup>st</sup> Osage Tribal Council

  
Dudley Whitehorn  
31<sup>st</sup> Osage Tribal Council

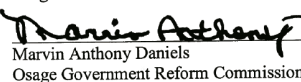
  
John W. Williams  
31<sup>st</sup> Osage Tribal Council

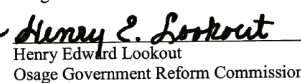
  
William S. Fletcher, Chair  
Osage Government Reform Commission


  
Priscilla H. Iba, Vice Chair  
Osage Government Reform Commission

  
Jerri Jean Brahnstetter, Secretary  
Osage Government Reform Commission

  
Joe L. Conner  
Osage Government Reform Commission

  
Marvin Anthony Daniels  
Osage Government Reform Commission

  
Henry Edward Lookout  
Osage Government Reform Commission

  
James Norris  
Osage Government Reform Commission

  
Charles H. Red Corn  
Osage Government Reform Commission

  
Douglas Clark Revard  
Osage Government Reform Commission

  
Mary Jo Webb  
Osage Government Reform Commission

Pawhuska, Oklahoma  
May 6, 2006

Prepared and Witnessed By:   
Mary Hester Barnett



# THE OSAGE NATION

627 Grandview Avenue

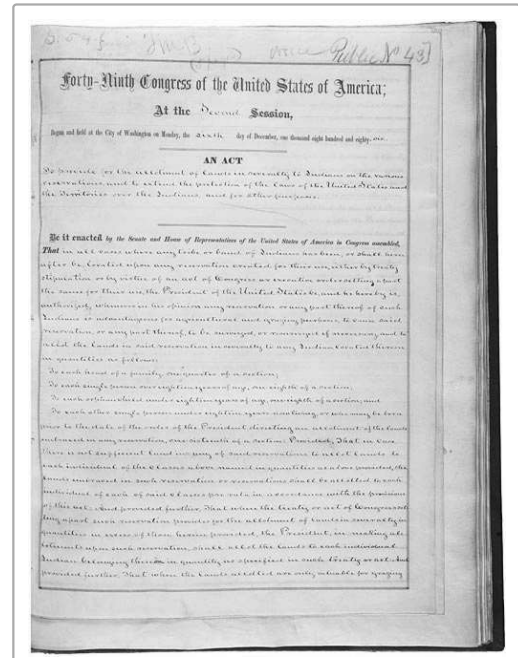
Pawhuska, OK 74056

# Dawes Act (1887)

**Approved on February 8, 1887, "An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations," known as the Dawes Act, emphasized severalty – the treatment of Native Americans as individuals rather than as members of tribes.**

Federal Indian policy during the period from 1870 to 1900 marked a departure from earlier policies that were dominated by removal, treaties, reservations, and war. The new policy focused specifically on breaking up reservations and tribal lands by granting land allotments to individual Native Americans and encouraging them to take up agriculture. It was reasoned that if a person adopted "White" clothing and ways, and was responsible for their own farm, they would gradually drop their "Indian-ness" and be assimilated into White American culture. Then it would no longer be necessary for the government to oversee Indian welfare in the paternalistic ways it had previously done, including providing meager annuities, with American Indians treated as dependents.

On February 8, 1887, Congress passed the Dawes Act, named for its author, Senator Henry Dawes of Massachusetts. Also known as the General Allotment Act, the law authorized the President to break up reservation land, which was held in common by the members of a tribe, into small allotments to be parceled out to individuals. Thus, Native Americans registering on a tribal "roll" were granted allotments of reservation land. "To each head of a family, one-quarter of a section; To each single person over eighteen years of age, one-eighth of a section; To each orphan child under eighteen years of age, one-eighth of a section; and To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section."



Citation: An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act or Dawes Act), Statutes at Large 24, 388-91, NADP Document A1887.

[View All Pages in the National Archives Catalog](#)

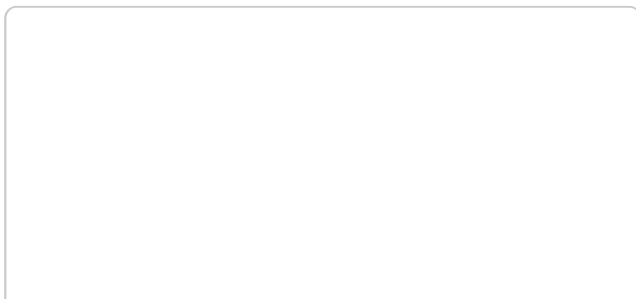
[View Transcript](#)

Section 8 of the act specified groups that were to be exempt from the law. It stated that "the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south."

Subsequent events, however, extended the act's provisions to these groups as well. In 1893, President Grover Cleveland appointed the Dawes Commission to negotiate with the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, who were known as the Five Civilized Tribes. As a result of these negotiations, several acts were passed that allotted a share of common property to members of the Five Civilized Tribes in exchange for abolishing their tribal governments and recognizing state and federal laws. In order to receive the allotted land, members were to enroll with the Office of Indian Affairs (later renamed the Bureau of Indian Affairs [BIA]). Once enrolled, the individual's name went on the "Dawes Rolls." This process assisted the BIA and the Secretary of the Interior in determining the eligibility of individual members for land distribution.

The purpose of the Dawes Act, and the subsequent acts that extended its initial provisions, was purportedly to protect American Indian property rights, particularly during the land rushes of the 1890s. But in many instances the results were vastly different. The land allotted to individuals included desert or near-desert lands unsuitable for farming. In addition, the techniques of self-sufficient farming were much different from their tribal way of life. Many did not want to take up agriculture, and those who did want to farm could not afford the tools, animals, seed, and other supplies necessary to get started.

There were also problems with inheritance. Often young children inherited allotments that they could not farm because they had been sent away to boarding schools. Multiple heirs also caused a problem; when several people inherited an allotment, the size of the holdings became too small for effective farming. Tribes were also often underpaid for the land allotments, and when individuals did not accept the government requirements, their allotments were sold to non-Native individuals, causing American Indian communities to lose vast acreage of their tribal lands.



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## Transcript

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### **Forty-Ninth Congress of the United States of America; At the Second Session,**

Begun and held at the City of Washington on Monday, the sixth day of December, one thousand eight hundred and eight-six.

### **An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;  
To each single person over eighteen years of age, one-eighth of a section;  
To each orphan child under eighteen years of age, one-eighth of a section;  
and  
To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section:

**Provided**, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: And provided further, That where the treaty or act of Congress setting apart such reservation provides the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: And provided further, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

**Sec. 2.** That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under his act: Provided, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

**Sec. 3.** That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be

certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

**Sec. 4.** That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

**Sec. 5.** That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situated shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the

Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release prescribed by Congress: Provided however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sale purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands taken as a homestead, or any contract touching the same, or lieu thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

**Sec. 6.** That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom

allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner affecting the right of any such Indian to tribal or other property.

**Sec. 7.** That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be permitted to the damage of any other riparian proprietor.

**Sec. 8.** That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

**Sec. 9.** That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

**Sec. 10.** That nothing in this act contained shall be so construed to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or condemn such lands to public uses, upon making just compensation.

**Sec. 11.** That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with consent of a majority of the adult male members of said tribe.

Approved, February, 8, 1887.

[Endorsements]

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## Burke Act



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### **BURKE ACT**

**BURKE ACT.** The Burke Act of 1906 amended the Dawes General Allotment Act of 1887 by changing the time when Indians would be enfranchised as citizens and become subject to the civil and criminal jurisdictions of the states in which they resided. Under the Dawes Act Indians became a citizen immediately upon receipt of a "trust patent" for their allotments. A "trust patent" prevented land from being sold (and taxed) for twenty-five years. Politicians argued that many Indians at that time were unprepared for citizenship, and had been exploited in connection with their voting rights. The Burke Act intended to remedy this situation by providing that Indians would become a citizen only at the end of the twenty-five-year trust period, when they became the unrestricted owners of their land. The secretary of the interior was given the right to abbreviate the probationary period for Indians judged competent to manage their own affairs. Competent Indians received fee-simple titles, which made land subject to taxation and removed all restrictions on its lease or sale. Competency commissions were established in various parts of the country to pass on the qualifications of Indian applicants. In some cases, commissions unilaterally declared Indians who had not applied for citizenship to be competent. The net effect of the Burke Act was to accelerate the alienation of Indian lands.

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*FrankRzeczowski*

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A RAPTIVE PARTNER SITE

Public Law 95-496  
95th Congress

An Act

Oct. 21, 1978  
[S. 1081]

To amend certain laws relating to the Osage Tribe of Oklahoma, and for other purposes.

Indians.  
Osage Tribe,  
Okla.  
Tribal  
government,  
elections and  
appointments.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 9 of the Act of June 28, 1906 (34 Stat. 539, 545), as amended, is further amended to read as follows: "There shall be a quadrennial election of the officers of the Osage Tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage Tribal Council shall be elected to succeed the officers elected in the year 1974 at a general election to be held in the town of Pawhuska, Oklahoma, on the first Monday in June 1978 and on the first Monday in June of each fourth year thereafter, in a manner to be prescribed by the Secretary of the Interior, and said officers shall be elected for a period of four years commencing on the first day of July following the election. In case of a vacancy in the office of principal chief or other officer by death, resignation, or otherwise, the vacancy shall be filled in a manner to be prescribed by the Osage Tribal Council. In the event of a common disaster and a quorum of five of the Osage Tribal Council does not survive, the Secretary shall appoint a principal chief and/or the number of councilmen necessary to complete a total of eight, to serve until the next quadrennial election. The Secretary is hereby authorized to remove from the council any member or members for good cause, to be by him determined, after the party involved has had due notice and opportunity to appear and defend himself. The tribal government so constituted shall continue in full force and effect until January 1, 1984, and thereafter until otherwise provided by Act of Congress."

SEC. 2. (a) The first paragraph of section 3 of the Act of June 24, 1938 (52 Stat. 1034, 1035), as amended, extending the mineral estate reserved to the Osage Tribe by the Act of June 26, 1906 (34 Stat. 539), is further amended by striking the phrase "until the eighth day of April 1983, and thereafter until otherwise provided by Act of Congress" and substituting, in lieu thereof, the phrase "in perpetuity".

(b) The second paragraph of section 3 of the Act of June 24, 1938 (52 Stat. 1034, 1035), as amended, is amended by striking the phrase "unless otherwise provided by Act of Congress" and inserting, in lieu thereof, the phrase "and thereafter until otherwise provided by Congress".

(c) The fourth paragraph of section 3 of the Act of June 24, 1938 (52 Stat. 1034, 1036) is amended by striking the phrase "January 1, 1984" and inserting, in lieu thereof, the phrase "January 1, 1984 and thereafter until otherwise provided by Congress".

SEC. 3. (a) The Act of February 5, 1948 (62 Stat. 18) is hereby repealed.

(b) Any Osage Indian having received a certificate of competency under paragraph 7 of section 2 of the Act of June 28, 1906 (34 Stat. 539, 542); section 3 of the Act of March 2, 1929 (45 Stat. 1478, 1480); or the Act of February 5, 1948 (62 Stat. 18), may make application to the Secretary of the Interior to revoke such certificate and the Secretary shall revoke such certificate: *Provided*, That revocation of any

Repeal.  
25 USC 331 note.  
Competency  
certificate  
revocation,  
application.  
25 USC 331 note.

certificate shall not affect the legality of any transactions heretofore made by reason of the issuance of any such certificate. Restrictions against alienation of lands heretofore removed are not reimposed.

(c) Sections 3 and 4 of the Act of February 27, 1925 (43 Stat. 1008 1010-11); and section 4 of the Act of March 2, 1929 (45 Stat. 1478, 1480); and sections 1 and 3 of the Act of June 24, 1938 (52 Stat. 1034) are hereby amended by striking, wherever they occur, the phrases "of one-half or more Indian blood"; "of more than one-half Indian blood", "of one-half or more Osage Indian blood", and "or who is one-half or more Osage Indian blood".

SEC. 4. In order to conserve natural resources and provide for the greatest ultimate recovery of oil and gas underlying the Osage mineral estate, the Secretary of the Interior is authorized to establish rules and regulations under which oil and gas leases producing from a common source of supply may be unitized.

SEC. 5. (a) Section 8 of the Act of April 18, 1912 (37 Stat. 86, 88), is hereby amended to read as follows: "Any person of Osage Indian blood, eighteen years of age or older, may dispose of his Osage head-right or mineral interest and the remainder of his estate (real, person, and mixed, including trust funds) from which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma: *Provided*, That the will of any Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior. The Secretary shall conduct a hearing as to the validity of such will at the Osage Indian Agency in Pawhuska, Oklahoma. Notice of such hearing shall be given by publication at least ten days before the hearing in a newspaper of general circulation in Osage County, Oklahoma, and by mailing notice of such hearing to the last known address of all known heirs, legatees, and devisees. The cost of publication shall be borne by the estate. The rules of evidence of the State of Oklahoma shall govern the admissibility of evidence at such hearing. All evidence relative to the validity of the will of an Osage Indian shall be submitted to the Secretary within one hundred and twenty days after the date of the petition for approval of such will is filed with the Secretary, unless for good cause shown the Secretary extends the time: *Provided*, That such time shall not be extended beyond six months from the date of the first hearing. For purposes of determining the validity of any will, the Secretary is hereby granted the same subpoena power as is vested in the courts. All costs of obtaining witnesses and evidence before the Secretary shall be borne by the party producing such witnesses or evidence, subject to such costs being taxed to the estate in the event that the District Court of the State of Oklahoma having jurisdiction should determine such costs beneficial to the whole estate. Notwithstanding any appeal from the decision of the Secretary, approval of such will by the Secretary shall entitle it to be admitted to probate without further evidence as to its validity or, upon disapproval thereof, the heirs may immediately petition for letters of administration in the district court. No appeal from the order of the Secretary approving or disapproving any will shall stay the issuance of letters testamentary or of administration: *Provided*, That such letters shall not confer power to sell any restricted assets by virtue of any provision in such will, pay or satisfy legacies, or distribute property of the decedent to the heirs or beneficiaries until the final determination of

Oil and gas  
lease unitization,  
rules.  
25 USC 331 note.

Mineral interest  
and estate,  
disposition.

Notice and  
hearing.

Subpenas.

Appeal.

the appeal, but all other action taken by the district court pending said appeal shall be valid and binding. No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Such appeals shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.”

**Probate.**

(b) Section 3 of the Act of April 18, 1912 (37 Stat. 86), is hereby amended to read as follows: “That the property of deceased and of orphan minor, insane, or other incompetent Osage Indians, such incompetency being determined by the laws of the State of Oklahoma which are hereby extended for such purpose to all Osage Indians, shall, in probate matters, be subject to the District Court of Oklahoma having jurisdiction. A copy of all papers filed in the district court shall be served on the Superintendent of the Osage Agency at the time of filing, and said Superintendent is authorized, whenever the protection of the interest of the Osage Indian requires, to appear in the district court. The Superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, guardians, or other persons having charge of the estate of any minor, incompetent, or deceased Osage Indian. Whenever he shall be of the opinion that the estate is in any manner being dissipated, wasted, or permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the executor, administrator, guardian, or other person in charge of the estate, the Superintendent of the Osage Agency or the Secretary is authorized, and it shall be his duty, to report said matter to the district court, take the necessary steps to have such case fully investigated, and prosecute any remedy, either civil or criminal, as the exigencies of the case may require. The costs and expenses of any civil proceedings shall be a charge upon the estate of the Osage Indian or upon the executor, administrator, guardian, or other person in charge of the estate of the Osage Indian and his surety, as the district court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage Indian shall be subject to the provisions of this section and shall contain therein a reference hereto: *Provided*, That no guardian shall be appointed for a minor whose parents are living unless the estate of said minor is being wasted or misused by such parents: *Provided further*, That no land shall be sold or alienated under the provisions of this section without approval of the Secretary.”

**Estate handling,  
investigation and  
prosecution.**

**Limitations.**

**Inheritance.**

25 USC 331 note.

(7) Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011), as amended, is hereby further amended to read as follows: “Hereafter none but heirs of Indian blood and children legally adopted by a court of competent jurisdiction and parents, Indian or non-Indian, shall inherit from Osage Indians any right, title, or interest to any restricted land, moneys, or Osage headright or mineral interest.”

25 USC 331 note.

(d) Notwithstanding the provisions of subsections (a), (b), and (c) of this section, disposition of any Osage headright or mineral interest shall be subject to the provisions of section 7 of this Act.

**Inter vivos  
trust.**

25 USC 331 note.

SEC. 6. (a) With the approval of the Secretary of the Interior, any person of Osage Indian blood, eighteen years of age or older, may establish an inter vivos trust covering his headright or mineral interest except as provided in section 8 hereof; surplus funds; invested surplus

funds: segregated trust funds; and allotted or inherited land, naming the Secretary of the Interior as trustee. An Osage Indian having a certificate of competency may designate a banking or trust institution as trustee. Said trust shall be revocable and shall make provision for the payment of funeral expenses, expenses of last illness, debts, and an allowance to members of the family dependent on the settlor.

(b) Property placed in trust as provided by this section shall be subject to the same restrictions against alienation that presently apply to lands and property of members of the Osage Tribe, and the execution of such instrument shall not in any way affect the tax-exempt status of said property.

SEC. 7. After passage of this Act, a person not of Osage Indian blood, except a child legally adopted by an Osage Indian in any court of competent jurisdiction and the lineal descendants of such adopted child, subject to the stipulation that such adopted child or his lineal descendants cannot alienate his Osage headright or mineral interest and the devolution thereof is limited to intestacy, will, or inter vivos trust the same as if he were of Osage Indian blood, is prohibited from receiving more than a life estate in an Osage headright interest owned by an Osage Indian, such adopted child or his lineal descendants, whether such interest is received by will, inter vivos trust, or Oklahoma law of intestate succession. Upon the death of such recipient, the Osage headright or mineral interest shall vest in the remaindermen thereof who are of Osage Indian blood, adopted children, and/or lineal descendants of such adopted children designated by the will or inter vivos trust of the deceased Osage Indian, his adopted child, or the lineal descendants of such adopted child. If such instrument does not designate remaindermen thereof who are of Osage Indian blood, adopted children, and/or lineal descendants of such adopted children, or if the deceased died intestate, the Osage headright or mineral interest shall vest in his heirs pursuant to the Oklahoma law of intestate succession, subject to the above limitations. On the death of the non-Osage beneficiary or heir, except in the case of adopted children or lineal descendants of such adopted children, such Osage headright or mineral interest shall vest in the Osage Tribe and the Tribe shall pay the estate of the non-Osage beneficiary or heir the market value of such Osage headright or mineral interest. Payments under this section shall be made from Osage tribal mineral funds authorized to be expended by section 8(b) hereof.

SEC. 8. (a) Any individual right to share in the Osage mineral estate (commonly referred to as "headright") owned by a person not of Indian blood may not, without the approval of the Secretary of the Interior, be sold, assigned, or transferred. Sale of any such interest shall be subject to the right of the Osage Tribe to purchase it within forty-five days at the highest legitimate price offered the owner thereof.

(b) Prior to the time and tribal mineral income is segregated for distribution to individual headright owners, the Secretary of the Interior, at the request of the Osage Tribal Council, may direct the use of any such income for the purchase of Osage headright interests offered for sale to the Osage Tribe pursuant to this section or vested in the Osage Tribe pursuant to section 7 of this Act.

Headright or mineral interest, alienation limitations.  
25 USC 331 note.

25 USC 331 note.

Determination.  
25 USC 331 note.

SEC. 9. Under such regulations as the Secretary of the Interior may prescribe, the heirs and legatees of any deceased owner of an Osage headright or mineral interest, real estate on which restrictions against alienation have not been removed, and funds on deposit at the Osage Agency may be determined by the Secretary if such aggregate interests do not exceed \$10,000: *Provided*, That no court of competent jurisdiction has undertaken the probate of the deceased's estate and a request for such administrative determination has been made to the Secretary by one or more of the heirs or legatees.

Approved October 21, 1978.

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**LEGISLATIVE HISTORY:**

HOUSE REPORT No. 95-1459, accompanying H.R. 11894 (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 95-1157 (Select Comm. on Indian Affairs).

CONGRESSIONAL RECORD, Vol. 124 (1978):

Sept. 8, considered and passed Senate.

Oct. 3, H.R. 11894 considered and passed House; passage vacated, and S. 1081, amended, passed in lieu.

Oct. 7, Senate concurred in House amendments.

Public Law 98-605  
98th Congress

An Act

To make certain technical corrections in various Acts relating to the Osage Tribe of Indians of Oklahoma.

Oct. 30, 1984

[H.R. 6303]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Osage Tribe of  
Indians  
Technical  
Corrections Act  
of 1984.

SHORT TITLE

SECTION 1. This Act may be cited as the "Osage Tribe of Indians Technical Corrections Act of 1984".

AMENDMENTS TO THE OSAGE INDIAN ACT OF 1978

SEC. 2. (a) Section 2(a) of the Act approved October 21, 1978, and entitled "An Act to amend certain laws relating to the Osage Tribe of Oklahoma, and for other purposes." (92 Stat. 1660) is amended by striking out "June 26, 1906" and inserting in lieu thereof "June 28, 1906".

(b) Section 5(7) of such Act is amended by striking out "(7)" and inserting in lieu thereof "(c)".

25 USC 331 note.

(c) Section 5(d) of such Act is amended to read as follows:

25 USC 331 note.

"(d)(1) Notwithstanding any provision of—

"(A) section 3 or 8 of the Osage Indians Act of 1912 (as amended by subsections (b) and (a), respectively), or

"(B) section 7 of the Osage Indians Act of 1925 (as amended by subsection (c)),

92 Stat. 1662,  
1661.

Post, p. 3167.

any sale or transfer or any disposition by any other means of any headright shall be subject to section 7 of this Act.

Post, p. 3164.

"(2) Notwithstanding section 6(a) of this Act or section 8 of the Osage Indians Act of 1912, no Osage Indian may—

25 USC 331 note.

92 Stat. 1661.

"(A) provide for the transfer of any interest of such person in any headright—

"(i) by will to any person which is not an individual, or

"(ii) by the establishment of an inter vivos trust for the benefit of any person which is not an individual; or

"(B) provide, whether by the terms of a will, the terms of a testamentary trust established by a will, or by the terms of an instrument establishing an inter vivos trust, that any interest in any headright—

"(i) which such Osage Indian had (at the time of death of such person or at the time any such inter vivos trust was established), and

"(ii) in which any individual was granted a life estate by such Osage Indian,

may be transferred to or held for the benefit of any individual who is not an Osage Indian upon the death of the individual who held such life estate."

(d) Section 6(b) of such Act is amended by striking out "members of the Osage Tribe," and inserting in lieu thereof "Osage Indians,".

25 USC 331 note.

25 USC 331 note. (e) Section 7 of such Act is amended to read as follows:

**"RULES GOVERNING DEVOLUTION OF INTERESTS IN OSAGE HEADRIGHTS**

Prohibition.

**"SEC. 7. (a) GENERAL RULE.—**No person who is not an Osage Indian may, on or after October 21, 1978, receive any interest in any headright, other than a life estate in accordance with subsection (b), whether such interest would be received by such person (but for this subsection) under a will, a testamentary or inter vivos trust, or the Oklahoma laws of intestate succession.

Ante, p. 3163.

**"(b) EXCEPTION FOR LIFE ESTATES.—**Notwithstanding subsection (a) and subject to section 5(d)(2), an individual who is not an Osage Indian may receive a life estate in any headright held by a testator, settlor, or decedent who is or was an Osage Indian under a will, or under a testamentary trust established by a will, of such testator, an inter vivos trust established by such settlor, or the Oklahoma laws of intestate succession relating to the administration of the estate of such decedent.

**"(c) SPECIAL RULES GOVERNING INTERESTS IN OSAGE HEADRIGHT UPON DEATH OF INDIVIDUAL WHO HELD LIFE ESTATE IN SUCH HEADRIGHT.—**

**"(1) DESIGNATED OSAGE REMAINDERMEN.—**Upon the death of any individual who is not an Osage Indian and who held a life estate in any headright of a testator or settlor described in subsection (b), all remaining interests in such headright shall vest in any remaindermen who—

**"(A)** are designated in the will of the testator or the instrument establishing the trust of the settlor to receive such remainder interest, and

**"(B)** are Osage Indians.

Prohibition.

**"(2) NO DESIGNATED OSAGE REMAINDERMEN.—**Upon the death of any individual who is not an Osage Indian and who held a life estate in any headright of a testator, settlor, or decedent described in subsection (b) who—

**"(A)** did not designate any remainderman who is an Osage Indian to receive any remaining interest in such headright in the will of such testator or instrument of such settlor, or

**"(B)** died intestate,

all remaining interests in such headright shall vest in any heirs, as determined under the Oklahoma laws of intestate succession, of such testator, settlor, or decedent who are Osage Indians.

Prohibition.

**"(3) NO HEIR WHO IS AN OSAGE INDIAN.—**Upon the death of any individual who is not an Osage Indian and who held a life estate in any headright of an Osage testator, settlor, or decedent described in subsection (b) who—

**"(A)** designated no remainderman who is an Osage Indian for any remaining interest in such headright, and

**"(B)** had no heir under the Oklahoma laws of intestate succession who is an Osage Indian and is living at the time of death of the individual who held such life estate,

all remaining interests in such headright shall vest in the Osage Tribe of Indians.

**"(d) LIABILITY OF TRIBE IN CASE OF REMAINDERMAN OR HEIR WHO IS NOT AN OSAGE INDIAN.—**In any case in which—

“(1) any remainder interest of a testator, settlor, or decedent described in subsection (b) vests in the Osage Tribe of Indians under subsection (c)(3), and

“(2) an individual who is not an Osage Indian and who, but for this section, would have received any portion of such remaining interest in the headright by virtue of—

“(A) having been designated under the will of such testator, or the instrument of such settlor which established any such trust, to receive such remainder interest, or

“(B) being the heir of such decedent under the Oklahoma laws of intestate succession,

the tribe shall pay any such individual the fair market value of the portion of the interest in such headright such individual would have received but for this section.”

(f) Section 8(a) of such Act is amended to read as follows:

“Sec. 8. (a)(1) No headright owned by any person who is not of Indian blood may be sold, assigned, or transferred without the approval of the Secretary. Any sale of any interest in such headright (and any other transfer which divests such person of any right, title, or interest in such headright) shall be subject to the following rights of purchase:

“(1) First right of purchase by the heirs in the first degree of the first Osage Indian to have acquired such headright under an allotment who are living and are Osage Indians, or, if they all be deceased, all heirs in the second through the fourth degree of such first Osage Indian who are living and are Osage Indians.

“(2) Second right of purchase by any other Osage Indian for the benefit of any Osage Indian in his or her individual capacity.

“(3) Third right of purchase by the Osage Tribal Council on behalf of the Osage Tribe of Indians.

No owner of any headright shall be required, by reason of this subsection, to sell such headright for less than its fair market value or to delay any such sale more than 90 days from the date by which notice of intention to sell (or otherwise transfer) such headright has been received by each person with respect to whom a right of purchase has been established under this subsection.”

(g) Section 8(b) of such Act is amended to read as follows:

“(b) Notwithstanding the paragraph designated ‘First’ of section 4 of the Osage Tribe Allotment Act or any other provision of law, any income from the Osage mineral estate may be used for the purchase of any headright offered for sale to the Osage Tribal Council pursuant to subsection (a) or vested in the Osage Tribe pursuant to section 7 if, prior to the time that any income from the Osage mineral estate is segregated for distribution to holders of headrights, the Osage Tribal Council requests the Secretary to authorize such use of such funds and the Secretary approves such request.”

(h) Such Act is amended by adding at the end thereof the following new sections:

“Sec. 10. Except where any provision of this Act explicitly provides otherwise, wherever the term ‘Osage Indian’ is used in this Act, such term shall be construed so as to include any child who has been adopted by an Osage Indian (pursuant to the decision of any court of competent jurisdiction) and any lineal descendant of such child.

“Sec. 11. For purposes of this Act—

25 USC 331 note.  
Prohibition.

25 USC 331 note.

34 Stat. 544.

*Ante*, p. 3164.

Children and  
youth.  
25 USC 331 note.

25 USC 331 note.

34 Stat. 543.

“(1) the term ‘Osage mineral estate’ means any right, title, or interest in any oil, gas, coal, or other mineral held by the United States in trust for the benefit of the Osage Indian Tribe under section 3 of the Osage Tribe Allotment Act;

“(2) the term ‘headright’ means any right of any person to share in any royalties, rents, sales, or bonuses arising from the Osage mineral estate;

“(3) the term ‘Secretary’ means the Secretary of the Interior;

“(4) the term ‘person’ has the meaning given to such term in section 1 of title 1, United States Code;

“(5) the term ‘Osage Tribe Allotment Act’ means the Act approved June 28, 1906, and entitled ‘An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.’ (34 Stat. 539);

“(6) the term ‘Osage Indians Act of 1912’ means the Act approved April 18, 1912, and entitled ‘An Act Supplementary to and amendatory of the Act entitled “An Act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma,” approved June twenty-eighth, nineteen hundred and six, and for other purposes.’ (37 Stat. 86); and

“(7) the term ‘Osage Indians Act of 1925’ means the Act approved February 27, 1925, and entitled ‘An Act To amend the Act of Congress of March 3, 1921, entitled “An Act to amend section 3 of the Act of Congress of June 28, 1906, entitled “An Act of Congress for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes.”’ (43 Stat. 1008).”

#### AMENDMENTS TO THE OSAGE INDIANS ACT OF 1912

92 Stat. 1662.

SEC. 3. (a) Section 3 of the Act approved April 18, 1912, and entitled “An Act Supplementary to and amendatory of the Act entitled ‘An Act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma,’ approved June twenty-eighth, nineteen hundred and six, and for other purposes.” (37 Stat. 86) is amended by striking out “That the” and inserting in lieu thereof the following:

“SEC. 3. Except as provided in sections 5(d) and 7 of the Act approved October 21, 1978, and entitled ‘An Act to amend certain laws relating to the Osage Tribe of Oklahoma, and for other purposes.’ (92 Stat. 1660), the”.

(b) Section 8 of such Act is amended—

(1) in the first sentence—

(A) by striking out “Any” and inserting in lieu thereof the following:

“SEC. 8. Except as provided in sections 5(d) and 7 of the Act approved October 21, 1978, and entitled ‘An Act to amend certain laws relating to the Osage Tribe of Oklahoma, and for other purposes.’, any”.

(B) by striking out “(real, person, and mixed,” and inserting in lieu thereof “(real, personal, and mixed,”

(C) by inserting a comma after “removed”.

(D) by striking out “will executed” and inserting in lieu thereof “the terms of a will, or the terms of a testamentary trust created by a will, executed”, and

(E) by striking out “State of Oklahoma:” and inserting in lieu thereof “State of Oklahoma, except that an Osage

Ante, pp. 3163,  
3164.  
92 Stat. 1661.

Indian under guardianship or conservatorship shall be exempt from the requirement that the will of such Indian shall be subscribed and acknowledged in the presence of a district judge.”;

(2) by striking out the third sentence and inserting in lieu thereof the following new sentence: “Notice of such hearing shall be given at least 10 days before the hearing by publication in a newspaper of general circulation in Osage County, Oklahoma, and by mailing to all known heirs, legatees, and devisees at their last known addresses.”;

(3) in the sixth sentence by striking out “of” where it appears after “date”;

(4) by inserting after the eighth sentence the following new sentence: “In the case of any action in probate contesting the will of any Osage Indian, the Secretary of the Interior may approve any settlement relating to such action with respect to any property under the jurisdiction of the Secretary.”;

(5) in the last sentence by striking out “Such appeals” and inserting in lieu thereof “Any such appeal shall be filed in a court of the United States with jurisdiction over such appeal before the end of the 30-day period beginning on the date of the decision of the Secretary and”;

(6) by adding at the end thereof the following new sentences: “In the case of any property or interest in property (including any headright) which was held by any Osage Indian decedent at the time of death of such Indian and is subject to any restriction against alienation, or which was held by the United States in trust for the benefit of any Osage Indian decedent, and which is property, or an interest in property, included in a testamentary trust created by a will of such decedent—

“(1) only the Secretary of the Interior may be appointed as, or may serve as, trustee with respect to any share of such trust property relating to a beneficiary of such trust who is an Indian with respect to whom—

“(A) a certificate of competency has never been issued, or

“(B) a certificate of competency has been revoked by the Secretary of the Interior;

“(2) only a bank or trust institution may be appointed as, or may serve as, the trustee with respect to any share of such trust property relating to any beneficiary other than an Indian described in subparagraph (A) or (B) of paragraph (1); and

“(3) the inclusion of such property, or interest in property, in such testamentary trust shall not affect—

“(A) the application, to such property, of any law and rule of law which applies to property of Osage Indians or the Osage Tribe of Indians, including any restrictions against alienation of lands or other property, or

“(B) the tax-exempt status of such property.”.

#### AMENDMENTS TO THE OSAGE INDIANS ACT OF 1925

SEC. 4. Section 7 of the Act approved February 27, 1925, and entitled “An Act to amend the Act of Congress of March 3, 1921, entitled ‘An Act to amend section 3 of the Act of Congress of June 28, 1906, entitled ‘An Act of Congress for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes.’” (43 Stat. 1008) is amended—

(1) by striking out "Hereafter" and inserting in lieu thereof the following:

"SEC. 7. Except as provided in sections 5(d) and 7 of the Act approved October 21, 1978, and entitled 'An Act to amend certain laws relating to the Osage Tribe of Oklahoma, and for other purposes', on or after October 21, 1978,";

*Ante*, pp. 3163,  
3164.

(2) by inserting after "inherit" the following: ", in accordance with the laws of the State of Oklahoma relating to intestate succession"; and

Children and  
youth.

(3) by adding at the end the following new sentence: "No adopted child of any Osage Indian who is not an Osage Indian shall be eligible to inherit, as the collateral heir (within the meaning of the laws of the State of Oklahoma relating to intestate succession) of any Osage Indian decedent, any property or interest in property held in trust by the Secretary of the Interior for the benefit of such decedent."

AMENDMENTS TO THE ACT PROVIDING FOR THE DISTRIBUTION OF  
JUDGMENT FUNDS OF THE OSAGE TRIBE OF INDIANS

SEC. 5. Section 1(b) of the Act approved October 27, 1972, and entitled "An Act to provide for the disposition of judgment funds of the Osage Tribe of Indians of Oklahoma." (86 Stat. 1295) is amended—

25 USC 883.

(1) by striking out "or other socioeconomic programs", and  
(2) by striking out "programs to be administered" and inserting in lieu thereof "program to be administered".

Approved October 30, 1984.

LEGISLATIVE HISTORY—H.R. 6303:

HOUSE REPORT No. 98-1115 (Comm. on Interior and Insular Affairs).

CONGRESSIONAL RECORD, Vol. 130 (1984):

Oct. 2, considered and passed House.

Oct. 9, considered and passed Senate.

Public Law 108–431  
108th Congress

An Act

To reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government.

Dec. 3, 2004  
[H.R. 2912]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Oklahoma.

**SECTION 1. REAFFIRMATION OF CERTAIN RIGHTS OF THE OSAGE TRIBE.**

(a) FINDINGS.—The Congress finds as follows:

(1) The Osage Tribe is a federally recognized tribe based in Pawhuska, Oklahoma.

(2) The Osage Allotment Act of June 28, 1906 (34 Stat. 539), states that the “legal membership” of the Osage Tribe includes the persons on the January 1, 1906 roll and their children, and that each “member” on that roll is entitled to a headright share in the distribution of funds from the Osage mineral estate and an allotment of the surface lands of the Osage Reservation.

(3) Today only Osage Indians who have a headright share in the mineral estate are “members” of the Osage Tribe.

(4) Adult Osage Indians without a headright interest cannot vote in Osage government elections and are not eligible to seek elective office in the Osage Tribe as a matter of Federal law.

(5) A principal goal of Federal Indian policy is to promote tribal self-sufficiency and strong tribal government.

(b) REAFFIRMATION OF CERTAIN RIGHTS OF THE OSAGE TRIBE.—

(1) MEMBERSHIP.—Congress hereby clarifies that the term “legal membership” in section 1 of the Act entitled, “An Act For the division of lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes”, approved June 28, 1906 (34 Stat. 539), means the persons eligible for allotments of Osage Reservation lands and a pro rata share of the Osage mineral estate as provided in that Act, not membership in the Osage Tribe for all purposes. Congress hereby reaffirms the inherent sovereign right of the Osage Tribe to determine its own membership, provided that the rights of any person to Osage mineral estate shares are not diminished thereby.

(2) GOVERNMENT.—Notwithstanding section 9 of the Act entitled, “An Act For the division of lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes”, approved June 28, 1906 (34 Stat. 539), Congress hereby reaffirms the inherent sovereign right of the Osage Tribe to determine its own form of government.

(3) ELECTIONS AND REFERENDA.—At the request of the Osage Tribe, the Secretary of the Interior shall assist the Osage Tribe with conducting elections and referenda to implement this section.

Approved December 3, 2004.

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LEGISLATIVE HISTORY—H.R. 2912:

HOUSE REPORTS: No. 108-502 (Comm. on Resources)

SENATE REPORTS: No. 108-343 (Comm. on Indian Affairs).

CONGRESSIONAL RECORD, Vol. 150 (2004):

June 1, considered and passed House.

Nov. 19, considered and passed Senate.



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**PART IV**

**LANDS ALLOTTED AMONG  
THE OSAGE INDIANS**

**BY**

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**INTRODUCTION AND KEY TO TABLES OF ALIENABILITY  
OF LANDS ALLOTTED AMONG THE OSAGE INDIANS**

There are several features in the Osage allotments under the Act of June 28, 1906, 34 Stat. 539, that are unique to them. In the first place, all of the land in the reservation was allotted. There were three rounds in each of which each allottee selected 160 acres. Following that, the remaining land was divided by a commission among the allottees. There was no land except that in townsites, see Act of March 3, 1905, 33 Stat. 1048, available for sale except from an allottee. One of the first three selections had to be designated as homestead. The certificate of allotment and deed carried that designation. The Act of 1918, see Note 8, permitted changing designations so that homestead became surplus, and vice versa.

A second feature was the severance of the mineral estate, which was reserved to the Tribe. The mineral estate has been managed by the tribal council with the supervision of government officials. The income thereof makes up the famous "Osage headrights." There was one headright for each of the original allottees.

As in no other scheme of restrictions, the terms "allotted" and "unallotted" became an important distinction. In other schemes, heirs were heirs and devisees were devisees. In the Osage scheme, at some periods in time, there are allotted and unallotted heirs, or allotted and unallotted devisees, and other classes. Those who were allotted were, of course, those who received allotments. The allotment act provided for allotment to those on the approved rolls as of January 1, 1906, to children born of those on the roll by that date but themselves not on the roll as of January 1, 1906, and all children born to those on the roll between January 1, 1906 and July 1, 1907. No Osage born thereafter received an allotment. They would take as heirs, devisees, or perhaps as purchasers with restricted funds under the Act of February 27, 1925, 43 Stat. 1008. Such Osages born too late to receive an allotment are referred to as "unallotted." At times, the term appears as the first part of a hyphenated term, such as "unallotted-heir."

In many pieces of legislation, "members of the Osage tribe" is construed to mean only those Osage who were allotted, see, e.g., Note 5 below. But context sometimes requires the construction which would include the unallotted as well, as in the Act of 1948, discussed below herein.

Although they were subject to having their land managed through guardianships, for most of the time the unallotted remained unrestricted until the Act of March 2, 1929, 45 Stat. 1478, when the same restrictions on the allotted were imposed on them.

Guardianship should be herein noted. It was applicable to both allotted and unallotted minors. The second section of the Allotment Act, supra, defined minors as those under twenty-one. The selection of land for minors was to be made by parents. Those who did not have parents had their selections made by the Osage Indian Agent, subject to approval of the Secretary.

The earliest provisions concerning the land of minors occurs in Section 7 of the Allotment Act, supra, and provides that parents of minors may lease their land for farming and grazing use and have control of the proceeds until the minor reaches majority. These leases were subject to approval of the Secretary of the Interior.

The first act providing for guardianship as well as general probate matters is found in Section 3 of the Act of April 18, 1912, 37 Stat. 86-87, set out below:

That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interest of the allottee require, to appear in the county court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court

shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: Provided, That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: Provided further, That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior.

The Act of February 27, 1925, 43 Stat. 1008, has numerous provisions as to guardians and their handling of funds paid to them. The one provision of significance to title examination occurs 43 Stat. 1009:

No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage Tribe of Indians who does not have a certificate of competency or who is one-half or more Indian blood.

The Act of October 21, 1978, Section 5(b), 92 Stat. 1660, overhauls the provisions of the Act of 1912 in relation to probate matters. It is set out in Note 25 below.

The certificate of competency is a very important feature in the scheme of Osage allotments. It was first provided for in the Osage Allotment Act. For its procedure, standards for issuance and consequence, see Note 1, below. Superficially, it permitted alienation of surplus but left homestead restricted initially for twenty-five years or for the life of the allottee, see Note 1, below. But the certificate, in the hands of an heir, freed all inherited land, see Note 2, below.

The Act of 1925 provided that the Secretary could, after hearing, revoke a certificate if he found the Indian was squandering his estate. The Secretary's action was not reviewable by the courts. The revocation was held not to void transactions taking place prior to the revocation. *U.S. v. Sands*, 94 F.2d 156 (10th Cir. 1938).

The Act of March 2, 1929, imposed restrictions on the unallotted Osages but at the same time authorized the Secretary to issue certificates of competency to the unallotted, see Note 17. Section 3 of the same Act required the Secretary to issue certificates to all allotted Osage having less than one-half Osage blood within ten years of the Act, 45 Stat. 1478.

This was followed by the Act of February 5, 1948, 62 Stat. 18, which required the Secretary to "issue a certificate of competency to each member of the Osage Tribe of less than one-half Indian blood heretofore or hereafter attaining the age of twenty-one years." While "member of the Osage tribe," as indicated herein above, is frequently construed to include only allotted Osage, such construction is here impossible. No allotted Osage could reach twenty-one after the passage of the Act. They were all born prior to July 1, 1907.

The Act of 1948 was repealed by Section 3(a) of the Act of October 21, 1978, 92 Stat. 1660, and Section 3(b), 92 Stat. 1660-1661, thereof provides:

Any Osage Indian having received a certificate of competency under paragraph 7 of section 2 of the Act of June 28, 1906 (34 Stat. 539, 542); section 3 of the Act of March 2, 1929 (45 Stat. 1478, 1480); or the Act of February 5, 1948 (62 Stat. 18), may make application to the Secretary of the Interior to revoke such certificate and the Secretary shall revoke such certificate: Provided, That revocation of any certificate shall not affect the legality of any transactions heretofore made by reason of the issuance of any such certificate. Restrictions against alienation of lands heretofore removed are not reimposed.

It was held in *U.S. v. Mashunkashey*, 72 F.2d 847 (10th Cir. 1934), the court may set aside a certificate of competency where fraud has been practiced (in this case by a third person) in procuring the issuance of the certificate.

One of the features of Indian allotments has been freedom from ad valorem taxation. That was a particular problem in the case of Osage allotments, because there were relatively no unallotted lands to be sold to whites

and thereby to become taxable.

In the Allotment Act, it was provided that all surplus should become taxable in three years, that is, beginning with the year 1910. In case of the death of the allottee or the issuance of a certificate of competency, surplus became taxable immediately, even though the three-year period had not run, Seventh par., § 2, Act of June 21, 1906, 34 Stat. 325.

Homestead, on the other hand, was made non-taxable until otherwise provided by Congress, Fourth par., § 2, 34 Stat. 325.

In the Act of March 3, 1921, § 3, 41 Stat. 1249, Congress removed the restrictions on homestead and surplus as to all adult allotted (see Note 9, *infra*) Osages of less than one-half blood but at the same time provided their homestead allotments should not be taxable before April 28, 1931, if held by the original allottee.

The status of the homestead in the hands of an heir is treated in *U.S. v. Board of Com'rs of Osage County*, 193 F. 485 (C.C. W.D. Okla. 1911). In that case, Judge Cotteral laid it down, *id.* at 488:

When no certificates of competency issue, the homesteads, whether held by the allottees or their heirs, remain an instrumentality employed by the national government, pursuant to the constitutional power it possesses to deal with the Indians for their protection and welfare. [Citations omitted.] The question presented for decision in respect to homesteads is whether they are exempt where the allottees die without receiving certificates of competence. In the opinion of this court they are exempt, and will so remain until Congress shall remove the exemption.

The Act of March 2, 1929, § 1, 45 Stat. 1479 provided:

Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at anytime exceed one hundred and sixty acres.

The Act of June 24, 1938, § 3, 52 Stat. 1034, 1036 provides in part:

Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1984: Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

The Act of October 21, 1978, § 2(c), 92 Stat. 1660, provides:

The fourth paragraph of section 3 of the Act of June 24, 1938 (52 Stat. 1034, 1036) is amended by striking the phrase "January 1, 1984" and inserting, in lieu thereof, the phrase "January 1, 1984 and thereafter until otherwise provided by Congress".

The Act of October 21, 1978, § 3(c), 92 Stat. 1660, 1661, reads in part:

[S]ection . . . 3 of the Act of June 24, 1938 (52 Stat. 1034) [is] hereby amended by striking wherever they occur, the phrase . . . "of one-half or more Osage Indian blood" . . .

Thus amended, the pertinent language of the Act of 1938 now reads:

Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee and in his unallotted heirs or

devises until January 1, 1984, and thereafter until otherwise provided by Congress: Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

The Allotment Act provided that the intestacy laws of the Territory of Oklahoma or of the state into which it might afterwards be incorporated should apply, Act of June 28, 1906, § 6, 34 Stat. 539, 545.

The Act of April 18, 1912, § 8, 37 Stat. 86, 88, in providing for the making of wills did not restrict the pattern of distribution thereunder other than providing that the wills should be in accordance with the laws of the State of Oklahoma.

But as every loyal Jimmy Stewart fan knows, the wealth of the Osages led to rackets involving the passage of wealth upon the death of an Osage Indian, In the Acts of May 10, 1926, 44 Stat. 453, 475, and May 29, 1928, 45 Stat. 883, 899, appropriations are made to aid in the prosecutions of the Osage murder cases.

The Act of February 27, 1925, § 5, 43 Stat. 1008, 1011 provided:

No person convicted of having taken, or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained.

Section 7 of the same Act, 43 Stat. 1011, said:

Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: Provided, That this section shall not apply to spouses under existing marriages.

Beginning with the Act of February 27, 1925, § 7, 43 Stat. 1008, 1011, Congress began limiting to who might take by intestate and testate succession. In the Act of 1925, supra, inheritance of any restricted property from Osages of one-half or more Osage blood was limited to those of Indian blood and the spouses of existing marriages. Under this Act, adopted white children were excluded, In re Martin's Estate, 183 Okla. 177, 80 P.2d 561 (1938).

The Act of February 27, 1925, § 7, supra, was amended by the Act of September 1, 1950, 64 Stat. 572. It provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011) which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section, after the comma following the word "provided," and inserting in lieu thereof the following:

"That (except in cases where a person claiming as such heir is a party to a judicial proceeding pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal ancestor so enrolled; provided further, that this section shall not apply to spouses under marriages existing on February 27, 1925."

It is said that this was adopted to put an end to the practice of using Mexican Indians to comply with the prior Act.

The Act of October 21, 1978, § 5(b) (7), 92 Stat. 1660, 1662, provides:

Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011), as amended, is hereby further amended to read as follows: "Hereafter none but heirs of Indian blood and children legally adopted by a court of competent jurisdiction and parents, Indian or non-Indian, shall inherit from Osage Indians any right, title, or interest to any restricted land, moneys, or Osage headright or mineral interest.

The Act further protects the disposition, testate, intestate or inter vivos, of headrights in a very complicated scheme preventing any interest but life estates to go to those not of Osage Indian blood, except adopted children and their lineal descendants, who are then restricted as though they were of Osage blood. Reversion back to the Tribe in some instances is provided for. Sale of headrights by those of non-Indian blood is subjected to the right of the Tribe to purchase at the highest legitimate offer made to the owner thereof.

Because restricted land is not involved in this morass, no further explanation is deemed necessary.

The main divisions of the chart are, like those in relation to the Five Civilized Tribes, critical time periods - periods of time in which the law as to alienability was the same. Toward the end of the chart, there is a departure from this pattern to avoid repetition, of which there is, even so, an overabundance.

In the broadest of the columns, statements are made concerning alienability by persons who occupy a stated status, such as "Allottee", "Heir", "Unallotted Devisee" etc. Some of the divisions relate to a particular type of alienation, such as "By Will", "Partition", etc. In that same column, conditions are stated, such as "Unconditionally", "With approval by Secretary", and the like. Those conditions are, of course, a part of the statement of the alienability.

The last five columns on the right convey information concerning authority or further limitations not reflected on the chart, or information which completes the statement. The first of the five columns, (1), is of the first sort. It directs the user to an appended note containing authority and discussion of the statement. In some cases, the column bears two numbers, as 1/5, which indicates that both Notes 1 and 5 must be consulted, and frequently there is cross-referencing within a Note itself.

Symbols in column (2) indicate the status of the alienor; that is, "A" for adult, which means twenty-one or over; "M" for minor, meaning under twenty-one, with the understanding that the minor must act through a guardian; and "All", including both adults and minors. Congress has recently permitted eighteen-year-olds to make wills and inter vivos trusts. In these cases, "18" will appear in the first column. It should be noted that where the alienability depends upon the alienor having a certificate of competency, the symbol is always "A", because certificates are issued to adults only.

In the third column, the symbols are "5", for surplus, "H", for homestead, or "All", for both. In the final two columns, the critical quantum of Indian blood is indicated. If "X" appears in column (4), it means the statement is true of an alienor who is one-half or more of Osage blood. If the "X" appears in column (5), it indicates the statement is true of those of less than one-half blood. Where the "X" appears in both columns (4) and (5), the statement is true of those of all degrees of blood.

Reference in the notes to "Mills" indicates a citation to Mills, Oklahoma Indian Land Laws (1924), and "Semple" refers to Semple, Oklahoma Indian Land Titles (1952). In the latter, the current pocket part should always be consulted.

For some reason, Mills did not update his Osage materials in his 1947 Supplement to his work.



# United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

**JUN 26 2020**

The Honorable Geoffrey Standing Bear  
Principal Chief, Osage Nation  
627 Grandview  
Pawhuska, Oklahoma 74056

Dear Principal Chief Standing Bear:

In 2016, the Osage Nation (Nation) submitted to the Bureau of Indian Affairs (BIA) an application to transfer into trust approximately 63.1 acres of land known as the Pawhuska Property (Site) in Osage County, Oklahoma, for gaming and other purposes.<sup>1</sup> The Nation will relocate its existing Pawhuska facility to the Site, and develop approximately 17 acres of the Site with a casino and hotel (Proposed Project). The Nation also submitted a request for a determination whether the Nation is eligible to conduct gaming on the Site. The Proposed Project would replace the Nation's existing Pawhuska Osage Casino in Osage County. The Nation intends to close the existing casino and relocate it to the Site operating approximately 300 feet directly across Highway 99/60.

We have completed our review of the Nation's request, the Regional Director's Findings of Fact,<sup>2</sup> and the documentation in the record. As discussed below, it is my determination that the Department of the Interior (Department) will transfer the Site into trust for the benefit of the Nation pursuant to Section 5 of the Indian Reorganization Act (IRA).<sup>3</sup> Once transferred into trust, the Nation may conduct gaming on the Site pursuant to the Indian Gaming Regulatory Act (IGRA).<sup>4</sup>

## **Background**

In 1870, Congress removed and relocated the Osage people from their lands in Kansas, which were then sold, to lands in the Indian Territory in present-day Oklahoma.<sup>5</sup> There, Congress established the boundaries of the Nation's Reservation in 1872, consisting of approximately 1.47 million acres, which subsequently became part of the Oklahoma Territory in 1890.<sup>6</sup>

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<sup>1</sup> See Letter from Property Manager, Osage Nation, to Robin Philips, Superintendent, Osage Agency (Nov. 10, 2016). The Nation submitted a previous application for the Site on December 30, 2013.

<sup>2</sup> Memorandum from Regional Director, Eastern Oklahoma Region, to Deputy Director, Office of Indian Gaming at 6 (Dec. 11, 2019) [hereinafter Regional Director's Findings of Fact]. See also Environmental Assessment Osage Nation Fee-to-Trust, Osage Casino - Pawhuska Project (June 2020) [hereinafter EA].

<sup>3</sup> 25 U.S.C. § 5108.

<sup>4</sup> 25 U.S.C. § 270 I *et seq.*

<sup>5</sup> Act of July 15, 1870, 16 Stat. 335, 362.

<sup>6</sup> Act of June 5, 1872, ch. 310, 17 Stat. 228. Act of May 2, 1890, ch. 182, 26 Stat. 81. See also *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011).

The Osage Allotment Act of 1906 provided for an equal division of the Osage lands among the approximately 2000 tribal members.<sup>7</sup> Each tribal member was permitted to select three allotments of 160 acres each, and would receive an equal share of any land left over after all allotments had been selected.<sup>8</sup> In addition, the 1906 Act severed the surface estate of the reservation from the subsurface mineral estate (commonly referred to as the Osage Mineral Estate), reserving all mineral rights to the Osage Nation in perpetuity.<sup>9</sup>

In 1907, Oklahoma became a state and incorporated the Nation's Reservation as Osage County.<sup>10</sup> The Nation lost more than 90 percent of its land base through this process.<sup>11</sup> Osage County is the largest county in Oklahoma, comprising approximately 1.47 million acres, approximately three percent of the State's total land area.<sup>12</sup>

### **Description of the Property**

The Site is located approximately 57 miles northwest of the City of Tulsa, and east of the City of Pawhuska, Oklahoma. The Nation's headquarters are located approximately 3.7 miles west of the Site.<sup>13</sup> The Nation acquired the Site in fee simple on October 25, 2012.<sup>14</sup> The legal description of the Site is included as Enclosure 1. Maps of the Site are included as Enclosure 2.

### **Eligibility for Gaming Pursuant to the Indian Gaming Regulatory Act**

Section 2719 of IGRA prohibits gaming on land acquired in trust after October 17, 1988. Congress expressly provided several exceptions to the general prohibition. Under Section 2719(a)(1), land that is located within reservation boundaries is exempt from the general prohibition. Similarly, land within the former reservation of an Oklahoma tribe that did not have a reservation on October 17, 1988, is also exempt from the general prohibition under Section 2719(a)(2)(A)(i).

The lands at issue are located within the exterior boundaries of the Reservation established by the United States for the Osage Nation, and, thus, are located within the former reservation of the Osage Nation under IGRA, 25 U.S.C. §§ 2719(a)(1), (a)(2)(A)(i), and the Department's regulations at 25 C.F.R §§ 292.4, 292.2.

We conclude, therefore, that the Site is eligible for gaming.

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<sup>7</sup> Act of June 28, 1906, ch. 3572, 34 Stat. 539.

<sup>8</sup> *Id.* at § 2, 34 Stat. 540.

<sup>9</sup> *Id.* at § 3, as amended by Act of Mar. 3, 1931, 41 Stat. 1249 (extending the trust status of the mineral estate to 1946); Act. of Mar. 2, 1929, 45 Stat. 1478 (extending to 1959), Act of June 24, 1938, 52 Stat. 1034 (extending to 1983), Act of Oct. 21, 1978, 92 Stat. 1660 (extending in perpetuity).

<sup>10</sup> Act of June 16, 1906, ch. 3335, 34 Stat. 267 §§ 2, 21; *Osage Nation v. Irby*, 597 F.3d at 1120.

<sup>11</sup> *Osage Nation v. Irby*, 597 F.3d at 1127.

<sup>12</sup> *Id.* at 1120.

<sup>13</sup> Regional Director's Findings of Fact at 5.

<sup>14</sup> *Id.*

## **Trust Acquisition Determination Pursuant to 25 C.F.R. Part 151**

The Secretary of the Interior's (Secretary) general authority for acquiring land in trust is found in Section 5 of the IRA, 25 U.S.C. § 5108. The Department's regulations at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5 of the IRA.

### **25 C.F.R. § 151.3 – Land acquisition policy.**

Section 151.3(a) sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe:

- (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
- (2) When the tribe already owns an interest in the land; or
- (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Although only one factor in Section 151.3(a) must be met, the Nation's application satisfies the requirements of all three. The Nation's application satisfies the criteria of subsections (a)(1) and (a)(2) because the Site is located in Oklahoma within the Nation's former reservation boundaries and the Nation owns the property in fee. As discussed below, the transfer of the Site into trust will facilitate tribal self-determination and economic development because it will generate additional revenue for the Nation's governmental services, thus, satisfying the criteria of Section 151.3(a)(3).

The Regional Director found, and we concur, that acquisition of the Site in trust will facilitate tribal self-determination and economic development.<sup>15</sup>

### **25 C.F.R. § 151.10 – On-reservation acquisitions.**

Section 151.10 requires the Secretary to evaluate requests for acquisition of land under the on-reservation criteria when the land is located within or contiguous to an Indian reservation.

The Site is located within the Nation's former reservation boundaries. Section 151.2 defines "Indian reservation" as, "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma ... 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." The Site meets these criteria.

The Regional Director found, and we concur, that the Nation's application is properly considered under the on-reservation criteria of Section 151.10.<sup>16</sup>

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<sup>15</sup> Regional Director's Findings of Fact at 5.

<sup>16</sup> *Id.* at 6.

**25 C.F.R. § 151.10(a) - The existence of statutory authority for the acquisition and any limitations contained in such authority.**

Section 151.10(a) requires the Secretary to consider whether there is statutory authority for the trust acquisition and, if such authority exists, to consider any limitations contained in it.

**Standard of Review**

*A. Four-Step Procedure to Determine Eligibility*

Section 5 of the IRA provides the Secretary with discretionary authority to acquire land in trust for “Indians.”<sup>17</sup> Section 19 of the Act defines “Indian” to include several categories of persons:

[Category 1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [Category 2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [Category 3] all other persons of one-half or more Indian blood.<sup>18</sup>

In 2009, the United States Supreme Court (Supreme Court) in *Carciere v. Salazar* construed the term “now” in Category 1 to refer to the date of the IRA’s enactment.<sup>19</sup> Thus, the Secretary’s authority to acquire land in trust for Indian tribes under Category 1 extended only to those tribes that were “under federal jurisdiction” when the IRA was enacted on June 18, 1934. The Supreme Court did not consider the meaning of the phrases “under federal jurisdiction” or “recognized Indian tribe.”

The Department finds that all federally recognized tribes in Oklahoma were “under federal jurisdiction” in 1934. This result is consistent with an earlier determination in 2011.<sup>20</sup> For the reasons explained more fully below, we conclude that there is evidence unambiguously demonstrating that the Nation was “under federal jurisdiction” in 1934. As such, the Nation is, therefore, eligible under Category 1 and, consequently, the Secretary has authority to acquire land into trust for the Nation.

To guide the implementation of the Secretary’s discretionary acquisition authority under Section 5 after *Carciere*, the Department, in 2010, prepared a two-part procedure for determining when an applicant tribe was “under federal jurisdiction” in 1934.<sup>21</sup> The Solicitor of the Interior

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<sup>17</sup> 25 U.S.C. § 5108.

<sup>18</sup> 25 U.S.C. § 5129 (bracketed numerals added).

<sup>19</sup> 555 U.S. 379 (2009) (*Carciere*).

<sup>20</sup> See Decision Letter, Assistant Secretary-Indian Affairs to Principal Chief John D. Red Eagle at 3-4 (Jul. 8, 2011) (acquisition of the 7.5-acre Skiatook Osage Million Dollar Elm Casino parcel).

<sup>21</sup> U.S. Dept. of the Interior, Assistant Secretary, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) (Cowlitz ROD). See also Memorandum from the Solicitor to Regional Solicitors, Field

(Solicitor) later memorialized the Department’s interpretation in Sol. Op. M-37029.<sup>22</sup> Despite this, however, uncertainty persisted over what evidence could be submitted for the inquiry and how the Department would weigh it, prompting some tribes to devote considerable resources to researching and collecting any and all forms of potentially relevant evidence; in some cases, leading to submissions totaling thousands of pages. To address this uncertainty, in 2018 the Solicitor’s Office began a review of the Department’s eligibility procedures to provide guidance for determining relevant evidence. This prompted questions concerning Sol. Op. M-37029’s interpretation of Category 1, on which its eligibility procedures relied. This uncertainty prompted the Solicitor to review Sol. Op. M-37029’s two-part procedure for determining eligibility under Category 1, and the interpretation on which it relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029. The Solicitor concluded that its interpretation of Category 1 was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase “recognized Indian tribe now under federal jurisdiction.”<sup>23</sup> In its place, the Solicitor issued a new, four-step procedure for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor (Solicitor’s Office).<sup>24</sup>

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

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

Step Three determines whether an applicant tribe’s evidence sufficiently demonstrates that the applicant tribe was “recognized” in or before 1934 and remained under jurisdiction in 1934. The Solicitor determined that the phrase “recognized Indian tribe” as used in Category 1 does not have the same meaning as the modern concept of a “federally recognized” (or “federally acknowledged”) tribe, a concept that did not evolve until the 1970s, after which it was

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Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor’s Office Review of Fee-to-Trust Applications (Mar. 7, 2014), *revised* (Jan. 5, 2017).

<sup>22</sup> Sol. Op. M-37029, *The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (M-37029).

<sup>23</sup> Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).

<sup>24</sup> *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 10, 2020) (Solicitor’s Guidance).

incorporated in the Department’s federal acknowledgment procedures.<sup>25</sup> Based on the Department’s historic understanding of the term, the Solicitor interpreted “recognition” to refer to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy. The Solicitor identified forms of evidence that establish a rebuttable presumption that that an applicant tribe was “recognized” in a political-legal sense before 1934 and remained under federal jurisdiction in 1934. In the absence of such evidence, the inquiry finally moves to Step Four.

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

To further assist Solicitor’s Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor’s Guidance includes a memorandum<sup>26</sup> detailing the Department’s revised interpretation of the meaning of the phrases “now under federal jurisdiction” and “recognized Indian tribe” and how they work together.

## B. *The Meaning of the Phrase “Now Under Federal Jurisdiction.”*

### 1. Statutory Context.

The Solicitor first concluded that the phrase “now under federal jurisdiction” should be read as modifying the phrase “recognized Indian tribe.”<sup>27</sup> The Supreme Court in *Carciere* did not identify a temporal requirement for recognition as it did for being under federal jurisdiction,<sup>28</sup> and the majority opinion focused on the meaning of “now” without addressing whether or how the phrase “now under federal jurisdiction” modifies the meaning of “recognized Indian tribe.”<sup>29</sup>

In his concurrence, Justice Breyer also advised that a tribe recognized *after* 1934 might nonetheless have been “under federal jurisdiction” *in* 1934.<sup>30</sup> By “recognized,” Justice Breyer

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<sup>25</sup> 25 C.F.R. Part 83.

<sup>26</sup> *Determining Eligibility under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor (Mar. 5, 2020) (Deputy Solicitor’s Memorandum).

<sup>27</sup> Deputy Solicitor’s Memorandum at 19. *See also* *Cty. of Amador v. United States Dep’t of the Interior*, 872 F.3d 1012, 1020, n. 8 (9<sup>th</sup> Cir. 2017) (*Carciere* leaves open whether “recognition” and “jurisdiction” requirements are distinct requirements or comprise a single requirement).

<sup>28</sup> *Carciere* at 382-83.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 398 (Breyer, J., concurring).

appeared to mean, “*federally* recognized”<sup>31</sup> in the formal, political sense that had evolved by the 1970s, not in the sense in which Congress likely understood the term in 1934. He also considered how “later recognition” might reflect earlier “Federal jurisdiction,”<sup>32</sup> and gave examples of tribes federally recognized after 1934 with whom the United States had negotiated treaties before 1934.<sup>33</sup>

Justice Breyer’s suggestion that Category 1 does not preclude eligibility for tribes “federally recognized” *after* 1934 is consistent with interpreting Category 1 as requiring evidence of federal actions toward a tribe with whom the United States dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934, as the example of the Stillaguamish Tribe of Indians of Washington (Stillaguamish Tribe) shows.<sup>34</sup> It is also consistent with the Department’s policies that in order to apply for trust-land acquisitions under the IRA, a tribe must appear on the official list of entities federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as such.<sup>35</sup>

The Solicitor noted that Category 1’s grammar supports this view. The adverb “now” is part of the prepositional phrase “under federal jurisdiction,”<sup>36</sup> which it temporally qualifies.<sup>37</sup> Prepositional phrases function as modifiers and follow the noun phrase that they modify.<sup>38</sup> Category 1’s grammar therefore supports interpreting the phrase “now under federal jurisdiction” as intended to modify “recognized Indian tribe.” This interpretation finds further support in the IRA’s legislative history, discussed below, and in Commissioner of Indian Affairs John Collier’s statement that the phrase “now under federal jurisdiction” was intended to limit the IRA’s application.<sup>39</sup> This suggests Commissioner Collier understood the phrase “now under federal

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 399 (Breyer, J., concurring).

<sup>33</sup> *Id.* at 398-99 (Breyer, J., concurring) (discussing Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Chippewa Indians).

<sup>34</sup> *Id.*

<sup>35</sup> Federally Recognized Indian Tribe List Act of 1994, tit. I, § 104, Pub. L. 103-454, 108 Stat. 4791, codified at 25 U.S.C. § 5131 (mandating annual publication of list of all Indian tribes recognized by Secretary as eligible for the special programs and services provided by the United States to Indians because of their status as Indians). The Department’s land-into-trust regulations incorporate the Department’s official list of federally recognized tribe by reference. See 25 C.F.R. § 151.2.

<sup>36</sup> *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016). The *Grand Ronde* court found “the more difficult question” to be which part of the expression “recognized Indian tribe” the prepositional phrase modified. *Id.* The court concluded it modified only the word “tribe” “before its modification by the adjective ‘recognized.’” *Id.* But the court appears to have understood “recognized” as used in the IRA as meaning “federally recognized” in the modern sense, without considering its meaning in historical context.

<sup>37</sup> H. C. House and S.E. Harman, *Descriptive English Grammar* at 163 (New York: Prentice-Hall, Inc. 1934) (hereafter “House and Harman”) (adverbs may modify prepositional phrases).

<sup>38</sup> L. Beason and M. Lester, *A Commonsense Guide to Grammar and Usage* (7th ed.) at 15-16 (2015) (“Adjective prepositional phrases are always locked into position following the nouns they modify.”); see also J. E. Wells, *Practical Review Grammar* (1928) at 305. A noun phrase consists of a noun and all of its modifiers. *Id.* at 16.

<sup>39</sup> Sen. Hrgs. at 266 (statement of Commissioner Collier). See also *Carcieri*, 555 U.S. at 389 (citing Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936) (“[IRA Section 19] provides, in effect, that the term ‘Indian’ as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act \* \* \*”) (emphasis added by Supreme Court)); *Cty. of*

jurisdiction” to limit and thus modify “recognized Indian tribe.” This is further consistent with the IRA’s purpose and intent, which was to remedy the harmful effects of allotment.<sup>40</sup> These included the loss of Indian lands and the displacement and dispersal of tribal communities.<sup>41</sup> Lacking an official list of “recognized” tribes at the time,<sup>42</sup> it was unclear in 1934, which tribes remained under federal supervision. Because the policies of allotment and assimilation went hand-in-hand,<sup>43</sup> left unmodified, the phrase “recognized Indian tribe” could include tribes disestablished or terminated before 1934.

## 2. Statutory Terms.

The Solicitor concurred with the Deputy Solicitor’s conclusion that the expression “now under federal jurisdiction” in Category 1 cannot reasonably be interpreted as synonymous with the sphere of Congress’s plenary authority, and is instead better interpreted as referring to tribes with whom the United States had clearly dealt on or a more or less sovereign-to-sovereign basis, or as to whom the United States had clearly acknowledged a trust responsibility in or before 1934.<sup>44</sup>

The contemporaneous legal definition of “jurisdiction” defined it as the “power and authority” of the courts “as distinguished from the other departments.”<sup>45</sup> The legal distinction between judicial and administrative jurisdiction is significant. Further, because the statutory phrase at issue here includes more than just the word “jurisdiction,” its use of the preposition “under” sheds additional light on its meaning. In 1934, BLACK’S LAW DICTIONARY defined “under” as most frequently used in “its secondary sense meaning of ‘inferior’ or ‘subordinate.’”<sup>46</sup> It defined “jurisdiction” in terms of “power and authority,” further defining “authority” as used “[i]n government law” as meaning “the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties.”<sup>47</sup>

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*Amador*, 872 F.3d at 1026 (“‘under Federal jurisdiction’ should be read to limit the set of ‘recognized Indian tribes’ to those tribes that already had *some* sort of significant relationship with the federal government as of 1934, even if those tribes were not yet “recognized” (emphasis original)); *Grand Ronde*, 830 F.3d at 564 (though the IRA’s jurisdictional nexus was intended as “some kind of limiting principle,” precisely how remained unclear).

<sup>40</sup> *Readjustment of Indian Affairs. Hearings before the Committee on Indian Affairs, House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7902, A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs*, 73d Cong. at 233-34 (1934) (hereafter H. Hrgs.) (citing Letter, President Franklin D. Roosevelt to Rep. Edgar Howard (Apr. 28, 1934)).

<sup>41</sup> *Id.*

<sup>42</sup> In 1979, the BIA for the first time published in the *Federal Register* a list of federally acknowledged Indian tribes. “Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,” 44 Fed. Reg. 7235 (Feb. 6, 1979); *see also Cty. of Amador*, 872 F.3d at 1023 (“In 1934, when Congress enacted the IRA, there was no comprehensive list of recognized tribes, nor was there a ‘formal policy or process for determining tribal status’” (citing William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 429-30 (2016))).

<sup>43</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994).

<sup>44</sup> *See* Deputy Solicitor’s Memorandum at 9.

<sup>45</sup> BLACK’S LAW DICTIONARY at 1038 (3d ed. 1933) (hereafter BLACK’S).

<sup>46</sup> BLACK’S at 1774.

<sup>47</sup> BLACK’S at 171. It separately defines “subject to” as meaning “obedient to; governed or affected by.”

Congress added the phrase “under federal jurisdiction” to a statute designed to govern the Department’s administration of Indian affairs and certain benefits for Indians. Seen in that light, these contemporaneous definitions support interpreting the phrase as referring to the federal government’s exercise and administration of its responsibilities for Indians. Further support for this interpretation comes from the IRA’s context. Congress enacted the IRA to promote tribal self-government but made the Secretary responsible for its implementation. Interpreting the phrase “now under federal jurisdiction” as modifying “recognized Indian tribe” supports the interpretation of “jurisdiction” to mean the continuing administration of federal authority over Indian tribes already “recognized” as such. The addition of the temporal adverb “now” to the phrase provides further grounds for interpreting “recognized” as referring to a *previous* exercise of that same authority, that is, in or before 1934.<sup>48</sup>

### 3. Legislative History.

The IRA’s legislative history lends additional support for interpreting “now under federal jurisdiction” as modifying “recognized Indian tribe.” A thread that runs throughout the IRA’s legislative history is a concern for whether the Act would apply to Indians not then under federal supervision. On April 26, 1934, Commissioner Collier informed members of the Senate Committee on Indian Affairs (Senate Committee) that the original draft bill’s definition of “Indian” had been intended to do just that:<sup>49</sup>

Senator THOMAS of Oklahoma. (...) In past years former Commissioners and Secretaries have held that when an Indian was divested of property and money in effect under the law he was not an Indian, and because of that numerous Indians have gone from under the supervision of the Indian Office.

Commissioner COLLIER. Yes.

Senator THOMAS. Numerous tribes have been lost (...) It is contemplated now to hunt those Indians up and give them a status again and try do to something for them.

Commissioner COLLIER: This bill provides that any Indian who is a member of a recognized Indian tribe or band shall be eligible to [*sic*] Government aid.

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<sup>48</sup> Our interpretation of “now under federal jurisdiction” does not require federal officials to have been aware of a tribe’s circumstances or jurisdictional status in 1934. As explained below, prior to M-37029, the Department long understood the term “recognized” to refer to political or administrative acts that brought a tribe under federal authority. We interpret “now under federal jurisdiction” as referring to the issue of whether such a “recognized” tribe maintained its jurisdictional status in 1934, i.e., whether federal trust obligations remained, not whether particular officials were cognizant of those obligations.

<sup>49</sup> *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs, 73rd Cong. at 80 (Apr. 26, 1934) (hereafter “Sen. Hrgs.”)*. See also *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 75 F.Supp.3d at 387, 399 (D.D.C. 2014) *aff’d* 830 F.3d 552 (D.C. Cir. 2016) (noting same).

Senator THOMAS. Without regard to whether or not he is now under your supervision?

Commissioner COLLIER. Without regard; yes. *It definitely throws open Government aid to those rejected Indians.*<sup>50</sup>

The phrase “rejected Indians” referred to Indians who had gone out from under federal supervision.<sup>51</sup> In Commissioner Collier’s view, the IRA “does definitely recognize that an Indian [that] has been divested of his property is no reason why Uncle Sam does not owe him something. It owes him more.”<sup>52</sup> Commissioner Collier’s broad view was consistent with the bill’s original stated policy to “reassert the obligations of guardianship where such obligations have been improvidently relaxed.”<sup>53</sup>

On May 17, 1934, the last day of hearings, the Senate Committee continued to express concerns over the breadth of the bill’s definition of “Indian,” returning again to the draft definitions of “Indian” as they stood in the committee print. Category 1 now defined “Indian” as persons of Indian descent who were “members of any recognized Indian tribe.”<sup>54</sup> As on previous days,<sup>55</sup> Chairman Wheeler and Senator Thomas questioned both the overlap between definitions and whether they would include Indians not then under federal supervision or persons not otherwise “Indian.”<sup>56</sup>

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<sup>50</sup> Sen. Hrgs. at 79-80 (Apr. 26, 1934) (emphasis added).

<sup>51</sup> See LEWIS MERIAM, THE INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION at 763 (1928) (hereafter MERIAM REPORT) (noting that issuance of patents to individual Indians under Dawes Act or Burke Act had “the effect of removing them in part at least from the jurisdiction of the national government”). See also Sen. Hrgs. at 30 (statement of Commissioner Collier) (discussing the role the Allotment Policy had in making approximately 100,000 Indians landless).

<sup>52</sup> Sen. Hrgs. at 80.

<sup>53</sup> H.R. 7902, tit. III, § 1. See Sen. Hrgs. at 20 (“The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. On the contrary, it makes permanent the guardianship services, and reasserts them for those Indians who have been made landless by the Government’s own acts.”).

<sup>54</sup> Sen. Hrgs. at 234 (citing committee print, § 19). The revised bill was renumbered S. 3645 and introduced in the Senate on May 18, 1934. *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 963 n. 55 (1972) (hereafter *Tribal Self-Government*) (citing 78 CONG. REC. 9071 (1934)). S. 3645, which, as amended, became the IRA, differed significantly from H.R. 7902 and S. 2755, and its changes resulted from discussions between Chairman Wheeler and Commissioner John Collier to resolve and eliminate the main points in controversy. Sen. Hrgs. at 237. The Senate Committee reported S. 3645 out four days after its reintroduction, 78 CONG. REC. 9221, which the Senate debated soon after. The Senate passed the bill on June 12, 1934. *Id.* at 11139. The House began debate on June 15. *Id.* at 11724-44. H.R. 7902 was laid on the table and S. 3645 was passed in its place the same day, with some variations. *Id.* A conference committee was then formed, which submitted a report on June 16. *Id.* at 12001-04. The House and Senate both approved the final version on June 16. *Id.* at 12001-04, 12161-65, which was presented to the President and signed on June 18, 1934. *Id.* at 12340, 12451. See generally *Tribal Self-Government* at 961-63.

<sup>55</sup> See, e.g., Sen. Hrgs. at 80 (remarks of Senator Elmer Thomas) (questioning whether bill is intended to extend benefits to tribes not now under federal supervision); *Id.* (remarks of Chairman Wheeler) (questioning degree of Indian descent as drafted); *id.* at 150-151; *id.* at 164 (questioning federal responsibilities to existing wards with minimal Indian descent).

<sup>56</sup> See, e.g., Sen. Hrgs. at 239 (discussing Sec. 3), 254 (discussing Sec. 10), 261-62 (discussing Sec. 18), 263-66 (discussing Sec. 19).

The Senate Committee's concerns for these issues touched on other provisions of the IRA as well. The colloquy that precipitated the addition of "now under federal jurisdiction" began with a discussion of Section 18, which authorized votes to reject the IRA by Indians residing on a reservation. Senator Thomas stated that this would exclude "roaming bands" or "remnants of a band" that are "practically lost" like those in his home state of Oklahoma, who at the time were neither "registered," "enrolled," "supervised," or "under the authority of the Indian Office."<sup>57</sup> Senator Thomas felt that "If they are not a tribe of Indians they do not come under [the Act]."<sup>58</sup> Chairman Wheeler conceded that such Indians lacked rights at the time, but emphasized that the purpose of the Act was intended "as a matter of fact, to take care of the Indians that are taken care of at the present time,"<sup>59</sup> that is, those Indians then under federal supervision.

Acknowledging that landless Indians ought to be provided for, Chairman Wheeler questioned how the Department could do so if they were not "wards of the Government at the present time."<sup>60</sup> When Senator Thomas mentioned that the Catawbas in South Carolina and the Seminoles in Florida were "just as much Indians as any others,"<sup>61</sup> despite not then being under federal supervision, Commissioner Collier pointed out that such groups might still come within Category 3's blood-quantum criterion, which was then one-quarter.<sup>62</sup> After a brief digression, Senator Thomas asked whether, if the blood quantum were raised to one-half, Indians with less than one-half blood quantum would be covered by the Act with respect to their trust property.<sup>63</sup> Chairman Wheeler thought not, "unless they are enrolled at the present time."<sup>64</sup> As the discussion turned to Section 19, Chairman Wheeler returned to the blood quantum issue, stating that Category 3's blood-quantum criterion should be raised to one-half, which it was in final version of the Act.<sup>65</sup>

Senator Thomas then noted that Category 1 and Category 2, as drafted, were inconsistent with Category 3. Category 1 would include any person of "Indian descent" without regard to blood quantum, so long as they were members of a "recognized Indian tribe," while Category 2

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<sup>57</sup> Sen. Hrgs. at 263.

<sup>58</sup> *Id.* By "tribe," Senator Thomas here may have meant the Indians residing on a reservation. A similar usage appears earlier in the Committee's discussion of Section 10 of the committee print (enacted as Section 17 of the IRA), Sen. Hrgs. at 250-55. Section 10 originally required charters to be ratified by a vote of the adult Indians residing within "the territory specified in the charter." *Id.* at 232. Chairman Wheeler suggested using "on the reservation" instead to prevent "any small band or group of Indians" to "come in on the reservation and ask for a charter to take over tribal property." *Id.* at 253. Senator Joseph O'Mahoney recommended the phrase "within the territory over which the tribe has jurisdiction" instead, prompting Senator Peter Norbeck to ask what "tribe" meant—"Is that the reservation unit?" *Id.* at 254. Commissioner Collier then read from Section 19, which at that time defined "tribe" as "any Indian tribe, band, nation, pueblo, or other native political group or organization," a definition the Chairman suggested he could not support. *Id.* As ultimately enacted, Section 17 authorizes the Secretary to issue charters of incorporation to "one-third of the adult Indians" if ratified, however, "by a majority vote of the adult Indians living on the reservation."

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 264.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (statement of Chairman Burton Wheeler) ("You will find here [*i.e.*, Section 19] later on a provision covering just what you have reference to.").

included their “descendants” residing on a reservation.<sup>66</sup> Senator Thomas observed that under these definitions, persons with remote Indian ancestry could come under the Act.<sup>67</sup> Commissioner Collier then pointed out that at least with respect to Category 2, the descendants would have to reside within a reservation at the present time.<sup>68</sup>

After asides on the IRA’s effect on Alaska Natives and the Secretary’s authority to issue patents,<sup>69</sup> Chairman Wheeler finally turned to the IRA’s definition of “tribe,”<sup>70</sup> which as then drafted included “any Indian tribe, band, nation, pueblo, or other native political group or organization.”<sup>71</sup> Chairman Wheeler and Senator Thomas thought this definition too broad.<sup>72</sup> Senator Thomas asked whether it would include the Catawbas,<sup>73</sup> most of whose members were thought to lack sufficient blood quantum under Category 3, but who descended from Indians and resided on a state reservation.<sup>74</sup> Chairman Wheeler thought not, if they could not meet the blood-quantum requirement.<sup>75</sup> Senator O’Mahoney from Wyoming then suggested that Categories 1 and 3 overlapped, suggesting the Catawbas might still come within the definition of Category 1 since they were of Indian descent and they “certainly are an Indian tribe.”<sup>76</sup>

Chairman Wheeler appeared to concede, admitting there “would have to [be] a limitation after the description of the tribe.”<sup>77</sup> Senator O’Mahoney responded, saying, “If you wanted to exclude any of them [from the Act] you certainly would in my judgment.”<sup>78</sup> Chairman Wheeler proceeded to express concerns for those having little or no Indian descent being “under the supervision of the Government,” persons he had earlier suggested should be excluded from the Act.<sup>79</sup> Apparently in response, Senator O’Mahoney then said, “If I may suggest, that could be handled by some separate provision excluding from the act certain types, but [it] must have a general definition.”<sup>80</sup> It was at this point that Commissioner Collier, who attended the morning’s hearings with Assistant Solicitor Felix S. Cohen,<sup>81</sup> asked:

Would this not meet your thought, Senator: After the words ‘recognized Indian tribe’ in line 1 insert ‘now under Federal jurisdiction’? That would limit the act to the Indians

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<sup>66</sup> *Id.* at 264-65.

<sup>67</sup> *Id.* at 264.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 265.

<sup>70</sup> *Id.* at 265.

<sup>71</sup> Compare Sen. Hrgs. at 6 (S. 2755, § 13(b)), with *id.* at 234 (committee print, § 19). The phrase “native political group or organization” was later removed.

<sup>72</sup> Sen. Hrgs. at 265.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 266. The Catawbas at the time resided on a reservation established for their benefit by the State of South Carolina. See Catawba Indians of South Carolina, Sen. Doc. 92, 71st Cong. (1930).

<sup>75</sup> *Id.* at 264.

<sup>76</sup> *Id.* at 266.

<sup>77</sup> *Id.* at 266.

<sup>78</sup> *Id.* Nevertheless, Senator O’Mahoney did not understand why the Act’s benefits should not be extended “if they are living as Catawba Indians.”

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 231.

now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.<sup>82</sup>

Without further explanation or discussion, the hearings adjourned.

The IRA's legislative history does not unambiguously explain what Congress intended "now under federal jurisdiction" to mean or in what way it was intended to limit the phrase "recognized Indian tribe." However, the same phrase was used in submissions by the Indian Rights Association to the House of Representatives Committee on Indian Affairs (House Committee), where it described "Indians under Federal jurisdiction" as not being subject to State laws.<sup>83</sup> Variations of the phrase appeared elsewhere, as well. In a memorandum describing the draft IRA's purpose and operation, Commissioner Collier stated that under the bill, the affairs of chartered Indian communities would "continue to be, as they are now, *subject to* Federal jurisdiction rather than State jurisdiction."<sup>84</sup> Commissioner Collier elsewhere referred to various western tribes that occupied "millions of contiguous acres, tribally owned and *under* exclusive Federal jurisdiction."<sup>85</sup> Assistant Solicitor Charles Fahy, who would later become Solicitor General of the United States,<sup>86</sup> described the constitutional authority to regulate commerce with the Indian tribes as being "*within* the Federal jurisdiction and not with the States' jurisdiction."<sup>87</sup> These uses of "federal jurisdiction" in the governmental and administrative senses stand alongside its use throughout the legislative history in relation to courts specifically.

The IRA's legislative history elsewhere shows that Commissioner Collier distinguished between Congress's plenary authority generally and its application to tribes in particular contexts. He noted that Congress had delegated "most of its plenary authority to the Interior Department or the Bureau of Indian Affairs," which he further described as "clothed with the plenary power."<sup>88</sup> But in turning to the draft bill's aim of allowing tribes to take responsibility for their own affairs, Commissioner Collier referred to the "absolute authority" of the Department by reference to "its rules and regulations," to which the Indians were subjected.<sup>89</sup> Indeed, even before 1934, the Department routinely used the term "jurisdiction" to refer to the administrative units of the Office of Indian Affairs having direct supervision of Indians.<sup>90</sup>

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<sup>82</sup> *Id.* at 266.

<sup>83</sup> H. Hrgs. at 337 (statement of John Steere, President, Indian Rights Association) (n.d.).

<sup>84</sup> *Id.* at 25 (Memorandum from Commissioner John Collier, *The Purpose and Operation of the Wheeler-Howard Indian Rights Bill* (S. 2755; H.R. 7902) (Feb. 19, 1934) (emphasis added)).

<sup>85</sup> *Id.* at 184 (statement of Commissioner Collier) (Apr. 8, 1934).

<sup>86</sup> Assistant Solicitor Fahy served as Solicitor General of the United States from 1941 to 1945. *See* <https://www.justice.gov/osg/bio/charles-fahy>.

<sup>87</sup> *Id.* at 319 (statement of Assistant Solicitor Charles Fahy).

<sup>88</sup> *Id.* at 37 (statement of Commissioner Collier) (Feb. 22, 1934).

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.*, U.S. Dept. of the Interior, Office of Indian Affairs, Circ. No. 1538, Annual Report and Census (ARCIA), 1919 (May 7, 1919) (directing Indian agents to enumerate the Indians residing at their agency, with a separate report to be made of agency "under [the agent's] jurisdiction"); Circ. No. 3011, Statement of New Indian Service Policies (Jul. 14, 1934) (discussing organization and operation of Central Office related to "jurisdiction administrations," *i.e.*, field operations); ARCIA for 1900 at 22 (noting lack of "jurisdiction" over New York Indian students); *id.* at 103 (reporting on matters "within" jurisdiction of Special Indian Agent in the Indian Territory); *id.* at 396 (describing reservations and villages covered by jurisdiction of Puyallup Consolidated Agency); MERIAM REPORT at 140-41

Construing “jurisdiction” as meaning governmental supervision and administration is further consistent with the term’s prior use by the federal government. In 1832, for example, the United States by treaty assured the Creek Indians that they would be allowed to govern themselves free of the laws of any State or Territory, “so far as may be compatible with the general jurisdiction” of Congress over the Indians.<sup>91</sup> In *The Cherokee Tobacco* cases, the Supreme Court considered the conflict between subsequent Congressional acts and “[t]reaties with Indian nations within the jurisdiction of the United States.”<sup>92</sup> In considering the 14th Amendment’s application to Indians, the Supreme Court in *Elk v. Wilkins* also construed the Constitutional phrase, “subject to the jurisdiction of the United States,” in the sense of governmental authority.<sup>93</sup>

The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.<sup>94</sup>

The terms of Category 1 suggest that the phrase “under federal jurisdiction” should not be interpreted to refer to the outer limits of Congress’s plenary authority, since it could encompass tribes that existed in an anthropological sense but with whom the federal government had never exercised any relationship. Such a result would be inconsistent with the Department’s understanding of “recognized Indian tribe” at the time, discussed below, as referring to a tribe with whom the United States had clearly dealt on a more or less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility.

If “under federal jurisdiction” is understood to refer to the application and administration of the federal government’s plenary authority over Indians, then the complete phrase “now under federal jurisdiction” can further be seen as resolving the tension between Commissioner Collier’s desire that the IRA include Indians “[w]ithout regard to whether or not [they are] now under [federal] supervision” and the Senate Committee’s concern to limit the Act’s coverage to Indian wards “taken care of at the present time.”<sup>95</sup>

### C. *The Meaning of the Phrase “Recognized Indian Tribe.”*

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(“[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity...Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs.”); Sen. Hrgs. at 282-98 (collecting various comments and opinions on the Wheeler-Howard Bill from tribes from different Office of Indian Affairs “jurisdictions”).

<sup>91</sup> Treaty of March 24, 1832, art. XIV, 7 Stat. 366, 368. *See also* Act of May 8, 1906, 34 Stat. 182 (lands allotted to Indians in trust or restricted status to remain “subject to the exclusive jurisdiction of the United States” until issuance of fee-simple patents).

<sup>92</sup> *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870). The Court further held that the consequences of such conflicts give rise to political questions “beyond the sphere of judicial cognizance.” *Id.*

<sup>93</sup> *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). *See also* *United States v. Ramsay*, 271 U.S. 470 (1926) (the conferring of citizenship does not make Indians subject to laws of the states).

<sup>94</sup> *Id.*

<sup>95</sup> Sen. Hrgs. at 79-80, 263. The district court in *Grand Ronde* noted these contradictory views. *Grande Ronde*, 75 F.Supp.3d at 399-400. Such views were expressed while discussing drafts of the IRA that did not include the phrase “now under federal jurisdiction.”

Despite suggesting that the term “recognized” meant something different in 1934 than it did in the 1970s, Sol. Op. M-37029 had appeared to use these historically distinct concepts interchangeably. And while today’s concept of “federal recognition” merges the cognitive sense of “recognition” and the political-legal sense of “jurisdiction,” as *Carciari* makes clear, the issue is what Congress meant in 1934, not how the concepts later evolved.<sup>96</sup> Congress’s authority to recognize Indian tribes flows from its plenary authority over Indian affairs.<sup>97</sup> Early in this country’s history, Congress charged the Secretary and the Commissioner of Indian Affairs with responsibility for managing Indian affairs and implementing general statutes enacted for the benefit of Indians.<sup>98</sup> Because Congress has not generally defined “Indian,”<sup>99</sup> it left it to the Secretary to determine to whom such statutes apply.<sup>100</sup> “Recognition” generally is a political question to which the courts ordinarily defer.<sup>101</sup>

Sol. Op. M-37029 had understood that a tribe could be considered “recognized” for purposes of the IRA so long as it is “federally recognized” when the Act is applied.<sup>102</sup> Arguendo, M-37029

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<sup>96</sup> M-37029 at 8, n. 57 (citing *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (in the absence of a statutory definition of a term, the court’s “task is to construe it in accord with its ordinary or natural meaning.”); *id.* at 275 (the court “presume[s] Congress intended the phrase [containing a legal term] to have the meaning generally accepted in the legal community at the time of enactment.”)).

<sup>97</sup> *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”)).

<sup>98</sup> 25 U.S.C. § 2 (charging Commissioner of Indian Affairs with management of all Indian affairs and all matters arising out of Indian relations); 43 U.S.C. § 1457 (charging Secretary with supervision of public business relating to Indians); 25 U.S.C. § 9 (authorizing President to prescribe regulations for carrying into effect the provisions of any act relating to Indian affairs). *See also* H. Hrgs. at 37 (remarks of Commissioner Collier) (“Congress through a long series of acts has delegated most of its plenary authority to the Interior Department or the Bureau of Indian Affairs, which as instrumentalities of Congress are clothed with the plenary power, an absolutist power”); *id.* at 51 (Memorandum of Commissioner John Collier) (providing statutory examples of “the broad discretionary powers conferred by Congress on administrative officers of the Government”).

<sup>99</sup> U.S. Dept. of the Interior, Commissioner of Indian Affairs, “Indian Wardship,” Circular No. 2958 (Oct. 28, 1933) (“No statutory definition seems to exist of what constitutes an Indian or of what Indians are wards of the Government.”); *Eligibility of Non-enrolled Indians for Services and Benefits under the Indian Reorganization Act*, Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Acting Deputy Commissioner of Indian Affairs (Dec. 4, 1978) (“there exists no universal definition of “Indian”). *See also* Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esq. on behalf of the Stillaguamish Tribe, at 8-9 (Oct. 27, 1976) (suggesting that “recognized Indian tribe” in IRA § 19 refers to tribes that were “administratively recognized” in 1934).

<sup>100</sup> *Secretary’s Authority to Extend Federal Recognition to Indian Tribes*, Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, at 1 (Aug. 20, 1974) (hereafter Chambers Memo) (“the Secretary, in carrying out Congress’s plan, must first determine, *i.e.*, recognize, to whom [a statute] applies”); Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate Committee on Interior and Insular Affairs at 5 (Jun. 7, 1974) (hereafter Butler Letter) (same); *Dobbs v. United States*, 33 Ct. Cl. 308, 315-16 (1898) (recognition may be effected “by those officers of the Government whose duty it was to deal with and report the condition of the Indians to the executive branch of the Government”).

<sup>101</sup> *Baker v. Carr*, 369 U.S. 186, 216 (1962) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865) (deferring to decisions by the Secretary and Commissioner of Indian Affairs to recognize Indians as a tribe as political questions)). *See also* Memorandum from Alan K. Palmer, Acting Associate Solicitor, Indian Affairs, to Solicitor, Federal “Recognition” of Indian Tribes at 2-6 (Jul. 17, 1975) (hereafter Palmer Memorandum).

<sup>102</sup> M-37029 at 25 (interpreting IRA as not requiring determination that a tribal applicant was “a recognized Indian tribe” in 1934).

concluded that even if “now” did modify “recognized Indian tribe,” the meaning of “recognized” was ambiguous.<sup>103</sup> It described the term as having been used historically in two senses: a “cognitive” or “quasi-anthropological” sense indicating that federal officials “knew” or “realized” that a tribe existed; and a political-legal sense connoting “that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States.”<sup>104</sup> The Solicitor concluded that this interpretation departs from the Department’s prior, long-held understanding of “recognition” as referring to actions taken by appropriate federal officials toward a tribe with whom the United States clearly dealt on a more-or-less sovereign-to-sovereign basis or for whom the federal government had clearly acknowledged a trust responsibility in or before 1934.

### 1. Ordinary Meaning.

The 1935 edition of WEBSTER’S NEW INTERNATIONAL DICTIONARY first defines the verb “to recognize” as meaning, “to know again (...) to recover or recall knowledge of.”<sup>105</sup> Most of the remaining entries focus on the legal or political meanings of the verb. These include, “To avow knowledge of (...) to admit with a formal acknowledgment; as, to *recognize* an obligation; to *recognize* a consul”; Or, “To acknowledge formally (...); specif: (...) To acknowledge by admitting to an associated or privileged status.” And, “To acknowledge the independence of (...) a community (...) by express declaration or by any overt act sufficiently indicating the intention to recognize.”<sup>106</sup> These political-legal understandings seem consistent with how Congress used the term elsewhere in the IRA. Section 11, for example, authorizes federal appropriations for loans to Indians for tuition and expenses in “recognized vocational and trade schools.”<sup>107</sup> While neither the Act nor its legislative history provide further explanation, the context strongly suggests that the phrase “recognized vocational and trade schools” refers to those formally certified or verified as such by an appropriate official.

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<sup>103</sup> *Id.* at 24 (“To the extent that the courts (contrary to the views expressed here) deem the term ‘recognized Indian tribe’ in the IRA to require recognition in 1934”).

<sup>104</sup> *Id.* M-37029 also notes that the political-legal sense of “recognized Indian tribe” evolved into the modern concept of “federal recognition” or “federal acknowledgment” by the 1970s, when the Department’s administrative acknowledgment procedures were developed. *See* 43 Fed. Reg. 39,361 (Aug. 24, 1978). Originally classified at Part 54 of Title 25 of the Code of Federal Regulations, the Department’s administrative acknowledgment procedures are today classified as Part 83. 47 Fed. Reg. 13326 (Mar. 30, 1982).

<sup>105</sup> WEBSTER’S INTERNATIONAL NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed.) (1935), entry for “recognize” (v.t.).

<sup>106</sup> *Id.*, entries 2, 3.c, 5. *See also id.*, entry for “acknowledge” (v.t.) “2. To own or recognize in a particular character or relationship; to admit the claims or authority of; to recognize.”

<sup>107</sup> The phrase “recognized Indian tribe” appeared in what was then section 9 of the committee print considered by the Senate Committee on May 17, 1934. Sen. Hrgs. at 232, 242. Section 9 provided the right to organize under a constitution to “[a]ny recognized Indian tribe.” It was later amended to read “[a]ny Indian tribe, or tribes” before ultimate enactment as Section 16 of the IRA. 25 U.S.C. § 5123. The term “recognized” also appeared several times in the bill originally introduced as H.R. 7902. In three, it was used in legal-political sense. H.R. 7902, 73d Cong. (as introduced Feb. 12, 1934), tit. I, § 4(j) (requiring chartered communities to be “recognized as successor to any existing political powers...”); tit. II, § 1 (training for Indians in institutions “of recognized standing”); tit. IV, § 10 (Constitutional procedural rights to be “recognized and observed” in courts of Indian offenses). H.R. 7902, tit. I, § 13(b) used the expression “recognized Indian tribe” in defining “Indian.”

## 2. Legislative History.

The IRA's legislative history supports interpreting "recognized Indian tribe" in Category 1 in the political-legal sense.<sup>108</sup> Commissioner Collier, himself a "principal author" of the IRA,<sup>109</sup> also used the term "recognized" in the political-legal sense in explaining how some American courts had "recognized" tribal customary marriage and divorce.<sup>110</sup> The IRA's legislative history further suggests that Congress did not intend "recognized Indian tribe" to be understood in a cognitive, quasi-anthropological sense. The concerns expressed by some members of the Senate Committee for the ambiguous and potentially broad *scope* of the phrase arguably prompted Commissioner Collier to suggest inserting "now under federal jurisdiction" in Category 1 as a limiting phrase.<sup>111</sup>

As originally drafted, Category 1 referred only to "recognized" Indian tribes, leaving unclear whether it was used in a cognitive or in a political-legal sense. This ambiguity appears to have created uncertainty over Category 1's scope and its overlap with Section 19's other definitions of "Indian," which appear to have led Congress to insert the limiting phrase "now under federal jurisdiction." As noted above, we interpret "now under federal jurisdiction" as modifying "recognized Indian tribe" and as limiting Category 1's scope. By doing so, "now under federal jurisdiction" may be construed as disambiguating "recognized Indian tribe" by clarifying its use in a political-legal sense.

## 3. Administrative Understandings.

Compelling support for interpreting the term "recognized" in the political-legal sense is found in the views of Department officials expressed around the time of the IRA's enactment and early implementation. Assistant Solicitor Cohen discussed the issue in the Department's HANDBOOK OF FEDERAL INDIAN LAW, which he prepared around the time of the IRA's enactment. The Handbook's relevant passages discuss ambiguities in the meaning of the term "tribe."<sup>112</sup> Assistant Solicitor Cohen explains that the term "tribe" may be understood in both an ethnological and a political-legal sense.<sup>113</sup> The former denotes a unique linguistic or cultural community. By contrast, the political-legal sense refers to ethnological groups "recognized as

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<sup>108</sup> See, e.g., Sen. Hrgs. at 263 (remarks of Senator Thomas of Oklahoma) (discussing prior Administration's policy "not to recognize Indians except those already under [Indian Office] authority"); *id.* at 69 (remarks of Commissioner Collier) (tribal customary marriages and divorces "recognized" by courts nationally). Representative William W. Hastings of Oklahoma criticized an early draft definition of "tribe" on the grounds it would allow chartered communities to be "recognized as a tribe" and to exercise tribal powers under section 16 and section 17 of the IRA. See *id.* at 308.

<sup>109</sup> *Carciari*, 555 U.S. at 390, n. 4 (citing *United States v. Mitchell*, 463 U.S. 206, 221, n. 21 (1983)).

<sup>110</sup> Sen. Hrgs. at 69 (remarks of Commissioner Collier) (Apr. 26, 1934). On at least one occasion, however, Collier appeared to rely on the cognitive sense in referring to "recognized" tribes or bands *not* under federal supervision. Sen. Hrgs. at 80 (remarks of Commissioner Collier) (Apr. 26, 1934).

<sup>111</sup> Justice Breyer concluded that Congress added, "now under federal jurisdiction" to Category 1 "believing it definitively resolved a specific underlying difficulty." *Carciari*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>112</sup> United States Department of the Interior, HANDBOOK OF FEDERAL INDIAN LAW (1942 ed.) at 268 (hereafter Cohen 1942).

<sup>113</sup> Cohen separately discussed how the term "Indian" itself could be used in an "ethnological or in a legal sense," noting that a person's legal status as an "Indian" depended on genealogical and social factors. Cohen 1942 at 2.

single tribes for administrative and political purposes” and to single ethnological groups considered as a number of independent tribes “in the political sense.”<sup>114</sup> This suggests that while the term “tribe,” standing alone, could be interpreted in a cognitive sense, as used in the phrase “recognized Indian tribe” it would have been understood in a political-legal sense, which presumes the existence of an ethnological group.<sup>115</sup>

Less than a year after the IRA’s enactment, Commissioner Collier further explained that “recognized tribe” meant a tribe “with which the government at one time or another has had a treaty or agreement or those for whom reservations or lands have been provided and over whom the government exercises supervision through an official representative.”<sup>116</sup> Addressing the Oklahoma Indian Welfare Act of 1936 (OIWA), Solicitor Nathan Margold opined that because tribes may “pass out of existence as such in the course of time, the word “recognized” as used in the [OIWA] should be read as requiring more than “past existence as a tribe and its historical recognition as such,” but “recognition” of a currently existing group’s activities “by specific actions of the Indian Office, the Department, or by Congress.”<sup>117</sup>

The Department maintained similar understandings of the term “recognized” in the decades that followed. In a 1980 memorandum assessing the eligibility of the Stillaguamish Tribe for IRA trust-land acquisitions,<sup>118</sup> Hans Walker, Jr., Associate Solicitor for Indian Affairs, distinguished the modern concept of formal “federal recognition” (or “federal acknowledgment”) from the political-legal sense of “recognized” as used in Category 1 in concluding that “formal acknowledgment in 1934” is not a prerequisite for trust-land acquisitions under the IRA, “*so long as* the group meets the [IRA’s] other definitional requirements.”<sup>119</sup> These included that the tribe had been “recognized” in 1934. Associate Solicitor Walker construed “recognized” as referring to tribes with whom the United States had had “a continuing course of dealings or some legal obligation in 1934 *whether or not that obligation was acknowledged at that time.*”<sup>120</sup> Associate Solicitor Walker then noted the Senate Committee’s concerns for the potential breadth of “recognized Indian tribe.” He concluded that Congress intended to exclude some groups that might be considered Indians in a cultural or governmental sense, but not “any Indians to whom the Federal Government had *already* assumed obligations.”<sup>121</sup> Implicitly construing the phrase “now under federal jurisdiction” to modify “recognized Indian tribe,” Associate Solicitor Walker

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<sup>114</sup> *Id.* at 268 (emphases added).

<sup>115</sup> *Id.* at 268 (validity of congressional and administrative actions depend upon the [historical, ethnological] existence of tribes); *United States v. Sandoval*, 231 U.S. 28 (1913) (Congress may not arbitrarily bring a community or group of people within the range of its plenary authority over Indian affairs). *See also* 25 C.F.R. Part 83 (establishing mandatory criteria for determining whether a group is an Indian tribe eligible for special programs and services provided by the United States to Indians because of their status as Indians).

<sup>116</sup> Letter, Commissioner John Collier to Ben C. Shawanese (Apr. 24, 1935).

<sup>117</sup> I OP. SOL. INT. 864 (Memorandum from Solicitor Nathan M. Margold to the Commissioner of Indian Affairs, Oklahoma – Recognized Tribes (Dec. 13, 1938)); Cohen 1942 at 271.

<sup>118</sup> Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980) at 1 (hereafter Stillaguamish Memo).

<sup>119</sup> *Id.* at 1 (emphasis added). Justice Breyer’s concurring opinion in *Carciere* draws on Associate Solicitor Walker’s analysis in the Stillaguamish Memo. *See Carciere*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>120</sup> *Id.* at 2 (emphasis added).

<sup>121</sup> *Id.* at 4 (emphasis added). This is consistent with Justice Breyer’s concurring view in *Carciere*.

found it “clear” that Category 1 “requires that some type of obligation or extension of services to a tribe must have existed in 1934.”<sup>122</sup> As already noted, in the case of the Stillaguamish Tribe, such obligations were established by the 1855 Treaty of Point Elliott and remained in effect in 1934.<sup>123</sup>

Associate Solicitor Walker’s views in 1980 were consistent with the conclusions reached by the Solicitor’s Office in the mid-1970s following its assessment of how the federal government had historically understood the term “recognition.” This assessment was begun under Reid Peyton Chambers, Associate Solicitor for Indian Affairs, and offers insight into how Congress and the Department understood “recognition” at the time the Act was passed. In fact, it was this historical review of “recognition” that contributed to the development of the Department’s federal acknowledgment procedures.<sup>124</sup>

Throughout the United States’ early history, Indian treaties were negotiated by the President and ratified by the Senate pursuant to the Treaty Clause.<sup>125</sup> In 1871, Congress enacted legislation providing that no tribe within the territory of the United States could thereafter be “acknowledged or recognized” as an “independent nation, tribe, or power” with whom the United States could contract by treaty.<sup>126</sup> Behind the act lay the view that though Indian tribes were still “recognized as distinct political communities,” they were “wards” in a condition of dependency who were “subject to the paramount authority of the United States.”<sup>127</sup> While the question of “recognition” remained one for the political branches,<sup>128</sup> the contexts within which it arose expanded with the United States’ obligations as guardian.<sup>129</sup>

After the close of the termination era in the early 1960s, during which the federal government had “endeavored to terminate its supervisory responsibilities for Indian tribes,”<sup>130</sup> Indian groups that the Department did not otherwise consider “recognized” began to seek services and benefits

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<sup>122</sup> *Id.* at 6. In the case of the Stillaguamish Tribe, such obligations arose in 1855 through the Treaty of Point Elliott, and they remained in effect in 1934.

<sup>123</sup> Justice Breyer’s concurring opinion in *Carcieri* draws on the analysis in the Stillaguamish Memo. See *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring).

<sup>124</sup> 25 C.F.R. Part 83.

<sup>125</sup> U.S. CONST., art. II, § 2, cl. 2. See generally Cohen 1942 at 46-67.

<sup>126</sup> Act of March 3, 1871, c. 120, § 1, 16 Stat. 544, 566. Section 3 of the same Act prohibited further contracts or agreements with any tribe of Indians or individual Indian not a citizen of the United States related to their lands unless in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Id.*, § 3, 16 Stat. 570-71.

<sup>127</sup> *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424, 441 (1911).

<sup>128</sup> *United States v. Holliday*, 70 U.S. 407, 419 (1865).

<sup>129</sup> See Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship). Compare, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832) with *United States v. Kagama*, 118 U. S. 375 (1886).

<sup>130</sup> *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). See also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW at § 1.06 (Nell Jessup Newton ed., 2012) (hereafter Cohen 2012) (describing history and implementation of termination policy). During the termination era, roughly beginning in 1953 and ending in the mid-1960s, Congress enacted legislation ending federal recognition of more than 100 tribes and bands in eight states. Michael C. Walsh, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983). Congress has since restored federal recognition to some terminated tribes. See Cohen 2012 at § 3.02[8][c], n. 246 (listing examples).

from the federal government. The most notable of these claims were aboriginal land claims under the Nonintercourse Act;<sup>131</sup> treaty fishing-rights claims by descendants of treaty signatories;<sup>132</sup> and requests to the BIA for benefits from groups of Indians for which no government-to-government relationship existed,<sup>133</sup> which included tribes previously recognized and seeking restoration or reaffirmation of their status.<sup>134</sup> At around this same time, Congress began a critical historical review of the federal government's conduct of its special legal relationship with American Indians.<sup>135</sup> In January 1975, it found that federal Indian policies had "shifted and changed" across administrations "without apparent rational design,"<sup>136</sup> and that there had been no "general comprehensive review of conduct of Indian affairs" or its "many problems and issues" since 1928, before the IRA's enactment.<sup>137</sup> Finding it imperative to do so,<sup>138</sup> Congress established the American Indian Policy Review Commission<sup>139</sup> to prepare an investigation and study of Indian affairs, including "an examination of the statutes and procedures for granting Federal recognition and extending services to Indian communities."<sup>140</sup> It was against this backdrop that the Department undertook its own review of the history and meaning of "recognition."<sup>141</sup>

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<sup>131</sup> See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 655 (D. Me.), *aff'd sub nom. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (Nonintercourse Act claim by unrecognized tribe in Maine); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 944 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (Nonintercourse Act claim by unrecognized tribe in Massachusetts).

<sup>132</sup> *United States v. State of Wash.*, 384 F. Supp. 312, 348 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (treaty fishing rights of unrecognized tribes in Washington State).

<sup>133</sup> AMERICAN INDIAN POLICY REVIEW COMMISSION, *Final Report, Vol. I* [Committee Print] at 462 (GPO 1977) (hereafter AIPRC Final Report) ("A number of [unrecognized] Indian tribes are seeking to formalize relationships with the United States today but there is no available process for such actions."). See also TASK FORCE NO. 10 ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, *Final Report to the American Indian Policy Review Commission* (GPO 1976) (hereafter *Report of Task Force Ten*).

<sup>134</sup> Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 LAW & SOC'Y REV. 930 (2017).

<sup>135</sup> Pub. L. No. 93-580, 88 Stat. 1910 (Jan. 2, 1975), *as amended*, (hereafter AIPRC Act), *codified at* 25 U.S.C. § 174 note.

<sup>136</sup> *Id.* Commissioner John Collier raised this same issue in hearings on the draft IRA. See H. Hrgs. at 37. Noting that Congress had delegated most of its plenary authority to the Department or BIA, which Collier described as "instrumentalities of Congress...clothed with the plenary power." Being subject to the Department's authority and its rules and regulations meant that while one administration might take a course "to bestow rights upon the Indians and to allow them to organize and allow them to take over their legal affairs in some self-governing scheme," a successor administration "would be completely empowered to revoke the entire grant."

<sup>137</sup> *Id.* (citing MERIAM REPORT).

<sup>138</sup> *Id.*

<sup>139</sup> AIPRC Act, § 1(a).

<sup>140</sup> *Id.*, § 2(3).

<sup>141</sup> See, e.g., Letter from LaFollette Butler, Acting Dep. Comm. of Indian Affairs to Sen. Henry M. Jackson, Chair, Senate Committee on Interior and Insular Affairs (Jun. 7, 1974) (hereafter Butler Letter) (describing authority for recognizing tribes since 1954); Memorandum from Reid P. Chambers, Associate Solicitor, Indian Affairs to Solicitor Kent Frizzell, Secretary's Authority to Extend Federal Recognition to Indian Tribes (Aug. 20, 1974) (hereafter Chambers Memo) (discussing Secretary's authority to recognize the Stillaguamish Tribe); Palmer Memorandum.

## The Palmer Memorandum

In July 1975, the acting Associate Solicitor for Indian Affairs prepared a 28-page memorandum on “Federal ‘Recognition’ of Indian Tribes” (Palmer Memorandum).<sup>142</sup> Among other things, it examined the historical meaning of “recognition” in federal law, and of the Secretary’s authority to “recognize” unrecognized groups. After surveying statutes and case law before and after the IRA’s enactment, as well as its early implementation by the Department, the memorandum notes that “the entire concept is in fact quite murky.”<sup>143</sup> The Palmer Memorandum finds that the case law lacked a coherent distinction between “tribal existence and tribal recognition,” and that clear standards or procedures for recognition had never been established by statute.<sup>144</sup> It further finds there to be a “consistent ambiguity” over whether formal recognition consisted of an assessment “of *past* governmental action” – the approach “articulated in the cases and [Departmental] memoranda” – or whether it “included authority to take such actions *in the first instance*.”<sup>145</sup> Despite these ambiguities, the Palmer Memorandum concludes that the concept of “recognition” could not be dispensed with, as it had become an accepted part of Indian law.<sup>146</sup>

Indirectly addressing the two senses of the term “tribe” described above, the Palmer Memorandum found that before the IRA, the concept of “recognition” was often indistinguishable from the question of tribal existence,<sup>147</sup> and was linked with the treaty-making powers of the Executive and Legislative branches, for which reason it was likened to diplomatic recognition of foreign governments.<sup>148</sup> Though treaties remained a “prime indicia” of political “recognition,”<sup>149</sup> the memorandum noted that other evidence could include congressional recognition by non-treaty means and administrative actions fulfilling statutory responsibilities toward Indians as “domestic dependent nations,”<sup>150</sup> including the provision of trust services.<sup>151</sup>

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<sup>142</sup> Associate Solicitor Reid P. Chambers approved the Palmer Memorandum in draft form. *Id.* The Palmer Memorandum came on the heels of earlier consideration by the Department of the Secretary’s authority to acknowledge tribes.

<sup>143</sup> Palmer Memorandum at 23.

<sup>144</sup> *Id.* at 23-24.

<sup>145</sup> *Id.* at 24. The memorandum concluded that the former question necessarily implied the latter.

<sup>146</sup> *Id.* at 24.

<sup>147</sup> The Palmer Memorandum noted that based on the political question doctrine, the courts rarely looked behind a “recognition” decision to determine questions of tribal existence *per se*. *Id.* at 14.

<sup>148</sup> *Id.* at 13. *See also* Cohen 1942 at 12 (describing origin of Indian Service as “diplomatic service handling negotiations between the United States and Indian nations and tribes”).

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* AIPRC Final Report at 462 (“Administrative actions by Federal officials and occasionally by military officers have sometimes laid a foundation for federal acknowledgment of a tribe’s rights.”); *Report of Task Force Ten* at 1660 (during the Nixon Administration, “federally recognized” included tribes recognized by treaty or statute and tribes treated as recognized “through a historical pattern of administrative action.”).

<sup>151</sup> Palmer Memorandum at 2; AIPRC Final Report at 111 (treaties but one method of dealing with tribes and treaty law generally applies to agreements, statutes, and Executive orders dealing with Indians, noting the trust relationship has been applied in numerous nontreaty situations). Many non-treaty tribes receive BIA services, just as some treaty-tribes receive no BIA services. AIPRC Final Report at 462; Terry Anderson & Kirke Kickingbird, *An Historical Perspective on the Issue of Federal Recognition and Non-Recognition*, Institute for the Development of Indian Law at 1 (1978). *See also* *Legal Status of the Indians-Validity of Indian Marriages*, 13 YALE L.J. 250, 251 (1904) (“The United States, however, continued to regard the Indians as nations and made treaties with them as such

Having noted the term's ambiguity and its political and administrative uses, the Palmer Memorandum then surveyed the case law to identify "indicia of congressional and executive recognition."<sup>152</sup> It describes these indicia as including both federal actions taken toward a tribe with whom the United States dealt on a "more or less sovereign-to-sovereign basis," as well as actions that "clearly acknowledged a trust responsibility"<sup>153</sup> toward a tribe, consistent with the evolution of federal Indian policy.<sup>154</sup>

The indicia identified by the Solicitor's Office in 1975 as evidencing "recognition" in a political-legal sense included the following: treaties;<sup>155</sup> the establishment of reservations; and the treatment of a tribe as having collective rights in land, even if not denominated a "tribe."<sup>156</sup> Specific indicia of Congressional "recognition" included enactments specifically referring to a tribe as an existing entity; authorizing appropriations to be expended for the benefit of a tribe;<sup>157</sup> authorizing tribal funds to be held in the federal treasury; directing officials of the Government to exercise supervisory authority over a tribe; and prohibiting state taxation of a tribe. Specific indicia of Executive or administrative "recognition" before 1934 included the setting aside or acquisition of lands for Indians by Executive order;<sup>158</sup> the presence of an Indian agent on a reservation; denomination of a tribe in an Executive order;<sup>159</sup> the establishment of schools and other service institutions for the benefit of a tribe; the supervision of tribal contracts; the establishment by the Department of an agency office or Superintendent for a tribe; the institution of suits on behalf of a tribe;<sup>160</sup> and the expenditure of funds appropriated for the use of particular Indian groups.

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until 1871, when after an hundred years of the treaty making system of government a new departure was taken in governing them by acts of Congress.").

<sup>152</sup> *Id.* at 2-14.

<sup>153</sup> *Id.* at 14.

<sup>154</sup> Having ratified no new treaties since 1868, ARCIA 1872 at 83 (1872), Congress ended the practice of treaty making in 1871, more than 60 years before the IRA's enactment. See Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. § 71. This caused the Commissioner of Indian Affairs at the time to ask what would become of the rights of tribes with which the United States had not yet treated. ARCIA 1872 at 83. As a practical matter, the end of treaty making tipped the policy scales toward expanding the treatment of Indians as wards under federal guardianship, expanding the role of administrative officials in the management and implementation of Indian Affairs. Cohen 1942 at 17-19 (discussing contemporaneous views on the conflicts between sovereignty and wardship); *Brown v. United States*, 32 Ct. Cl. 432, 439 (1897) ("But since the Act 3d March, 1871 (16 Stat. L. 566, § 1), the Indian tribes have ceased to be treaty-making powers and have become simply the wards of the nation."); *United States v. Kagama*, 118 U.S. 375, 382 (1886) ("But, after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,-to govern them by acts of congress. This is seen in the act of March 3, 1871...").

<sup>155</sup> Butler Letter at 6; Palmer Memorandum at 3 (executed treaties a "prime indicia" of "federal recognition" of tribe as distinct political body).

<sup>156</sup> Butler Letter at 6 (citing Cohen 1942 at 271); Palmer Memorandum at 19.

<sup>157</sup> Butler Letter at 5; Palmer Memorandum at 6-8 (citing *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913), *United States v. Nice*, 241 U.S. 591, 601 (1916), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920)); *id.* at 8-10 (citing *United States v. Nice*, 241 U.S. 591, 601 (1916); *Tully v. United States*, 32 Ct. Cl. 1 (1896) (recognition for purposes of Depredations Act by federal officers charged with responsibility for reporting thereon).

<sup>158</sup> Palmer Memorandum at 19 (citing Cohen 1942 at 271)); Butler Letter at 4.

<sup>159</sup> Palmer Memorandum at 19 (citing Cohen 1942 at 271).

<sup>160</sup> *Id.* at 6, 8 (citing *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913), *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920) (suit brought on behalf of Oneida Indians)).

The Palmer Memorandum also considered the Department’s early implementation of the IRA, when the Solicitor’s Office was called upon to determine tribal eligibility for the Act. While this did not provide a “coherent body of clear legal principles,” it showed that Department officials closely associated with the IRA’s enactment believed that whether a tribe was “recognized” was “an administrative question” that the Department could determine.<sup>161</sup> In making such determinations, the Department looked to indicia established by federal courts.<sup>162</sup> There, indicia of Congressional recognition had primary importance, but in its absence, indicia of Executive action alone might suffice.<sup>163</sup> Early on, the factors the Department considered were “principally retrospective,” reflecting a concern for “whether a particular tribe or band *had* been recognized, not whether it *should* be.”<sup>164</sup> Because the Department had the authority to “recognize” a tribe for purposes of implementing the IRA, the absence of “formal” recognition in the past was “not deemed controlling” *if there were sufficient indicia* of governmental dealings with a tribe “on a sovereign or quasi-sovereign basis.”<sup>165</sup> The manner in which the Department understood “recognition” before, in, and long-after 1934<sup>166</sup> supports the view that Congress and the Department understood “recognized” to refer to actions taken by federal officials with respect to a tribe for political or administrative purposes in or before 1934.

C. *Construing the Expression “Recognized Indian Tribe Now Under Federal Jurisdiction” as a Whole.*

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

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

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<sup>161</sup> *Id.* at 18.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (emphasis in original). *See also* Stillaguamish Memo at 2 (Category 1 includes “all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time.”).

<sup>165</sup> Palmer Memorandum at 18.

<sup>166</sup> *See, e.g.*, Stillaguamish Memo. *See also* 25 C.F.R. § 83.12 (describing evidence to show “previous Federal acknowledgment” as including: treaty relations; denomination as a tribe in Congressional act or Executive Order; treatment by Federal government as having collective rights in lands or funds; and federally held lands for collective ancestors).

Based on this understanding, the phrase “now under federal jurisdiction” can be seen to exclude two categories of tribe from Category 1. The first category consists of tribes never “recognized” by the United States in or before 1934. The second category consists of tribes who *were* “recognized” before 1934 but no longer remained under federal jurisdiction in 1934. This would include tribes who had absented themselves from the jurisdiction of the United States or had otherwise lost their jurisdictional status, for example, because of policies predicated on “the dissolution and elimination of tribal relations,” such as allotment and assimilation.<sup>167</sup> Though outside Category 1’s definition of “Indian,” Congress may later enact legislation recognizing and extending the IRA’s benefits to such tribes, as *Carciari* instructs.<sup>168</sup> For purposes of the eligibility analysis, however, it is important to bear in mind that neither of these categories would include tribes who were “recognized” and for whom the United States maintained trust responsibilities in 1934, despite the federal government’s neglect of those responsibilities.<sup>169</sup>

## Analysis

### A. Procedure for Determining Eligibility.

As noted, the Solicitor’s Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.<sup>170</sup> It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.<sup>171</sup> The Solicitor’s Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.<sup>172</sup> Only in the absence of presumptive evidence should the inquiry proceed to Step Four, which requires the Department to weigh the totality of an applicant tribe’s evidence.<sup>173</sup>

Having identified no separate statutory authority making the IRA applicable to the Nation under Step One, our analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the Nation was under federal jurisdiction in

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<sup>167</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994) (“The “ultimate purpose of the [Indian General Allotment Act was] to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country.”); *see also Montana v. United States*, 450 U.S. 544, 559 (1981) (citing 11 CONG. REC. 779 (Sen. Vest), 782 (Sen. Coke), 783–784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881); SECRETARY OF THE INTERIOR ANN. REP. 1885 at 25–28; SECRETARY OF THE INTERIOR ANN. REP. 1886 at 4; ARCIA 1887 at IV–X; SECRETARY OF THE INTERIOR ANN. REP. 1888 at XXIX–XXXII; ARCIA 1889 at 3–4; ARCIA 1890 at VI, XXXIX; ARCIA 1891 at 3–9, 26; ARCIA 1892 at 5; SECRETARY OF THE INTERIOR ANN. REP. 1894 at IV). *See also* Cohen 1942 at 272 (“Given adequate evidence of the existence of a tribe during some period in the remote or recent past, the question may always be raised: Has the existence of this tribe been terminated in some way?”).

<sup>168</sup> *Carciari*, 555 U.S. at 392, n. 6 (listing statutes by which Congress expanded the Secretary’s authority to acquire land in trust to tribes not necessarily encompassed by Section 19).

<sup>169</sup> *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004) (improper termination of treaty-tribe’s status before 1934).

<sup>170</sup> Solicitor’s Guidance at 1.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

1934.<sup>174</sup> This criterion derives from understanding the meaning of the phrase “under federal jurisdiction” as referring to the federal government’s administration of its Indian affairs authority with respect to particular groups of Indians. Certain federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934. These are: elections conducted by the Department pursuant to Section 18 of the IRA; approval by the Secretary of a constitution following an election held pursuant to Section 16 of the IRA; issuance of a charter of incorporation following a petition submitted pursuant to Section 17 of the IRA; adjudicated treaty rights; inclusion in 1934 on the Department’s Indian Population Report; and land acquisitions by the United States for groups of Indians in the years leading up to 1934.<sup>175</sup> It also includes the continuing existence of treaty rights and federal legislation addressing a particular tribe.<sup>176</sup> Where any of these forms of evidence exist, then the Solicitor’s Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.<sup>177</sup> The Nation, as explained below, provided unambiguous evidence under Step Two that it was “under federal jurisdiction” in 1934 and therefore eligible for the benefits of Section 5 of the IRA.

*B. Dispositive Evidence of Federal Jurisdiction in 1934.*

1. Osage Allotment Act.

The United States acquired the lands occupied by the Osage in 1803 through the Louisiana Purchase, first bringing the Nation within federal authority.<sup>178</sup> Soon after, in 1808, the United States entered the first of several treaties with the Nation, by which the Osage made a major cession of land in present-day Missouri.<sup>179</sup>

In 1870, Congress removed and relocated the Osage from their lands in Kansas to lands in the Indian Territory.<sup>180</sup> In 1872, Congress established a reservation for the Osage (Reservation) consisting of approximately 1.47 million acres, which subsequently became part of the Oklahoma Territory in 1890.<sup>181</sup> In 1906, Congress enacted the Oklahoma Enabling Act, which authorized the admission of the Indian Territory and Oklahoma Territory to the Union as the State of Oklahoma.<sup>182</sup> That same year, Congress enacted legislation allotting the Nation’s

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<sup>174</sup> *Id.* at 2.

<sup>175</sup> *Id.* at 2-4.

<sup>176</sup> *Id.* at 6.

<sup>177</sup> *Id.* at 2.

<sup>178</sup> *Brunt v. Commissioner*, 5 U.S.B.T.A. 134, 149 (1926).

<sup>179</sup> Treaty with the Great and Little Osage (Nov. 10, 1808), 7 Stat. 107. *See also* Treaty with the Great and Little Osage (Sep. 12, 1815), 7 Stat. 133; Treaty with the Great and Little Osage (Sep. 25, 1818), 7 Stat. 183; Treaty with the Great and Little Osage (Aug. 21, 1822), 7 Stat. 222; Treaty with the Osage (Jun. 2, 1825), 7 Stat. 240; Treaty with the Great and Little Osage (Aug. 10, 1825), 7 Stat. 268; Treaty with the Great and Little Osage (Jan. 11, 1839), 7 Stat. 576; Treaty with the Great and Little Osage (Sep. 29, 1865), 14 Stat. 687.

<sup>180</sup> Act of July 15, 1870, 16 Stat. 335, 362.

<sup>181</sup> Act of June 5, 1872, ch. 310, 17 Stat. 228. Act of May 2, 1890, ch. 182, 26 Stat. 81. *See also Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011).

<sup>182</sup> *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267. *See also* OKLA. CONST. art. XVII, § 8 (“[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County.”).

reservation to individual tribal members.<sup>183</sup> The Osage Allotment Act severed the surface estate of the Reservation from the subsurface mineral estate (Osage Mineral Estate), reserving all mineral rights in trust for the benefit of the Nation.<sup>184</sup> The United States has continuously held the Osage Mineral Estate in trust for the Nation, and continues to do so today.<sup>185</sup> Approximately ten percent of the surface estate in Osage County is held in trust or restricted status, with all other lands held in fee. Under the Osage Allotment Act, the Nation is further authorized to lease the Osage Mineral Estate for oil and gas mining “subject to the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe.”<sup>186</sup> The Department has since established a regulatory regime, which has evolved and continues in force to this day.<sup>187</sup> The Osage Allotment Act has been held to have established a trust relationship between the Nation and the United States establishing a specific duty on the part of the federal government “to hold in trust all moneys due [under the Osage Allotment Act], now and in future to the Osage Tribe,”<sup>188</sup> a duty that remains in effect today.<sup>189</sup>

The federal duties and responsibilities established by the Osage Allotment Act in 1906, which remain in effect today, demonstrate that the Nation was under federal jurisdiction in 1934.

## 2. IRA Section 13.

By expressly referencing Osage, Section 13 of the IRA provides dispositive evidence that the Nation was under federal jurisdiction in 1934. Though the IRA is a statute of general applicability, it includes provisions that are applicable to specific Indian groups.<sup>190</sup> These include Section 13 of the IRA, which exempts specific tribes in the State of Oklahoma, including the Osage, from the application of certain IRA provisions.<sup>191</sup> Section 13 provides in relevant part:

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<sup>183</sup> Act of June 28, 1906, ch. 3572, 34 Stat. 539 (“Osage Allotment Act”).

<sup>184</sup> Osage Allotment Act at § 3.

<sup>185</sup> Though the Osage Allotment Act originally provided that the mineral estate would become the property of individual landowners within 25 years, Congress ultimately extended the restrictions indefinitely. *See* Act of March 3, 1921, ch. 120, 41 Stat. 1249 (extending trust status of mineral estate to 1946); Act of March 2, 1929, ch. 493, § 1, 45 Stat. 1478 (extending same to 1958); Act of June 24, 1938, ch. 645, § 3, 52 Stat. 1034 (extending same to 1983); Pub. L. No. 95-496, § 2(a), 92 Stat. 1660 (extending same in perpetuity).

<sup>186</sup> *Id.*

<sup>187</sup> Regulations to implement the Osage Allotment Act were first issued in 1912. *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 636 (2006), and were amended prior to and after the passage of the IRA. *See* Secretary of the Interior, *Regulations to govern the leasing of lands in the Osage Reservation, Oklahoma, for oil and gas mining purposes* (July 12, 1932), first promulgated at 25 C.F.R. part 180 (1938). These regulations are now found at 25 C.F.R. part 226 (governing leases of Osage Reservation lands for oil and gas mining).

<sup>188</sup> *Osage Tribe of Indians v. United States*, 85 Fed. Cl. 162, 171 (2008) (citing *Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (2003)).

<sup>189</sup> The first act extending the trust status period of the Osage mineral estate declared all members of the Nation to be United States citizens without prejudice to “their interest in tribal property or the control of the United States over such property”). Act of March 3, 1921, ch. 120, § 3, 41 Stat. 1250.

<sup>190</sup> *See, e.g.*, IRA, § 3 (addressing Papago Tribe); *id.*, § 14 (addressing Sioux Indians); *id.*, § 13 (addressing Indians in the Territory of Alaska).

<sup>191</sup> By 1934, specific statutes applied to the Five Civilized Tribes and Osage Nation and to the land base of Oklahoma tribes. Similarly, specific provisions in the IRA addressed Alaska where there were few reservations.

[...] That sections 2, 4, 7, 16, 17 and 18<sup>192</sup> of this title shall not apply to the following named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek and Seminole.<sup>193</sup>

Thus, the Nation's inclusion in the list of tribes in Section 13 provides unambiguous evidence that Congress understood the Nation to be under federal jurisdiction at the time of the IRA's enactment in 1934.<sup>194</sup> It is further worth noting that Section 13 did not exempt the named Oklahoma tribes from application of Section 5. As its legislative history shows, Congress understood that Section 5 would remain a source of authority for the Secretary to accept land in trust even for those Oklahoma tribes, including the Nation.<sup>195</sup>

### **Conclusion**

Consistent with Step Two of the Solicitor's Guidance, the continuing applicability of the Osage Allotment Act, as amended, and the inclusion of Osage in Section 13 of the IRA unambiguously establish that the United States considered the Nation to be under federal jurisdiction in 1934. As such, the Nation satisfies the definition of "Indian" contained in Category 1. We, therefore, conclude that the Secretary has the authority to acquire land in trust for the Nation under Section 5 of the IRA.

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<sup>192</sup> Section 2 (25 U.S.C. § 5102) extended the existing periods of trust and any restriction on alienation placed upon Indian lands. Section 4 (25 U.S.C. § 5107) limited sales, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of the tribe or corporation organized under the Act. Section 7 (25 U.S.C. § 5110) authorized the Secretary to proclaim new reservations or add lands to existing reservations. Section 16 (25 U.S.C. § 5123) provided that any Indian tribe, or tribes, residing on the same reservation, the right to organize and adopt a constitution. Section 17 (25 U.S.C. § 5124) provides that the Secretary, upon a petition by at least one-third of the adult Indians, may issue a charter of incorporation to such tribe. Section 18 (25 U.S.C. § 5125) provided that the adult Indians on any reservation could vote in a special election to opt out of the IRA.

<sup>193</sup> 25 U.S.C. § 5118.

<sup>194</sup> *See also* 78 Cong. Rec. 11125 (June 12, 1934) (remarks of Senator Thomas of Oklahoma) (describing the Osage Reservation as the only "great Indian reservation[]" remaining in Oklahoma).

<sup>195</sup> Members of the Oklahoma Congressional delegation held a similar understanding at the time. *See* 78 Cong. Rec. 11125-26 (June 12, 1934) (remarks of Senator Thomas of Oklahoma) (offering amendment, adopted by Congress, so as to make Section 5 available to individual Indians "not only in my State for individual Indians but in other States where Indian lands have been allotted." *See also*, 78 Cong. Rec. 11739 (June 15, 1934) (remarks of Representative Hastings of Oklahoma) (noting exemption of Oklahoma tribes from certain sections of the IRA and not objecting "to assistance by the Government in the form of and to the extent of the purchase of land for landless and indigent Indians").

**25 C.F.R. § 151.10(b) - The need of the individual Indian or the tribe for additional land.**

Section 151.10(b) requires the Secretary to consider the tribe's need for additional land.

The Nation seeks to restore part of its land base in a region that it has occupied since 1870. Following the enactment of the Osage Allotment Act in 1906, the Nation lost the majority of its trust and restricted allotted lands.<sup>196</sup> By 1957, 1.1 million acres of the 1.47 million acres in Osage County lost their trust and restricted status.<sup>197</sup>

The Nation needs additional land on which to relocate and improve its existing gaming facility, which will facilitate increased economic development. The Nation's existing 8,360-square foot (sf) gaming facility is located in a modular building on a three-acre parcel that the Nation leases from the Pawhuska Indian Village on land reserved by the Allotment Act.<sup>198</sup> The Nation uses the Pawhuska Indian Village, an Osage historic cultural site, primarily for ceremonial activities and residential home sites.<sup>199</sup>

The Proposed Project will be located on land held in trust for the Nation, in a bigger facility with a hotel and additional amenities. These improvements will increase patronage, and thereby also increase revenue for the Nation's governmental programs. The Proposed Project will also enhance the Pawhuska Indian Village as a location for tribal cultural events.

In recent years, the Nation has experienced a 20 percent increase in enrollment.<sup>200</sup> In 2019, the Nation had approximately 21,567 members who rely on the tribal government to provide benefits and services. With the steady increase in tribal enrollment, the Nation has greater needs for funding. Transfer of the Site into trust will allow the Nation to support governmental functions including its health benefit card, scholarships, general assistance, and language and cultural schools, and will decrease dependence on limited federal and state funds.<sup>201</sup> With the expected increase in revenue from transferring the Site into trust, the Nation will address the needs of its members and prepare for future membership growth. Transfer of the Site into trust will also create additional jobs for tribal members.

The Regional Director found, and we concur, that the Tribe has a need for additional land for an improved gaming facility that will generate increased funding for governmental programs.<sup>202</sup>

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<sup>196</sup> Allotted lands are lands owned by the United States in trust for an Indian (trust allotment) or owned by an Indian subject to a restriction on alienation (restricted allotment). During the trust or restricted period, typically 25 years, federal law protects allotments against encumbrance, alienation, and taxation without federal consent. Often, when the restricted period was complete, the lands were lost from Indian ownership through tax foreclosure or other means. *See* Cohen's Handbook of Federal Indian Law § 16.03 (2019).

<sup>197</sup> *Osage Nation v. Irby*, 597 F.3d at 1127.

<sup>198</sup> Regional Director's Findings of Fact at 8.

<sup>199</sup> Regional Director's Findings of Fact at 8; EA § 1.4.

<sup>200</sup> *Id.* at 4.

<sup>201</sup> *Id.* at 8.

<sup>202</sup> *Id.* at 7 - 5.

**25 C.F.R. § 151.10(c) - The purposes for which the land will be used.**

Section 151.10(c) requires the Secretary to consider the purposes for which land will be used in evaluating a trust application.

The Nation will relocate its existing Pawhuska gaming facility to the Site, and develop approximately 17 acres of the Site.<sup>203</sup> The Proposed Project will include a gaming facility, hotel, and a travel plaza. The Nation will construct the Proposed Project in multiple phases. During Phase 1, the Nation will construct a 34,000-sf gaming facility with a gaming floor, casino support areas, dining area, sports bar, fast food/coffee outlet, administration and security areas, and will have up to approximately 400 class III gaming machines and six table games.

During Phase 2, the Nation will construct a 31,100-sf hotel with up to 75 rooms. The facility would include 405 surface level parking spots for patrons and employees. Also during Phase 2, the Nation would construct a 4,800-sf travel plaza and fueling stations on the same 17 acres as the proposed casino-hotel. The travel plaza will include a convenience store and six fueling stations with parking for 20 trucks and 10 recreational vehicles.

Upon completion of the new gaming facility, the Nation will donate the existing building to the Pawhuska Indian Village for use as a tribal resource.<sup>204</sup>

**25 C.F.R. § 151.10(e) - If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.**

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

By correspondence dated February 20, 2014 and January 25, 2018, the BIA solicited comments from the following state and local governments on the potential impact of the proposed acquisition on regulatory jurisdiction, real property taxes, and special assessments:<sup>205</sup>

- Governor of Oklahoma
- Oklahoma Tax Commission
- Osage County Commissioners
- Osage County Assessor
- Osage County Treasurer
- Mayor of Pawhuska
- Chief of Police of Pawhuska
- City Clerk of Pawhuska

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<sup>203</sup> EA § 2.1.2.

<sup>204</sup> Regional Director's Findings of Fact at 8.

<sup>205</sup> *Id.* at 9.

The County Assessor responded with tax information.<sup>206</sup> The BIA received no other responses. Real property in Oklahoma is subject to state property taxes, which counties collect to fund a variety of countywide services. The 2018 tax for the Site was \$128.00. The loss of taxes on the Site is minimal and will be more than offset by economic gains from the Proposed Project.

### *Employment and Economic Output*

The Proposed Project would result in a variety of benefits to the regional economy, including increased overall economic output, employment opportunities, and tax revenues.

Construction of the Proposed Project will create approximately 112 new jobs throughout Osage County.<sup>207</sup> The available labor force in the City of Pawhuska and Osage County will primarily fill these jobs. Construction will also generate substantial economic output, creating economic benefits for a variety of area businesses that support construction activities. Area businesses will then increase their spending and labor demand, thereby stimulating the local economy.

Operation of the Proposed Project would generate approximately 62 employment opportunities, with an anticipated payroll of approximately \$6 million.<sup>208</sup> Currently, the Nation employs 35 people at its existing casino in Pawhuska, with an annual payroll of approximately \$1.6 million. These employees are likely to fill the same number of jobs at the Proposed Project. The newly created jobs at the casino, hotel, and travel plaza will be filled through the local labor market. Additional new jobs are expected for regional businesses that support operations or are near the Proposed Project.

### *Tax Impacts*

The construction and operation of the Proposed Project would result in a variety of fiscal impacts to state and local governments that will more than offset the loss of \$128.00 in annual property taxes. The construction budget for the Proposed Project is approximately \$20 million.<sup>209</sup> This economic output will directly benefit the construction industry.

Operation of the Proposed Project will generate an additional \$6.7 million in operating expenses, which will generate indirect and induced output that will be dispersed and distributed among a variety of different industries and businesses in the County. Output from construction and operation will generate tax revenue for the state and local governments.

The Regional Director found, and we concur, that the removal of the Site from the tax rolls will be offset by the economic development provided by the Proposed Project.<sup>210</sup>

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<sup>206</sup> *Id.*, Attachment 41 (Osage County Tax Receipt dated December 21, 2018).

<sup>207</sup> EA § 4.6.1.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Regional Director's Findings of Fact at 9.

**25 C.F.R. § 151.10(f) - Jurisdictional problems and potential conflicts of land use which may arise.**

Section 151.10(f) requires the Secretary to consider whether any jurisdictional problems and potential conflicts of land use may arise.

*Jurisdiction and Land Use*

The Site is zoned as urban farm.<sup>211</sup> The Site is largely undeveloped and is currently used only for oil production from four on-site oil wells. Adjacent properties are largely undeveloped, with land uses that include grazing and pastureland. Nearby commercial developments include the Nation's current casino directly across US-60, a gas station, small retail facilities, and fast food restaurants. The Site will be located on approximately 17 acres of the Site, with the remaining 53 acres left unchanged. All four existing oil wells will continue to operate. The new casino and hotel will be constructed in the western portion of the project site, which would reduce the potential for land use conflicts with nearby sensitive receptors. Additionally, the proposed casino, hotel, and travel plaza are consistent with the nearby public utility use to the north (the Pawhuska Wastewater Treatment Plant) and commercial uses to the southwest (retail stores, gas station, and restaurants). No adverse effects associated with land use conflicts would occur.

As noted above, the BIA, by correspondence dated February 20, 2014, and January 25, 2018, requested comments from State, County, and City officials regarding the proposed acquisition. The BIA received no comments or concerns regarding jurisdictional issues or potential conflicts of land.<sup>212</sup>

*Law Enforcement, Fire Protection, and Emergency Services*

The Osage Nation Police Department (ONPD) will provide law enforcement for the Proposed Project.<sup>213</sup> The ONPD also maintains a cross-deputization agreement with the City of Pawhuska and Osage County Sheriff.<sup>214</sup> The Pawhuska Police Department headquarters are located less than two miles from the Site. The Pawhuska Fire Department provides fire and emergency services within the city limits of Pawhuska. The Pawhuska Emergency Medical Services will provide primary EMS services to the Site. The Pawhuska Fire Department and Pawhuska Emergency Medical Services are located one mile away.

The Regional Director found, and we concur, that the transfer of the Site into trust would not cause conflicts of land use or other jurisdictional problems.<sup>215</sup>

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<sup>211</sup> EA §§ 3.8.1, 4.8.1.

<sup>212</sup> Regional Director's Findings of Fact at 10.

<sup>213</sup> *Id.*

<sup>214</sup> EA § 3.9.5; Attachment C.

<sup>215</sup> Regional Director's Findings of Fact at 10.

**25 C.F.R. § 151.10(g) - If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.**

Section 151.10(g) requires the Secretary to determine whether the BIA has the resources to assume additional responsibilities if the land is acquired in trust.

The Site is located within the jurisdictional boundaries of the BIA Osage Agency. The Nation is responsible for the administration of real estate services and natural resources programs associated with the management of trust lands through a Self-Governance Multi-Year Funding Agreement. The BIA Osage Agency provides technical assistance, review, and approval of real estate transactions.

The Regional Director found, and we concur, that the BIA has adequate resources to assume the additional responsibilities resulting from the transfer of the Site into trust.<sup>216</sup>

**25 C.F.R. § 151.10(h) - The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.**

Section 151.10(h) requires the Secretary to consider the availability of information necessary for compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and a determination on the presence of hazardous substances.

*602 DM 2, Land Acquisitions: Hazardous Substances Determinations*

A Phase I Environmental Site Assessment (ESA) was prepared in January 2018 for the Site, which complied with ASTM Standard E 1527-13.<sup>217</sup> The ESA found no Controlled Recognized Environmental Conditions and no Historical Environmental Recognized Conditions. There were no hazardous materials or underground storage tanks. The ESA recommended no additional subsurface hazardous materials investigations. An updated ESA will be prepared prior to transferring the Site into trust.

*National Environmental Policy Act*

The BIA prepared an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C § 4321 *et seq.* The EA evaluated the transfer of the Site into trust and the subsequent development of the Proposed Project by the Nation. The BIA made the EA available for public comment from June 21, 2019, through July 22, 2019. The BIA published notices of availability of the EA in the *Tulsa World of Tulsa*, *Oklahoma, Pawhuska Journal Capital*, and the *Bartlesville Examiner*. The BIA received no comments from the public. The EA is available at [www.pawhuskaea.com](http://www.pawhuskaea.com).

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<sup>216</sup> Regional Director's Findings of Fact at 10.

<sup>217</sup> Regional Director's Findings of Fact, Attachment 132.

As discussed below, I conclude that the development of the Proposed Project on the Site will not result in significant impacts to the human environment, and, therefore, an environmental impact statement is not required. The Finding of No Significant Impact is included as Enclosure 3.

The BIA considered four alternatives:

*Alternative A - Proposed Action - Casino and Hotel Alternative*

Under Alternative A, the United States will transfer the approximately 63.1-acre Site into trust for the benefit of the Nation. The Proposed Project will be constructed on 17 acres and will include an approximately 34,000-sf gaming facility, 31,100-sf hotel, and 4,800-sf travel plaza. The attached hotel will have two-stories with up to 75 rooms. Approximately 405 parking spaces will be constructed to accommodate both patrons and employees.

*Alternative B – Different Layout Alternative*

Under Alternative B, the United States will transfer the Site into trust. The components will remain the same as Alternative A, except the development of the casino, hotel and travel plaza will be constructed on the southern part of the property.

*Alternative C – Reduced Intensity Alternative*

Under Alternative C, the United States will transfer the Site into trust. Under this Alternative, only the casino and hotel will be constructed.

*Alternative D - No Action Alternative*

Under the No Action Alternative, the United States will not transfer the Site into trust for the benefit of the Nation, no development will occur, and the land will remain in its existing condition.

*Selection of the Preferred Alternative*

We have determined that the Department will implement Alternative A as the Preferred Alternative. This decision is based on the environmental analysis in the EA, a consideration of economic and technical factors, and the purpose and need for action. Of the alternatives evaluated in the EA, Alternative A will best meet the purpose and need for action because it best promotes the long-term economic self-sufficiency, self-determination, and self-governance of the Nation.

*Environmental Analysis*

The EA evaluated the potential impacts to land resources; water resources; air quality; biological resources; cultural resources; socioeconomic conditions; transportation networks; land use; public services; visual resources; noise; and hazardous materials. The EA describes the Best

Management Practices (BMPs) in Section 2.1.3 that are incorporated into the project design to eliminate or substantially reduce any environmental consequences to less-than-significant levels.

*Land Resources* (EA § 4.1) – Alternative A will not result in adverse impacts to land resources. Some changes to topography will occur including converting agricultural and woodland to commercial development. A grading plan will comply with standard engineering practices resulting in no adverse effects on topography. The Site is located near moderately optimal seismic faults, however, there have been no known seismic events on the Property and the overall seismic hazard is low. Construction of the Proposed Project will conform to the requirements of the International Building Code Seismic Zone 1, and will reduce risk to patrons and employees within the facilities. No adverse impacts to geology and soils will occur. Engineering and design plans, implementation of the BMPs in Section 2.1.3, and mitigation measures in Section 5.1 will address the “very limited” soil types on the Site. Construction of the casino facilities will not result in loss of mineral resources. Four oil wells exist on the Site; however, they will be integrated into the project design and fenced off so the public will not have access to those areas. With implementation of BMPs and mitigation measures, impacts to land resources will be less than significant.

*Water Resources* (EA § 4.2) – Alternative A will not result in adverse impacts on water resources. Potable water will be provided by the City of Pawhuska. There is sufficient available capacity to provide potable water to the Site. Additionally, the water demand from the Proposed Project will be offset by the closure of the current casino. No adverse effects from stormwater or flooding will occur. Stormwater detention basins and a stormwater pollution prevention plan (SWPPP) will be developed. The 17 acres of development are not within a 100-year FEMA designated flood zone. No adverse effects to groundwater will occur; implementation of the SWPPP will ensure minimal impact to groundwater recharge. Impacts to water resources will be less than significant.

*Air Quality and Climate* (EA § 4.3) – Alternative A will have no direct impacts on air quality. Short-term impacts to air quality will occur during construction, but application of standard BMPs will reduce emissions to a less-than-significant level. The State of Oklahoma is currently in attainment status. Impacts during operation will be below air quality threshold levels and will not contribute to a change in the designation status. Impacts to air quality and climate will be less than significant.

*Biological Resources* (EA § 4.4; Appendix E; Appendix G) – Alternative A will have no direct impacts on biological resources. There are no federally listed plants within the Proposed Project area. Seven federally listed species may occur; however, only the American burying beetle (ABB) may occur within the project area. Two ABB surveys were done in June 2015 and August 2017. The 2015 survey found no ABBs. The 2017 survey captured one ABB. Mitigation measures as written in Section 5.4 will require surveys for ABB prior to construction. Alternative A may effect, but is not likely to affect, any federally listed species. Migrating birds may occur within the Site; however, implementation of mitigation measures as identified in Section 5.4 will ensure no significant adverse impacts. No adverse impacts to wetlands or waters of the U.S. will occur. Seven aquatic features are on the Pawhuska Property; however, the construction is set back from the FS-5 pond and will not affect the pond. With implementation

of mitigation measures in compliance with permits as identified in Section 5.4, impacts to biological resources will be less than significant.

*Cultural Resources* (EA §§ 3.5; 4.5) – Alternative A will have no direct impacts on cultural resources. There are two historic sites and one prehistoric site within the area of potential effect, however, they are not eligible for the National Register of Historic Places. The BIA conducted Section 106 consultation with regional tribal groups. Only the Osage Nation responded, and is the only affected tribe. Inadvertent discovery may occur during construction, but with implementation of BMPs and mitigation measures in Section 5.5, impacts to cultural resources will be less than significant.

*Socioeconomic Conditions* (EA § 4.6; Appendix B) – Alternative A will not adversely impact socioeconomic conditions. The Proposed Project is expected to create 112 construction employment opportunities and 62 employment opportunities during operation, 35 of which will be filled by employees of the existing Pawhuska casino, which will close upon opening of the new Proposed Project. The only identified environmental justice community identified near the Proposed Project is the Osage Nation. The Proposed Project will be beneficial in providing funding for the Osage Nation for education, health care, and housing programs. Impacts to socioeconomic conditions will be less than significant.

*Transportation Networks* (EA § 4.7; Appendix J) – Alternative A will have no direct impacts on transportation. Trip generation, trip distribution, intersection capacity, and safety were analyzed for the Proposed Project in a traffic impact study. During operation, the applicable intersections will operate at an acceptable level service. With implementation of mitigation measures identified in Section 5.7, impacts to transportation networks will be less than significant.

*Land Use* (EA § 3.8; § 4.8) – Alternative A will have no direct impacts on land use. Current zoning of the Pawhuska Property is urban farm. Past uses of the land include grazing and rangeland. Current use of the land is oil production from four existing wells, which will continue to operate under Alternative A. Approximately 17 acres will change from agricultural to commercial land use. The remaining 46 acres will remain undeveloped and consistent with current land use. The development will not differ from adjacent land uses. With implementation of BMPs, impacts from change in land use will be less than significant. Under the Farmland Protection Policy Act, prime and unique farmlands must be assigned a conversion impact score. Some soils within the Proposed Project area are designated as prime farmland, however, there are no agricultural production on the Pawhuska Property; therefore, no adverse effects will occur. A score of less than 160 does not require further evaluation or protection. The score of the Site is 138, and no further evaluation is required. Impacts to land use will be less than significant.

*Public Services* (EA § 3.9; § 4.9) – Alternative A will have no direct impacts on utilities or public services.

### *Utilities*

The City of Pawhuska currently uses less than half its maximum capacity at its water plant, and, therefore, has the capacity to provide potable water to the Site. The closure of the existing casino will also offset overall water usage. The City of Pawhuska also uses less than half its maximum capacity of their Wastewater Treatment Plant (WWTP), and, therefore has the capacity to accommodate wastewater flows from the Proposed Project. Solid waste generated from the construction and operation of the Proposed Project will be hauled to the Osage Landfill, which has the capacity to accept solid waste from the Proposed Project. The Nation will coordinate with Oklahoma Natural Gas for gas utilities. Impacts to utilities will be less than significant.

### *Law Enforcement, Fire Protection, and Emergency Services*

The Osage Nation Police Department (ONPD) will provide law enforcement for the Proposed Project. The ONPD also maintains a cross deputization agreement with the Pawhuska Police Department and Osage County Sheriff. The Pawhuska Police Department headquarters are less than two miles from the Site. The Pawhuska Fire Department provides fire and emergency services within the city limits of Pawhuska. The Pawhuska Emergency Medical Services will provide primary EMS to the Site. The Pawhuska Fire Department and Pawhuska Emergency Medical Services are located one mile away. Impacts to law enforcement, fire protection, or emergency services will be less than significant.

*Visual Resources* (EA § 4.10) – Alternative A will have no direct impacts on visual resources. The Proposed Project has been designed to be more aesthetically pleasing than the existing casino. A row of trees mostly obscures views from the closest resident, approximately 590 feet north of the Site. Incorporation of BMPs will reduce visual impacts. Impacts to visual resources will be less than significant.

*Noise* (EA § 4.11) – Alternative A will have no direct impacts from noise. Noise from construction activities will be temporary and will not result in an increase of existing volumes from current traffic. Operation of the facilities will slightly increase existing noise levels; however, the increase is marginal and will be below the Federal Noise Abatement Criteria threshold. Incorporation of BMPs will reduce noise impacts. Impacts from noise will be less than significant.

*Hazardous Materials* (EA § 4.12; Appendix D) – Alternative A will have no direct impacts on public safety. A Phase I Environmental Site Assessment (ESA) was prepared in January 2018 for the Site, which complied with ASTM Standard E 1527-13. The ESA found no Controlled Recognized Environmental Conditions and no Historical Environmental Recognized Conditions. There were no hazardous materials or underground storage tanks. The ESA recommended no additional subsurface hazardous materials investigations. An updated ESA will be prepared prior to transferring the Pawhuska Property into trust. Implementation of BMPs will ensure impacts to public health and safety will be less than significant.

any other Departmental requirements, the Regional Director shall immediately acquire the Pawhuska Site in trust. This decision constitutes a final agency action under 5 U.S.C. § 704.

Sincerely,

A handwritten signature in blue ink that reads "Tara Sweeney". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

Tara Sweeney  
Assistant Secretary - Indian Affairs

Enclosures