United States Court of Appeals

for the

First Circuit

Case No. 23-1197

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACORD; DEBORAH CANARY; FRANCIS CANARY, JR.; VERONICA CASEY; PATRICIA COLBERT; VIVIAN COURCY; WILL COURCY; DONNA DEFARIA; ANTONIO DEFARIA; KIM DORSEY; KELLY DORSEY; FRANCIS LAGACE; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; MICHELE LEWRY; RICHARD LEWRY; ROBERT LINCOLN; CHRISTINA ALMEIDA; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior; BRYAN NEWLAND, in his official capacity as Assistant Secretary - Indian Affairs, U.S. Department of the Interior; MASHPEE WAMPANOAG INDIAN TRIBE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, CASE NO. 1:22-CV-10273-AK, ANGEL KELLEY, U.S. DISTRICT JUDGE

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INTRODUCTION

This appeal concerns the December 22, 2021 Record of Decision ("2021 ROD") by the Department of the Interior which found the Mashpee Wampanoag Tribe was under federal jurisdiction in 1934 and therefore eligible to have land taken into trust under the Indian Reorganization Act of 1934 ("IRA"). The lands are located in the Town of Mashpee, on the Cape, and a distinct parcel 50 miles away in East Taunton. Plaintiffs-Appellants David Littlefield et al. ("Littlefields") are residents of East Taunton and challenge the federal government's decision under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA").

A tribe is eligible for trust lands under the IRA if it meets the statutory definition of "Indian," which only includes:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [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 [3] all other persons of one-half or more Indian blood.

25 U.S.C. § 5129.

The 2021 ROD found the Mashpee Tribe qualifies because its members belong to a tribe that was under federal jurisdiction in 1934. That determination is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of the APA, because:

1. The Supreme Court held in *Carcieri v. Salazar,* 555 U.S. 379 (2009), that the Narragansett Tribe, whose history is materially the same, was not under federal jurisdiction in 1934. Interior failed to take that into account; indeed *Carcieri* is controlling law that dictates the same finding that the Mashpees were not under federal jurisdiction in 1934.

2. Even assuming no direct conflict with *Carcieri*, Interior failed to provide an adequate explanation of why the 2021 ROD had changed from two prior decisions by Interior finding the Mashpees were not under federal jurisdiction in 1934—there was no new evidence to justify finding the Mashpees now qualified under the statute.

3. Interior acted arbitrarily and capriciously by failing to address serious issues regarding the deficiency of the Mashpee Tribe's evidence.

The central question presented by the appeal can be framed as follows: Whether the Mashpees can be found to be a tribe under federal jurisdiction in 1934 when:

- They were "tribal remnants" under colonial, British, and then state jurisdiction—living as fully assimilated citizens of Massachusetts since 1869;
- The federal government historically made no provision for the Mashpees by treaty, statute or through administrative actions of the Office of Indian Affairs, and did not even recognize them as a tribe until 2007; and
- Interior consistently disclaimed any responsibility for the Mashpees in and around 1934, expressly stating they were not under federal jurisdiction in 1934 and thus were ineligible for services under the IRA.

The 2021 ROD is nothing more than an attempt to undo *Carcieri* and read out of the IRA the 1934 jurisdictional requirement. *Carcieri* requires a finding that the Mashpee Tribe was not under federal jurisdiction in 1934.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and the APA, 5 U.S.C., Subchapter II. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The appeal is taken from the Memorandum and Order on Cross-Motions for Summary Judgment (ADD1-31), and Judgment (ADD32-33) entered on February 10, 2023, with the Notice of Appeal (JA17) timely filed on March 1, 2023.

STATEMENT OF THE ISSUES

This appeal presents the question of whether the Secretary of the Interior overstepped her authority in finding the Mashpees eligible for land into trust under the IRA. The specific question is whether the 2021 ROD is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" under APA Section 706(2)(A), where the record shows that the ROD conflicts with Supreme Court and other judicial precedent, as well as departmental precedent in the form of two prior decisions finding the Mashpees ineligible under the IRA.

STANDARD OF REVIEW

This Court reviews de novo the decision of the district court on cross-motions for summary judgment under the APA, which presents a

pure question of law. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *Carcieri v. Kempthorne*, 497 F.3d 15, 25 (1st Cir. 2007) ("Our review of such an appeal is de novo as to the district court's conclusions.") (citing *Harvey v. Veneman*, 396 F.3d 28, 33 (1st Cir.2005)), *reversed on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379 (2009).

A reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While "[t]his is a 'deferential standard' that 'presume[s] the validity of agency action'"(*WorldCom, Inc. v. FCC*, 238 F.3d 449, 457 (D.C. Cir. 2001) (quoting *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999)), APA review is not a rubber stamp. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (stressing "the importance of not simply rubber-stamping agency factfinding" and requiring instead "meaningful review") (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)); *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n.*, 59 F.3d 284, 290 (1st Cir. 1995) (same). This standard "obligates the agency to examine all relevant factors and record evidence, and to articulate a reasoned explanation for its

decision." *Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Thus in reviewing the 2021 ROD, this Court must ensure that Interior has offered "a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43.

This Court must reverse where:

> the agency [1] has relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

Where an "agency [has] chang[ed] its course from its own precedent it must acknowledge that change and provide an adequate explanation for its departure from established precedent[;] an agency that neglects to do so acts arbitrarily and capriciously." *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 214 (D.D.C. 2020) (citing *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112,

1119 (D.C. Cir. 2010)) (cleaned up); *Citizens Awareness Network, Inc.*, 59 F.3d at 290 (same).

STATEMENT OF THE CASE

A. The 2015 ROD takes land into trust under the second definition of "Indian".

The instant appeal traces back to the Littlefield's first successful challenge to the Secretary's efforts to acquire land in trust for the Mashpee Tribe. JA104-105. In the 2015 ROD, the Secretary avoided using the most commonly employed definition of "Indian," relying instead on the IRA's rarely used second definition: "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." JA186.[1] Based on Interior's determination that the Mashpees met that statutory definition, it took into trust 170 acres in the Town of Mashpee on the Cape (the Tribe's historic homelands) and 151 acres of land located in

[1] "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [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 [3] all other persons of one-half or more Indian blood." 25 U.S.C. § 5129 (emphasis added).

the City of Taunton, Bristol County, 50 miles distant, as a site for a tribal casino. JA104-105, JA40, JA48.[2]

The Littlefields challenged the 2015 ROD as contrary to the plain language of the IRA and the district court agreed. *Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391, 396 (D. Mass. 2016). The district court concluded that a proper reading of the phrase "such members" in the second definition referred to the first definition of "Indian" meaning that the Mashpees must also demonstrate that they were under federal jurisdiction in 1934. *Id*. at 399-400. The district court vacated the 2015 ROD and remanded. *Id*. at 400. This Court affirmed the district court's analysis in all respects, finding the result was dictated by the statue's plain text. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 40-41 (1st Cir. 2020).

B. Interior issues 2017 and 2018 RODs.

On remand from *Littlefield*, the Secretary determined in 2017 ("2017 ROD) that the Mashpee Tribe could not demonstrate that it was

[2] The Tribe applied for trust lands first in Middleborough, and then Fall River, before settling on East Taunton, based on its better suitability as a casino site. *See* JA 48 (2021 ROD at 1 n. 2). The Tribe had next to no historical ties to any of these locations, acquisition of which was contemplated solely for Indian gaming purposes.

under federal jurisdiction in 1934 based on the historical evidence assembled and supplied by the Mashpees beginning in 2012. JA976, JA935-967. Interior provided that decision to the Tribe on June 19, 2017. JA976. The Tribe objected to the 2017 ROD, and Interior responded by "withdrawing" it and marking it a "draft." *See* JA976, JA935.[3] The June 19, 2017 ROD (JA935-967) is fully developed and complete when compared to the ROD ultimately issued September 7, 2018 (JA1061-1088) ("2018 ROD"). Indeed, no material change in Interior's analysis of the Mashpees' historical evidence occurred between the 2017 ROD and the 2018 ROD.[4]

In twice finding the Mashpees did not qualify under the IRA's statutory definition, the Secretary unequivocally concluded that the Mashpee Tribe was not under federal jurisdiction in 1934:

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[3] Interior intended the June 19, 2017 ROD to be the final agency decision on remand, which it promised to release on that date to all parties. *See* JA976, JA933. Only after the Tribe objected to its conclusion did Interior decide to "withdraw" its remand decision and label it a "draft." *See* JA976.

[4] Interior proceeded to ask for additional briefing on an obscure legal issue (JA976-977) which the parties completed in late 2017. Interior took until September 7, 2018 to issue its decision, again concluding the Mashpees were not under federal jurisdiction in 1934. JA1061.

> [T]he evidence does not show that the Tribe was under Federal jurisdiction in 1934 within the meaning of the IRA's first definition of 'Indian.' The record before me contains little indicia of Federal jurisdiction beyond the general principle of plenary authority, and little if any evidence demonstrating that the United States took any actions establishing or reflecting Federal obligations, duties, responsibilities for or authority over the Tribe in or before 1934. Because the Tribe was not 'under federal jurisdiction' in 1934, the Tribe does not qualify under the IRA's first definition of 'Indian.' Nor does it qualify under the second definition, as that definition has been interpreted by the United States District Court for the District of Massachusetts.

JA1088 (2018 ROD signed by Assistant Secretary — Indian Affairs Tara Sweeney).

The Secretary reached the identical conclusion in the 2017 ROD:

> [T]he evidence submitted by the Tribe on remand provides insufficient indicia of federal jurisdiction beyond the general principle of plenary authority. The evidence does not demonstrate that the United States had, at or before 1934, taken an action or series of actions that sufficiently establish or reflect federal obligations, duties, responsibilities for or authority over the Tribe. As a result I conclude that the evidence does not show that the Tribe was under federal jurisdiction in 1934 for purposes of the IRA.

JA966 (2017 ROD as prepared and distributed to the Tribe by Associate Deputy Secretary James E. Cason).

C. The Tribe challenges the 2018 ROD in D.C.

The Mashpees brought an APA action in the D.C. District Court, rather than in the District of Massachusetts where the Tribe is resident, the Plaintiffs reside and the land at issue is located. The District Court for the District of Columbia in *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199 (hereafter "D.D.C.") found the Secretary in the 2018 ROD had not properly applied the Department's two-part test for "under federal jurisdiction" as stated in Interior's Solicitor's Op. M-37029 (so-called "M-Opinion").[5] The D.D.C. concluded that the Secretary had weighed the discrete pieces of historical evidence in isolation when it needed to consider the evidence in "concert." *Id.* at 217-233.

In a footnote, the D.D.C. rejected the Littlefields' legal argument that the decision in *Carcieri* stood as a barrier to finding the Mashpees were "under federal jurisdiction." *Id.* at 215 n. 9. In that footnote, the D.C. District Court incorrectly stated that the Supreme Court in *Carcieri* "accepted as fact that the Narragansett Tribe was not under federal jurisdiction because the parties did not contest the point." As

[5] Sol. Op. M-37029, Solicitor Hilary C. Tompkins, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act (Mar. 12, 2014) reproduced at JA869.

explained, *infra*, at pp. 17-20, the Supreme Court expressly held that the Narragansett Tribe was not under federal jurisdiction in 1934 a matter of historical fact, based on the Tribe's documented history published in the Federal Register. That published history serves as the most salient benchmark for evaluating the IRA eligibility of the identically-situated Mashpees.

D. Secretary pivots 180 degrees in 2021 ROD.

On December 22, 2021, Interior issued its new ROD (JA48-102), reversing course from its two previous findings. The historical evidence cited by the Secretary in support of the 2021 ROD is the very same evidence found wanting by two different Secretaries of the Interior: Secretary Dirk Kempthorne in 2017 and Secretary Ryan Zinke in 2018. Not one iota of relevant historical evidence changed between 2017 and 2021. The Tribe did not produce any new evidence. And the Secretary in 2021 cited none. What did change was the identity of the decision-maker: the new administration in 2020 included a new Secretary of the Interior, Deb Halland, the first Native American to head Interior. She looked at the very same evidence found wanting twice before and called it sufficient.

E. Littlefield Plaintiffs commence a new APA action challenging the 2021 ROD.

The Littlefields commenced a new APA action in the District of Massachusetts challenging the 2021 ROD. The District Court (Hon. Angel Kelley) held a hearing on cross-motions for summary judgment and then issued its decision. ADD1. In affirming the 2021 ROD in all respects, the District Court concluded that the Plaintiffs were barred under principles of issue preclusion from "relitigating" the issue of whether *Carcieri* stands as a legal barrier to finding the Mashpees were under federal jurisdiction since the Narragansetts were not. ADD14. The District Court treated the D.D.C.'s footnote as dispositive and agreed with the D.D.C. that the Supreme Court assumed the Narragansett Tribe was not under federal jurisdiction in 1934 owing to the parties' concessions and did not decide the issue as a matter of historical fact. *Id*.

Plaintiffs timely appealed. JA17.

SUMMARY OF ARGUMENT

I. The Secretary's failure to apply *Carcieri v. Salazar* to the Mashpee Tribe renders the 2021 ROD contrary to law. *Carcieri* barred the Narragansetts and bars identically situated Eastern tribes including

the Mashpees from satisfying the "under federal jurisdiction" requirement. (*See*, *infra*, at pp.17-20.)

A. Plaintiffs are not precluded from raising the Narragansett "comparator" argument on appeal.

1. Issue preclusion does not apply because the D.D.C.'s footnote treatment of the issue was neither complete nor essential to its judgment. (*See*, *infra*, at pp. 20.)

2. Appeal of the underlying decision is permitted now in any event based on the D.C. Circuit's ordinary remand rule, which foreclosed a prior appeal. (*See*, *infra*, at pp. 20-22.)

II. The Secretary's failure to address other judicial precedent that also bars the Mashpees from being found eligible under the IRA, is arbitrary, capricious and contrary to law.

A. 19th and 20th Century judicial determinations demonstrate the Mashpees and other fragmentary tribes in Massachusetts were never under federal jurisdiction and always under state jurisdiction. Federal and state decisions document

that the Mashpees were wards of the Commonwealth and not of the federal government. (*See, infra*, at pp. 26-27.)

B. The federal court jury finding that the Mashpees were not organized as a tribe as of 1869 or any time after means the Mashpees did not exist as a tribe within the meaning of the IRA on June 1, 1934 and therefore could not satisfy the first definition of "Indian" under the IRA. (*See*, i*nfra*, at pp. 27-30.)

III. The Secretary's dismissive treatment of contemporary statements by Indian Commissioner John Collier and other high ranking Department officials—calling them "factual mistakes"— is arbitrary, capricious and contrary to law when these statements constitute highly probative evidence under *Carcieri* and *prove* that the federal government did not view the Mashpees as being under federal jurisdiction in 1934. (*See*, *infra*, at pp. 30-35.)

IV. The Secretary's finding that the Mashpee Tribe was under federal jurisdiction in 1934 not only conflicts with *Carcieri* and two prior RODs but rest on an historical record that plainly lacks meaningful federal contacts and shows no federal jurisdiction-conferring acts extant in 1934. (*See*, *infra*, at pp. 35-60.)

A. The controlling standards for determining a tribe's status "under federal jurisdiction" in 1934 require proof of positive actions with jurisdictional impact in 1934. (*See*, *infra*, at pp. 35-37.)

B. The 2021 ROD is arbitrary, capricious and contrary to law in attributing probative value and weight to meager federal contacts that do not show affirmative actions by the federal government that are jurisdictional in nature and *in effect in 1934,* as required by *Carcieri.*

i. Surveys and reports that resulted in no federal action are not probative. (*See*, *infra*, at pp. 37-52.)

ii. Carlisle School attendance that had lapsed 16 years before the IRA was enacted is not probative—which in any event was of little probative value in the specific context of voluntary attendance by Mashpee children. (*See*, *infra*, at pp. 52-60.)

V. The 2021 ROD fails to compare the meager evidence assembled by the Mashpees to evidence submitted by other tribes that the Secretary found under federal jurisdiction in 1934, and altogether

fails to compare the histories of the Mashpees to the Narragansetts which are identical in showing the absence of federal jurisdiction in 1934, thus rendering the 2021 ROD arbitrary, capricious and contrary to law. (*See*, *infra*, at pp. 61-62.)

ARGUMENT

I. The Secretary ignores the legal and historical barriers that exist to finding the Mashpee Tribe was under federal jurisdiction in 1934.

A. *Carcieri v. Salazar* bars the Narragansetts and identically situated Eastern tribes including the Mashpees.

The IRA contains an important jurisdictional limitation on eligibility. Under the IRA's first definition of "Indian," set forth in 25 U.S.C. § 5129, eligible Indians are defined as "members of any recognized Indian tribe now [in 1934] under Federal jurisdiction." *Carcieri*, 555 U.S. at 382 (holding that Congress in using the word "now" meant to restrict eligibility to Indians under Federal jurisdiction at the time of enactment in 1934). This necessarily excluded Indians who were assimilated and living under the jurisdiction of the States, including the Narragansetts. *See id.* at 382-383; *see generally* Cohen's Handbook of Federal Indian Law § 3.02[9] (2015) (documenting stark difference between a state recognized tribe and a federally recognized tribe:

"State-recognized tribes are, by definition, not considered federally recognized tribes, and the legal status of their reservations and the scope of their governmental authority, if any, is a matter of state, not federal, law."). Indeed, the difference between state recognized tribes and Indians assimilated under the jurisdiction of the States was central to the "under federal jurisdiction" limitation adopted by Congress in 1934—such wards of the state were expressly carved out from the IRA's reach—as the legislative history shows. *See* JA899, 906-911 (Plaintiffs' February 13, 2017 Remand Submission at 14, 15).

The Supreme Court in *Carcieri* expressly held the Narragansett Tribe was not under Federal jurisdiction based on its well-documented history under colonial and state jurisdiction, as detailed in the record assembled for federal recognition as a tribe, which was published in the Federal Register. *See Carcieri*, 555 U.S. at 395; *see id.* at 383-384 (citing Federal Register); *id.* at 399 (Breyer, J. concurring) (citing Federal Register and noting "little Federal contact with the Narragansetts as a group"). The Narragansetts' historical record is indistinguishable from the Mashpees from the 17th century on, as laid out in Plaintiffs remand submission (JA914-916) and summarized below:

- Each tribe has early 17th century contact with English colonists.
- Each tribe befriends Rogers Williams.
- Each tribe voluntarily cedes Indian lands to English colonists.
- Both tribes align to fight against colonial expansion in the large regional conflict known as King Philip's War; both tribes are decimated during the war.
- Each tribe in the early 18th century is placed under a form of guardianship under colonial authority.
- Each tribe remains a ward of the colonial government, and later the state government, until the late 19th century when both Rhode Island and Massachusetts enact assimilation/citizenship/ detribalization laws that make the tribal members citizens of the state.
- Each tribe remains under state jurisdiction in all respects through 1934, treated at all times as a ward of the state and not of the Federal Government.
- Each tribe commences land claim litigation against the states in the 1970s, represented by the same lawyer. In each case, the

> Federal Government declined the tribe's request, prior to filing suit, to join the lawsuit.

In all material respects the histories are the same and demonstrate very little contact with the Federal Government—and nothing that could be considered a jurisdictional conferring act. Based on their indistinguishable histories, the holding in *Carcieri* pertaining to the Narragansetts applies equally to the Mashpees. The Mashpee Tribe cannot be found "under federal jurisdiction" in 1934 except by conflicting with *Carcieri*.

B. Plaintiffs are not precluded from raising the Narragansett "comparator" argument on appeal.

The District Court below concluded that the D.D.C. reached and rejected in a footnote the Narragansett "comparator" argument. ADD14-15. That abbreviated and incomplete treatment—not in the body of the D.D.C.'s analysis—should not be given preclusive effect inasmuch as it was not "essential to the judgment." *See Rodríguez-García v. Miranda-Marín*, 610 F.3d 756, 770 (1st Cir. 2010). But even if the D.D.C.'s ruling in that regard met the criteria for issue preclusion, such that it could not be revisited by the District Court, Plaintiffs have the right to appeal in this proceeding the underlying ruling by the

D.D.C. This is because the D.D.C. ruling was not reviewable on direct appeal by the Littlefield Plaintiffs, who were intervenor-defendants in the D.C. action. Under the D.C. Circuit's rigorous application of the ordinary remand rule, the Littlefield intervenors had no standing to appeal the D.D.C. decision once the federal government chose not to appeal.[6] *See Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656-657 (D.C. Cir. 2013). The Littlefield intervenors were obligated to withdraw their appeal when the government withdrew its appeal; otherwise, the D.C. Circuit would have held that there was no appellate jurisdiction for the Littlefield intervenors' appeal. *See id.* at 656-657. The Littlefields, as intervenors, did not waive any rights by acceding to that authority. *See id.* at 657. The jurisdictional bar to maintaining that interlocutory appeal only meant that the Littlefields had to wait until Interior issued a decision on remand (i.e., the 2021 ROD) at which point they, as plaintiffs in a new APA action, could

[6] The federal government filed a prophylactic appeal but withdrew it. Upon withdrawal, Plaintiffs had no ability to separately maintain the appeal under the D.C. Circuit's ordinary remand rule.

challenge that adverse final agency action in district court and, if necessary, on appeal. *See id*. at 656-657.

As a necessary corollary to the ordinary remand rule, the Littlefields must have standing now to raise the correctness of the D.D.C.'s decision to reject the Narragansett comparator argument, or that central legal challenge to the 2021 ROD—made by Plaintiffs on remand and in both courts—will be deemed unreviewable. That is not just unfair, it is jurisdictionally indefensible in light of the D.C. Circuit's ordinary remand rule.

On the merits, the D.D.C.'s ruling is wrong about *Carcieri*: both the majority and concurring opinions reached the historical record of the Narragansetts, and the majority *held* that history disqualified the Narragansetts. 555 U.S. at 395; *see id*. at 383-384. Both the D.D.C. and the District Court misread *Carcieri* believing the majority never reached the Narragansett Tribe's history and instead concluded the Narragansetts were not under federal jurisdiction in 1934 because Interior conceded the point. ADD14, 15 n.6 (citing *Bernhardt,* 466 F. Supp. 3d at 215 n. 9). That is an incorrect reading of *Carcieri*. The Narragansetts' well-documented history, published in the Federal

Register, was before the Supreme Court and relied on by both the majority and concurring opinions.[7]

Recognizing that *Carcieri* stands as a barrier to finding the Mashpee Tribe was under federal jurisdiction in 1934, both Interior and the Tribe have tried to avoid subjecting the Mashpees to the "under federal jurisdiction" requirement since 2009. Interior has continuously fought *Carcieri* through so-called *Carcieri*-fix bills in Congress, and tried to avoid applying the "under federal jurisdiction" requirement to the Mashpees by proffering a novel reading of the second definition of "Indian" shorn of the "under federal jurisdiction" requirement—a reading the district court and this Court squarely rejected. *See*

[7] The District Court also wrongly stated that the Narragansetts' history was discussed by the Supreme Court only in relation to the tribe's status in 1998. ADD14. But the 2-page Federal Register cited by the majority in *Carcieri* was expressly discussed in relation to the Narragansets' eligibility under the IRA. 555 U.S. at 395; *see id*. at 382-384; 399-400 (Breyer, J. concurring). Plaintiffs' counsel provided a copy of the 2-page Federal Register to the District Court during argument. It is judicially noticeable in any event as a matter of law. 44 U.S.C. § 1507; *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 325 n.19 (1st Cir. 2004). The District Court further incorrectly believed there was "voluminous evidence in the *Carcieri* record concerning the Narragansett's history" and that evidence is not in the administrative record here. ADD15 n. 6. The undisputed history of the Narragansett Tribe was solely contained in the 2-page Federal Register.

Littlefield, 199 F. Supp. 3d at 396; 951 F.3d at 37-41. The Secretary never would have tried so hard to avoid the "under federal jurisdiction" requirement if the Secretary thought the Mashpees could meet it. Interior had never advanced that ungrammatical reading of the second definition for any other tribe. For its part, the Tribe sought to avoid *Carcieri* through an elaborate land transaction outside the IRA land-into-trust process. *See* JA971-973. The Mashpees never would have undertaken that effort if they believed they satisfied *Carcieri*'s requirement of being under federal jurisdiction in 1934.

C. The New England States, including Massachusetts, were expressly carved out from the jurisdiction of the federal Indian Department in 1786.

The Mashpees were never served by the federal Office of Indian Affairs, which had no presence in the New England States.[8] Indeed the New England States were carved out from the jurisdiction of the Indian Department from the outset in 1786. This geographical exclusion

[8] The absence of an Indian agency in Massachusetts is documented in the Meriam Report: The Problem of Indian Administration (1928), Ch. 3, at 64–65 (available at https://narf.org/nill/resources/meriam.html last visited May 29, 2023).

reflected an important policy choice by Congress when enacting the 1786 Ordinance for the Regulation of Indian Affairs (August 7, 1786):

> The Ordinance of 1786 is highly significant. It established two separate districts within the Indian Department, northern and southern, and *geographically* [original emphasis] described the limits of those districts. Clearly, New England fell within neither district. Regarding the southern district, New England, of course is not south of the Ohio River. Regarding the northern, New England is obviously not west of the Hudson River. Since the Ordinance was enacted to provide the administrative framework "for the complete arrangement and government" of Indian affairs, and since the preamble to the Ordinance specifically recited that the Congress, under Article IX, had the exclusive power to manage "all affairs" with Indians "not members of any of the states*," the definite exclusion of New England Indians from the coverage of the Ordinance constitutes a clear expression of congressional intent that the small, fragmentary bands of Indians in New England were considered "members" of the New England states and subject to their jurisdiction alone.*

John M.R. Paterson & David Roseman, A Reexamination of *Passamaquoddy v. Morton*, 31 ME. L. REV 115, 128-129 (1979) (emphasis added). ADD34-36; *see* JA994-997 (Citizens' Group Supplemental Submission on Remand providing historical context for 1786 Ordinance and evidence of exclusive state jurisdiction over New England remnant tribes).

D. 19th and 20th century judicial determinations demonstrate the Mashpees and other fragmentary tribes in Massachusetts were never under federal jurisdiction and always under state jurisdiction.

1. Federal and state decisions document that the Mashpees were solely wards of the Commonwealth.

Numerous contemporaneous (19th and 20th century) state and federal court decisions emphasize that the tribal remnants of the Mashpees and other Massachusetts Indians were always wards of the State and not of the federal government. In 1884 the Supreme Court noted the well-known historical fact that the "Indians in Massachusetts" were "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 108 (1884) (citing *Danzell v. Webquish*, 108 Mass. 133 (1871); *Pells v. Webquish*, 129 Mass. 469 (1880); Mass. Stat. 1862, ch. 184; and 1869, ch. 463).[9] *See Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 483 (1st Cir. 1987) (citing *Elk* and concluding the

[9] *Danzell*, 108 Mass. at 133-135, addressed the state statutes including St. of 1869, c. 463, § 1, granting state citizenship, and detailed the history of the "Marshpee" (and other small Indian groups) and determined these Indians were "treated as wards of the Commonwealth" and not of the federal government.

Mashpees and four other tribal remnants in Massachusetts were never recognized by the Federal Government).

The District Court observed that *Elk* was decided 50 years before the IRA, as if this somehow undermined its relevance. ADD26. But *Elk* documents the long-standing status of the Mashpees as wards of the state and not the federal government, including at the time of the Morse Report, *infra*, which the Secretary improperly credits as probative of federal jurisdiction in the mid-19th century. *See* JA59-60 (2021 ROD at 12-13). *Elk* post-dates Morse and defeats its probative value.

2. The federal court jury finding that the Mashpees were not organized as a tribe as of 1869 means the Mashpees did not exist as a tribe within the meaning of the IRA's first definition of "Indian" on June 1, 1934.

When Congress enacted the IRA in 1934 and included in the first definition of "Indian" "members of any recognized tribe now under Federal jurisdiction," it necessarily incorporated the then-prevailing legal definition of a "tribe." The prevailing definition of "tribe" in 1934 was found in the federal common law; no administrative procedure for federal recognition existed then (and would not come into being until 1978). The federal common law definition of a "tribe" was first articulated by the Supreme Court in *Montoya v. United States*, 180 U.S.

261, 266 (1901) and reaffirmed 25 years later in *United States v. Candelaria*, 271 U.S. 432, 442 (1926): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Candelaria*, 271 U.S. at 442 (quoting *Montoya*,180 U.S. at 266). Congress in 1934 is presumed to have incorporated that common law definition into the IRA. *See United States v. Merriam*, 263 U.S. 179, 187 (1923) (finding that the word "bequest" had "a judicially settled meaning" that Congress is presumed to have used); *see Bradley v. United States*, 410 U.S. 605, 609 (1973) (Courts presume, in interpreting statutes, that "'[t]he law uses familiar legal expressions in their familiar legal sense'") (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920)).

The Mashpees' ability to satisfy the federal common law definition of a "tribe" was tested in federal court litigation in the 1970s and 1980s. The Mashpees pursued land claim litigation without the support or participation of the United States—despite requesting the Federal Government's assistance prior to the case being filed. JA217-218 (2015 ROD at 111-112). To establish standing to assert their land claim, the Mashpees had to prove that they were organized as a tribe on the date

the lands were unlawfully taken from them, and on the date they sued to recover possession.

A federal court jury determined that the Mashpees gave up their tribal organization and became citizens of Massachusetts in 1869, and were not thereafter a tribe in Massachusetts. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978). As a result, the tribe lacked standing to bring a land claim action against the state defendants. *Id*. at 942-943; 949-950. That verdict came after 40 days of trial with expert testimony presented by both sides. *Id*. at 943. The proof elements for tribal identity were taken directly from *Montoya* and set out on a special verdict form with interrogatories. *Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575, 582 (1st Cir. 1979). The jury's verdict expressly found that the extension of state citizenship in 1869 ended the Mashpees' tribal identity and existence. 447 F. Supp at 943-946. The jury's verdict was affirmed on appeal. *Mashpee Tribe*, 592 F.2d at 582-585.

Accordingly, as a matter of historical fact and binding legal precedent, the Mashpees did not meet the common law definition of a "tribe," as incorporated in the IRA, as of 1934. Indeed, such

fragmentary tribal remnants were always deemed under the jurisdiction of the States. *See Elk* and discussion, *supra*, at pp. 26-27, and *infra* at pp. 31.

Neither the Secretary nor the District Court considered what Congress intended in 1934 when it used "tribe" in the IRA. *See* ADD25 (failing to connect Plaintiffs' citation of *Montoya* to statutory interpretation of "tribe" under the IRA). The Secretary's failure to address the Mashpees' status as a tribe in 1934—based on its inability to meet *Montoya's* definition of a tribe at that time—is a failure to consider an important aspect of the problem under *State Farm*, 463 U.S. at 43, that renders the 2021 ROD arbitrary and capricious.

E. The Secretary erred in dismissing Commissioner Collier's determination that that the Mashpee Tribe was not under federal jurisdiction in 1934.

Indian Commissioner John Collier—an "unusually persuasive source" pertaining to "the [Narragansett] tribe's status under [the IRA]"— disclaimed the Narragansetts were under federal jurisdiction in 1934. Carcieri, 555 U.S. at 390 n. 5; *see id.* at 383-384. Collier was a "'principal author of the [IRA]'" and source of the "under federal

jurisdiction" requirement. *Id.* at 390 n.5.[10] The historical record for the Mashpees is the same. Collier made the same observation with respect to the Mashpees in a contemporary (1935) letter disclaiming any federal relationship with the Mashpees and other "small eastern groups under the States." JA74-75 (2021 ROD at 27-28); JA726. Collier referred another writer to the Massachusetts Legislature as the "proper authority" to address concerns about the status of the "Wampanoag Indians of Massachusetts." JA729. In this respect, Commissioner Collier's observations about the Narragansetts and Mashpees fully corroborates the Supreme Court's observation in *Elk* fifty years earlier that the Massachusetts' Indians were "remnants of tribes never recognized by the treaties or executive acts of the United States as distinct political bodies." *See Mashpee Tribe*, 820 F.2d at 483 (citing *Elk*).

[10] In finding the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Supreme Court in *Carcieri* emphasized not only Commissioner Collier's statements at the time but other contemporary records from the Department "spanning a 10-year period from 1927 to 1937," in which "federal officials declined [the Narragansett's] request [for economic support and other assistance from the Federal Government], noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government." *Id.* at 384; *id.* at 399-400 (Breyer, J. concurring).

In addition to Commissioner Collier, other senior officials in the Department likewise disclaimed the Mashpees were under federal jurisdiction in 1934 and thus were ineligible under the IRA. *See* JA74-75 (2021 ROD at 27 nn. 194-196; *id* at 28 n. 200); JA728; JA730; JA731.

While the 2021 ROD acknowledges that these writings show the Mashpees' status as wards of the state and not the federal government—and concedes "this evidence demonstrate[s] that the Federal Government excluded the Mashpees from the scope of its federal programs following passage of the IRA"—the Secretary then dismisses this highly probative evidence as "factual mistakes." JA74 (2021 ROD at 27). But the 2021 ROD does not explain what was factually mistaken about any of the statements except one minor criticism as to one senior official not knowing about an obscure study in 1935 (JA75 (2021 ROD at 28) that was never published by the BIA. JA215 (2015 ROD at 109 n. 340); JA58 (2018 ROD at 11 n. 91) (only available in unpublished manuscript). That study (JA687) marked "Draft manuscript," was conducted by a student and was completed a year after the IRA was enacted. The report was found to contain "no material of ethnographic interest" and was never printed or even mimeographed. JA727.

The Secretary relies heavily on this unpublished study as if were widely available when it was not. It is no wonder that a senior BIA official (Herrick) was not aware of its existence. JA75 (2021 ROD at 28). Moreover, the unpublished study corroborates the Mashpees' experience under colonial and British rule, and subsequent to that, the Commonwealth (JA688-691), and their assimilated status as citizens of the Commonwealth who attended public schools. JA694, 696-700, 713-715. The 2018 ROD correctly noted that the report "does not show any formal action by a Federal official determining any rights of the Tribe" and "provides little if any demonstration of the exercise of Federal jurisdictional authority over the Tribe." JA1085 (2018 ROD at 25). Indeed, there is not a single act of federal jurisdictional authority identified in the report. Interior's 2021 ROD simply flip-flops and attaches probative value to the existence of the unpublished report (JA69 (2021 ROD at 22)) when the contents disprove the very point it attempts to make.

The real problem for the Secretary is not that the Department's contemporaneous pronouncements were somehow factually in error. It is just the opposite. They are inconvenient historical truths. These

historically accurate contemporaneous statements were deemed highly probative evidence in the majority and concurring opinions in *Carcieri* and must be so here. There is nothing "mistaken" about them.[11]

The 2021 ROD's dismissive treatment of this critical historical evidence is arbitrary and capricious. The District Court accepted the Secretary's superficial claim that Commissioner Collier was "mistaken." But in doing so the District Court cited the same three instances, relied on by the Secretary, where *other tribes* were mistakenly left off of the Hass list of tribes under federal jurisdiction (ADD25). Neither the Secretary nor the District Court made any finding that the Mashpees belonged on that list, much less that any mistake was made by Commissioner Collier (or other senior official) with respect to their statements about the Mashpees not being under federal jurisdiction in

[11] The Secretary also incorrectly contends that certain assumptions underlying the Department's contemporaneous disclaimers of federal jurisdiction were false, suggesting Collier's limited view of federal jurisdiction was informed by "practical budgetary constraints" during the Depression. JA75 (2021 ROD at 28). But such practical constrains were hard-wired into the IRA, as the legislative history of the IRA proves. The historical explanation for the "under federal jurisdiction" requirement is that Congress sought to limit the federal government's support obligations given the paucity of resources during the Great Depression. *See* JA903-913.

in 1934. Thus, the record evidence disproves the contention that Collier was "mistaken" about the Mashpees.

II. The Secretary erred in finding the Mashpee Tribe was under federal jurisdiction in 1934 based on insubstantial federal contacts that are nothing like the affirmative jurisdictional acts set out in the M-Opinion and Justice Breyer's concurring opinion which informs the M-Opinion—rendering her decision arbitrary, capricious and contrary to law.

A. The controlling standards for determining a tribe's status "under federal jurisdiction" in 1934 require proof of positive actions with jurisdictional impact in 1934.

The "under federal jurisdiction" in 1934 standard articulated in the M-Opinion, which is expressly grounded in Justice Breyer's concurring opinion in *Carcieri* (*see* JA871-872, 885, 891-892 (M-Opinion at 3-4, 17, 23, 24)), requires evidence of positive actions by the federal government that connote the exercise of federal jurisdiction over a tribe through *guardian like actions*—not federal passivity in the face of state jurisdiction. Indeed the M-Opinion specifically excludes reliance on the federal government's reserved (unexercised) plenary power in Indian affairs (JA885-886 (M-Opinion at 17-18)) and instead includes a series of positive actions by the federal government that might satisfy the requirement of guardian like actions: negotiation of treaties, taking

legal action to support Indian land claims, approval of contracts between the tribe and non-Indians, enforcement of federal commerce laws, provision of federal health and social services to the tribe through the Office of Indian Affairs, and the education of the tribe's children in BIA schools. JA887 (M-Opinion at 19).

For his part, Justice Breyer identified three principal jurisdiction-conferring acts that had to be effective as of 1934: "a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." 555 U.S. at 399. For each jurisdictional act identified in Justice Breyer's concurring opinion, the act must impart federal obligations that existed in 1934. In Justice Breyer's view (and in the view of the majority), whatever jurisdictional act that brings a tribe under federal jurisdiction in 1934, it has to carry with it federal obligations that are present in 1934. Thus, there is no room under the M-Opinion to dilute the "under federal jurisdiction" standard to include federal studies that result in no action taken by the federal government, or federal censuses that simply tally a headcount of all Indians. Such broad concepts of federal jurisdiction, resting in the federal government's plenary powers, are

insufficient to show "under federal jurisdiction." Indeed, that is what the Secretary had concluded both in 2017 and 2018 in finding this evidence insufficient to show federal actions that carried with them responsibilities to the Mashpee Tribe.

B. The Secretary's finding that the Mashpee Tribe was under federal jurisdiction in 1934 not only conflicts with *Carcieri* and two prior RODs but rests on an historical record that plainly lacks meaningful federal contacts and shows no federal jurisdiction-conferring acts extant in 1934.

The Secretary's treatment of the Tribe's meager historical evidence, giving credit to evidence that is legally impermissible under *Carcieri* and not grounded in the M-Opinion, is arbitrary, capricious and contrary to law. Below we address the key historical evidence relied on by the Secretary, and do so by comparing the Secretary's 2021 pronouncements with Interior's two earlier contrary findings regarding the very same evidence. This comparison shows the Secretary coming out differently in 2021 with little in the way of proffered explanation, other than stating it was complying with the remand order of the D.D.C.—a position that both overstates the directives contained in the D.D.C.'s remand order and understates the Secretary's obligation to

exercise independent judgment on remand. The result is an arbitrary and capricious ROD that warrants reversal.

1. The Secretary improperly credits the Morse Report and other reports as probative of being under federal jurisdiction in 1934 when they show no federal action was undertaken.

Excerpts from the 2017 ROD, 2018 ROD and 2021 ROD expose the arbitrariness of the 2021 ROD's treatment of the Morse Report and its progeny, where the Morse report was mentioned in correspondence, or its data included in other reports—all resulting in no jurisdiction-conferring action by the federal government. Studies without results—that is, reports uncoupled to affirmative actions—are not probative of being under federal jurisdiction in 1934 under the M-Opinion and Justice Breyer's concurrence in *Carcieri*, as both the 2017 ROD and 2018 ROD make clear.

2017 ROD

> The Tribe fails to show how the Morse Report constitutes a federal action reflecting an exercise of authority over the Tribe. The Tribe characterizes the Morse Report as the 'first explicit application of federal Indian policy'— not, however, to the Tribe in particular but 'to eastern tribes' generally. Yet as even the Tribe concedes, Congress ultimately took no steps to remove any tribes based on the Morse Report and, despite its deliberations, enacted no national removal policy until the following decade. The Tribe's evidence demonstrates that the federal government did little more than consider the Tribe, along with tribes across the United

> States, as *potentially* subject to the exercise of the federal Indian authority, in this case for the purpose of removal and resettlement. As this further suggests, the Morse Report only provides evidence of Congress' plenary authority over tribes. This is consistent with the Department's 2015 Decision, which characterized the lands set aside for the Tribe as 'subject to federal oversight as part of the Federal Government's larger agenda to remove Indians from their aboriginal territories' based on the Morse Report.[12] While the Morse Report provides evidence that the federal government was cognizant of the existence of the Tribe and its lands, it does not further demonstrate any exercise of federal authority over any tribe, much less the Tribe itself. The Morse Report's compilation of general information about tribes in the United States, without more, does not amount to an action or course of dealings for purposes of the first part of M-37029's two-part analysis.

JA958-959 (emphasis original).

2018 ROD

The 2018 ROD follows the 2017 ROD's reasoning and tracks its precise language, with one additional word of emphasis:

> While the Morse Report provides evidence that the Federal Government was cognizant of the existence of the Tribe and its lands, it does not further demonstrate any *exercise* of Federal authority over any tribe, much less the Tribe itself.

JA1081 (emphasis original).

[12] The 2021 ROD also conflicts with the 2015 ROD's treatment of the Morse Report, demonstrating just how far out of step it is from Interior precedent.

2021 ROD

The 2021 ROD does a dramatic "about face" addressing the same historical evidence:

> The Remand Decision determined that the record evidence showed that the Tribe was *potentially* subject to the exercise of federal Indian authority, but that such authority was never actually exercised. Our review on remand however makes plain that the federal government considered and ultimately rejected application of the removal policy to the Mashpee. In so doing, the United States took specific action, in addition to acknowledging the Tribe's existence, which constitutes the exercise [of] federal Indian authority over the Tribe.

JA62 (emphasis original).[13]

The 2021 ROD's documented reversal on the exact same historical evidence is arbitrary and capricious. It not only dismisses Interior's earlier stated (and detailed) conclusions to the contrary in 2017 and 2018 (and even as far back as 2015), but also reaches the untenable and illogical conclusion that specific federal "action" had occurred when the record objectively shows federal "*in*-action"—federal passivity that left the Mashpees exactly where they had always been: under the

[13] The Secretary provides further details on the "debate" of the Morse report in Congress and other historical record facts to support its diametrically opposed conclusion. *See* JA61-62. But all these facts were known to the Secretary previously and none connotes any affirmative federal action, just further study and discernment.

jurisdiction and supervision of the Commonwealth of Massachusetts, just like the Narragansetts were in Rhode Island. Indeed, the Morse Report called the "Marshpee" (and other Massachusetts bands of Indians) "feeble remnants" of tribes (JA264) and documented the Marshpee as an assimilated group of Indians whose "connexion with the State, and with those immediately superintending their affairs, is a very happy one." JA267; *see* JA264 ("The State by a Board of Overseers, exercises a guardian care over them."). By documenting the Mashpees were under the close guardian-like supervision of the State Board of Overseers, the Morse Report and related documents certainly did not demonstrate the federal government's exercise of any obligation, duty, responsibility or authority over the Mashpees.

As Justice Breyer's concurring opinion in *Carcieri* makes plain, as well as the M-Opinion, the "under federal jurisdiction" in 1934 requirement is premised on jurisdictionally meaningful "actions or series of actions" consisting of "guardian like actions" that resulted in some "obligation, duty, responsibility or authority over the tribe." M-Opinion at 19. The M-Opinion lists only affirmative actions, and Justice Breyer identified major federal jurisdictional acts such as a

federal treaty in effect in 1934, congressional appropriation before 1934, and enrollment in Office of Indian Affairs as of 1934. Thus every previously recognized conception of "under federal jurisdiction"—both departmental and judicial precedent—looks to positive, affirmative acts extending federal jurisdiction over a tribe with such acts in effect in 1934. Nothing in the M-Opinion or Justice Breyer's concurrence supports finding federal action premised on federal reports that led to federal acquiescence to state jurisdiction (the antithesis of guardian like actions), which indisputably occurred in the case of the Morse Report, related correspondence (i.e., McKenney letters (JA292, 319)[14] and Calhoun transmittal letter to Congress (JA289)[15], and the later Schoolcraft Report that referenced the same data and listed the "Marshpee" as one of the "Fragmentary Tribes still existing within the

[14] The McKenney letters document that the "Marshpees"—one of the "Remnants of Tribes" in Massachusetts identified in the Morse Report (JA250)—"reside on their reservations, at the places by which they are designated. The quantity of land occupied by them is not known; nor is there any information in this office by which it can be ascertained." JA292.

[15] Calhoun's transmittal letter refers to the "small remnants of tribes" in Massachusetts. JA289.

Boundaries of the Old States." JA332.[16] Compare 2017 ROD at 26-27 (JA960-961) and 2018 ROD at 20-21 (JA1080-1081), with 2021 ROD at 14-15. JA61-62.

The 2021 ROD's reinterpretation of this same historical evidence is contradicted by the historical record and case law interpreting it. This Court in *Mashpee Tribe*, 820 F.2d at 482, rejected the Mashpees' claim that they were a federally recognized tribe by acts of the federal government. Then-Judge Breyer, writing for the Court, evaluated the very same documents (Morse Report, McKenney letters and Schoolcraft Report) and found they failed to show the Mashpees were recognized as a tribe by the federal government, both as a matter of law and fact. *Id.* at 483. The Court further noted that the "difficulty with [the tribe's] argument is that neither the executive nor the legislative branch of the

[16] The 2021 ROD recognizes that the Schoolcraft Report's description here shows the federal government was estranged from the New England tribes and further admits that the federal government "opted not to implement" any recommendations in the Report. JA68 (2021 ROD at 21). Overlooked by the Secretary is the fact that the Schoolcraft Report's population figures are taken from an 1849 Report of the *State* Commissioners to the *State* Legislature on the condition of the Indians in the *State*. ADD37-42. The Report thus reinforces the fact that the Mashpees were wards of the State and not wards of the federal government.

federal government has recognized the five entities as tribes; and the four documents fail to show the contrary." *Id*. at 484; *see id*. ("These documents, whether taken individually or together, do not provide evidence . . . of a continuing relationship between the Indian groups and the United States."). Because these 19th century documents did not demonstrate federal recognition, *and did not even document a continuing relationship between the Indian groups and the United States*, a fortiori these documents do not demonstrate the exercise of federal jurisdiction over those Indian groups. Clearly the federal government did not act to extend its jurisdiction over these tribal remnants. *Id*. at 484 (citing *Elk*).

The same reasoning applies to the 1890 Commissioner's Report and other federal reports which resulted in no actions. Compare 2017 ROD at 27-28 (JA961-962) (reports show only plenary authority—not administrative action over tribe) and 2018 ROD at 25 (JA1085) (contents of 1890 Report belie Tribe's claims of exercise of federal jurisdiction) with 2021 ROD at 20-21 (JA69-69) (1890 Report "explicitly acknowledged that the Tribe fell within its purview and noted the Tribe maintained 'tribal relations' and maintained authority over its lands.

Inclusion in the report constitutes probative evidence of the Federal Government's exercise of jurisdiction over and responsibility for the Tribe "). The Secretary's sudden reversal in 2021 in finding this evidence probative, when it objectively documents plenary authority without any a*ction* (as previously found in 2017 and 2018), is thus arbitrary and capricious. It is not rooted in Department precedents or case law.[17] Even so, the District Court treats these old reports as probative evidence of the Mashpee Tribe being under federal jurisdiction in 1934, taking a "holistic" view (ADD18) that is not founded in the M-Opinion which requires "actions." While the Secretary is to consider such actions "in concert," there is nothing in the record of anything close to a recognizable federal action, much less a guardian like action, toward the fragmentary tribes in Massachusetts,

[17] The Secretary never identifies what "specific action" the federal government supposedly took to carve out the Mashpees from federal removal policy. The Secretary's unsupported "spin" cannot change the fact that no federal action was taken towards the Mashpees and other fragmentary tribes in Massachusetts. The record evidence shows the federal government acquiescing to State jurisdiction, leaving the Mashpees under the guardian-like care of the State Board of Overseers. The Mashpees then and always were wards of the State and not of the federal government, as Indian Commissioner Collier and other Department officials well understood in 1934. *See*, *supra*, at pp. 30-34.

who were long considered wards of the State and not of the federal government. And grouping these "inactions" "in concert" does nothing to enhance their probative value.

The Secretary's unfounded, counter-factual treatment of the Morse Report and other reports and studies is symptomatic of the 2021 ROD, where each jurisdictional "finding" in 2021 flies in the face of the Secretary's earlier determinations resting on precisely the same historical facts. A change in identity of the Secretary does not provide carte blanche to misread the historical record to achieve a now-preferred different outcome. Nor does the Secretary discharge her responsibility to exercise her independent judgment on remand by insisting that the result was dictated by the D.D.C.'s remand order, which could not and did not direct how the Secretary should come out when viewing the historical evidence in concert.

Interior's brief in support of the 2021 ROD[18] reads as though Interior had no choice—that the D.D.C. directed the outcome for it. The brief states that "Interior was bound to follow" (*id.* at 3 (ECF 47 at 6))

[18] U.S. Memorandum of Law in Support of Cross-Motion and Opposition to Plaintiffs' Moton for Summary Judgment (ECF 47) ("U.S. Mem.").

and "diligent[ly] compli[ed]" with (*id*. at 2 (ECF 47 at 5)) the "express dictates" (*id*. at 3 (ECF 47 6)) and "explicit remand directives" (*id*. at 13 (ECF 47 at 16)) "mandated" by the D.D.C. *Id*. at 18 (ECF 47 at 22). *Cf*. *Bernhardt*, 466 F. Supp. 3d at 224; 225, 231-233 (directing Interior to consider certain evidence as probative but leaving the Secretary to weigh all the evidence in concert). Yet Interior seems to believe that all of the evidence "must be considered consequential and probative" (U.S. Mem. at 25 (ECF 47 at 28)) even when deemed only *potentially* probative under Judge Friedman's ruling, with Interior tasked to determine in the first instance "whether probative." The Secretary apparently believed the result was compelled by the D.D.C decision vacating the 2018 ROD. Not only does she abdicate her role as Secretary, impermissibly ceding authority to the D.D.C., she errs as a matter of law in giving the D.D.C. decision preclusive effect when it has none. The most the remand order could do is direct the agency to reweigh the evidence, not signal or direct its outcome. So it is Interior and not the D.D.C. that is responsible for the fundamentally conflicted and flawed 2021 ROD, all of which comes after the better part of a decade of Interior trying to free the Tribe of the *Carcieri* "under federal

jurisdiction" requirement, and twice concluding the Tribe was not under federal jurisdiction in 1934. The 2021 ROD is thus arbitrary, capricious and not in accordance with the law and should be set aside.

2. The Secretary improperly credits Federal Census evidence that is indistinguishable from federal plenary power.

The 2017 and 2018 RODs each explain why the federal "annual reports, surveys, and census reports" were not probative of being "under federal jurisdiction" because the evidence submitted by the Tribe did not consist of reports prepared as an exercise of administrative jurisdiction over the Tribe (JA884) and showed "no federal obligation to the Tribe beyond the general principle of plenary authority." JA961-962 (2017 ROD at 27-28); JA1084 (2018 ROD at 24). The 2017 ROD specifically points out that the 1910 Indian census cited by the Tribe was not prepared by the Office of Indian Affairs in the exercise of its administrative jurisdiction (as the Tribe contended) but rather was part of the general census undertaken by the Director of the Census. JA966 (2017 ROD at 32 n. 241).

Pivoting 180 degrees, the Secretary in the 2021 ROD finds the inclusion of Mashpees on federal census reports probative of it being under federal jurisdiction in 1934 (JA71-72) without ever determining if

the federal government had exercised administrative jurisdiction over the Tribe, or had enumerated the Mashpees as part of the general census. Only if the federal government's Office of Indian Affairs undertook the census is it probative of "under federal jurisdiction" status in 1934. Otherwise a general census prepared by the Director of the Census is no different from the principle of plenary power, which is plainly not probative of a tribe being under federal jurisdiction in 1934.

In seeking to justify her reversal based on the same evidence, the Secretary cites Justice Breyer's concurrence in *Carcieri,* contending that "Justice Breyer made clear that inclusion of tribes and their members on federal census rolls is probative evidence of whether a tribe was under federal jurisdiction in 1934." JA71. But the Breyer concurrence says no such thing. Rather Justice Breyer noted that probative evidence would exist if the tribal members were *enrolled* in the Office of Indian Affairs. *See Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) (finding that "enrollment (as of 1934) with the Indian Office" is evidence that a tribe was under federal jurisdiction in 1934). Thus probative evidence supporting a finding that a tribe was under federal jurisdiction in 1934 would exist if tribal members were enumerated on a census

conducted by the Office of Indian Affairs, as an exercise of its administration jurisdiction over the tribe. The same holds true for the Secretary's reliance on *Confederated Tribe of the Grande Rond Community of Oregon v. Jewell,* 830 F.3d 552, 566 (D.C. Cir. 2016) (JA71, 2021 ROD at 24 n. 182), where the record showed that the Indian Office [Taholah Agency] enumerated Cowlitz living on the Quinault reservation under the supervision of the Indian Office. Nothing like these Indian Office enumerations occurred here.

The District Court improperly treated all census records as probative because the federal government expended money to conduct them. ADD28-29. For support, the District Court cites a single case that stands for the non-controversial proposition that when the Bureau of Indian Affairs undertakes a tribe-specific survey to determine eligibility for federal benefits that survey is evidence of the tribe being under federal jurisdiction. *See No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015) (summarizing Band's status "under federal jurisdiction" as consisting of "Band being a successor in interest to Treaty J in the mid–1800s*; efforts to document members of the Band in the early 1900s*; efforts to acquire a 40-acre parcel for the

Band; failed – but consistent – attempts to complete the acquisition of land for the Ione Band continuing into the 1930s ") (emphasis added), *rev'd on other grounds*, 698 Fed App'x 531 (9th Cir. 2017).[19] The historical record for the Mashpees shows no similar federal treaty or attempted land acquisition. And of course no similar federal survey was ever undertaken by the Bureau of Indian Affairs (or predecessor Indian Office) with respect to the Mashpees or other fragmentary tribes in Massachusetts. Indeed no federal office for Indian Affairs was ever located in Massachusetts to even be in a position to undertake such a survey. Again, the District Court purports to employ a "holistic" view of the evidence that in effect excuses the lack of probative value in the actual pieces of evidence, here general census data. That federal activity does not reflect guardian-like *actions* extending federal obligations to any tribe. *See* JA917-92 (even Special Indian census—part of the general census—is a blunt instrument not probative of a tribe being under federal jurisdiction because it does not distinguish

[19] The record showed the BIA appointed a special agent in 1905-1906 to investigate the conditions of dispossessed California tribal members, which included taking a census of the number of surviving Indian people residing at specific localities that specifically included the Ione Band. 136 F. Supp. 3d at 1174.

between reservation Indians, assimilated Indians, wards of the federal government or wards of the state). *See also* JA745-772 (Indian Census rolls 1885-1940 which omit the Mashpees notably do not include "tribes, particularly in the East, [that] have never been under Federal jurisdiction").

The Secretary's finding of probative value in the generation of general census reports is arbitrary, capricious and contrary to law.

3. The Secretary errs in crediting Carlisle School attendance evidence that is two decades removed from 1934 (the school closed in 1918) and in any event shows voluntary attendance by Mashpee children who were not even eligible for such schooling.

    a. The M-Opinion and 2021 ROD irrationally treat as probative evidence school attendance that lapsed upon the school closing two decades before the IRA was enacted.

The M-Opinion and 2021 ROD treat BIA school attendance as a "tag, you're it" form of federal jurisdiction, where the attendance of a single child at such a school becomes the basis for a tribe being under federal jurisdiction in 1934 even when the attendance ends 16 years before the IRA was enacted, as was the case of the Carlisle School. *See* JA65 (2021 ROD at 18 n. 134) (noting school closed in 1918). To the extent the 2021 ROD treats this evidence as probative of federal jurisdiction that "continues" to 1934 because Congress did not act to

terminate the tribe's jurisdictional status (JA72)(2021 ROD at 25) (JA55)(*id.* at 8)) the decision is arbitrary and capricious and contrary to law—flouting *Carcieri*'s' *"in 1934"* requirement for federal action. *See Carcieri*, 555 U.S. at 391-396; *id.* at 397-399 (Breyer, J., concurring). Congress never thought to pass an act declaring the Mashpees were not wards of the federal government when Congress had long deferred to the states respecting tribal fragments in New England, and the federal government *never* treated them as wards of the federal government in the first place. By broadly disclaiming any jurisdiction over the fragmentary groups of Indians in Massachusetts, Interior did not and would not attach jurisdictional significance in 1934 to a handful of children of such tribal remnants *voluntarily* attending a federally funded school, especially when the school closed two decades before the IRA was enacted.

Grounding federal jurisdiction on such minimal *and lapsed* contacts is itself arbitrary, capricious and contrary to law. Indeed, relying on evidence that by its own terms has no continuing effect in 1934 is not only contrary to *Carcieri* but also reads the 1934 requirement out of the statute, rendering it surplusage. Moreover, Interior creates an entirely asymmetrical "under federal jurisdiction" framework where an insignificant historically-distant federal "touch" establishes conferral of federal jurisdiction over a tribe but "only

Congress has the authority to terminate such authority." JA76 (2021 ROD at 29). That easy-to-acquire but impossible-to-lose view of federal jurisdiction is result-oriented "reasoning" that cannot be reconciled with *Carcieri* and the IRA's "in 1934" plain text requirement. It constitutes arbitrary and capricious decision-making.

Neither the D.D.C. nor the District Court addressed, much less defended, the Secretary's irrational approach to finding the Mashpee Tribe was under federal jurisdiction in 1934 based on lapsed attendance at a long-closed school.

b. The Secretary improperly advances a rhetoric-filled narrative about Mashpee children being forced to attend the Carlisle School that is contradicted by the record.

Even if Carlisle School attendance has some probative value, the Secretary in the 2021 ROD vastly overstated its significance by citing to it 41 times (JA55, 63-66, 72) (2021 ROD at 8, 16-19, 25) and arguing Mashpee attendance was part of a federal policy of forced assimilation / de-tribalization. JA55, 63, 66, (2021 ROD at 8, 16, 19).[20] Interior

[20] Interior cites In re: Carlisle Indian School, Carlisle, Pennsylvania, GAO (Aug. 24, 1927) (showing Mashpee students enrolled in the years 1905 through 1918). JA65 (2021 ROD at 18 n. 135). That GAO Report, and the digital student enrollment records for all Carlisle School students (available on line at http://carlisleindian.dickinson.edu), show that only 12 Mashpee students—a total of 12 students who identified themselves as "Mashpee" "Wampanoag" or "South Seas"—attended the Carlisle School between 1904 and 1918.

"counts" the Carlisle School evidence under four separate categories that logically collapse into one, since each category is a consequence or corollary of enrolling at the school and something that would occur at any boarding school, federally funded or not. Specifically, Interior claims in addition to attendance the fact that the school undertook a headcount of its students (JA58, 65, 71) (2021 ROD at 11, 18, 24); oversaw the health its students (JA63, 65, 66) (2021 ROD at 16, 18, 19) and managed their funds. *Id.* The Secretary does this multiplication to inflate the significance of the evidence, because so little other evidence of federal contacts exists.

The 2021 ROD stresses (without citation to the administrative record) that the Carlisle School evidence constitutes the "plainest" exercise of "federal authority over the Tribe by removing Mashpee children from their families and tribal community and relocating them hundreds of miles away to Carlisle Indian School . . . part of a broader federal Indian policy aimed at breaking up tribal communities throughout the country and assimilating tribal members into the American Society." JA55 (2021 ROD at 8). This novel contention in regard to the Mashpees—never before made by the Secretary or even advanced by the Tribe itself over the past decade—is contradicted by the record evidence. The evidence that refutes Interior's false narrative

of federal removal of Mashpee children from their homes includes the following:

- Under 5 U.S.C. § 287 (June 10, 1896, ch. 398, §1, 29 Stat. 348) entitled "taking child to school in another State without written consent," provides that "No Indian child shall be taken from any school in any State or Territory to a school in any other State against its will or without the written consent of its parents."

- All 12 Mashpee students *voluntarily* attended the Carlisle School with their parents' consent, to take courses not available in their public schools.[21]

[21] Attendance at this "nonreservation school," was voluntary and required an application that stated it applied only to "a child not enrolled at an Agency" (i.e., not enrolled in the Indian Office). JA444, 464, 484. The application required parental consent and signatures by disinterested persons attesting to the reasons why the student should be admitted to Carlisle. E.g. Application of Alfred DeGrasse for Enrollment at the Carlisle Indian School (JA463-466); Application of Charles A. Peters (JA443-446); Application of Alston DeGrasse (JA483-487) (applicant wished to study mechanical engineering and no such courses were available in public schools in South Mashpee and Bourne). Each application required the signed consent of a parent. E.g. JA464 (Alfred DeGrasse); JA444 (Peters); JA484 (Alston DeGrasse).

- The Commonwealth of Massachusetts paid for the public school education of Mashpee children and appears to have paid for the education of Mashpee children at the Carlisle School.[22]

- The Carlisle School Supervisor in Charge dissuaded Mashpee students from applying believing, based on a directive from the Indian Office in D.C., that they and other Massachusetts Indians had "ample public school facilities at their homes" and openly "doubted whether any other young people from Massachusetts can establish their eligibility for enrolment here." ADD43 [Letter dated January 27, 1915].[23]

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[22] State laws provided for funding for Mashpee students (*see* "An Act in Relation to the Distribution of the School Fund for Indians – 1870, chapter 350," providing funding to the Town of Mashpee for education "of their inhabitants formally called Indians"). State funds also appear to have been available to cover the costs of tuition and transportation for Mashpee students attending the Carlisle School (*see* "An Act Making an Appropriation for the Tuition and Transportation of Children Attending School Outside of the Town in Which They Live," Ch 23 (February 2, 1905)).

[23] *See* similar letters from Carlisle School superintendent dated November 16, 1915 (JA432-433) and October 20, 1915 (JA410-411). Ample public schools in Mashpee were documented in the Tantaquidgeon report. JA694, JA696-700, 713-714. The Carlisle School reported it disenrolled 100 students in 1916 who were assimilated,

The 2021 ROD's avowal of forcible de-tribalization of Mashpee children at the Carlisle School reveals the Secretary trying to add weight to the evidence that is contradicted by the record. The District Court altogether dismisses this argument as "puffery" (ADD22) while stating that "the Secretary does not assert or rely upon an assertion that Mashpee children attended the school involuntarily" (ADD23)—even though the Secretary's insidious contentions about Mashpee forced de-tribalization infects every aspect of the Secretary's evaluation of the Carlisle School evidence. JA55, 63-64, 66 (2021 ROD at 8, 16-17, 19).

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living in towns, with access to public schools (like the Mashpee children) because they were "ineligible" for education at the Carlisle School, which should only educate "real Indians," i.e., children of Tribes under the care of the federal government. Letter from Carlisle Superintendent O.H. Lipp, dated Feb 12, 1916 (available at https://carlisleindian.dickinson.edu/sites/default/files/docs-documents/NARA_RG75_CCF_b029_f013_16293.pdf) (last visited May 25, 2023) at p. 3. Superintendent Lipp stated that: large non-reservation schools [enroll] at least five or six hundred children who have no business being in Government schools. What we should do is . . . cease enrolling Indian students at Government schools who have the privileges of public schools . . . . *See also* Inspection Report dated May 20, 1911, dismissing 69 Carlisle students as ineligible because of assimilation and access to public schools, including one Mashpee student Alonzo Brown (available at https://carlisleindian.dickinson.edu/sites/default/files/docs-documents/NARA_RG75_CCF_b024_f44_34461.pdf) (last visited May 25, 2023) at p. 1, 32 (supporting letter identifying Brown as an "ineligible pupil") at 36 (supporting letter describing Brown's ineligibility).

To be sure, forced assimilation was in fact a national policy employed in many areas of the country, but the record evidence refutes the idea that *Mashpee* children were forced to attend the Carlisle school as part of that policy. If the evidence of being "under federal jurisdiction" is "fact and tribe-specific" as both the M-Opinion (JA887) and the District Court (ADD7) state, then the individual circumstances of the Mashpee children at the Carlisle School is what must count, not the experience of other students there or at other federal schools that may have played a role in forced assimilation. Forced assimilation played no role in the attendance of Mashpee children at Carlisle, notwithstanding the Secretary's recent rhetoric to the contrary.

When the Carlisle School evidence is properly understood, its probative value is minimal, especially when viewed "in concert" with:

- contemporaneous (1930's) statements of Interior officials disclaiming any federal authority over the Mashpees;

- pronouncements by the Supreme Court and other federal and state courts documenting the tribal fragments in Massachusetts as lacking any federal recognition or continuing relationship; and

- the history and laws of Massachusetts regarding the Indians since early colonial times exercising state authority over the Mashpees, including providing public education to their children.

Based on this undisputed record evidence, it is clear that the voluntary attendance of several Mashpee children at Carlisle—two decades before enactment of the IRA— has little meaning. It reflects dealings with individual Indians rather than an exercise of jurisdiction over the tribe and in any event no such jurisdictional status "*continued after Carlisle closed in 1918,"* as the Secretary properly determined in 2017 ROD. JA965 (2017 ROD at 31 emphasis added); *see* JA1087 (2018 ROD at 27). By *allowing* (not forcing) individual Mashpee families to send a handful of children to the Carlisle School *by choice*, the federal government cannot rationally or logically be said to have subjected the entire Mashpee community in Massachusetts, 445 miles away, to federal jurisdiction. This is particularly true since the Mashpees were outside the jurisdiction of any Indian Agency and always viewed as among the Massachusetts' "tribal remnants" over which the federal government had never exercised jurisdiction. *See* discussion, *supra*, at pp. 24-27, 30-35.

III. The Secretary arbitrarily resists any comparison to other tribes that would show no tribe has ever qualified for trust lands with such a paucity of historical evidence as the Mashpee Tribe, and refutes any comparison to the Narragansett Tribe found ineligible in *Carcieri*, despite its near identical history.

Interior's prior "under federal jurisdiction" determinations logically provide guideposts that enable comparisons to be made between tribes and their historical evidence. Indeed, that is how precedents are made and evolve over time. Interior cites its own precedents to illustrate that certain historical factors were considered probative, including numerous citations to the "Cowlitz ROD." JA52, 2021 ROD at 5 and *passim*. *See* U.S. Mem. (ECF 47 at internal page 41 (citing record regarding Ione Band); ADD29 (same); *Mashpee v. Bernhardt*, 466 F. Supp. 3d at 226 (citing record regarding Tunica-Biloxi); *id*. at 227 (Cowlitz). Even so, Interior arbitrarily and capriciously rejects any comparison to other tribes (particularly the Narragansetts) when Plaintiffs seek to marshal precedents to show that no other tribe has been found "under federal jurisdiction" with the paucity of historical evidence as the Mashpees. U.S. Mem. (ECF 47 at internal page 39).

Plaintiffs submitted a chart on remand in 2017 that gathered key factors considered by Interior when evaluating tribal applications claiming "under federal jurisdiction" status. JA923-926. This chart

compares the Mashpees to the Narraganset, Cowlitz, Tunica-Biloxi, Stillaguamish and Oneida. Like the Narragansett Tribe, the Mashpees were always under the rule of the colony, British rule and the states, with no meaningful contacts with the federal government. Unlike the Mashpees (and Narragansetts) these other tribes were able to produce historical evidence of either a federal treaty, congressional appropriations or enrollment in the Office of Indian Affairs—and thus satisfied the Breyer trilogy and M-Opinion.

What Interior and the Tribe never address in all of the briefing since 2017 is if the Mashpees are not excluded from the IRA, are any tribes excluded? But Congress, in expressly restricting statutory eligibility to tribes under federal jurisdiction in 1934, clearly intended to exclude some tribes and tribal remnants, and necessarily excluded fragmentary tribal remnants in the New England States long under exclusive state jurisdiction. This includes both the Narragansetts and the Mashpees. Interior's 2021 ROD finding the Mashpees were under federal jurisdiction in 1934 not only conflicts with *Carcieri* but also effectively eliminates the statutory requirement that a tribe be under federal jurisdiction in 1934. While the Secretary would like to be free of that statutory limitation on its authority to act for tribes, it is for Congress to decide, not the Secretary.

CONCLUSION

For each of the foregoing reasons, Plaintiffs-Appellants David Littlefield et al. respectfully request that the Court (a) reverse the District Court's order and judgment; (b) hold that, under *Carcieri v. Salazar* and other judicial and departmental precedent, the Mashpees do not qualify under the IRA to have lands taken into trust; and (c) direct that the Secretary remove the land in East Taunton from trust status. In an alternative to (b) and (c), Plaintiffs-Appellants respectfully request the Court to remand the case to Interior for further proceedings not inconsistent with this decision.

Dated: May 31, 2023

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirement, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 12,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ David H. Tennant

Attorney for Appellants David Littlefield at al.

Dated: May 31, 2023

CERTIFICATE OF FILING AND SERVICE

I, Elissa Diaz, hereby certify pursuant to Fed. R. App. P. 25(d) that, on May 31, 2023, the foregoing Brief for Plaintiff Appellant was filed through the CM/ECF system and served electronically.

Upon acceptance by the Court of the e-filed document, nine paper copies will be filed with the Court within the time provided in the Court's rules via Express Mail.

/s/ Elissa Diaz
Elissa Diaz

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, MICHELLE LITTLEFIELD, TRACY ACORD, DEBORAH CANARY, FRANCIS CANARY JR., VERONICA CASEY, PATRICIA COLBERT, VIVIAN COURCY, WILL COURCY, DONNA DEFARIA, ANTONIO DEFARIA, KIM DORSEY, KELLY DORSEY, FRANCIS LAGACE, JILL LAGACE, DAVID LEWRY, KATHLEEN LEWRY, MICHELE LEWRY, RICHARD LEWRY, ROBERT LINCOLN, CHRISTINA ALMEIDA, CAROL MURPHY, DOROTHY PEIRCE, and DAVID PURDY, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA A. HAALAND, *in her official capacity as Secretary of the Interior*; BUREAU OF INDIAN AFFAIRS; and BRYAN NEWLAND, *in his official capacity as Assistant Secretary of the Interior for Indian Affairs*; Defendants, and MASHPEE WAMPANOAG TRIBE, Intervenor-Defendant.	Case No. 22-CV-10273-AK

MEMORANDUM AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

A. KELLEY, D.J.

This is a challenge to a decision of the United States Secretary of the Interior (the "Secretary")[1] brought under the Administrative Procedure Act. In December 2021, the Secretary issued a decision taking into trust, for the benefit of the Mashpee Wampanoag Tribe ("Mashpee" or "Tribe"),[2] 321 acres of land located in southeastern Massachusetts (the "Designated Lands"). Plaintiffs are 23 residents of Taunton, Massachusetts, who live in the vicinity of a portion of the Designated Lands. They allege that the Secretary's decision was arbitrary, capricious, and otherwise not in accordance with law. The Tribe has intervened as a defendant. On the parties' cross-motions for summary judgment, the Court finds that the Secretary's decision was not arbitrary and capricious, and will accordingly **GRANT** Defendants' motions [Dkts. 46, 48] and **DENY** Plaintiffs' motion [Dkt. 45].

I. BACKGROUND

A. The Mashpee and the Designated Lands

The Mashpee are Indigenous people of North America whose historic lands include southeastern Massachusetts and eastern Rhode Island. As the Tribe notes in its briefing on these motions, its "history, government, language and culture … predates the founding of the United States." [Dkt. 49 at 1]; see also Thanksgiving Day 2010, Proclamation No. 8606, 75 Fed. Reg. 74605 (Dec. 1, 2010) (recognizing that "the Wampanoag tribe … had been living and thriving around Plymouth, Massachusetts for thousands of years" prior to European settlement).

[1] For convenience, this opinion attributes the actions of all federal parties, including the Department of the Interior, the Bureau of Indian Affairs, and the Assistant Secretary of the Interior for Indian Affairs, to Debra A. Haaland, the United States Secretary of the Interior, as she is the party who bears the ultimate responsibility for the decision under review.

[2] The present-day Mashpee Wampanoag Tribe is a legal successor to historic tribes known by many names, including the Pokanoket, the Mashpee, the Wampanoag, and the South Sea Tribe. For convenience, this opinion refers to the present-day Mashpee Wampanoag Tribe and all of its recognized predecessors in interest as either the "Mashpee" or the "Tribe."

Annually, millions of Americans celebrate the Tribe's impact on this country's history through the Thanksgiving holiday. See, e.g., Thanksgiving Day 2018, Proclamation No. 9827, 83 Fed. Reg. 61109 (Nov. 28, 2018) ("Members of the Wampanoag tribe—who had taught the Pilgrims how to farm in New England and helped them adjust and thrive in that new land—shared in the bounty and celebration"); Thanksgiving Day 2011, Proclamation No. 8755, 76 Fed. Reg. 72079 (Nov. 21, 2011) ("The feast honored the Wampanoag for generously extending their knowledge of local game and agriculture to the Pilgrims, and today we renew our gratitude to all American Indians and Alaska Natives."); Thanksgiving Day 1995, Proclamation No. 6849, 60 Fed. Reg. 57311 (Nov. 14, 1995) ("In 1621, Massachusetts Bay Governor William Bradford invited members of the neighboring Wampanoag tribe to join the Pilgrims as they celebrated their first harvest … More than 300 years later, the tradition inspired by that gathering continues on Thanksgiving Day across America—a holiday that unites citizens from every culture, race, and background.").

At the time of their first contact with Europeans in the 16th and 17th centuries, the Tribe's territory "comprised a group of allied villages in eastern Rhode Island and in southeastern Massachusetts." [Record of Decision, Dkt. 1-3 ("2021 ROD") at 40 (quoting Bert Salwen, Indians of S. N.E. and Long Isl.: Early Period in 15 HANDBOOK OF N. AM. INDIANS 160, 171 (1978))]. This land covered all of present-day Bristol County and Barnstable County, Massachusetts, including the towns of Taunton and Mashpee. [Id. at 41]. At that time, present-day Taunton was known as the village of Cohannet. [Id. at 41, 49]. The Mashpee were struck by an epidemic between 1617 and 1619 that resulted in extensive loss of life. [Id. at 41]. After the English ship *Mayflower* arrived in Plymouth, Massachusetts, in 1620, tribal leadership

entered into a peace treaty with the Plymouth Colony, which was the first English political entity established in Massachusetts. [See id.]

Between 1621 and 1670, the Mashpee sold or gave large tracts of land to English settlers. [Id.] This included the sale of Cohannet, which the Plymouth Colony incorporated as the town of Taunton in 1639. [Id. at 49]. In 1675, disputes around land use and land ownership led to a war between the English settlers and New England tribes, including the Mashpee. [Id. at 42]. This conflict, now known as King Philip's War, resulted in large losses of life among the Mashpee. [Id.]

After the war, most of the Mashpee residing in mainland Massachusetts dispersed, with some sold into slavery. [Id.] Many of those who remained coalesced into settlements organized by the English, [id.], including the town of Mashpee, which was formed from land deeded by individual tribal leaders to the Tribe in 1665 and 1666, [id. at 9]. In 1685, the colonial court confirmed these deeds and guaranteed that the land belonged to "said Indians, to be perpetually to them and their children," with a restriction on transfer to non-Mashpee without the assent of the entire Tribe. [Id.] The lands were initially governed by a six-person council of Mashpee, but the General Court of Massachusetts diluted tribal control in 1746 by appointing three non-Mashpee overseers. [Id.] In 1763, the General Court converted the land into a self-governing "Indian district." [Id.] Massachusetts terminated Mashpee control over this district in 1788, but restored it in 1834. [Id.] In 1869, Massachusetts eliminated the restriction on transfer of the land to non-Mashpee, and in 1870, the state incorporated the town of Mashpee, coterminous with the borders of the prior Indian district. [Id. at 10].

The Tribe had 2,633 members in 2021. [Id. at 52]. Of these members, 65 percent lived in Massachusetts, 40 percent lived in the town of Mashpee (where the Tribe is headquartered),

and over 60 percent lived within 50 miles of the land in Taunton that is the subject of this litigation. [Id. at 52].

B. Statutory and Interpretative History

Congress adopted the Indian Reorganization Act ("IRA") in 1934 "to change 'a century of oppression and paternalism' in the relationship between the United States and its native Indian tribes." Mashpee Wampanoag Tribe v. Bernhardt, 466 F. Supp. 3d 199, 207 (D.D.C. 2020) (quoting H.R. Rep. No. 73-1804, at 6 (1934)). The statute's purpose is "to create the mechanisms whereby tribal governments could be reorganized and tribal corporate structures could be developed" and to facilitate the acquisition of reservation lands. Id. (citations omitted).

The IRA authorizes the Secretary of the Interior "to acquire land and hold it in trust 'for the purpose of providing land for Indians.'" Carcieri v. Salazar, 555 U.S. 379, 381–82 (2009) (quoting 25 U.SC. § 5108). The Secretary may only take land into trust for persons or tribes that meet at least one of the statute's definitions of "Indian." Littlefield v. Mashpee Wampanoag Tribe ("Littlefield II"), 951 F.3d 30 at 34 (1st Cir. 2020). The IRA defines "Indian" as follows:

> The term "Indian" as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [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 [3] all other persons of one-half or more Indian blood.

25 U.S.C. § 5129 (bracketed numbers added).

The Supreme Court partially interpreted the IRA's first definition of "Indian"—the definition at issue in this action—in Carcieri, a challenge to the Secretary's power to take lands into trust for the Narragansett Tribe, whose traditional lands neighbor the Mashpees'. The Supreme Court defined the term "now" in the phrase "now under Federal jurisdiction" as

referring to the date of the IRA's enactment in 1934. Carcieri, 555 U.S. at 395. In effect, Carcieri set 1934 as the reference date for all future litigation under the IRA's first definition of "Indian," requiring the Secretary to find that a tribe was "under Federal jurisdiction" in that year before exercising her authority under this provision to take land into trust. See id.

Left unanswered by the Carcieri majority was the proper construction of the term "under Federal jurisdiction." See Bernhardt, 466 F. Supp. 3d at 207. In a concurring opinion, Justice Breyer detailed examples of tribes whom the federal government had erroneously concluded were not under its jurisdiction in 1934, but whom the government later recognized. See Carcieri, 555 U.S. at 398–99 (Breyer, J., concurring) (citing examples of the Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Tribe). Justice Breyer suggested that post-1934 federal recognition of a tribe could reflect pre-1934 "federal jurisdiction" such that the tribe could qualify under the IRA's first definition of "Indian." Id. at 399. He further outlined types of evidence that could imply "a 1934 relationship between [a tribe] and [the] Federal Government," including a treaty in effect in 1934, a pre-1934 congressional appropriation, and enrollment with the Indian Office prior to 1934. Id.

After Carcieri, the Solicitor of the Department of the Interior ("the Department") published a memorandum ("the M-Opinion") establishing a framework for interpreting the phrase "under Federal jurisdiction."[3] U.S. Dept. of Interior, M-37029, Memorandum on the Meaning of "Under Federal Jurisdiction" for Purposes of the IRA ("M-Opinion") (March 12, 2014). The M-Opinion applies the familiar two-step interpretative process the Supreme Court delineated in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), first

[3] The Solicitor withdrew the M-Opinion in 2020, see U.S. Dept. of Interior, M-37055, but reinstated it on April 27, 2021, see U.S. Dept. of Interior, M-37070. The M-Opinion was thus in force at the time of the ROD under review, which was published on December 22, 2021.

concluding that Congress had "left a gap for the agency to fill" in the statute's meaning, and then proposing an interpretation that is binding on the Secretary and the entire Department, including the Bureau of Indian Affairs ("BIA").[4] Id. at 843–44; see M-Opinion at 4–5, 17.

The M-Opinion creates a two-part inquiry for determining whether a tribe was "under Federal jurisdiction" in 1934. The Secretary first must determine whether there was a "sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction." Bernhardt, 466 F. Supp. 3d at 208–09; M-Opinion at 19. To make this finding, the Secretary asks "whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." Id. This inquiry is "fact and tribe-specific," id., and the Secretary may afford different types of evidence different weight, Bernhardt, 466 F. Supp. 3d at 209. The Secretary may consider "guardian-like action[s]" the government took on behalf of a tribe, including, but not limited to, negotiation of treaties, approval of contracts between the tribe and non-Indians, enforcement of federal commerce laws, the education of the tribe's children at BIA schools, and provision of federal health and social services to the tribe. M-Opinion at 19. If the Secretary concludes jurisdiction existed prior to 1934, the second step of her inquiry is to determine "whether the tribe's jurisdictional status remained intact in 1934." Id.

[4] The D.C. Circuit upheld the M-Opinion's application of Chevron on a direct challenge to its validity, concluding that the Department was reasonable in concluding that the term "under Federal jurisdiction" was ambiguous, and that the two-part test it established to interpret the term was likewise reasonable. Confederated Tribes of Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 564–65 (D.C. Cir. 2016). Neither the Supreme Court nor the First Circuit has considered the validity of the M-Opinion.

C. Procedural History

The parties have been litigating the lands in question for 16 years. In 2007, the Secretary recognized the Mashpee as "an Indian tribe within the meaning of Federal law." 72 Fed. Reg. 8007-01 (Feb. 22, 2007). Shortly after, the Tribe submitted a "fee-to-trust" application requesting that the Department acquire and take into trust the Designated Lands for purposes of establishing a reservation. Littlefield II, 951 F.3d at 33. At this time, the Tribe owned and operated the portion of the Designated Lands in the town of Mashpee, and planned to acquire the portion in Taunton. Id.

In 2015, the Secretary issued a written decision granting the Tribe's application, and shortly thereafter took the Designated Lands into trust and proclaimed them to be the Tribe's reservation. Id. at 33–34; see 81 Fed. Reg. 948 (Jan. 8, 2016). The Secretary concluded that the Mashpee qualified as "Indians" within the meaning of the *second* definition of that term in the IRA: "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 5129; Littlefield v. U.S. Dept. of Interior ("Littlefield I"), 199 F. Supp. 3d 391, 393 (D. Mass. 2016) (Young, J.). Plaintiffs, as neighbors to the Taunton parcel of land, filed suit in this district, arguing that the Secretary's decision exceeded statutory authority. Littlefield I, 199 F. Supp. 3d at 393. This district granted summary judgment for Plaintiffs, concluding that the Secretary had improperly construed the IRA's second definition of "Indian." Id. at 398–400. It remanded the matter to the Secretary for reconsideration of the Tribe's application, suggesting that the agency "analyze the Tribe's eligibility under the first definition of 'Indian.'" Littlefield II, 951 F.3d at 34.

In 2018, the Secretary issued a second written decision ("the 2018 ROD") denying the Tribe's application, concluding that the Tribe did not qualify under the IRA's first definition of

"Indian" because it was not under federal jurisdiction in 1934. Id. The Tribe then sued the Secretary in the U.S. District Court for the District of Columbia ("the D.C. district court"), arguing that the Secretary's interpretation of the first definition of "Indian" was arbitrary, capricious, and contrary to law. Bernhardt, 466 F. Supp. 3d at 212. The Plaintiffs to this action intervened in the D.C. district court action as defendants. See id. at 205. Simultaneously, the Tribe appealed the Littlefield I decision on the second definition of "Indian" to the First Circuit, which affirmed the district court's interpretation of that definition to exclude the Tribe. Littlefield II, 951 F.3d at 41.

With the litigation concerning the Tribe's eligibility under the second definition resolved,[5] the D.C. district court considered the Secretary's 2018 decision that the Tribe did not qualify under the first definition. That court vacated the decision, faulting the Secretary for "evaluating the evidence in isolation and failing to view the probative evidence 'in concert,'" as the M-Opinion requires. See Bernhardt, 466 F. Supp. 3d at 218. It further held that the Secretary "improperly treated the Mashpee's evidence" by misapplying the M-Opinion's standards to evidence concerning the education of Mashpee children at the federally-operated Carlisle Indian School, the appearance of the Tribe on federal census rolls, and federal reports and surveys regarding the Tribe. Id. at 219–35. The D.C. district court remanded the action to the agency with instructions to "apply the two-part test in [the M-Opinion]—correctly this time." Id. at 236.

On remand, the Secretary issued a third written decision in December 2021 ("the 2021 ROD"), which is the decision under review here. The 2021 ROD concluded that the Tribe had been under federal jurisdiction in 1934 and thus qualified under the IRA's first definition of

[5] The Tribe did not appeal the First Circuit's decision to the Supreme Court.

"Indian." The Secretary accordingly retook the Designated Lands into trust. Plaintiffs, as they had following the 2015 decision authorizing the Secretary to take the lands into trust, brought suit in this district, again arguing that the Secretary's decision exceeded statutory authority. [Dkt. 1]. The Mashpee timely moved to intervene as defendants. [Dkt. 16]. The Secretary moved to transfer the action to the D.C. district court, which had issued the most recent decision remanding this matter to the agency. [Dkt. 10]. This district denied that motion and further concluded that this matter was not related to Littlefield I, the 2016 action between these parties concerning the application of the second definition of "Indian" to the Tribe. [Dkt. 27]. The case was redrawn to this session, and the three parties—Plaintiffs, the Mashpee Wampanoag Tribe, and the Secretary—filed the instant-cross motions for summary judgment. Oral argument was presented on January 13, 2023, and the Court took the matter under advisement.

II. STANDARDS OF LAW

Plaintiffs seek judicial review of the Secretary's decision under Chapter 7 of the Administrative Procedure Act ("APA"). That statute provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

Where a party challenges an administrative action under the APA, "summary judgment ... serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Minuteman Health, Inc. v. U.S. Dep't of Health & Human Servs., 291 F. Supp. 3d 174, 189–90 (D. Mass. 2018) (citation omitted). Accordingly, the traditional Rule 56 standard does not apply; rather, "a motion for summary judgment is simply a vehicle to tee up a case for judicial review." Boston Redevel. Auth. v. National Park Serv., 838 F.3d 42, 47 (1st Cir. 2016). Courts do not

review the administrative record to determine whether a material dispute of fact remains, but rather ask "whether the agency action was arbitrary and capricious." Id.; see 5 U.S.C. § 706 (directing courts to "hold unlawful and set aside agency action, findings, and conclusions" that they deem "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

The scope of judicial review under the arbitrary and capricious standard "is narrow[,] and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Rather, the court "must examine the evidence relied on by the agency and the reasons given for its decision," and determine whether it articulated "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Minuteman Health, 291 F. Supp. 3d at 190 (quoting Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43). This standard is "highly deferential," and accordingly, "courts should uphold an agency determination if it is 'supported by any rational view of the record.'" Marasco & Nesselbush, LLP v. Collins, 6 F.4th 150, 172 (1st Cir. 2021) (quoting Atieh v. Riordan, 797 F.3d 135, 138 (1st Cir. 2015)). Conversely, courts should reverse and remand where

> the agency (1) has relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (quoting Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43) (numbers added).

III. DISCUSSION

The parties raise several issues in their cross-motions for summary judgment. They first dispute the preclusive effect of prior litigation. They also debate the validity of the M-Opinion.

Finally, they disagree as to whether the 2021 ROD taking the Designated Lands into trust for the Tribe was arbitrary, capricious, or contrary to law.

A. Estoppel

The Court's first task is to determine the degree to which the questions the parties present have been preclusively resolved through their prior litigation. The Tribe argues that the doctrine of judicial estoppel bars Plaintiffs from challenging the validity of the M-Opinion in these proceedings, and that the related doctrine of collateral estoppel, or issue preclusion, bars relitigation of certain discrete lines of argument. The Court addresses each of the Tribe's estoppel-based arguments in turn.

1. Judicial Estoppel

Judicial estoppel provides that "where one succeeds in asserting a certain position in a legal proceeding, one may not assume a contrary position in a subsequent proceeding simply because one's interests have changed." Berkowitz v. Berkowitz, 817 F.3d 809, 813 (1st Cir. 2016). The purpose of this doctrine is to prevent parties from "playing fast and loose with the courts." Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (1st Cir. 2004). The party asserting judicial estoppel must show that the opposing party has taken a position that is "mutually exclusive" with its prior position, and that the party succeeded in persuading a court to adopt that prior position. See id.

The Tribe argues that Plaintiffs are barred from contesting the validity of the current version of the M-Opinion here because Plaintiffs conceded the opinion's validity in the D.C. district court proceedings. However, a review of the D.C. district court's opinion indicates that the validity of the M-Opinion was not made an issue in that case. Although Plaintiffs "defend[ed] the Secretary's use of the M-Opinion" in that action, Bernhardt, 466 F. Supp. 3d at

216, no party challenged the Secretary's reliance on the opinion, see id. Instead, the D.C. district court made clear that its analysis was limited to the Secretary's application of the M-Opinion, and not to the opinion itself. Id. at 217 ("This is the question before the Court: whether the Secretary's application of its interpretation of the IRA – the M-Opinion – was arbitrary and capricious." (emphasis in original)).

Because the validity of the M-Opinion was not at issue in the D.C. district court action, Plaintiffs cannot be said to have "succeeded" in asserting its validity there. Thus, they are not judicially estopped from contesting its validity here.

2. Collateral Estoppel

Collateral estoppel, or issue preclusion, applies "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment … in a subsequent action between the parties, whether on the same or a different claim." B&B Hardware, Inc. v. Hagris Indus., Inc., 575 U.S. 138, 148 (2015). Here, two prior actions between these parties have been litigated to a valid and final judgment: the action in this district concerning the second definition of "Indian" (Littlefield I) and the D.C. district court action concerning the first definition of "Indian" (Bernhardt). Accordingly, any issues of fact or law actually litigated and determined in either of these proceedings that was essential to a final judgment may not be relitigated here. The Tribe specifically argues that the D.C. district court resolved a number of arguments that Plaintiffs raise here.

First, they contend, Plaintiffs argued in Bernhardt that the Supreme Court's decision in Carcieri mandates a finding that the Mashpee were not under federal jurisdiction in 1934. See Bernhardt, 466 F. Supp. 3d at 215 n.9. Plaintiffs raise this argument again here; in both actions, their position has been that any lower court decision recognizing the Mashpee under the IRA is

fundamentally inconsistent with the Supreme Court's holding in Carcieri excluding the Narragansett tribe from recognition under the IRA. See id.; [Dkt. 45 at 9]. Plaintiffs' argument proceeds on the theory that the Narragansett and Mashpee, who are neighboring tribes in Southern New England with ancestral lands divided by Narragansett Bay, present functionally identical cases for recognition. They posit that if the Supreme Court held that the Narragansett presented evidence insufficient to establish that they were under federal jurisdiction in 1934, no such evidence could be sufficient for the Mashpee.

The D.C. district court rejected this argument, noting that the parties to Carcieri did not contest whether the Narragansett had been under federal jurisdiction in 1934. Bernhardt, 466 F. Supp. 3d at 215 n.9. Accordingly, the Supreme Court had merely accepted without deciding that the Narragansett were not under jurisdiction at the time the IRA was exacted, see Carcieri, 555 U.S. 395–96, and two Justices wrote separately to state that they would have remanded the matter to the Secretary for factfinding on this question, id. at 400–01 (Souter, J., dissenting). Indeed, the argument the Secretary and the Narragansett pursued in Carcieri was that the word "now" in the statutory term "now under Federal jurisdiction" referred to the year *1998*, not 1934. Id. at 382. The underlying factfinding in Carcieri had concerned the Narragansett's status in 1998, not 1934, so that decision is not binding as to the Narragansett's status in 1934.

This Court affords preclusive effect to Bernhardt's rejection of the Narragansett comparator argument. Although Bernhardt addressed this argument in a footnote, it provided full reasoning for its rejection of Plaintiffs' reading of Carcieri, see Bernhardt, 466 F. Supp. 3d at 215 n.9, and the reasoning was essential to its conclusion, as the court could not have ruled in favor of the Mashpee had it concluded that Carcieri foreclosed their argument. Thus, the prior

litigation on this argument meets all required elements for issue preclusion.[6] The Court considers the Narragansett comparator argument fully litigated and resolved.

Plaintiffs and the Tribe also disagree over the extent to which Bernhardt precludes Plaintiffs' arguments about the Secretary's reliance on evidence concerning Mashpee children's attendance at the Carlisle School and the potential for evidence to demonstrate that the Tribe was under concurrent state and federal jurisdiction. Bernhardt held that the M-Opinion requires the Secretary to consider evidence of Mashpee children's attendance at the Carlisle School as probative of "guardian-like action" taken by the federal government on behalf of the Tribe as a whole. 466 F. Supp. 3d at 219–23. To the extent Plaintiffs argue the Secretary erred in considering this evidence (as Bernhardt held that the M-Opinion directs her to), they would be precluded. However, Plaintiffs frame their arguments here as challenges only to the Secretary's weighing of this evidence, which are permissible.

Likewise, the Tribe suggests that Plaintiffs are precluded from arguing that the Tribe's status as "under state jurisdiction" forecloses the possibility of it also having been under federal jurisdiction. The D.C. district court's opinion does not, however, suggest that this line of argument was thoroughly litigated in that matter. That court agreed, at the Tribe's request, to consider evidence "that Massachusetts' actions toward the Tribe supplemented the federal government's assertion of jurisdiction and should be considered as part of the federal course of dealings," id. at 216, but these considerations do not preclude Plaintiffs from arguing here that the Tribe could not have been under both state and federal jurisdiction.

[6] The Court notes that—in addition to being preclusive—Bernhardt's reading of Carcieri's limited holding is *correct*, and further notes that the voluminous evidence in the Carcieri record concerning the Narragansett's history is not in the administrative record in this case. Without access to this evidence, the Court would have had no basis to evaluate Plaintiffs' position that the Narragansett and Mashpee present identical cases for recognition under the IRA. The Court is aware of no opinion holding that the tribes' history and circumstances are identical.

B. Validity of the M-Opinion

Having concluded that Plaintiffs are not estopped from challenging the validity of the M-Opinion, the Court now turns to that challenge. Courts evaluate agencies' construction of statutes under the two-step Chevron framework. The Court first asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." Chevron, 467 U.S. at 842. The agency's conclusion as to the existence of ambiguity in the statute receives no deference. Littlefield I, 199 F. Supp. 3d at 395. However, if the Court concludes that there is ambiguity, it "must defer to the agency's interpretation, so long as it is 'rational and consistent with the statute.'" Id. (quoting Sullivan v. Everhart, 494 U.S. 83, 89 (1990)). The First Circuit has described this standard of scrutiny as "de novo review, but with some deference to the agency's reasonable interpretation of statutes and regulations that fall within its sphere of authority." Jianli Chen v. Holder, 703 F.3d 17, 21 (1st Cir. 2012); see Littlefield I, 199 F. Supp. 3d at 394–95 (reconciling First Circuit's concept of "de novo review … with some deference" with Chevron and broader principles of de novo review).

Plaintiffs argue that the M-Opinion creates "a standardless test that practically any tribe can meet," and that it is irreconcilable with the Supreme Court's decision in Carcieri. [Dkt. 45 at 32]. They view the M-Opinion's two-part inquiry into whether the federal government had conferred jurisdiction on a tribe before 1934 and, if so, whether that jurisdiction remained extant in 1934, as contrary to Carcieri's requirement that the jurisdiction-conferring event be in effect in 1934. [Id.]

The M-Opinion withstands scrutiny under both Carcieri and the Chevron framework. Plaintiffs' assertion, [Dkt. 45 at 32], that the M-Opinion disregards Carcieri's holding that a tribe must have remained under federal jurisdiction in 1934 is a misreading of both opinions. The

second step of the M-Opinion's inquiry requires the Secretary to determine "whether the tribe's jurisdictional status remained intact in 1934." M-Opinion at 19. Carcieri's holding is limited to interpreting the word "now" in the IRA to refer to the date of the statute's enactment in 1934. 555 U.S. at 395; see id. at 396 ("Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case."). The Supreme Court's decision leaves open the question of how the Secretary may determine jurisdiction existed in 1934, and in no way forecloses the M-Opinion's two-part inquiry for evaluating such claims of jurisdiction.

Further, Plaintiffs raise no meaningful challenge to the validity of the M-Opinion under the Chevron framework. The first step of this framework is to determine whether there is ambiguity to the term at issue—here, "under Federal jurisdiction." Justice Breyer strongly suggested that this term was ambiguous in his concurrence to Carcieri, id. at 398 (Breyer, J., concurring), and each of the three appellate courts to have considered the term have agreed. County of Amador v. U.S. Dep't of Interior, 872 F.3d 1012, 1021 (9th Cir. 2017); Confederated Tribes of Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 564 (D.C. Cir. 2016); see Rape v. Poarch Band of Creek Indians, 250 So.3d 547, 560 n.7 (Ala. 2017). This Court agrees that more than one reasonable construction of the term "under Federal jurisdiction" exists, and the term is thus ambiguous within the meaning of Chevron.

Turning to the second Chevron step, this Court agrees with the D.C. Circuit's conclusion in Grand Ronde that the M-Opinion's construction of "under Federal jurisdiction" is reasonable. 830 F.3d at 564–65. As the term "jurisdiction" is "of extraordinary breadth," id. at 564, the M-Opinion's context-driven, tribe-by-tribe interpretation of the term is permissible. See also County of Amador, 872 F.3d at 1026 (describing "jurisdiction," as it is used in the IRA, as "a word of many, too many, meanings"). Moreover, the M-Opinion adopts and expands upon

Justice Breyer's suggested interpretation of the term in his Carcieri concurrence. Justice Breyer suggested that evidence of jurisdiction could include treaties with the United States, congressional appropriations, and enrollment with the federal Indian Office. Carcieri, 555 U.S. at 399 (Breyer, J., concurring). To these suggestions, the M-Opinion adds approval of contracts between the tribe and non-Indians, enforcement of federal commerce laws against the tribe, federally funded education of the tribe's children, and provision of federal health and social services to the tribe. M-Opinion at 19. The conjunctive, holistic, and tribe-specific inquiry the opinion prescribes to resolve the question of jurisdiction is a reasonable interpretation of the statute's use of that term and is consistent with Carcieri's treatment of the statute.

Accordingly, the Court grants deference to the M-Opinion's construction of the phrase "under Federal jurisdiction." Because the M-Opinion is binding on the Secretary, the Court uses the M-Opinion as the benchmark by which it evaluates the decision under review. See Bernhardt, 466 F. Supp. 3d at 236 (deeming the Secretary's previous decision "arbitrary, capricious, an abuse of discretion, and contrary to law" because the Secretary had failed to correctly apply M-Opinion's two-part test).

C. APA Review of the 2021 ROD

The Court now turns to the ultimate question at bar, that of whether the 2021 ROD taking the Designated Lands into trust for the Tribe was arbitrary, capricious, or contrary to law. Plaintiffs make four principal challenges to the 2021 ROD. First, they allege that the ROD constructed a "false narrative" about Mashpee children's attendance at the Carlisle school that intentionally misrepresents the historical record. [Dkt. 45 at 14–19]. Second, they allege that prior case law is inconsistent with the ROD's conclusion. [Id. at 19–22]. Third, they argue that various record evidence the Secretary considered is not probative. [Id. at 23–31]. And fourth,

they allege that the Secretary's creation of a reservation comprised of two noncontiguous parcels of land was unlawful. [Id. at 33–34]. Each of these arguments is addressed in turn.

1. Carlisle School Evidence

The Carlisle Indian School was a non-reservation boarding school in Carlisle, Pennsylvania, for Indigenous children operated by the BIA. See Bernhardt, 466 F. Supp. 3d at 219. The Secretary made extensive findings of fact concerning this school in the 2021 ROD; the Court briefly summarizes the relevant evidence the Secretary relied upon below.

The Carlisle School was a part of the federal government's longstanding "civilization" policy that "sought to eliminate Indian culture." [2021 ROD at 16]. The federal government ceased making treaties with Indigenous tribes in 1871 and began to instead pursue forcible assimilation. [Id.] The government's goal was to "detribalize" Native Americans through "division of communally held tribal land." [Id. (quoting Addie C. Rolnick, Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention, 11 Colum. J. Race & L. 811, 826–27 (2021))]. An essential component of this policy was the forcible introduction of children to "the American educational, child welfare, and juvenile justice systems." [Id.]

The government established a nationwide policy "that Native children should be removed from their homes and placed in church or government-run boarding schools." [Id.] Between the late 19th and mid-20th century, thousands of children were separated from their families and institutionalized in government-run boarding schools like the Carlisle School. [Id.] These schools' mission was to '"civilize' Native children by forcing them to adopt the norms of Christian Anglo-American culture." [Id. at 17]. The schools punished Native children for speaking their languages and engaging in any non-Christian religious or spiritual practices. [Id.]

In addition to this forced assimilation to the government's language and religious norms, some students at the Carlisle School were made to adopt new names, clothing, haircuts, and cultural practices. [Id.]

Thus, the purpose of the Carlisle School and similar off-reservation boarding schools was, as the Commissioner of Indian Affairs wrote in 1896, "for the strong arm of the nation to reach out, take [Indian children] in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, … instead of allowing them to grow up as barbarians and savages." [Id. at 16 (citing Brackeen v. Haaland, 994 F.3d 249, 282–83 (5th Cir. 2021))]. The administrator in charge of the Carlisle School in 1882, Captain R. H. Pratt, is today infamous for his support of the goal of "'kill[ing] the Indian' to 'save the man.'" [Id. at 17 n.127 (quoting United States v. Erickson, 436 F. Supp. 3d 1242, 1267 (D.S.D. 2020))].

The Carlisle School was funded through Congressional appropriations of federal funds. [Id. (citing Act of May 17, 1882, 22 Stat. 68, ch. 163, p. 85)]. An 1882 funding bill specified that the purpose of the school's appropriation was "educational purposes for the Indian tribes." [Id.] An 1892 bill authorized the Commissioner of Indian Affairs to make and enforce regulations to "secure the attendance of Indian children … at schools established and maintained for their benefit." [Id. (citing Act of July 1, 1892, 27 Stat. 120)]. The Commissioner of Indian Affairs adopted admissions standards tailored to serve the purpose of the government's "civilization" policy by ensuring that the school indoctrinated children whom the government "perceived as being too 'Indian' or too connected to tribal culture." [Id.]. These standards excluded from admission children with "one-eighth or less Indian blood," those whose parents did not live on a reservation, and those who were "presumed to have adopted the white man's manners and customs" or were otherwise "to all intents and purposes white people." [Id. at 17–

18 (quoting Education Circular No. 85, Rules for the Collection of Pupils for Nonreservation Schools)].

Mashpee children attended the Carlisle School between 1905 and 1918. [Id. at 16]. Records show that the school documented each Mashpee student's compliance with the regulations regarding admission, including specification of the students' tribe, "blood quantum," and verification of living in "Indian fashion." [Id. at 18]. The Mashpee students were identified as members of the Mashpee Nation, North Wampanoag Tribe, Pokanoket Tribe, or South Sea Tribe. [Id.] Each of these tribal designations refers to a legal predecessor of the modern Mashpee Wampanoag Tribe. Each student that the Carlisle School identified as affiliated with one of these four tribes had been certified by an official as "liv[ing] as an Indian." [Id.]

The school maintained "extensive federal supervision over Mashpee students' education, health[,] and finances." [Id. at 16 (citing Erickson, 436 F. Supp. 3d at 1267)]. The Superintendent and Commissioner of Indian Affairs oversaw the use and disbursement of funds belonging to the students and also supervised health care for the students. [Id. at 18]. In one instance, the Superintendent authorized amputation of a Mashpee student's toe, without the student's mother's knowledge of the procedure until after it was completed. [Id.] The school also restricted Mashpee students' ability to leave its premises. [Id. at 18–19].

From this evidence, the Secretary concluded that federal agents "exercised extraordinary control over the Mashpee students attending Carlisle School from 1905 through 1918." [Id. at 19]. In support of that decision, she cited the school's "integral part" in the government's nationwide "federal Indian policy aimed at breaking up tribal communities," the government's provision of health and social services to the Mashpee students, and the government's control and management of the Mashpee students' funds. [See id.] Relying on the M-Opinion's

instruction to evaluate the government's "guardian-like action on behalf of the tribe," M-Opinion at 19, the Secretary concluded that the Carlisle School records constituted evidence of "a clear assertion of federal authority over the Tribe and its members and, therefore, evidence [of] the United States' assertion of jurisdiction over the Tribe in the decades leading up to passage of the IRA." [2021 ROD at 19].

Plaintiffs argue that the Secretary's analysis of the Carlisle School evidence "represents a complete and gross misstatement of the historical record." [Dkt. 45 at 16]. They cite evidence that the Mashpee students who attended Carlisle did so with their parents' voluntary consent, that state funds were available to cover the cost of Mashpee students' attendance at the school, and that a Carlisle School supervisor had discouraged Mashpee students from applying to the school because there were ample public school facilities for them in Massachusetts. [Id. at 16–17]. Relying on this record evidence, Plaintiffs charge the Secretary with crafting a "false narrative" that "smacks of intentional misrepresentation of the historical record." [Id. at 18].

The Court finds no substance beneath this puffery. Plaintiffs do not contest the legitimacy of any of the facts in the administrative record that form the basis for the Secretary's conclusion: that the Carlisle School was funded via Congressional appropriations for the purpose of educating Indian children [see 2021 ROD at 17]; that the school was part of the federal government's policy of forcibly eliminating tribal culture, including tribal languages and religions [id. at 16]; that Mashpee students attended the school [id. at 18]; that the Mashpee students were subject to the school's enrollment requirements, including a "blood quantum" and verification that they lived in "Indian fashion" [id.]; that federal officials at the school managed money on behalf of Mashpee students [id.]; and that federal officials at the school made health care decisions and expended federal health care funds on behalf of Mashpee students, [id.].

The facts recited herein, uncontested by Plaintiffs, are overwhelming evidence in support of the Secretary's conclusion that the federal government subjected the Mashpee to its jurisdiction prior to 1934. The record in this case reveals the government's systemic, decades-long policy of forcibly dissolving Indigenous tribes and cultures by coercing children to assimilate into what the government defined as "white" society. The Carlisle School, funded by Congress for the purpose of separating Indigenous children from their families and indoctrinating them in accordance with the government's policy, was an essential component of this system. By recognizing Mashpee students as sufficiently "Indian" to attend the Carlisle School, funding their education, making health care decisions on their behalf, and dictating their cultural practices and beliefs, the government took "guardian-like action[s]" over the Tribe. See M-Opinion at 19. The Secretary was thus reasonable in considering the government's inclusion of the Mashpee in federally funded ventures to "kill the Indian," [see 2021 ROD at 17 n.127 (quoting Erickson, 436 F. Supp. 3d at 1267)], as indicative of jurisdiction. See Marasco & Nesselbush, 6 F.4th at 172 (requiring courts to uphold agency's decision if it is "supported by any rational view of the record").

Further, none of the facts Plaintiffs point to are inconsistent with the Secretary's conclusion that the Carlisle School evidence supports a finding that the Mashpee were under federal jurisdiction. The Secretary does not assert, or rely upon an assertion, that Mashpee students attended the school involuntarily. The availability of state funds for Mashpee children's attendance at the school, and the availability of public schooling in Massachusetts, do not disprove the record evidence demonstrating that federal funds were expended for the education, health care, and social support of Mashpee students as part of a nationwide federal program to detribalize children.

Moreover, the Court's task is not to determine which party's narrative description of the evidence in the administrative record is more compelling. The Secretary's interpretation alone is under review, and the Court must merely determine whether she has provided "a satisfactory explanation" for that interpretation, "including a rational connection between the facts found and the choice made." Minuteman Health, 291 F. Supp. 3d at 190. And the Secretary's narrative need not be the only one plausibly supported by the record—it simply must be among those supported by "any rational view of the record." See Marasco & Nesselbush, 6 F.4th at 172. The Secretary here has provided a sufficiently rational connection between the facts in the Carlisle School record and her conclusion that this record is indicative of the federal government exercising jurisdiction over the Mashpee through its guardian-type actions toward Mashpee children. This conclusion is a reasonable application of the M-Opinion's test to the record, and thus is not arbitrary or capricious.

2. Historic Case Law

Plaintiffs cite various judicial decisions, spanning a period between the 1880s and 1970s, which suggest that federal courts did not regard the Mashpee as subject to federal jurisdiction. They argue that this case law is irreconcilable with the Secretary's conclusion that the Mashpee were under federal jurisdiction in 1934.

Specifically, Plaintiffs point to an 1884 Supreme Court decision which noted that "Indians in Massachusetts" were "remnants of tribes never recognized by treaties or legislative or executive acts of the United States as distinct political communities," Elk v. Wilkins, 112 U.S. 94, 108 (1884). They also point to the common-law definition of a "tribe," first articulated by the Supreme Court in Montoya v. United States, 180 U.S. 261 (1901): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and

inhabiting a particular though sometimes ill-defined territory." Id. at 266. A series of decisions in the 1970s concluded that the Mashpee did not qualify as a "tribe" under the Montoya common-law definition. See Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582–85 (1st Cir. 1979).

This precedent does not foreclose the Secretary's decision to take the Designated Lands into trust for the Mashpee or render that decision arbitrary and capricious. First, Justice Breyer's concurrence in Carcieri and the M-Opinion each recognize that the government's disclaimer of jurisdiction over a tribe is not dispositive of the question of whether the Tribe was in fact under federal jurisdiction in 1934. See Carcieri, 555 U.S. at 397 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time."); M-Opinion at 19 ("[A] tribe may have been under federal jurisdiction in 1934 even though the United States did not believe so at the time."). Indeed, Justice Breyer recognized that, on at least three occasions, the government concluded after 1934 that it had erroneously excluded a tribe from its list of those under federal jurisdiction and thus subject to the IRA. Carcieri, 555 U.S. at 398 (Breyer, J., concurring). The government excluded the Stillaguamish Tribe from recognition despite the fact that this tribe had maintained treaty rights against the United States since 1855. Id. It had mistakenly concluded that the Grand Traverse Band of Ottawa and Chippewa Indians—which has continually existed since 1675—had dissolved. Id. And it had likewise mistakenly concluded that the Mole Lake Tribe no longer existed. Id. at 399. The government later remedied these errors by retroactively concluding that these tribes had each been under federal jurisdiction in 1934. Id. at 398–99.

Thus, the Supreme Court's statement in Elk that Massachusetts tribes were not recognized by the federal government—which was published 50 years before the IRA's enactment in 1934—is hardly inconsistent with the Secretary's decision. Likewise, the First Circuit's holding that the Mashpee did not meet Montoya's common-law definition of a "tribe" is not relevant. The M-Opinion, not Montoya, provides the test that the Secretary was required to apply to this record. Further, the Department formally recognized the Mashpee as a tribe in 2007, and that decision is not under review here. The question at bar is whether the Mashpee were under federal jurisdiction in 1934, and Montoya does not provide a test for this.

3. Probative Value of Reports and Census Records

Plaintiffs also assert that various reports and census records that the Secretary relied upon are of no probative value, and thus provided legally insufficient support for the Secretary's decision. They specifically challenge five documentary records the Secretary evaluated: the Morse Report, the McKenney Report, the Schoolcraft Report, Indian Census records, and Carlisle School census records. The Court examines the Secretary's consideration of each of these records in turn.

The Morse Report was an 1820 effort by the federal government to catalogue the Indigenous tribes of the United States. The report was funded by the federal government, and the Secretary recognizes it as one of the government's "first initiatives to 'civilize' Indians." [2021 ROD at 13]. The report's author, the Rev. Jedidiah Morse, traveled as far west as present-day Wisconsin in an effort to provide the government with "as full and correct a view of the numbers and actual situation of the *whole* Indian population *within their jurisdiction*." [Id. (first emphasis in original, second emphasis added)]. Morse included the Mashpee in the report, identifying 320 tribal members as living on the tribe's lands in the town of Mashpee. [Id.] He

recommended against forcibly removing the Tribe to western lands, citing their strong "local attachments" and their "public utility" as "expert whalemen and manufacturers." [Id.] The federal government later relied upon the Morse Report in setting its policy toward forcible Indian removal, and the Secretary credits the Report's description of the Mashpee with influencing the government's decision to protect the Tribe from removal. [Id. at 14]. Accordingly, the Secretary construes the Morse Report as evidence that the government actively considered the Mashpee as under its jurisdiction in the 1820's, and thus subject to its removal policies. [Id. at 15].

Five years after the Morse Report, Thomas McKenney, who served as Superintendent of Indian Affairs, submitted his own report on the status of various tribes. [Id. at 14]. The McKenney Report listed the Mashpee as residing on their reservation in the town of Mashpee. [Id.] The Secretary likewise credits the McKenney Report with influencing the government's Indian removal policy, including its decision not to forcibly remove the Mashpee from their lands, and thus construes it as evidence that the Mashpee were sufficiently under federal jurisdiction to be subject to the federal removal policy. [Id. at 15].

In 1847, Congress ordered an additional report on the country's tribes, to be prepared by Henry Schoolcraft, an agent in the Office of Indian Affairs. [Id. at 20]. Schoolcraft summarized Mashpee history and made policy recommendations as to the Tribe; specifically, he proposed merging all Indian communities in Massachusetts except those at Mashpee, Herring Pond, and Martha's Vineyard into a single community under the supervision of an Indian commissioner. [Id. at 20–21]. The Secretary construes the Schoolcraft Report to demonstrate federal recognition of the Mashpee as an extant tribe subject to federal jurisdiction, with the report actively considering whether the federal government ought to merge the Tribe with others according to a central plan. [Id.]

The Secretary likewise relied on federal census records compiled between 1860 and 1930. In some years during this period, the government had recorded its count of the Indigenous population according to a separate "Indian population schedule"; one such Indian schedule, in 1910, identified 157 "Mashpee Indians" living in the town of Mashpee. [Id. at 23]. Further, incomplete census records from the Carlisle School from 1911 and 1912 list a count of Mashpee students. [Id. at 24]. The Secretary construes these school census records as prepared in response to an 1884 law for the purpose of informing Congress' expenditure of federally appropriated funds to "educate, clothe, and provide services to Mashpee students attending the Carlisle School." [Id.] Further, the Secretary construes the totality of these Census records as "efforts to enumerate the Tribe and its members" that are "probative of and demonstrate the Tribe's relationship with the Federal Government." [Id. at 25].

Plaintiffs propose alternate constructions of each of these records and argue that none are indicative of federal jurisdiction over the Mashpee.[7] Again, however, the Court's task is not to review the Secretary's conclusion de novo, nor is it to consider her weighing of the evidence against alternate proposals. It is simply to ask whether her conclusion was supported by "any rational view of the record." Marasco & Nesselbush, 6 F.4th at 172. Accordingly, Plaintiff's alternate interpretations of the record do not suffice to render the Secretary's interpretation arbitrary and capricious. To the contrary, each of the sources the Plaintiffs dispute here is a documentation of an interaction between the Tribe and a federally funded venture prior to 1934. The census records suggest that the federal government expended money on efforts to document

[7] Plaintiffs also suggest that the Secretary was arbitrary and capricious in interpreting these records differently from how the Department interpreted them in prior draft and published decisions concerning the Mashpee. To the extent the Secretary interpreted records differently in the 2021 ROD than in the 2018 ROD, this was appropriate, as the D.C. district court held that the 2018 ROD was arbitrary and capricious, and remanded this matter for the Secretary to re-weigh the evidence in accordance with the M-Opinion. Bernhardt, 466 F. Supp. 3d at 236. To the extent the 2021 ROD conflicts with any unpublished draft decision, the Secretary owes the Court no explanation, as a draft opinion carries no legal force, is not subject to judicial review, and—nearly by definition—invites revision.

membership of the Tribe—a federal action that at least one court has previously held can be probative of jurisdiction. See No Casino in Plymouth v. Jewell, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015) (holding that the federal government's efforts to document the Ione Band were evidence the tribe was under federal jurisdiction in 1934). The Morse, McKinney, and Schoolcraft reports each suggest that the federal government may have considered the Mashpee as a candidate for forcible removal or reorganization. Even if Plaintiffs are correct to suggest that none of these sources, taken alone, would establish grounds to conclude that the Mashpee were under federal jurisdiction in 1934, the M-Opinion prescribes a holistic process that requires the Secretary to review each of these forms of documentary evidence. The Secretary was not arbitrary or capricious in reading these sources, in conjunction with other evidence (including the Carlisle School evidence), to collectively establish that the Mashpee were under federal jurisdiction at the time the IRA was enacted.

4. Reservation Boundaries

Plaintiffs' final argument is that the Secretary violated the law by establishing two noncontiguous parcels of land—the Mashpee and Taunton sites—as the Tribe's initial reservation. Plaintiffs cite no authority to support their assertion that an initial reservation may not be comprised of noncontiguous parcels.

The Secretary is authorized by statute to "proclaim new Indian reservations on lands acquired pursuant to any authority conferred" by law. 25 U.S.C. § 5110. Regulations define the term "initial reservation"—the concept at issue here—as land "located within the State or States where the Indian tribe is now located" and "within an area where the tribe has significant historical connections and one or more of the following modern connections to the land: (1) The land is near where a significant number of tribal members reside; or (2) The land is within a 25–

mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or (3) The tribe can demonstrate other factors that establish the tribe's current connection to the land." 25 C.F.R. § 292.6(d).

Plaintiffs thus attempt to add to the regulations a requirement of contiguity that does not exist.[8] Under the regulations that do exist, the Secretary's decision to proclaim a reservation consisting of both the Taunton and Mashpee parcels is not arbitrary or capricious. The parcels are both located in Massachusetts, the state where the Tribe is headquartered. Likewise, the parcels are both within an area—southeastern Massachusetts—where the Tribe has "significant historical connections"; as detailed above, the Mashpee's traditional territory consists of all of southeastern Massachusetts and eastern Rhode Island. The Tribe has maintained a continuous presence in the town of Mashpee since prior to European settlement and had established the village of Cohannet on the site of present-day Taunton before selling that land to English colonists in 1639. [2021 ROD at 49]. And the Tribe has a modern connection to both parcels, as about 40 percent of its members live in the town of Mashpee, and over 60 percent of its members live within 50 miles of the Taunton parcel. [Id. at 52]. The Secretary was thus reasonable in determining that "a significant number" of tribal members live sufficiently "near" both parcels to establish a modern connection to each. [Id. at 53].

IV. CONCLUSION

The historical record indicates that the Mashpee have had a robust connection to the Designated Lands for over four centuries. Upon review of the 2021 ROD, the Court concludes that the Secretary was not arbitrary and capricious in determining that the Tribe was under

[8] The Mashpee reservation is not the first noncontiguous initial reservation proclaimed under these provisions; the ROD discusses the Nottawaseppi Tribe's noncontiguous reservation. [2021 ROD at 38 n.263].

federal jurisdiction in 1934 within the meaning of the IRA, nor was she arbitrary and capricious in proclaiming the Designated Lands as the Tribe's initial reservation.

Accordingly, Defendants' motions for summary judgment [Dkts. 46, 48] will be **GRANTED** and Plaintiffs' motion [Dkt. 45] will be **DENIED**. Judgment for Defendants will enter accordingly.

SO ORDERED.

February 10, 2023

/s/ Angel Kelley
Hon. Angel Kelley
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, MICHELLE LITTLEFIELD, TRACY ACORD, DEBORAH CANARY, FRANCIS CANARY JR., VERONICA CASEY, PATRICIA COLBERT, VIVIAN COURCY, WILL COURCY, DONNA DEFARIA, ANTONIO DEFARIA, KIM DORSEY, KELLY DORSEY, FRANCIS LAGACE, JILL LAGACE, DAVID LEWRY, KATHLEEN LEWRY, MICHELE LEWRY, RICHARD LEWRY, ROBERT LINCOLN, CHRISTINA ALMEIDA, CAROL MURPHY, DOROTHY PEIRCE, and DAVID PURDY, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA A. HAALAND, *in her official capacity as Secretary of the Interior*; BUREAU OF INDIAN AFFAIRS; and BRYAN NEWLAND, *in his official capacity as Assistant Secretary of the Interior for Indian Affairs*; Defendants, and MASHPEE WAMPANOAG TRIBE, Intervenor-Defendant.	Case No. 22-CV-10273-AK

JUDGMENT

A. KELLEY, D.J.

In accordance with the Court's Memorandum and Order (Doc. No. 55) entered on February 10, 2023, granting Defendants' motion for summary judgment and denying Plaintiffs' motion, it is hereby ORDERED:

Judgment entered for Defendants.

Dated: February 10, 2023

By the Court:

/s/ Miguel A. Lara
Deputy Clerk

A REEXAMINATION OF *PASSAMAQUODDY V. MORTON*

*John M. R. Paterson and David Roseman**

I. INTRODUCTION

In December 1975, the United States Court of Appeals for the First Circuit issued its historic decision in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton.*[1] That decision set in motion a sequence of events that only the most prescient of the original participants could have imagined. At its height the litigation that grew out of *Passamaquoddy* involved a threatened suit by the United States Justice Department on behalf of two Indian groups in Maine[2] against the State of Maine, several of the nation's largest corporations, 350,000 residents, and scores of Maine municipalities. The plaintiffs sought possession of 12,000,000 acres of privately-owned lands, 500,000 acres of publicly-owned lands,[3] plus $25 billion in trespass damage claims. Recognizing the enormous import of this action, the Justice Department once described the suit as "potentially the most complex litigation ever brought in the federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties."[4]

The authors of this article first became involved in the land claim suit in early 1976, shortly after the appeal period expired in *Passamaquoddy*. At that time the immediate task was to organize the state's case in defense of the enormous land and damage claims. In

* Messrs. Paterson and Roseman are Deputy and Assistant Attorneys General for the State of Maine, respectively. The authors' research was undertaken as counsel for the State of Maine in regard to pending litigation involving Indian land claims and related lawsuits; the opinions and conclusions expressed herein are solely theirs and do not necessarily represent the opinion or position of the Attorney General or the State of Maine. The authors wish to acknowledge their enormous debt of gratitude to the late Professor Ronald Banks without whose diligence and analysis this paper could not have been prepared and whose recent, untimely passing is sorrowfully felt.

1. 528 F.2d 370 (1st Cir. 1975), *aff'g* 388 F. Supp. 649 (D. Me. 1975).

2. The two Indian groups are commonly known as the Passamaquoddy Tribe and the Penobscot Nation. While the article may hereafter use the terms "Passamaquoddy Tribe" and "Penobscot Nation," the use of the titles "Tribe" or "Nation" does not necessarily indicate that the authors believe those Indian groups constitute tribes in a legal sense. The legal status of the Maine Indians could presumably be an issue in any future litigation, as it was in Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 48 U.S.L.W. 3221 (Oct. 2, 1979). However, because the Passamaquoddy and Penobscot are usually referred to as "Tribe" and "Nation," respectively, and for ease of reference, we have employed that nomenclature in this article.

3. These privately- and publicly-owned lands collectively represented approximately 60% of the total land area in Maine.

4. Memorandum of the United States Department of Justice to the United States District Court, United States v. Maine, Nos. 1966-ND, 1969-ND (D. Me., filed July 1, 1972).

> *western Indian affairs* were to be placed under Federal control. The concept of an *"Indian Country"* was thus strengthened. The *Federal laws* in relation to Indians and Indian trade *took effect only in Indian country; elsewhere—that is within the original established States—they did not hold.*[51]

For example, in 1782, the Catawba tribe of South Carolina petitioned the Continental Congress to intervene in order to protect them from the involuntary alienation of their land. The Congress declined and recommended, instead, that the matter be referred to the legislature of South Carolina for such action as it considered appropriate.[52] And in 1785, the Continental Congress received a petition from the Mohecaunie tribe of Massachusetts, but the Congress referred the petition to Secretary of War Knox with instructions that it be referred to the State of Massachusetts "to which they belong."[53] Throughout the 1780s, however, the federal government insisted on its right to treat with the Cherokees, a sovereign and independent frontier tribe, despite vigorous protests from the State of Georgia.[54]

Had any doubt whatsoever existed as to whether the Indians in New England, during the Articles of Confederation period, fell under the jurisdiction of the federal government or the individual states, none remained after the enactment in 1786 of the Ordinance for the Regulation of Indian Affairs. The Ordinance was enacted by the Continental Congress to create the administrative framework required to carry out its sole and exclusive responsibility under Article IX of regulating all affairs of Indians not members of any states. Indeed, Congress charged the drafting committee to draft a document "for the complete arrangement and government of the Indian Department."[55] In part, the Ordinance of 1786 established that

> [T]he Indian department be divided into two districts, viz; The southern, which shall comprehend within its limits all the nations in the territory of the United States, who reside southward of the river Ohio; and the northern, which shall comprehend all the other Indian nations within the said territory, and westward of the Hudson River: . . . a superintendent be appointed for each of the said districts . . . [and] [t]he said superintendents shall attend to the execution of such regulations, as congress shall, from time to time, establish respecting Indian affairs.[56]

The Ordinance of 1786 is highly significant. It established two separate districts within the Indian Department, northern and southern, and *geographically* described the limits of those districts. Clearly, New England fell within neither district. Regarding the southern

51. *Id.* at 34 (emphasis added).
52. 23 JOUR. OF THE CONT. CONG. 706-07 (1782).
53. 24 JOUR. OF THE CONT. CONG. 688 (1783).
54. F. PRUCHA, *supra* note 32, at 35.
55. 30 JOUR. OF THE CONT. CONG. 332 (1786).
56. 1 LAWS OF THE UNITED STATES, *supra* note 43, at 614.

district, New England, of course is not south of the Ohio River. Regarding the northern, New England is obviously not west of the Hudson River. Since the Ordinance was enacted to provide the administrative framework "for the complete arrangement and government" of Indian affairs, and since the preamble to the Ordinance specifically recited that the Congress, under Article IX, had the exclusive power to manage "all affairs" with Indians "not members of any of the states," the definite exclusion of New England Indians from the coverage of the Ordinance constitutes a clear expression of congressional intent that the small, fragmentary bands of Indians in New England were considered "members" of the New England states and subject to their jurisdiction alone.[57]

As Prucha noted,

> The debates over the Articles of Confederation and the subsequent practice under this frame of government nevertheless did gradually clarify one element of Indian relations. *The concept of the Indian Country was strengthened.* Not only was the *Indian Country* that territory lying *beyond the boundary lines* and forbidden to settlers and to unlicensed traders; but it was also the area over which federal authority extended. *Federal laws governing the Indians and the Indian trade took effect in the Indian Country only; outside they did not hold.*[58]

It is against the foregoing historical background and development of Indian policy that the Trade and Intercourse Acts should be viewed in order to determine their territorial applicability.[59] Although Con-

57. For example, Massachusetts had for many years exercised jurisdiction over the Indians residing within its geographical limits. To illustrate, in 1769 Governor Barnard and the Governor's Council appointed three Penobscot Indians as Justices of the Peace to adjudicate disputes among the Indians under the laws of Massachusetts and Great Britain. Massachusetts Executive Department Journals, Council Records, Commissions, Proclamations, etc., (July 26, 1769), (Massachusetts Archives).

In 1784, Benjamin Lincoln (who served as Secretary of War from 1782-1785, and was presumably familiar with the laws and policy of the Continental Congress) and Henry Knox represented Massachusetts in negotiations with the Penobscots. 1784 Mass. Acts, ch. 82 (May session). This activity presumes that they believed both that the Penobscot Indians were members of the state and that the Indians were within the state's jurisdiction. *See also* 15 DOCUMENTRY HISTORY, *supra* note 49, at 229.

58. F. PRUCHA, *supra* note 32, at 31 (emphasis added).

59. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (concurring opinion of Justice McLean). Justice Baldwin specifically stated in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831):

> The legislation of congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles, which prevailed in the old congress and under the old confederation. . . . In 1802, congress passed the act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations.

Id. at 45.

Baldwin's opinion in *Cherokee Nation* is confirmed by several leading texts on Indian affairs. Reginald Horsman had stated that the Trade and Intercourse Act of 1790

Massachusetts. Commissioners to examine into the condition of the Indians in the commonwealth.

1858

HOUSE..... .....No. 46.

REPORT OF THE COMMISSIONERS

RELATING TO

THE CONDITION OF THE INDIANS

IN MASSACHUSETTS.

Commonwealth of Massachusetts.

MESSAGE.

COUNCIL CHAMBER,
February 21, 1849.

To the House of Representatives:

I herewith communicate, for the use of the Legislature, the Report of the Commissioners, appointed under the Resolve of the Legislature, passed on the 10th of May, 1848, "to visit the several tribes, and parts of tribes, of Indians, remaining within this Commonwealth, to examine into their condition and circumstances, and report to the next Legislature what legislation, in their opinion, is necessary in order best to promote the improvement and interests of said Indians."

These scattered and poor remains of tribes, who were once the numerous and powerful occupants of our hills and valleys, our lakes and rivers, of which advancing civilization has dispossessed them, have the strongest claims upon the government of the Commonwealth to do every thing in their power to preserve their existence, protect their rights, and improve their condition.

I commend the subject to your consideration, with the hope that the Report of the Commissioners, who have given to it great labor and attention, will lead to such legislative provisions as are demanded by justice and humanity.

GEO. N. BRIGGS.

Commonwealth of Massachusetts.

His Excellency GEORGE N. BRIGGS:

The Commissioners, appointed by your Excellency, under a Resolve of the Legislature, of May 10th, 1848, "to visit the several tribes, and parts of tribes, of Indians, remaining within this Commonwealth, to examine into their condition and circumstances, and Report to the next Legislature, what legislation, in their opinion, is necessary, in order best to promote the improvement and interests of said Indians," respectfully submit the following

REPORT:

The duty imposed upon us by the first two clauses of the extract, recited from the Resolve, has proved far more laborious than was supposed, when its performance was commenced; especially the recommendation of measures "to promote the improvement and interests of the Indians," requires a wisdom to which we dare not claim, and involves a responsibility which we hesitate to meet.

Unwilling, as we should have been, to have assumed the task, had we been aware of its difficulties and importance, we have yet endeavored to carry out, to the extent of our abilities, the intentions of the Legislature. We have visited all the tribes and parts of tribes of Indians in the Commonwealth, except, perhaps, a few scattered over the State, who have long since ceased to be the wards of the State, and who are, practically, merged in the general community. We have seen them in their dwellings and on their farms, in their school-houses and meeting-houses, have partaken of their hospitalities of bed and board, have become familiar with their private griefs and public grievances, have congratulated them upon their privileges, and consulted with them on their disabilities. Encountering, at first, not unnaturally, jealousy and distrust, we have found that these, almost invariably, yielded before the exhibition of our own kind sympathies, and our assurances that the Commission had its origin in none but the most friendly motives on the part of the government of the State. Reserve once removed, we have found them, almost without exception, communicative and confiding. If we fail in making a satisfactory statement of their condition and wants, it will not be for want of opportunities of observation.

We are tempted to turn aside from the path to which our instructions point us, and enter upon a field full of materials for historical inquiry and antiquarian speculation. We are among the "stricken few" who remain of the once undisputed sovereigns of the Western World. The blood of Samoset and Massasoit runs in their veins; and the same spirit which prompted the "Welcome, Englishmen," which greeted the weary Pilgrims, and relieved their fears of Indian hostilities, has ever since controlled the intercourse of nearly all the tribes, of which they are the remnants, with the whites.

During Philip's war, the "Praying Indians" formed a bulwark between the hostile Indians and the feeble colonists; and subsequently, when in their own quarrels, or as allies of a foreign foe, other tribes eagerly embraced the opportunity to take bloody vengeance for the wrongs of their race, these have, with more than Christian forbearance, uniformly favored their invaders. It might be useful to illustrate more fully this fact as constituting a claim for the most generous treatment by the State.* It would be interesting to rescue from oblivion some of these fast fleeting mementoes of a people, soon to become extinct. We must leave, to the historian and the antiquary, what is not strictly within our province.

The names of the different tribes in the State are as follows: Chappequiddic, Christiantown, Gay Head, Fall River or Troy, Marshpee, Herring Pond, Grafton or Hassanamisco, Dudley, Punkapog, Natick, and Yarmouth.

The whole number of Indians, and people of color, connected with them, not including Natick, is 847. There are but six or

* See Appendix F.

iniquities," but, also, because he "healeth all our diseases," who will illustrate, in his daily life, the best mode of training body, mind and heart, and who will devote himself to an intelligent enforcement of the means of physical and spiritual improvement; such an one,—he need not be a great man,—would reap a reward to gladden a philanthropic and Christian heart. The cost of supporting a missionary in the other hemisphere, for a single year, would nearly support one at Gay Head for life.

We do not see that legislation can do any thing, immediately and directly, to improve the condition of the Indians at Gay Head. Whenever public sentiment shall have removed the social disabilities growing out of the unjust and unnatural prejudice against color, civil and political enfranchisement will follow, as a matter of course. Whatever recommendations we may make, will be intended to form the first step to a consummation so devoutly to be wished. The conqueror and the oppressor, with his heel upon the neck of his victims, should deal gently with their degradation.*

The Marshpee Tribe.

The territory of this tribe is bounded on the north, by Sandwich, east, by Barnstable, south, by the Vineyard Sound, and west, by Falmouth.

The whole territory consists of about 13,000 acres, of which about 11,000 acres are owned in severalty, and 2,000 held in common. The whole number of the tribe is 305.†

Families,	57
Males,	154
Females,	151
Natives,	279
Foreigners,	26
Under 5 years,	57
From 5 to 10,	32
" 10 to 21,	56

* See Appendix G. † Appendix A.

From 21 to 50,	103
" 50 to 70,	48
Over 70,	9

Ages, 70, 73, 75, 77, 83, 85, 87, 104, 107.

At sea,	30

The pursuits of this tribe, with the usual exceptions, are exclusively agricultural. The soil is various, but each allotment usually contains enough of good soil to yield comfortable support to industry and good management. The only articles produced are potatoes and the different grains, most of the families raising enough potatoes for their own use, and from ten to seventy or eighty bushels of corn annually. The larger portion of the tribe secure a tolerably comfortable living; quite a number are poor and improvident, ekeing out a scanty support by begging. They are behind the tribes already considered in the social arts and domestic comforts; none reaching the condition of the best, very many falling below the worst. The majority live in comfortable framed houses, while many still occupy huts and hovels, amidst filth and degradation. As to chastity and temperance too, they are behind the other tribes, though the uniform testimony is, that in both these respects, particularly in regard to temperance, there have been very great improvements during the last 15 or 20 years. The cases of illegitimacy, known now to exist, are 11. There is great deficiency of self-respect and of love of approbation, (with many laudable exceptions,) and, as a necessary result, of those high aspirations and aims, so essential to progress.*

Their stock consists of 16 horses, 76 horned cattle, 43 swine, 554 fowls, and 19 sheep.

The legal condition of this tribe is peculiar. We do not propose to enter into an examination of the circumstances which led to the passage of the act of March 31, 1834, establishing the district of Marshpee. Those circumstances are still comparatively fresh in the minds of all who were at the time interested in them, and the facts connected with them are matters of full record. The animosities leading to, attending and resulting from, that controversy, have hardly yet died out; as far as possible, we would avoid reviving them. That act conferred upon,

* Appendix C.

or recognized in, the proprietors of Marshpee, certain municipal rights, but left them under the same disabilities, as citizens of the State and the Union, with the other tribes. The commissioner, appointed under that act, is simply a guardian under a different name. The operation of the act has undoubtedly been favorable; still, perhaps not from any defect in itself, it has failed to accomplish all that was expected from its operation.

The act of 1834 recognized the existing divisions of the land, and confirmed each proprietor in the possession of such lands as he had appropriated. The act of March 3d, 1842, providing for the division of the common lands, has had a most important bearing upon the condition of the tribe. That act provided for the appointment of three commissioners, who were authorized so to make partition of the territory, as to give to each legal adult proprietor, male or female, to the children of such proprietors, and to every person of Indian descent, who was born in said Marshpee, or within the counties of Barnstable or Plymouth, and who had resided, or whose parents had resided, in Marshpee, for 20 years or upwards previous to the passage of the act of 1834, sixty acres of land in severalty, including what each proprietor might have previously occupied. The act of 1834 prohibits the alienation of lands to persons not belonging to the tribe, but allows of transfers among themselves. The proprietors "are exempt from State and county taxation," and their lands, from liability to be taken in execution. The act of 1842 provides for the assessment of taxes for district purposes. One tax has been assessed, and about one half of it was collected; but it was found impossible to collect the balance, and this shadowy exercise of municipal power, flattering as it at first seemed to the proprietors, has been abandoned. Under this partition of the lands, nearly every family now holds 60 acres; a large number, where both husband and wife were original proprietors, 120 acres; quite a number, inheriting, in addition to their own, allotments by the death of original proprietors, 180 or 240 acres.

A large portion of the land thus allotted in severalty, was, at the time of the partition, covered with valuable wood. This has nearly all been cut off and sold, very many of the less industrious proprietors relying upon the proceeds of its sale for support. In many instances, it has been cut at improper seasons, and sold for much less than its value; and now, not only is the wood gone, but the reliance upon this easy means of support has, in very many instances, engendered indolent and improvident habits, and many are just beginning to be thrown upon their own resources, without the industrious and economical habits which, but for the ill-advised kindness which has allowed this waste of their property, necessity would have compelled them to form. It is too late, now, to regret it; we have only to do with the remedy; but, had only an allotment of land been made to each proprietor, sufficient for purposes of cultivation and pasture, and the residue still held in common, the proceeds of the sales of the wood would, under judicious management, have constituted a fund which would have made the district independent for all coming time.

Some estimate may be made of the value of the wood of the whole territory, from the sum realized from the sale of the wood from the "Parsonage Lot." By the act of June 14, 1813, the "Marshpee Parsonage" was established, embracing, in 1845, 450 acres. For reasons, the nature or validity of which it is not material to discuss, the pastoral connection between the Rev. Phineas Fish and the district having been dissolved, and a compromise effected in accordance with which Mr. Fish relinquished the Parsonage, in July, 1845, the wood from that lot was sold for $6952 00. The whole territory comprises 13,000 acres; it will be readily seen that enough might have been assigned to each proprietor, and a common territory left, which would have been a fortune to the district.* We refer to this

* Hon. Josiah J. Fisk, who was appointed Commissioner to visit the Marshpee Indians, in 1833, in his Report, (Senate Document, No. 14, 1834,) says: "This plantation consists of 10,500 acres of land, (it has been since surveyed, and found to contain 13,000 acres,) three fourths of which, at least, are said to be more or less covered with wood averaging, by estimation, from five to ten cords the acre, consisting, principally, of pitch pine and oak, the first, of the value of one dollar, standing, the latter of the value of two dollars, standing. And there is a ready market for all this wood, at the landing-places which lie upon the borders of the Plantation. By a Report of Commissioners, made to the Legislature, in 1819, it appears that this whole territory, at that time, was estimated at five dollars the acre, and the Plantation was then *fourteen hundred dollars in debt*. From the late increased value of wood, upon the sea-board, this territory is thought to

as one of the mistakes of past legislation, throwing light upon the causes of the present improvident habits of the tribe, and suggesting the importance of care in avoiding similar mistakes in future.

The sources of public income are, the interest of the above amount, about one hundred dollars a year from salt marshes, and some small sums from sale of wood from common lands and from hiring out privileges of trout fishing. The last item, under good management, might become of considerable value to the district. The Annual Reports of the Commissioner, Hon. Charles Marston, contain so minute statements of the sources of public income to the district, and of its distribution, that we do not consider it important to enlarge upon this point.

Considerable uneasiness has been expressed in relation to the amount which the State is called to pay, from year to year, for the support of paupers at Marshpee. The condition of Marshpee, in this respect, is peculiar. The number of foreigners is not unusually large. The per centage of foreigners to the whole population of the various tribes, is as follows: Chappequiddic, 7 per cent., Christiantown, 8½, Gay Head,

have nearly doubled in value; its whole debt has been paid off, and the tribe have a balance of nearly *a thousand dollars in the treasury.*" We have no doubt, that, from the continued increase of the demand for wood, the value of the territory, had the wood been properly managed, would have doubled since 1833. This appears from the sale of the wood from the Parsonage, averaging about sixteen dollars per acre; so that, in this proportion, the plantation, under good husbandry, might now have been worth, at least, 100,000 dollars. We would not be understood as blaming the present Commissioner; the fault seems to have been the unwise concession of the Legislature to the importunate demands of the Indians, to be allowed the entire control of their lands.

We agree, however, with the Commissioner, and with the most intelligent men of the tribe, in the opinion, that it is fortunate that this source of support, if the lands must be thus allotted, is now exhausted. They are now thrown upon their own resources; and, though it will be long before the bad habits formed have been overcome, we have no doubt better days await them. They may now enjoy the blessings of the primal curse,—"In the sweat of thy brow shalt thou eat bread."

We do not question the necessity of a division of the lands, in 1842. The mistake was, in assigning so large a portion to each proprietor. The Commissioner, and others who were in favor of the division, opposed the allotment of so much. Still, the owning of the land in severalty, for the same reasons as on the Vineyard, has operated favorably. The difficulty will soon regulate itself. As the law allows the transfer of land among themselves, the indolent and improvident will gradually dispose of portions of their lands to the more thrifty, and economical habits will be formed under the natural laws of distribution.

7, Marshpee, 8½. But it so happens that, at this time, a large proportion of the foreigners at Marshpee are very aged and infirm. Of the 9 persons, over 70 years of age, 4 are foreigners, 1 of whom is an idiot. Unless the Commonwealth resorts to a remedy of more than questionable humanity, the forcible removal of these poor creatures, several of whom are fugitive slaves, from a community where they meet with sympathy and kindness, it would seem that no consideration of niggardly economy should prevent the State from allowing the district, in the language of Mr. Marston, "the full sum actually and necessarily paid for the support of the State paupers." The district ask nothing for the support of native paupers. This class imposes a heavy burden upon the district, especially as, practically, they are unable to assess taxes for their support. The overseers state, too, that this burden presses the more heavily, as the cost of supporting the county roads, which pass through their territory, is a serious item.

The amounts paid by the Commonwealth, for the last six years, are as follows:—

1843,	. .	$321 11
1844,	. .	317 34
1845,	. .	290 22
1846,	. .	346 15
1847,	. .	446 10
1848,	. .	434 50
Total,		$2155 42

The amount, it is true, is somewhat large. It may be more a matter of regret, when it is reflected that, with a more judicious rule of allotment, it might have been avoided; still, the necessity exists; and it seems to us that, until, under the operation of elevating influences which we do not despair of seeing brought to bear upon this people, they become capable of self-support, every consideration of humanity and of policy even, requires the adoption of a generous treatment.

One of the largest items of the State pauper account is an appropriation of a dollar and a quarter per week, for the sup-

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Jan. 27th, 1915.

Mr. Chas. A. Peters,

Box 32, Mashpee, Mass.

My dear Sir:

I have received your letter of January the 25th requesting that application blanks be sent you, but because it is the desire of the officials at Washington more and more to eliminate from the government's schools all the Indian students who have access to ample public school facilities at their homes it is doubted whether any other young people from Massachusetts can establish their eligibility for enrolment here.

If you have any information which would seem to establish the need of admitting your friends at Carlisle I will be pleased to have you write me full particulars.

In this connection I must add that transportation cannot be provided this year for any additional students.

Very truly yours,

HKM.

Supervisor in Charge.