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 LEAVE TO FILE GRANTED ON JULY 21, 2016

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

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INTRODUCTION

The United States Department of the Interior ("Department" or "Interior") et al. ("Defendants") hereby submit this supplemental memorandum of law in support of its Motion for Partial Summary Judgment, ECF Nos. 55-57, to address certain points made during oral argument held on July 11, 2016. As set forth below, for Plaintiffs' "plain language" argument to succeed, they cannot simply demonstrate that their reading is plausible. Plaintiffs must prove that their reading is the *only possible construction* of Section 479 of the Indian Reorganization Act ("IRA"), and that Interior's reading in the September 18, 2015 Record of Decision ("ROD") is *entirely* foreclosed. For the reasons below, Plaintiffs cannot, and have not, met this burden.

ARGUMENT

A plain language reading of a statute involves looking at statutory design, structure and purpose, not just the words in a vacuum. The First Circuit is quite clear that determining whether the "plain meaning" of a statute is really plain requires more than just reading the words of a statutory provision. Those words must be understood in the context of the statute's design, structure, and underlying congressional purposes. *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999) (interpreting statutes involves more than "culling selected words or sentences from a statute's text and inspecting them in an antiseptic laboratory setting," because "a court engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language") (internal quotations and brackets omitted); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 46 (1st Cir. 2009) (interpreting a statute requires a court to "consider its plain text and design, structure, and purpose") (internal quotations omitted); *Simmons v. Galvin*, 575 F.3d 24, 35 (1st Cir. 2009) ("As the meaning of statutory

language, plain or not, depends on context, we must look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy") (internal quotations and citations omitted). This rule of statutory interpretation applies to the Court's determination at *Chevron* step one whether the plain language of a statute is ambiguous, and it requires rather than precludes consideration of the legislative history. *See Succar v. Ashcroft*, 394 F.3d 8, 31 (1st Cir. 2005) ("Our view is that where traditional doctrines of statutory interpretation have permitted use of legislative history, its use is permissible and even may be required at stage one of *Chevron*.").[1]

The Second Definition of Section 479 is ambiguous. Basic grammar principles do not govern how much of the First Definition the Court must read into the Second Definition through Congress' use of the phrase "such members." Black's Law Dictionary defines the term "such" as "[o]f this kind or that kind" or alternatively, "[t]hat or those; having just been mentioned[.]"

[1] Nothing in *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004) (cited in Plaintiffs' PowerPoint), requires this Court to accept Plaintiffs' reading, creates or applies a new or revised standard of review at *Chevron* step one, or otherwise does anything to support Plaintiffs' argument. *Lamie* was a recitation of the long-held view that "in interpreting a statute a court should always turn first to one, cardinal canon before all others . . . that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253--254 (1992). Citing *Lamie* merely begs the question—is there truly a plain meaning that unambiguously forecloses the agency's interpretation? The statutory language construed in *Lamie* was nothing like Section 479. Before the Court in *Lamie* was 11 U.S.C. § 330(a)(1), which provided that a bankruptcy "court may award to a trustee, an examiner, a professional persons employed under section 326 or 1103" reasonable compensation. *Lamie*, 540 U.S. at 530. A *previous version* of the statute had included five extra words, "or to the debtor's attorney." *Id.* The debtor's attorney contended that § 330(a)(1) was ambiguous and should be construed to allow the award of reasonable compensation, i.e., reading back into the statute the words that had been removed, *id.* at 533, and the Court, unsurprisingly, disagreed, *id.* at 542. That is hardly the case here. And nothing in *Lamie*, even in the bankruptcy context, challenges the bedrock principle that the purpose of the analysis at *Chevron* step one is to discern congressional intent. Here, neither the actual language, the overall context, nor the legislative history of Section 479 unambiguously forecloses the Secretary' interpretation. Plaintiffs' reading, on the other hand, "may be plausible in the abstract, but it is ultimately inconsistent with both the text and the context of the statute as whole." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016).

(10th ed. 2014). When tasked with interpreting the term "any such" in the first paragraph of 18 U.S.C. § 1546(a), the Ninth Circuit aptly recognized the ambiguity in such an endeavor:

> No bright-line rule governs this area of the English language. "Such" can refer exclusively to preceding nouns and adjectives. It can also refer to surrounding verbs, adverbial phrases, or other clauses. Context is typically determinative.

United States v. Krstic, 558 F.3d 1010, 1013 (9th Cir. 2009). Plaintiffs rely on the statutory canon of the last antecedent to argue, on a purely grammatical basis, that "such members" in the Second Definition refers back to the entire phrase "members of any recognized Indian tribe now under Federal jurisdiction" in the First Definition. 25 U.S.C. § 479. Interior contends that the rule against surplusage makes a reading of "such members" that only incorporates "members of any recognized tribe" more plausible, especially when considered in light of congressional purpose and statutory design. Even if Plaintiffs' reading is a plausible alternative interpretation, such reading does not unambiguously foreclose Interior's reading. As a result, the Court must find that the Second Definition is ambiguous. *See, e.g., In re Perry*, 882 F.2d 534, 539 (1st Cir. 1989) (a statute is ambiguous if its language permits more than one plausible interpretation); *Am. Fed'n of Labor and Cong. of Indus. Orgs. v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003).

Directly comparable here, the Third Circuit found two competing readings, one relying upon grammatical principles and the other relying upon the rule against surplusage, as rendering the statute ambiguous. *See United States v. Ashurov*, 726 F.3d 395, 398-400 (3d Cir. 2013). *Ashurov* concerned the phrase "such false statement" in 18 U.S.C. 1546(a), which provides:

> Whoever knowingly makes under oath . . . *any false statement* with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or *knowingly presents* any such application, affidavit, or other document which contains any *such false statement* or which fails to contain any reasonable basis in law or fact.

Id. (emphasis added). Ashurov made false statements on a form which he knowingly presented to authorities to acquire a temporary visa. *Ashurov*, 726 F.3d at 396-97. Because his false statements were not made under oath, the United States charged him only with "knowingly present[ing]" a false statement, but not with making one under oath. *Id.* at 397. Ashurov contended "such false statement" in Section 1546 incorporates by reference the larger phrase "knowingly makes under oath . . . any false statement," such that unless the false statement he presented was made under oath, he could not be convicted under the statute. *Id.* at 398. The United States, in turn, argued that Ashurov's reading did not make grammatical sense because "knowingly makes under oath" does not modify "false statement," and the court agreed: "grammatically, the words 'under oath' in the 'making' clause do not describe the false statement. Instead, they characterize and qualify the *action itself* that the statute punishes, 'knowingly makes.'" *Id.* (emphasis in original). The court explained that the "word 'such' . . . naturally, by grammatical usage, refers to the last precedent," and said that the rule of the last antecedent supported the United States' construction. *Id.* at 398-99.

However, before accepting the United States' reading, the court explained that it was obliged "at the very least to satisfy ourselves that no 'other indicia of meaning' suggests a contrary outcome." *Id.* at 399. And in *Ashurov*, like here, a contrary outcome arises by virtue of the rule against surplusage: "As it turns out, another important canon of construction does suggest a contrary outcome: the rule against surplusage." *Id.* Ashurov argued that if "knowingly makes under oath" were not read as modifying "such false statement," it would be rendered surplusage because all false statements, whether under oath or not, become punishable as soon as the document containing them is presented to authorities. *Id.* "Thus, the 'fundamental canon' that we must, if possible, *give effect to every clause and word of a statute points in the opposite*

direction than the 'last antecedent' canon, rendering the statute's text ambiguous." *Id.* at 400 (emphasis added). That is precisely the case here. Just as the court in *Ashurov* did not end its analysis with a "grammatical" reading of the statute, neither should the Court in this case.

Plaintiffs' reading is contrary to a rule of statutory construction, in that their reading renders "residing within the present boundaries of any Indian reservation" surplusage. The First Definition of Section 479 reaches "members of any recognized Indian tribe now under Federal jurisdiction[.]" 25 U.S.C. § 479. That means for these members, they must show both membership in a recognized tribe and that the tribe was under federal jurisdiction when the statute was enacted. *See* ECF No. 56 at 17-18. The Second Definition, on the other hand, reaches (1) "descendants of such members" (2) "who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."[2] *Id.* If the universe of "recognized Indian tribes" in the Second Definition is read as limited to those under federal jurisdiction at the time of enactment, then meeting the requirements of the Second Definition requires: (1) meeting all of the requirements of the First Definition and (2) residing upon a reservation in 1934. The residence requirement, therefore, become surplusage because if tribes can meet the requirements of the First Definition, they are already "Indian" within the meaning of the IRA without need to ever look to residency upon a reservation in 1934.

To be sure, one could be a descendant of a "recognized Indian tribe" who is not a member of that tribe, and thus need to resort to the reservation residence requirement, as Plaintiffs argue. But the purpose of the Second Definition was not merely to "mop up"

[2] There is a question of who the Second Definition requires to reside upon a reservation as of June 1, 1934 – members of recognized tribes or also their descendants. However, the Court need not wrestle with this problem as the Mashpee Wampanoag Tribe, as noted in the ROD, meet the Second Definition under either interpretation. *See* AR000152 (addressing the ambiguity and noting "the Tribe satisfies either possible construction").

unenrolled minor children, as Plaintiffs stated at oral argument. Under Plaintiffs' unsupported reading, a group of unenrolled minor children, who do not even have the right to vote in the elections contemplated by the IRA, *see* 25 U.S.C. § 479 (defining "adult Indians" as persons of 21 years of age or older and "tribe" as including "Indians residing on one reservation"); *id.* § 476 (allowing "adult members of the tribe" to vote to adopt a tribal constitution or other governing documents), would nevertheless constitute an "Indian tribe" within the meaning of the IRA. Thus, the notion that the Second Definition is designed to only capture unenrolled minors and similarly situated people "is not well taken" because "[i]t is hard to imagine" that one of the three definitions of "Indian" was designed for such a narrow class. *Ashurov*, 726 F.3d at 399 (rejecting strained hypothetical designed to suggest no surplusage in statutory construction).[3] Instead, the more plausible reading is the one Congress intended, which was to use the Second Definition to encompass members (and their descendants) of recognized tribes, regardless of whether under federal jurisdiction, so long as they were residing on lands set aside specifically for Indians, i.e., a reservation, such that they could organize as an entirely different tribe from that which they descended.[4] This is precisely how Interior understood the Second Definition in the early years of the IRA. *See* AR000418-19 (Solicitor Opinion on Status of the Nahma and Beaver Indians, May 1, 1937); AR000424-27 (Solicitor Memoranda on status of Yavapai

[3] In *Ashurov*, the court determined the provision remained "a grievous ambiguity" after considering "textual, contextual, and atextual canons of statutory construction" including consideration of legislative history, ultimately ruling in favor of Ashurov after applying the rule of lenity. *Ashurov*, 726 F.3d at 402.
[4] Plaintiffs' argument, ECF Doc. 64-1 at 16, that Interior's reading of the Second Definition would sweep in all the Indians on state reservations, is nonsensical. By its express terms, the Second Definition requires (1) an entity composed of descendants of members of a recognized Indian tribe; (2) that were maintaining residence on an Indian reservation as of June 1, 1934. 25 U.S.C. § 479; AR000153. Only after an exhaustive analysis of the statute, the legislative history, the early implementation of the IRA, and Mashpee's unique and well-documented history, including its status as a federally recognized Indian tribe today, AR000145, and its residence on land set aside for Indians as of 1934, AR000165-82, did Interior find that the Mashpee fell within the scope of the Second Definition.

Indians). Interior treated residence of a group of Indians on a reservation as "sufficient recognition of the distinct character of the group to warrant the Department" to allow the entity to organize as a tribe under the IRA. AR000427.[5] *See also* AR000377 (Solicitor Opinion on organization of the Minnesota Chippewa, stating that the IRA "permits the organization as a tribe of . . . [a] group of Indians residing on a single reservation, who may be recognized as a 'tribe' for purposes of the [IRA] regardless of former affiliations").

Interior's interpretation, both then and now, is bolstered by the fact that the phrase "now under Federal jurisdiction" was added late in the legislative process and functions as the equivalent of a proviso limiting the reach of the phrase to the First Definition alone.[6] *See Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992) ("a proviso can only operate within the reach of the principal provision it modifies"); *United States v. McClure*, 305 U.S. 472, 478 (1939) (noting "presumption that a proviso refers only to the provision to which it is attached") (internal quotations omitted); *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 74 (2d Cir. 1986).

And if the Second Definition can be plausibly read as Plaintiffs suggest, it can certainly be read as Interior construes it in the ROD. For instance, Plaintiffs ask this Court, in the context of their "plain meaning" argument, ECF No. 64-1 at 10, that the Court consider a memorandum prepared by John Collier in 1936. *See* AR00409-10. Regardless of the interpretive value of that

[5] Thus, while the First Definition requires membership in a recognized tribe that is "now under Federal jurisdiction," the Second Definition allowed Interior to "recognize" an "Indian tribe" that was comprised of Indians living together on land set aside for Indians. This approach finds support in Section 479's definition of a tribe as including, "the Indians residing on one reservation." 25 U.S.C. § 479.

[6] As discussed at oral argument, the original version of the IRA was introduced on February 12, 1934. AR001274-75. On April 9, 1934, the conjunction between the First and Second Definitions was changed from "or" to "and." AR001466. And it was not until May 17, 1934 that Congress added "now under Federal jurisdiction" to the First Definition, AR001725, and even as late as June 15, 1934, the House version did not contain the addition, AR000926. Just three days later, the IRA was passed on June 18, 1934. Pub. L. No. 73-383, 48 Stat. 984 (1934).

document, if the Court is to consider Interior's interpretation of the Act in the years immediately following enactment, the Court must look at *all* pertinent documents included in the Administrative Record. And the Administrative Record includes another memorandum authored by John Collier, in which he construed the Second Definition *exactly* as the ROD did: "[a]ll 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." AR000917 (emphasis added). Thus, it would go too far to say, as Plaintiffs must to succeed on their claim, that Interior's reading of the Second Definition is foreclosed. Plaintiffs' reliance on grammar is neither supported by, nor can it foreclose, application of other relevant tools of statutory interpretation, and here the rule against surplusage renders the text of Section 479 ambiguous.

The Supreme Court in Carcieri only held the word "now" is unambiguous, not Section 479 in its entirety or even the First Definition in its entirety. Given Plaintiffs' repeated assertions to the contrary, it bears repeating that *Carcieri v. Salazar* decided one question concerning one word in the First Definition: whether "now" means at the time of enactment or at the time of taking land into trust. 555 U.S. 379, 395 (2009). In the wake of that decision, the Department began implementing the Court's construction of the First Definition but ran into two ambiguities left untouched by *Carcieri*. First, it was unclear whether the requirement of a "recognized Indian tribe" was temporally restricted to 1934 by the "now" of "now under Federal jurisdiction." *See Mackinac Tribe v. Jewell*, No. 15-5118, 2016 WL 3902667, *2 (Jul. 19, 2016) ("The [Supreme] Court has not analyzed the meaning of the word "recognized" nor has it determined whether recognition must have existed in 1934."). Second, the Department had to construe the meaning of the broad language of "under Federal jurisdiction." Accordingly, Interior issued a twenty-six page M-Opinion addressing these ambiguities in the First Definition.

AR000663-88.[7] If the language in the First Definition, other than the word "now," was unambiguous and thus subject to a "plain reading," the Department would not have had to interpret it. Moreover, subsequent to *Carcieri*, multiple courts have agreed with Interior on the ambiguities contained in the First Definition, notwithstanding the *Carcieri* decision on the word "now," and have accorded Interior's interpretation *Chevron* deference. *See No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015) ("there is far more ambiguity than not about what it means for a tribe to be 'under Federal jurisdiction' in 1934"); *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 398 (D.D.C. 2014) ("The *Carcieri* majority makes no attempt to interpret what the word 'recognized' means"); *Cent. N. Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-0660, 2015 WL 1400384 at *7 (N.D.N.Y. Mar. 26, 2015) ("*Carcieri* left the meaning of 'under Federal jurisdiction' an open question."); *Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 66 (D.D.C. 2013) ("*Carcieri* also left several relevant questions unanswered. The first and most pressing question left open by *Carcieri* is what it means to have been "'under Federal jurisdiction'" in 1934").

If the First Definition contains multiple ambiguities, even after *Carcieri* brought clarity to a portion of it, it goes without saying there is no basis for concluding *Carcieri* resolves all ambiguity in the Second Definition. Nor is there any basis to give credence to Plaintiffs' argument that Justice Breyer's concurring comments regarding agency deference were meant to apply to the entirety of Section 479 rather than that portion of Section 479 he was interpreting. Justice Breyer was quite clear that his interpretation was focused on one word "now":

> The scope of the word "now" raises an interpretive question of considerable importance; the provision's legislative history makes clear that Congress focused

[7] M-37029: The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (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.

> directly upon that language, believing it definitively resolved a specific underlying difficulty; and *nothing in that history indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word "now."* These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity.

Carcieri, 555 U.S. at 396-97 (emphasis added). This Court faces an entirely separate question, one that Congress did not consider after choosing to limit the First Definition, which is the interplay of the First and Second Definitions after Congress limited the First. Plaintiffs have failed to prove that Interior's reading of the Second Definition is foreclosed, and thus the existence of two plausible readings requires the Court to conclude that the text is ambiguous.

CONCLUSION

For the reasons stated above and in Defendants' opening memorandum, the Court should grant Defendants' Motion for Partial Summary Judgment with respect to Plaintiffs' First Cause of Action.

DATED: July 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that, on July 21, 2016, the foregoing UNITED STATES' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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