IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

CIVIL ACTION NO.
1:16-cv-10184-WGY

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case was brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, by David Littlefield et al. (collectively, "Plaintiffs") challenging the September 18, 2015 Record of Decision ("ROD") issued by the United States Department of the Interior ("Department" or "Interior") et al. (collectively, "Defendants") to acquire approximately 170 acres in the Town of Mashpee, Massachusetts and approximately 151 acres in the City of Taunton, Massachusetts ("Property") in trust for the benefit of the Mashpee Wampanoag Tribe ("Mashpee" or "Tribe"). Defendants here move for summary judgment on Plaintiffs' First Cause of Action, in which Plaintiffs challenge the ROD on the basis that the Secretary of the Interior ("Secretary") lacks authority under the Indian Reorganization Act, ("IRA") 25 U.S.C. §§ 461-479a-1, to acquire land in trust for the Tribe.

The IRA, the cornerstone of modern Indian law and policy, authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." *Id.* § 465 (Section "465"). To determine whether it had authority to acquire land in trust for the Tribe, Interior construed another section of the Act, *id.* § 479 ("Section 479"), which sets forth three definitions of "Indian." Plaintiffs contend that the pertinent language is unambiguous and amenable only to the reading they give it—a reading that renders a portion of Section 479 entirely surplus. As set forth below, the statutory text and legislative history reveal that the IRA's language is ambiguous, and Interior's interpretation and application of it was reasonable and is therefore entitled this Court's deference under *Chevron U.S.A. Inc. v. NRDC* ("*Chevron*") 467 U.S. 837, 842 (1984). Defendants respectfully request the Court grant this Motion for Partial Summary Judgment on Plaintiffs' First Cause of Action and affirm Interior's authority to acquire the Property in trust.[1]

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[1] The initial Provisional Administrative Record, lodged on June 30, 2016, along with the Second Provisional Administrative Record, lodged on July 6, 2016, together comprise the full Administrative

STATUTORY BACKGROUND

I. The Tribal Self-Governance Goals of the Indian Reorganization Act

When enacted in 1934, the IRA marked a radical shift in Federal Indian policy away from prior policies designed to force Indians to abandon their way of life and resulted in the transfer of several millions of acres of land from Indian tribes to non-Indians. *Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992); F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW ("COHEN") § 1.04, pp. 71-79 (2012 ed.). By 1934, both Congress and Interior recognized that these prior policies were disastrous for Indians and that significant measures were needed to remedy the situation. ROD at 81-82[2] (citing AR001377-80). Commissioner John Collier[3] believed the solution to these problems was rebuilding and revitalizing the tribal communities through the return of governmental control over Indian communities to Indian tribes.[4]

The IRA, therefore, had two central goals: (1) "to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains"; and (2) "to enable the tribe to interact with and adapt to modern society as a governmental unit." COHEN § 1.05, at 81. *See Morton v. Mancari*, 417 U.S. 535, 542 (1974) (the "overriding purpose" of the IRA was to "establish machinery whereby

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Record for the ROD. The Administrative Record is cited herein as "ARXXXXXX." To the extent the Court desires, Defendants are amenable to further briefing on the First Cause of Action.

[2] The ROD appears in the Administrative Record at AR000050-189. For the Court's convenience, citations to the ROD herein refer to its internal page numbering.

[3] Commissioner Collier was the highest-ranking Department official tasked with matters pertaining to Indian Affairs at the time, and was also the primary author of the legislation that would become the IRA. *See Carcieri v. Salazar*, 555 U.S. 379, 390 n.5 (2009).

[4] *See*, *e.g.*, AR001380-81 ("The bill curbs Federal absolutism and provides Indian Home Rule under Federal guidance."); AR001384 ("[T]he fundamental purpose of the bill . . . [is] to promote Indian self-government, [and] gradually to turn over to organized Indian communities the various functions and powers of supervision which the Interior Department now exercises").

Indian tribes would be able to assume a greater degree of self-government, both politically and economically"). Accordingly, the IRA, *inter alia*, authorized new land acquisitions for Indians, 25 U.S.C. § 465, and extended indefinitely the periods of the federal government's trust with respect to Indian lands, *id.* § 462. It also required, shortly following enactment, that the Secretary hold elections at reservations, to allow the adult Indians residing there to vote on whether to reject, i.e., "opt out" of the IRA's benefits. *Id.* § 478 ("Section 478"). And to foster tribal self-government, the IRA provides that, if requested by "any Indian tribe," the Secretary shall hold an election allowing the tribe to adopt a constitution or bylaws. *Id.* § 476 ("Section 476").

II. Secretary's Authority to Acquire Land in Trust for Indians Under the IRA

Section 465 of the IRA, which authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians," has been described as the "capstone" of the IRA's land-related provisions. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Salazar*, 132 S. Ct. 2199, 2211 (2012). This authority, when coupled with the right of Indian tribes to organize a tribal government, *id.* § 476, provided a vehicle by which Indians residing together on a reservation at the time of enactment could pursue tribal self-governance, regardless of any tribal affiliation. Thus, the IRA fostered "tribal organization . . . to rehabilitate the Indian's economic life and . . . a chance to develop the initiative destroyed by a century of oppression and paternalism." AR001310; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

III. The IRA's Definitions

The IRA defines "Indian" in three crucial and independent ways:

> 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 [3] shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479 ("Section 479"). Thus, the Act first makes eligible for IRA benefits members of recognized tribes, which were under federal jurisdiction as of 1934 ("First Definition"). Second, the Act reaches those living on reservations as of June 1, 1934, whether they are members of recognized Indian tribes, or descendants of those members ("Second Definition"). Finally, the Act extends to those with "one half or more Indian blood" ("Third Definition"), regardless of whether they satisfy either of the first two definitions of "Indian."[5]

STANDARD OF REVIEW

I. Summary Judgment in the APA Context

Summary judgment is appropriate in APA cases because there are no issues of material fact and the "entire case on review is a question of law." *Patel v. Johnson*, 2 F. Supp. 3d 108, 117 (D. Mass. 2014) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). The Court's review is limited to the administrative record or those parts of it cited by the parties. 5 U.S.C. § 706; *Lovgren v. Locke*, 701 F.3d 5, 20 (1st Cir. 2012). Section 706(2)(A) of the APA provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *see also Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 72 (1st Cir. 2006). "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *see also Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015) ("If the agency's decision is supported by any rational view of the record, a reviewing court must

[5] Section 479 further defines "tribe" as including "the Indians residing on one reservation." Thus, persons who fall within the Second Definition, i.e., descent from a member of a recognized Indian tribe coupled with reservation residency as of June 1, 1934, were understood at the time of enactment to constitute an "Indian tribe," and thus would have qualified for the benefits the IRA accorded tribes, even if they did not satisfy the First Definition. *E.g.*, 25 U.S.C. § 476 ("[a]ny Indian tribe" may organize a tribal government).

uphold it.”). This standard is “highly deferential, and the agency’s actions are presumed to be valid.” *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009).

II. *Chevron* Deference

***Chevron* Step One.** In reviewing an agency’s interpretation of a statute it administers, a court is tasked with a two-step inquiry. *Chevron*, 467 U.S. at 842. “First, always, is the question whether Congress has directly spoken to the precise question at issue.” *Id.* “If the intent of Congress is clear, that is the end of the matter.” *Id.*; *see also Castaneda v. Souza*, 810 F.3d 15, 23 (1st Cir. 2015). Review at *Chevron* step one includes consideration of the legislative history. *Succar v. Ashcroft*, 394 F.3d 8, 30-31 (1st Cir. 2005). And, “to prevail under *Chevron* step one, [Plaintiffs] must show that the statute unambiguously forecloses [Defendants’] interpretation.” *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011). Where a statutory provision can “support two plausible interpretations,” even if one is the “more natural” reading, such language is ambiguous under *Chevron*. *Am. Fed’n of Labor and Cong. Of Indus. Orgs. v. FEC,* 333 F.3d 168, 174 (D.C. Cir. 2003); *see also Brand X*, 545 U.S. at 989. In such a case, courts are obligated to ask merely whether the “agency’s [action] is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843; *State of Ohio v. EPA*, 997 F.2d 1520, 1545 (D.C. Cir. 1993) (“both parties have proposed plausible constructions. . . we may not second-guess a permissible and reasonable construction posited by the agency”).

***Chevron* Step Two.** If statutory analysis does not clearly resolve textual ambiguity, then courts proceed to *Chevron* step two. There, “[i]f a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *Brand X*, 545 U.S. at 980. The underlying presumption is that

Congress "'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

ARGUMENT

I. Summary of Argument

The IRA defines "Indian" in three ways for purposes of identifying who is eligible for the Act's benefits. The first turns on tribal membership; the second turns on reservation residence; and the third turns on degree of Indian blood, i.e., heritage. Congress did this in order to bring within the Act's coverage Indians who faced three distinct set of circumstances. Any interpretation of these three definitions needs to preserve the logic Congress infused into the statutory provision containing these definitions. For instance, the IRA permits the Secretary to acquire land in trust for landless Indians meeting the Third Definition, thereby demonstrating a nexus based on heritage, so as to provide them a reservation. For Indians residing on a reservation, the Second Definition provides mechanisms for organizing as a tribe. And for recognized Indian tribes that were "under Federal jurisdiction" in 1934, the First Definition that was at issue in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the IRA provides the means for acquiring and expanding trust lands and reorganizing the tribal government structure. Here, Interior concluded it has authority to take land into trust for the Mashpee under the Second Definition because the Mashpee descend from, and are members of, a recognized Indian tribe and they were residing upon an Indian reservation as of June 1, 1934. Because the Mashpee were residing on a reservation as of June 1, 1934, Congress does not require consideration of whether they were also "now under Federal jurisdiction" when the IRA was enacted (First Definition) or whether they have the requisite degree of Indian blood (Third Definition).

Plaintiffs challenge Interior's interpretation of the Second Definition on a number of fronts. In each case, they must show that their definition is plainly the only one that a fair reading of the statute can support. Because Plaintiffs cannot do this, and because at best their proposed interpretation offers only a plausible alternative, principles of *Chevron* deference require the Court to uphold Interior's interpretation unless it is an unreasonable construction. Here, Interior's construction is more than reasonable. First, Interior construes "such members" in the Second Definition as referring back to "members of any recognized Indian tribe" in the First Definition. Plaintiffs would read that phrase as incorporating substantially more, essentially importing the main requirements of the First Definition into the Second. As set forth in detail below, nothing in the legislative history indicates that was what Congress intended, as the three-pronged definition of "Indian" already provides, for each prong, distinct requirements and limitations that do not require importing the requirements of one prong into another. Just as the First Definition limits members of recognized tribes to those under Federal jurisdiction at the time of the IRA's enactment, the Second Definition limits members of recognized tribes and their descendants to those residing on reservations as of June 1, 1934.

Plaintiffs would also import the "under Federal jurisdiction" requirement of the First Definition into the term "reservation," thereby limiting its applications to Federal reservations. There is no such specification in the IRA's language, however, and the understanding of the term "reservation" contemporaneous to the Act's enactment suggest no more than land that was set aside, or reserved, for Indian use. That was Interior's understanding in the years immediately after the Act's enactment, even if they balked, for policy reasons, at extending the Act to reservations that as a practical matter had been largely subject to state authority. Finally, Plaintiffs wish to limit recognized tribes to those recognized as of 1934, but Interior's

interpretation tracks the construction of that term offered by Justice Breyer in *Carcieri*, which has already been affirmed by a number of courts and should also be upheld here.

As to application of the Second Definition, Interior considered a voluminous historical record and found the Mashpee qualify. The Mashpee received Federal recognition as a tribe in 2007, and the historical record demonstrates that the Town of Mashpee has been set aside for Mashpee Indians through 1934, and several of its members resided there on June 1, 1934.

II. *Carcieri v. Salazar* Does Not Resolve the Ambiguity of the Second Definition

As Interior concluded in the ROD, many provisions in Section 479 are ambiguous. Contrary to Plaintiffs' argument, the Supreme Court decision in *Carcieri* only considered the meaning of "now" in the First Definition, and went no further. 555 U.S. at 395. Following *Carcieri*, Interior has had to address, with respect to the First Definition, what Congress meant by the phrases not interpreted by the Court in *Carcieri*, namely "under Federal jurisdiction," as well as "recognized Indian tribe" and whether the word "now" modifies both "recognized" and "under Federal jurisdiction." *See* AR000663-88.[6] Courts addressing the First Definition have agreed that ambiguity exists with regard to these phrases, and Interior's interpretation of them has consistently been accorded deference. *See*, *e.g.*, *Confed. Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 397-401 (D.D.C. 2014).[7]

Interior determined that Section 479's Second Definition[8] of "Indian" "indicates all or a

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[6] M-37029: The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act ("M-37029") (Mar. 12, 2014). An M-Opinion is a legal opinion issued by the Solicitor that formally institutionalizes Interior's position on a particular legal issue. *See* Dep't of the Interior, 209 Departmental Manual 3.2A(11) http://elips.doi.gov/ELIPS/DocView.aspx?id=792.

[7] *See also Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-CV-0660, 2015 WL 1400384, at *10-11 (N.D.N.Y. Mar. 26, 2015); *Stand Up for Cal. v. DOI*, 919 F. Supp. 2d 51, 69-70 (D.D.C. 2013).

[8] The Second Definition of "Indian" in Section 479 states: "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." Interior did not evaluate whether the First Definition also authorizes land acquisitions. ROD at 79-80.

portion of the preceding phrase" (i.e., the First Definition). ROD at 81. While Plaintiffs assert, as a matter of plain language textual analysis, that "now under Federal jurisdiction" is inseparable from the phrase preceding it, "members of a recognized tribe," a review of the legislative history demonstrates otherwise. As discussed below, "now under Federal jurisdiction" was sutured into the First Definition late in the legislative process to limit the reach of that definition. Until that change, "such members" in the Second Definition could not refer back to "under Federal jurisdiction" because it had not yet been added to the legislation. And, as shown below, importing the late-appended phrase "under Federal jurisdiction" from the First Definition into the Second disrupts the coherence and logic of Section 479's three definitions and simply makes no sense. Accordingly, there is no basis for embracing Plaintiffs' proposed reading of the Second Definition, especially at *Chevron* step one.

III. The Structure and Legislative History of Section 479 Demonstrate that Each Definition Has a Distinct Meaning and Purpose

The original version of the IRA, introduced February 12, 1934, offered a definition of "Indian" that, like the version eventually enacted, was three pronged. AR001274-75. While significant changes were eventually made to the First and Third definitions of "Indian" in the legislative process, the Second Definition, at issue here, largely remained intact:

> The term 'Indian' as used in this title to specify the persons to whom charters may be issued shall include persons of Indian descent who are members of any recognized tribe, band, or nation, *or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation*, and shall further include all other persons of one fourth or more Indian blood . . .

AR001275 (emphasis added). As of February 12, 1934, the Second Definition of Indian required (1) descent from members of a "recognized tribe, band, or nation" and (2) residence within the

"present boundaries of any Indian reservation." *Id.*[9] Commissioner Collier explained: "The object of this definition is to include all Indian persons who, by reason of residence, are definitely members of Indian groups." AR001384.

Between the initial version of the House Bill and its amended version of May 28, 1934, the conjunction between the First and Second Definitions was changed from "or" to "and." AR001466 . The change, the legislative history explains, clarified that the Second Definition was a stand-alone definition, not a modifier of either the First or Third definition:

> This amendment is designed to clarify the intent of the section that residence upon a reservation is deemed an essential qualification of charter membership in a community only with respect to persons who are not members of any recognized Indian tribe and not possessed of one fourth degree of Indian blood.

Id.[10]

The most significant modifications to Section 479 came in the Senate, late in the process, on May 17, 1934. That hearing focused on the three definitions of "Indian," with resultant amendments designed to limit the reach of the First and Third. With regard to the Third Definition, proposed at the time to encompass "persons of one fourth or more Indian blood," AR001694, Senator Wheeler, Chairman of the Senate Committee on Indian Affairs, was concerned that it was too lax and proposed instead a requirement of one half or more Indian blood. AR001723-24. Senator Thomas then noted that under the Second Definition, the quanta of blood was irrelevant, and Commissioner Collier rejoined by noting that the Second Definition

[9] "Tribe" was defined in a separate section as "any Indian tribe, band, nation, pueblo, or other native political group or organization" and did not originally include "Indians residing on one reservation." AR001277. Before it was struck, a section of an early draft of the Bill that focused on the preservation, acquisition and use of Indian lands defined "a member of an Indian tribe" as including "any descendant of a member permanently residing within an existing Indian reservation." AR001294.

[10] Changes to the Second Definition of "Indian" also created ambiguity regarding whether the persons who residing on a reservation must be members of recognized tribes, or simply descendants of members; this question, as noted by the ROD, is not germane to the Mashpee acquisition. ROD at 100.

was limited to those who reside upon a reservation:

> Senator Thomas: Well if someone could show that they were a descendant of Pocahontas, although they might be only five-hundredths Indian blood, they would come under the terms of this act.
>
> Commissioner Collier: If they are actually residing within the present boundaries of an Indian reservation at the present time.

AR001724. This explanation appearing to satisfy Senator Thomas's concern, the discussion then turned to the definition of "tribe" which was regarded as overbroad since it encompassed "any Indian tribe, band, nation, pueblo, or other native political group or organization." AR001725.

Senator O'Mahoney then responded that he did not see why those qualifying as tribal Indians should have more limited access to the IRA than those able to meet the Second Definition: "Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the reservation [who are not subject to a blood requirement]?" *Id.* After further discussion concerning whether certain tribal groups, perceived as problematic, could be addressed by unique provisions,[11] Collier intervened and suggested that the First Definition be limited to tribal Indians "now under Federal jurisdiction":

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

Id. Thus, under the First Definition, Interior must both confirm an entity is a recognized Indian tribe before taking some action for it, and also confirm the entity was "under Federal jurisdiction" as of 1934. The key point is that, although based on the exchange Congress altered the First and Third Definitions of "Indian," it left the Second Definition unaltered.

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[11] Senator Wheeler opined that certain tribes were not really tribes, should not be under Federal supervision, and should have their lands turned over to them "in severalty." AR001726. Senator O'Mahoney offered that the concern could be addressed "by some separate provision excluding from the benefits of the act certain types," but nevertheless insisted on the need for "a general provision." *Id.*

To be sure, the exchange leading to alteration of the First Definition appears to reflect some confusion on the part of its participants about the limits of what would become Section 479. *See* AR 0006714-74 (M-37029, at 9-12) (discussing legislative history of "now under Federal jurisdiction"). And Felix Cohen,[12] assessing the Senate's new version of what would become Section 479, noted that it "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' whatever that may mean." *Id.* at AR000674.[13] Not only was "now under Federal jurisdiction" left unexplored, but there was no indication that it was intended to add to the Second Definition's already-existing requirement of reservation residency. Collier's suggested addition to the First and Third Definitions appeased Senator Wheeler's demand for stronger limits on Section 479 and the discussion, thereafter, abruptly ends. AR001726-27.[14]

IV. Plausible Constructions of the Second Definition

As the Secretary found, the plain language of Section 479 permits two possible readings of the Second Definition of "Indian." First, it could be read as including "all persons who are descendants of such members [of any recognized Indian tribe] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." This reading defines "such members" in the Second Definition in the only way it could have been understood by Congress up until the May 17, 1934 Senate hearing which added the phrase "now under Federal

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[12] Felix Cohen was the Assistant Solicitor for Indian Affairs at the time, was one of the primary authors of the legislation that would become the IRA, and authored the first edition of the preeminent Federal Indian Law treatise. *See Confed. Tribes of Grand Ronde Cmty. of Or.*, 75 F. Supp. 3d at 404 n.10.

[13] Another Department memo similarly opined that the phrase "now under Federal jurisdiction" is "likely to provoke interminable questions of interpretation." AR000651.

[14] Meanwhile, on June 15, 1934, the House considered its own version of the IRA bill, which did not contain these changes introduced in the Senate. Per Senator Howard, the House version "recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood." AR000926. He elaborated that these "present reservation Indians" encompassed either "enrolled members of a tribe or descendants of such members living on a reservation." *Id.*

jurisdiction" to the First Definition. A second potential reading incorporates the entirety of the First Definition into the Second Definition such that it would require both residence upon an Indian reservation, and also descent from a member of a recognized tribe, which in turn needed to have been under federal jurisdiction as of 1934. The first reading of the provision means the IRA can reach members and descendants of members of recognized tribes not under federal jurisdiction, provided they were living on lands reserved for the use of Indians, or otherwise have the requisite blood quanta. The second reading, on the other hand, means that recognized Indian tribes and their descendants not under federal jurisdiction can only benefit from the IRA upon a showing of blood quanta alone, effectively reading the Second Definition out of the Act.

The legislative history confirms that the IRA was meant to reach tribal Indians as well as Indians residing on reservations who could, for various reasons, no longer claim membership in a recognized tribe (although they would have to show descent from members of such a tribe). But it sheds no light on whether what everyone understood as the modifying limitation on the First Definition of "Indian" was also intended to limit the Second. Indeed, by defining the residents of a reservation as a tribe in Section 479, Congress made clear its intent to rebuild tribal relations on the basis of reservation residence, regardless of the tribal relations possessed by the reservation residents at time of IRA enactment.

V. Interior's Interpretation of "Such Members" is Reasonable and Entitled to *Chevron* Deference

A. Interior Reasonably Concluded that "Such Members" in the Second Definition Does Not Incorporate "Under Federal Jurisdiction"

Given that neither the plain language of Section 479 or its legislative history resolves the question of whether the phrase "under Federal jurisdiction" is meant to apply to the Second Definition of Indian as well as the First, the question for this Court thus becomes whether, under

the second step of *Chevron*, Interior's construction should be upheld as reasonable.[15]

Interior construes "such members" in the Second Definition as not incorporating the limiting phrase "now under Federal jurisdiction." ROD at 93-95. As Interior explained, incorporating the entirety of the First Definition into the Second means that to qualify under the Second Definition requires qualification under the First – except perhaps, as Plaintiffs argue, for unenrolled minors. Nothing in the legislative history supports, nevermind compels, this view. And of course, once those minors are old enough to enroll, they too would come under the reach of the IRA, thereby rendering implausible Plaintiffs' suggestion that Congress enacted the Second Definition out of concern for "unenrolled minor children." Am. Compl. ¶ 20.

Plaintiffs' reading of the Second Definition, as discussed below, is also contradicted by Interior's early implementation of the IRA. When determining whether a group fell within the scope of the Act, Interior looked to the Second Definition if authority was not found under the First. It cannot follow, then, that all of the requirements of the First must be implied in the Second, because if that was true, then Interior would have had to move directly to the Third Definition under those circumstances. Yet, that was not what Interior did. *See* AR000427 ("Whether or not the Indians residing in the Yavapai Camp constitute a recognized tribe, they are eligible to organize under the Act by virtue of their residence on the reservation."); AR000419 (noting that the Indians referenced "do not enjoy a status either as recognized bands or as Indians on a reservation entitling them to be organized under the [IRA]"); ROD at 86.

B. Interior's Post-Enactment Implementation of the IRA Supports the Department's Interpretation in the ROD

[15] In light of Interior's expertise and its role in administering the IRA, the concerns of *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), regarding the Internal Revenue Service's lack of expertise in health care policy, do not apply here and thus *Chevron* controls the case.

The ROD thoroughly details how Interior implemented the IRA after its enactment, ROD at 85-90, and the Department concludes that overall "implementation of the IRA varied, substantially depending on the unique history of each region" as well as "policy decisions and the dearth of Federal resources," *id.* at 90. Nevertheless, Interior understood Section 479 as providing three, not two, distinct ways to qualify as an "Indian" under Section 479. Commissioner Collier issued a memo, Circular 86949, describing the IRA's provisions. AR000910-917. In it, he distinguished each of the definitions of Indian in terms of the limitations it did not share with the other prongs:

> (a) All persons of Indian descent who are members of a recognized tribe, *whether or not residing on an Indian reservation and regardless of the degree of blood*.
> (b) All persons who are descendants of any such members of *recognized Indian tribes* and were residing within an Indian reservation on June 1, 1934, *regardless of degree of blood.*
> (c) Persons of one-half or more Indian blood, *whether or not affiliated with any recognized tribe and whether or not they have ever resided on an Indian reservation*.

AR000916-17 (emphasis added). Collier explained that compliance with the Third Definition required neither an affiliation with a recognized Indian tribe, nor residence on an Indian reservation. In short, Collier viewed the Second Definition as a stand-alone requirement, not a mere appendage to the First Definition. While Plaintiffs characterize the ROD's reading of the Second Definition as "newly-minted," Am. Compl. ¶ 17, the ROD's reading is *exactly* how Collier read it in his Circular 86949. AR000917. Collier reiterated this view in a second memo, Circular No. 3134, Enrollment under the Indian Reorganization Act (Mar. 7, 1936):

> Thus, if a person of Indian descent belongs to a recognized tribe which was under Federal jurisdiction on the date of the Act (Class 1) or is a descendant of such member residing on a reservation June 1, 1934, (Class 2), he is entitled to participate in the benefits of the Act regardless of his degree of Indian blood; and, likewise, a person of one-half or more Indian blood (Class 3) is eligible therefor irrespective of tribal membership or residence on a reservation.

AR000409. To be sure, Collier noted that "[t]here will not be many applicants under Class 2,

because most persons in this category will themselves be enrolled members of the tribe . . . and hence included under Class 1," *id.*, but this was not because the Second Definition was regarded as statutory surplusage, but rather because individuals living as Indians likely both had tribal relations with a tribe under federal jurisdiction (Class 1) and land set aside for the tribe (Class 2). And where one or the other was lacking, the IRA provided the means for rectifying the situation. Hence, Interior advised its employees, "[w]herever practicable, the Interior Department will treat the Indians of a single reservation as a single tribe." AR000917.[16]

C. Interior Reasonably Concluded that, in Light of Statutory Construction Principles, Plaintiffs' Preferred Reading Should be Rejected

As Interior explained, Plaintiffs' interpretation would effectively read the Second Definition out of existence. Their reading violates the statutory construction rule that an interpretation resulting in the statute's nullification, or rendering superfluous other statutory provisions, is disfavored. *See*, *e.g.*, *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *Mass. Ass'n. of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999). And, as Interior noted, it runs afoul of the Indian canon that requires "ambiguous provisions [in a statute be] interpreted to the Indians' benefit." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal ellipses, quotations, brackets and citations omitted); *see also Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985).[17]

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[16] The First and Second Definitions are "limited to those for whom a Federal relationship existed in 1934, either through membership in a 'recognized Indian tribe' or by residence on a reservation." ROD at 94. Federal authority to deal with all Indians is plenary. *Id.* (citing *U.S. v. Sandoval*, 231 U.S. 28, 45-46 (1913)). It is settled that Indian lands are governed by "federal law and can only be extinguished with federal consent . . . in all of the States, including the original 13." *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661, 670 (1974). The United States can assume a relationship with Indians on the basis of their possession of land alone, even where in all other respects the Federal Government has not dealt with them. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

[17] Despite Plaintiffs' contrary assertions, the rule of the last antecedent does not come into play because this is not a situation concerning whether a limiting clause modifies only the last term or an entire series. Moreover, even if the rule came into play, the Supreme Court has long recognized that application of it

Interior's construction honors the logic of Section 479 and is also consonant with other provisions of the IRA designed to ensure that self-governing tribes have a reservation, 25 U.S.C. § 465, and that reservation residents can politically organize as an Indian tribe, *id.* § 476. That includes Section 479 itself, which provides that residents of a reservation are a tribe for purposes of the IRA. The Second Definition was not an afterthought, but a viable definition meant to include a category of Indian tribes not otherwise encompassed by the First Definition.

D. The Meaning of "Recognized Indian Tribe" in the First Definition

In *Carcieri*, the Supreme Court interpreted the word "now" in the First Definition, but nothing more. In his concurrence, Justice Breyer went further, observing that the First Definition "imposes no time limit upon [tribal] recognition." 555 U.S. at 398. This follows foremost from Section 479's syntax. *Id.* In English, "the normal position of an adjective is directly before the word it modifies." *Gen. Elec. Co. v. Comm'r of Internal Revenue*, 245 F.3d 149, 155 (2d Cir. 2001) (internal quotations omitted). By placing the adjective "now" before "under Federal jurisdiction," but after "recognized Indian tribe," 25 U.S.C. § 479, Congress evidenced its intent that "now" modify only "under federal jurisdiction." *Id.*[18]

Interior has followed Justice Breyer's reading of Section 479, interpreting the First Definition as only requiring that a tribe show it was under federal jurisdiction as of 1934, not that it was recognized as of 1934. AR000685-88. This makes sense because they are two separate inquiries. Whether a tribe is under federal jurisdiction as of 1934 goes to the question of whether the United States had assumed duties, responsibilities or obligations to such tribe at time of IRA

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must yield when statutory and legislative context requires a different interpretation. *E.g.*, *United States v. Hayes*, 555 U.S. 415, 425 (2009).

[18] That "now" modifies "under Federal jurisdiction" and not "recognized Indian tribe" confirms that they are independent phrases with distinct meanings. Thus, it was perfectly rational, and consistent with the Indian canon, that Interior did not read the Second Definition as importing the entirety of the First.

enactment. *Id.* at AR000678-82 (M-37029 at 16-20). But whether a tribe is "recognized" goes to whether the subject group is an actual Indian tribe, and that need only be ascertained at the time of the trust acquisition. *Id.* at AR000685-87 (23-24).[19] This puts to rest Plaintiffs' contentions that the Mashpee must be federally recognized in 1934, because that is not required by the IRA.

E. The Phrase "Any Indian Reservation" is Not Unambiguous

The IRA's language, and its legislative history, also demonstrate that the term "any Indian reservation" in the Second Definition is ambiguous and does not have a plain meaning. The Second Definition encompasses Indians "residing within the present boundaries of any Indian reservation" as of June 1, 1934, but the IRA, unlike a number of other statutes, does not include a definition of the term "reservation." 25 U.S.C. § 479. Looking at the IRA as a whole, Interior determined that "reservation" was intended to include a diverse array of land holdings that had been established in various ways. The IRA provides that upon its passage, "no land of any Indian reservation, *created* or *set apart* by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or *otherwise*, shall be allotted in severalty to any Indian." *Id.* § 461 (emphasis added). From this provision, it can be gleaned that the IRA requires that the "reservation" be established, or set aside for Indians, by some mechanism which could include those specifically listed or the catch-all of "otherwise." The scope of "otherwise" is not specified.

As the ROD details, Interior consulted contemporaneous dictionary definitions and Supreme Court decisions to determine the most likely contemporaneous understanding of

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[19] As Justice Breyer noted, there was a lack of clarity about the status of many tribes at the time of the IRA. 555 U.S. at 397-98. To verify tribal status, the relevant concern is not the state of Federal knowledge at the time of the IRA's enactment—when information regarding tribal status might be missing and/or before a formal investigation is made—but whether tribal status is confirmed (and the tribe "recognized") before land is taken into trust under Section 465. The Secretary's interpretation of the First Definition has been found deserving of deference and consistently upheld. *See, e.g.*, *Confed. Tribes of Grand Ronde Cmty. of Or.*, 75 F. Supp. 3d at 397-401; *Cent. N.Y. Fair Bus. Ass'n*, 2015 WL 1400384, at *10-11.

"reservation." ROD at 95-97. Dictionaries in the early 20th Century defined "reservation" in various ways, including "a tract of land such as parks, military posts, and Indian lands"; "[a] tract of the public land reserved for some special use, as for schools, for forests, for the use of Indians." *Id.* at 96 & n.254; AR000658; AR000661. Supreme Court decisions that preceded the IRA reflect that "reservation" did not have a fixed meaning and was applied broadly to diverse factual circumstances, regardless of how the reservation was formed.[20] Thus, the fact that the land has been set aside or reserved for Indian use is key, regardless of how it was set aside.[21]

The IRA's legislative history reveals some grappling with the term "reservation" and the phrase "any Indian reservation," but does not conclusively resolve its precise scope. Early drafts of the legislation defined "reservation" as "all the territory within the outer boundaries of an Indian reservation, whether or not such property is subject to restrictions on alienation and whether or not such land is under Indian ownership." ROD at 82; AR001277. Congress also considered limiting the Indian tribes who were eligible to formally organize under the IRA to "[a]ny Indian tribe residing on a reservation on which at least 40 per centum of the original land is still restricted or in tribal status." ROD at 82; AR001309. Sections of the draft legislation, including the draft definitions of "reservation," were ultimately struck from the bill, leaving undefined the phrase "any Indian reservation" in the Second Definition.

In sum, after examining the statutory text, contemporaneous interpretations of the word

[20] For instance, a "place of encampment" promised to an Indian tribe by treaty for fishing purposes was determined to be a "reservation" and it was "immaterial" how the precise boundaries of the set aside were established. ROD at 95-96 (discussing *Spalding v. Chandler*, 160 U.S. 394, 403-04 (1896)). Subsequently, the Court confirmed that it was not necessary that a reservation be established through "a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes." ROD at 96 (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

[21] In 1945, Solicitor Gardner concluded that neither Interior, or the courts, had "laid down a general definition of" "reservation." ROD at 97; AR000442. *See also* COHEN § 3.04[2][b], pp. 185-86.

"reservation," and the legislative history, the precise limits of the phrase "any Indian reservation," are not unequivocally clear. The phrase is therefore ambiguous, and Interior had to give meaning to it. For the reasons below, the Court should conclude that Interior's interpretation is reasonable and entitled to *Chevron* deference.

F. Interior's Interpretation of "Any Indian Reservation" is Reasonable and Entitled to Deference

In construing the phrase "any Indian reservation," Interior determined that the terms "reservation" and "Indian reservation" at the time of the IRA's enactment referenced "lands set aside for Indian use and occupation." ROD at 98. Interior further determined that whether a particular tract of land constitutes a "reservation" under the Second Definition is a case-by-case inquiry, in which a "wide range of relevant evidence" should be examined to determine whether "that land was set aside for Indian purposes." *Id*. Such evidence includes "colonial, State, and Federal records pertaining to a protected Indian settlement,"[22] academic reports, and other historical evidence, including evidence that precedes or post-dates 1934, given the need to understand the full historical context of lands set aside for Indian purposes. *Id*. at 98-99. As set forth below, Interior reached this conclusion based on its careful consideration of the Department's early implementation of the IRA, and after taking into account other agency interpretations of the language done for specific administrative purposes.

i. Interior's Contemporaneous Implementation of the Second Definition Confirms the ROD's Conclusions

Interior's duty to implement the IRA was triggered immediately as demonstrated through

[22] Interior elaborates that these records include, but are not limited to "treaties and executive orders concerning the land, Commissioner of Indian Affairs reports discussing the status of the settlement and its Indian inhabitants, Federal enforcement of the Trade and Intercourse Acts for activities on the reservation, and any other records of an agency presence on the reservation or consideration of the reservation in the formation of Federal policy." ROD at 98.

the Act's requirement that shortly after enactment, the Secretary was required to hold elections at reservations providing "adult Indians" the opportunity to vote to opt out of the IRA's provisions, 25 U.S.C. § 478. Interior had to quickly determine, therefore, which land holdings constituted a "reservation" upon which a Section 478 election should be held. Despite the preparation of "general guidance," Interior's implementation of the IRA reveals that agency officials "were often uncertain, and in some cases, mistaken as to whether the IRA applied to a certain Indian group or reservation." ROD at 85. Nevertheless, it also shows that Interior understood the term "reservation" to have a broad reach, even if, as a matter of policy, Interior was unprepared to extend the IRA to all Indians residing on such reservations.[23]

With regard to Eastern tribes, policy choices about where the IRA "should" apply often influenced the process. For instance, while recommending that Indians residing on reservations subject to State law should not be organized under the IRA, Interior field agents acknowledged that "it is generally understood that these Reservations could be considered 'Reservations' within the meaning of Section [479] of the Reorganization Act." AR001470. Although Commissioner Collier, based on his view of who appeared sufficiently "Indian," decided as a matter of policy not to extend the IRA to certain Indians, Interior's Solicitor at the time emphasized that, as a legal matter, the phrase "any Indian reservation" was broad enough to encompass reservations that were not "*federal* reservations." AR000415; ROD at 87-88 (analyzing full debate over extending IRA to state reservations). As Department officials urged at the time, the assertion of State jurisdiction over Indian communities in the years leading up to 1934 did not foreclose Federal authority in or after 1934, a conclusion that federal courts have also reached. *E.g.*, *Joint*

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[23] For instance, Interior wrestled with whether the land holdings in California for small groups of Indians, referred to as "rancherias," constituted "reservations" within the meaning of Section 478. ROD at 86-87. Interior ultimately concluded they did, and elections were held throughout California on them. *Id.*; *see also* AR001328-35 (listing most reservations where Indian residents voted whether to opt out of the IRA).

Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

Given this, the Court should reject Plaintiffs' contention that the IRA "plainly" requires that "federal" be read into the phrase "any Indian reservation" in the Second Definition, or that it requires some sort of showing of federal superintendence. Congress declined to include an express limitation such as "federal" in the phrase, and early interpretations construed the provision as broadly encompassing more than just "federal" reservations. Moreover, tracts of land, set aside for Indian purposes, were within the sphere of Federal authority despite any assertions of state authority over the parcel, as the Federal government's authority vis-à-vis Indians cannot be ousted by the assertion of state jurisdiction. *Id.*[24] Although Commissioner Collier and others asserted that "culturally viewed" residents on some state reservations were "not Indians at all," AR000415, the IRA definition of "Indian" does not involve "cultural views." The Second Definition requires residence on a reservation, and in the wake of the IRA's enactment, Interior understood "reservation" to encompass areas set aside for Indians regardless of whether State or Federal authorities asserted jurisdiction over such lands.

ii. Other Interpretations of "Reservation" or the Second Definition are Irrelevant to the Inquiry Here

Plaintiffs argue that the ROD reflects a deviation from other agency interpretations of the IRA, including in Interior regulations addressing specific administrative functions, and that the interpretation deviates from positions taken by the United States concerning the meaning of "reservation" in different statutes. At the outset, Congress sometimes, but not always, defined "reservation" or "Indian lands" in statutes, in accord with the purposes in enacting those statutes. Additionally, when Congress did supply a definition for the terms "reservation" or "Indian

[24] *See*, *e.g.*, Trade & Intercourse Act, 25 U.S.C. § 177.

lands," it did not do so in a consistent or even similar manner.[25] With the IRA, Congress did not define the term, leaving it to the Department to interpret as it implemented the Act.

Plaintiffs mistakenly assert that Interior's definition of "Indian reservation" in its Land Acquisition regulations controls. The regulations at 25 C.F.R. Part 151 are applicable to all land acquisitions, both for Indian tribes and individual Indians, under any statute, including the IRA.[26] The regulations guide the Secretary's exercise of discretion in acquiring land into trust, not in determining whether an Indian or tribe is eligible for IRA benefits. These regulations provide for stricter scrutiny of "off-reservation" trust acquisitions than for "on-reservation" acquisitions. *Compare* 25 C.F.R. § 151.11 *with* 151.10. The reservation definition in Section 151.2 turns on "governmental jurisdiction" exercised by a tribe as a way to avoid administrative problems that could arise wherein members of other Indian tribes obtain land holdings within a different Indian tribe's reservation, potentially creating jurisdictional problems that would frustrate subsequent agency administration. Finally, Plaintiffs cannot seriously assert that the 25 C.F.R. Part 151 definition controlled, because in many respects it is even more expansive than the language at issue here, encompassing as it does "former reservation" lands, i.e., "disestablished or diminished" reservations. *Id.* § 151.2(f).[27]

VI. Interior's Determination that the Mashpee Was Eligible for IRA Benefits Pursuant to the Second Definition is Reasonable and Should be Upheld

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[25] *E.g.*, 7 U.S.C. § 2012 (1994) (defining "reservation" as "the geographically defined area or areas over which a tribal organization . . . exercises governmental jurisdiction"); 25 U.S.C. § 1452(d) (1994) (defining "reservation" as including "Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated by Native groups, regional corporations and village corporations under the provisions of the Alaska Native Claims Settlement Act.").

[26] *See* 25 C.F.R. § 151.2(f) (limiting definition of "Indian reservation" where "another definition is required by the act of Congress authorizing a particular trust acquisition.").

[27] Plaintiffs also allege that the BIA's hiring preference regulation contradicts the ROD, Am. Compl. ¶ 18, but that regulation just tracks the language of Section 479. *See*, *e.g.*, 25 C.F.R. § 5.1 (defining "Indian" exactly as set forth in Section 479).

A. Interior Properly Determined the Mashpee are Descendants of Members of a Recognized Indian Tribe

As discussed above, the IRA does not impose a temporal requirement on the term "recognized Indian tribe."[28] In determining that the Mashpee satisfied the descendants of members of a recognized Indian tribe requirement, Interior had to look no further than the Tribe's formal federal recognition, which occurred in 2007 and was done through the 25 C.F.R. Part 83 federal acknowledgment process. ROD at 112; *see also* Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007) (AR000192). As part of that process, the Tribe was required to fulfill various political and ethno-historical criteria, including that there existed a "genealogical relationship stemming back to 1934 and earlier." ROD at 112; *see also* 25 C.F.R. 83.7(e) (as of 2007) (requiring that the "petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."). Additionally, a tribe must establish that it has been "identified as an American Indian entity on a substantially continuous basis since 1900[,]" *id.* § 83.7(a), and "maintained political influence or authority over its members as an autonomous entity from historical times until the present[,]" *id.* § 83.7(c). Thus, a tribe recognized through the acknowledgment process constitutes a tribe that existed as a government and community from historical times and has been identified as such since at least 1900. Interior determined the Tribe

[28] Plaintiffs' allegations that Mashpee were not "federally recognized" in 1934 or registered as a tribe with the Office of Indian Affairs, Am. Compl. ¶¶ 127, 140, have no place in this inquiry. Neither *Carcieri* nor the IRA requires recognition in 1934. Further, to the extent that Plaintiffs argue Mashpee were not under federal jurisdiction in 1934, such an allegation is not apt, as the "under federal jurisdiction" requirement applies only to the First Definition. Interior explicitly stated that its determination only applies to the Second Definition, which does not include such requirement. ROD at 79.

satisfied both of these criteria as well. AR000973.[29] The 2007 federal acknowledgment of the Tribe, coupled with the factual findings made regarding genealogical aspects of the Tribe's current members, provided the Department the requisite information to demonstrate the Tribe's current members descend from a recognized tribe.

To the extent they try, Plaintiffs are precluded by the statute of limitations from challenging the determinations made during the federal acknowledgment process, Am. Compl. ¶ 125. *See* 28 U.S.C. §2401; *Mowa Band of Choctaw Indians v. United States,* No. 07-CV-0508, 2008 WL 2633967, at *2 (S.D. Ala. July 2, 2008) (finding "that § 2401(a) applies to suits regarding Bureau of Indian Affairs decisions in Federal Acknowledgment petitions"). Plaintiffs would have this Court substitute findings made in a jury trial in the context of a land-claim suit to which the United States was not a party, *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 945 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), for the Bureau of Indian Affairs' ("BIA") Proposed Findings for the Mashpee's federal acknowledgement, even though the BIA squarely addressed the land claim suit's findings in its administrative process, finding them not controlling. AR000961.

The BIA properly stated that the "Federal acknowledgement regulations employ different legal standards of evidence to determine whether an Indian group exists [as] an Indian tribe than those used in the land-claim suit of 1976." *Id*. Moreover, that suit and the subsequent suit against the federal government, *Mashpee v. Watt*, 542 F. Supp. 797 (D. Mass. 1982); *aff'd* 707 F.2d 23 (1st Cir. 1983) (applying res judicata to bar the suit against the United States), addressed whether

[29] In concluding in 2007 that the Mashpee satisfied this criteria, the BIA relied upon an 1861 report, authored by John Milton Earle and commissioned by the Massachusetts Legislature, which provided a membership list for the Tribe. ROD at 112-113 (citing Office of Federal Acknowledgment Proposed Findings (Mar. 31, 2006); AR001086-1087). BIA concluded that 90% of the Tribe's current members descend from that list. *Id*.

the Mashpee constituted a "tribe" under the Non-Intercourse Act, not whether the Mashpee constituted a "tribe" within the meaning of Interior's Federal Acknowledgment regulations.[30]

Finally, to the extent that Plaintiffs point to the fact that Interior did not apply the IRA to the Mashpee immediately after enactment, that is not dispositive. As Justice Breyer noted in *Carcieri*, Interior often lacked clarity regarding the status of tribes at and after the IRA's enactment, and was free to later correct mistakes that were made, because, as the Justice further noted, the phrase "recognized Indian tribe" in the First Definition is not subject to the same temporal restriction that applies to "under Federal jurisdiction." 555 U.S. 397-98.

B. Interior Properly Determined the Tribe's Members Resided Within the Boundaries of an Indian Reservation as of June 1, 1934

Interior concluded that the terms "reservation" and "Indian reservation" at the time of the IRA's enactment referenced "lands set aside for Indian use and occupation." ROD at 98. Interior further determined that whether a particular tract of land constitutes a "reservation" within the meaning of the Second Definition is a case-by-case inquiry that has to be done through an examination of a "wide range of relevant evidence," *id.*, given the need to understand the full historical context for the particular tract, *id.* at 98-99.

Interior reasonably determined that the Mashpee were, on June 1, 1934, residing on a "reservation" within the meaning of the IRA. Given its initial history as a set aside for the Mashpee Indians beginning in colonial times and its subsequent history carrying forward to modern times, including and even following 1934, the Town of Mashpee constituted a

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[30] Plaintiffs attempts to argue that judicial estoppel, Am. Compl. ¶ 100, should have prevented the BIA's 2007 federal acknowledgement of the Tribe fail because as Plaintiffs concede, *id.*, judicial estoppel does not apply to the United States. *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (determining that nonmutual offensive collateral estoppel does not extend to suits against the United States). And in any event, the United States has never affirmatively litigated, let alone unsuccessfully, the issue of the Mashpee's tribal identity, and thus collateral estoppel principles could not and did not foreclose the BIA from acknowledging the Tribe through the administrative process.

"reservation" under the IRA. ROD at 113. The Town was initially set aside as a praying town for the Mashpee, when two Wampanoag leaders in 1665 and 1666 granted by deed the lands comprising the Town to the "South Sea Indians and their children forever"[31] to be held in common and inalienable to outsiders unless all tribal members consented. ROD at 102 (citing AR000195 and AR000198). Historical evidence confirms that the colonial court endorsed the set aside of the Town for the Mashpee. *Id.* at 113-14.[32]

Interior properly concluded that this evidence alone demonstrated that the lands comprising the Town "constitute an initial set aside appropriating the Mashpee tracts for the use and occupation of the Mashpee Indians." ROD at 114. As Interior pointed out, there are no "magic words" for the creation of a reservation. *Id.* And the Supreme Court has articulated that "in order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract[.] It is enough that from what has been done there results a certain defined tract appropriated to certain purposes." *Hitchcock*, 185 U.S. at 390; ROD at 114. Thus, by operation of law, when the United States was formed, the United States assumed the rights and obligations of the Crown regarding existing property ownership,[33] and the federal government possessed exclusive sovereign authority over Indians and their lands, including the Mashpee, even if it declined to exercise such jurisdiction.[34]

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[31] Mashpee were previously referred to as South Sea Indians or Marshpee. AR000967.

[32] *See also* 1665 Deed (AR000195) (stating the lands belong to "said Indians, to be perpetually to them and their children, as that no part of them shall be granted or purchased by any English, whatsoever, by the Courts [sic] allowance, without the consent of all the said Indians.")).

[33] *See* ROD at 110 n.350; *Mitchel v. United States*, 34 U.S. 711, 748–49 (1835) ("[A]ccording to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws.").

[34] It is settled law that Indian lands, in the first instance, are governed by "federal law and can only be extinguished with federal consent . . . in all of the States, including the original 13." *Oneida Indian Nation of N.Y. v. Oneida Cty.*, 414 U.S. 661, 670 (1974). Whether these lands comprised a "federal" or "state" reservation does not resolve the question. As set forth above, the Second Definition broadly

In the years that followed, the record demonstrates that the Tribe continued to occupy these lands and the governing sovereigns, whether it be the British Crown by way of the colonial government, the United States, or the Commonwealth of Massachusetts, continued to recognize the lands as a reservation. During the years before the United States was formed, the colonial government implemented a number of oversight measures, including a proprietary system of governance and ownership in the 1720s, and installing non-Mashpee overseers in 1746, before eventually reversing course and creating a self-governing Indian district in 1763. ROD at 103.

The Town of Mashpee remained a set aside for Indians after the formation of the United States, as evidenced by the Tribe's continued ownership of the lands in common with restraints against alienation and the political and cultural control the Tribe exerted over the reservation. ROD at 104; 114. Between 1788 and 1870, the Commonwealth implemented various policies, including installing guardians in 1788; converting the reservation back into a self-governing Indian district in 1834; allotting some of the Tribe's common lands in 1842 to individual members; lifting restrictions against alienation in 1869; and converting the lands from classification as an Indian district to an incorporated Town in 1870.[35] ROD at 104-05. Nevertheless, the ROD explains, "the Mashpee continued to dominate the Town's population, as well as control the Town's government and culture up until the 1970s." *Id.* at 106-07.

Additionally, the Federal government exercised oversight, although admittedly limited, of

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encompassed more than "federal" reservations, and it is well-established that regardless of whether it was actually exercised, the federal government had authority over all Indian lands.

[35] The Commonwealth's allotment of the common lands within the reservation, its lifting of the restrictions on alienation, and the subsequent dissolution of the Indian district do not effect a termination of the reservation-status of the land, since it is well established that "only Congress can divest a reservation of its lands and diminish its boundaries" through explicit actions. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); ROD at 115-116. Recognizing that the Commonwealth's authorization of allotment of the reservation was done without congressional approval, the Department reasonably determined that the 1842, 1869, and 1870 actions could not serve as a basis for a change in status of the reservation. *Id.*

the Tribe and its lands, when the Mashpee were evaluated as a potential candidate for forced removal west under the prevailing Federal removal policy. *Id.* at 104; 115. After visiting the Town and identifying it as a "reservation," the Federal agent, Jedidiah Morse, ultimately recommended against the Tribe's removal in 1822. *Id*. The Tribe was further discussed in an 1890 annual report by the Commissioner of Indian Affairs, describing their occupancy on certain tracts of lands in the Commonwealth. AR000273-274. And even contemporaneous to the passage of the IRA, Gladys Tantaquidgeon, by commission of the BIA, surveyed New England tribes including the Mashpee, and identified the Town of Mashpee as a "reservation." AR000313. While Interior declined to extend the IRA to the Mashpee for the same policy reasons it declined the Act's benefits to other Eastern tribes (whether the tribe's members were sufficiently "Indian" in the eyes of Interior officials), *see* AR006678; AR006680, Interior nevertheless understood that the Mashpee, like other the other Eastern tribes, *see* AR000415, were residing on a reservation.

Interior also recognized that the historical record, especially in the years just following the IRA's passage, demonstrated that Federal officials assumed tribes located in the Eastern states, like the Mashpee, were to be overseen by state and local governments, and thus did not qualify for federal funds. ROD at 117; *see also* AR000278; AR001909. Interior, however, determined this assumption was a reflection of "evolving and changing Federal policy, rather than legal realities, of that period" and thus, Mashpee's exclusion from federal programs was not dispositive of the Town's status as a reservation for IRA purposes. ROD at 117-118. Further, as discussed *supra*, state and federal oversight are not mutually exclusive, and primary state oversight over a particular Indian reservation does not erase, or in any way hinder, the federal government's overarching sovereign authority over the Mashpee and their lands.

Looking to the history and varying relationships among the Tribe and colonial, state, and

federal governments, coupled with (1) no showing of Congressional sanction of diminishment of the Tribe's reservation and (2) the Tribe's continued cultural and political control of the Town into the late twentieth century, the Department reasonably determined the Indian "character of the Reservation persevered up until and through the time in question, June 1, 1934." ROD at 116.

The Tribe identified thirty-five "living tribal members" who resided within these boundaries as of June 1, 1934. AR006669. Thus, the Department reasonably concluded that the "Tribe's members maintained residence within the boundaries of an Indian reservation as of June 1, 1934." ROD at 120. In light of the extensive historical evidence, the sweeping remedial purpose of the IRA, and the Indian canon of construction, Interior reasonably concluded that the Tribe met the requirements of the Second Definition and thus, the Secretary possesses the requisite IRA authority to acquire land in trust for their benefit. These determinations are reasonable, supported by the Administrative Record, and entitled to *Chevron* deference.

CONCLUSION

Accordingly, the Court should grant Defendants' Motion for Partial Summary Judgment with respect to Plaintiffs' First Cause of Action.

DATED: July 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that, on July 7, 2016, the foregoing UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT will be sent electronically to the following registered participants as identified on the Notice of Electronic Filing:

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