UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, And MASHPEE WAMPANOAG TRIBE, Intervenor-Defendant.	Civil Action No. 1:22-cv-10273-AK REQUEST FOR ORAL ARGUMENT

THE MASHPEE WAMPANOAG TRIBE'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Mashpee Wampanoag Tribe ("Tribe") has lived in what is now southeastern Massachusetts since time immemorial, and has a history, government, language and culture that predates the founding of the United States. The Tribe's ancestors are the Indians who fed the starving Pilgrims, thereby launching the tradition that has become our national day of Thanksgiving. Yet by the turn of this last century, the Tribe had been rendered unrecognized and landless – it was not until 2007 that the federal government formally acknowledged its recognition of the Tribe, and not until 2015 that lands were taken into trust to form a federally protected reservation for the Tribe.

The December 22, 2021 Record of Decision ("2021 ROD") at issue in this litigation was issued by the Department of the Interior ("Interior" or "Secretary") to confirm the status of the Tribe's reservation. Plaintiffs' effort to attack this ROD, funded by competing gaming interests,[1] further extends the years of litigation between these parties, and ignores Plaintiffs' prior concessions and prior judicial decisions. The 2021 ROD is reasonable agency action issued in accordance with the directives of a federal district court, and is consistent with relevant case law, administrative precedent, and Interior's own binding internal legal guidance. To set it aside, Plaintiffs must show that Interior's actions were arbitrary, capricious and not in accordance with law, and therefore violate the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706. Plaintiffs cannot meet that burden.

II. BACKGROUND

A. Prior Proceedings

[1]Charles Winokoor, *Latest Mashpee Wampanoag land-in-trust decision elicits joy and dismay*, The Herald New (Sep. 9, 2018), https://www.heraldnews.com/story/news/2018/09/09/latest-mashpee-wampanoag-land-in/10806770007/.

In 2007, Interior acknowledged federal recognition of the Tribe pursuant to the Federal Acknowledgment Process, 25 C.F.R. Part 83. Tribes that have been recognized through this process have demonstrated that they have maintained their tribal identities on a substantially continuous basis. 25 C.F.R. § 83.10 (formerly § 83.3). Interior's final determination concluded that Mashpee made this showing, and that Mashpee is a distinct Indian community that has existed since at least the 1620s.[2]

Despite this formal recognition, the Tribe remained without a federally protected land base over which it could exercise its own jurisdiction and on which it could provide for its people, so the Tribe petitioned Interior to exercise its authority under Sections 5 and 7 of the Indian Reorganization Act ("IRA")[3] (25 U.S.C. §§ 5108, 5110, respectively), to place land in trust and create a reservation for the Tribe. This petition included two parcels within the Tribe's historical territory, one each in the Town of Mashpee and the City of Taunton. AR0005089. The Town and the City actively supported these requests. AR00056-57; AR017083-84. To exercise its Sections 5 and 7 authority, Interior had to determine whether the Tribe meets any of the three definitions of "Indian" in the IRA's Section 19.[4] 25 U.S.C. § 5129. *Carcieri v.*

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[2] *See* Office of Federal Acknowledgement ("OFA") Summary Under the Criteria and Evidence for Mashpee Final Determination of Acknowledgment ("OFA Summary and Final Determination"), AR0005544-86 at AR0005552-53, AR0005560-61; *see also* 72 Fed. Reg. 8007-08 (2007).

[3] Prior to 1934, federal Indian policy focused on forced assimilation, wholesale removal from historical homelands, and even extinction. *See generally* Cohen's *Handbook of Federal Indian Law*, § 1.04 (2005 ed.). The IRA was enacted to reverse the disastrous impacts of these policies to "rehabilitate the Indian's economic life" and to "develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No.73-1804, at 6 (1934), AR0008513. A key purpose of the IRA was to authorize the Secretary to acquire land in trust for tribes that did not already benefit from possession of federally-held reservation lands. See S. Rep. No. 73-1080, at 1 (1934), AR0008502 (one of the "purposes of the bill" was to "provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land"); H.R. Rep. No.73-1804, at 6 (1934), AR0008513 (IRA would help to "make many of the now pauperized, landless Indians self-supporting").

[4] Section 19's three definitions of Indian "include all persons of Indian descent [1] who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood." 25 U.S.C. § 5129.

Salazar, 555 U.S. 379, 387-88 (2009). On September 18, 2015, Interior issued a Record of Decision ("2015 ROD") to acquire these lands in trust and to make them the Tribe's reservation based on an analysis of the *second* definition of Indian.[5]

In 2016, some Taunton residents (same Plaintiffs as this case) funded by commercial gaming interests challenged Interior's decision in this Court. In July 2016, this Court held that Interior's interpretation of the IRA's second definition of Indian was flawed (essentially holding that the second definition necessarily incorporates the first definition, whereas Interior had interpreted the second definition as having an independent meaning), and so rejected Interior's reliance on that definition. *Littlefield v. U.S. Dep't of the Interior,* 199 F. Supp. 3d 391 (D. Mass. 2016). However, the Court also ruled that Interior could analyze whether the Tribe was "under federal jurisdiction" in 1934 and thus met the first definition of Indian. *Littlefield v. U.S. Dep't of the Interior*, Civ. No. 1:16-cv-10184-WGY, Order at 2-3 (D. Mass. Oct. 12, 2016) (Dkt. No. 121).[6]

Interior has formal legal guidance, issued through the Solicitor's office in 2014, M-37029, Memorandum on the Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014) ("M-Opinion") that governs the agency's analysis of whether a Tribe was under federal jurisdiction in 1934.[7] From December 2016 through February

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[5] U.S. Department of the Interior, Assistant Secretary-Indian Affairs, Record of Decision, Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts for the Mashpee Wampanoag Tribe (Sept. 18, 2015). AR0005223-362.

[6] Interior and the Tribe appealed the *Littlefield* decision's interpretation of the second definition of Indian to the First Circuit. *Littlefield. v. U.S. Dep't of the Interior*, Case No. 16-CV-10184-WGY (D. Mass. Dec. 8, 2016) (Dkt. No. 131; Dkt. No. 132). In April 2017, after the Trump Administration took office, Interior Secretary Ryan Zinke abandoned Interior's appeal, leaving the Tribe to defend its reservation in the appeal without the federal decision-maker and its federal trustee. Defendants-Appellants' Motion to Voluntarily Dismiss Appeal, *Littlefield v. U.S. Dep't of the Interior*, No. 16-2481 (1st Cir. Apr. 27, 2017).

[7] The majority opinion in *Carcieri* did not address the meaning of "under federal jurisdiction[.]" *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 207-208 (D.D.C. 2020). In the M-Opinion, Interior concluded that "under federal jurisdiction" is ambiguous and, applying *Chevron USA, Inc. v. Natural Resources*

2017, the Tribe and Plaintiffs submitted evidence and argument on whether the Tribe was under federal jurisdiction in 1934. The Tribe's evidence included, *inter alia*, attendance of Mashpee children at a federal Indian boarding school, federal management of funds and provision of health and social services for tribal members, federal census records identifying tribal members, and multiple federal reports demonstrating the federal government's exercise of jurisdiction over the Tribe.

In September 2018,[8] Secretary Zinke issued the 2018 ROD in which Interior strained to discount the submitted evidence to conclude the Tribe was not under federal jurisdiction in 1934.[9] The Tribe challenged the 2018 ROD in the U.S. District Court for the District of Columbia as arbitrary, capricious, an abuse of discretion and contrary to law. On June 5, 2020, U.S. District Judge Paul Friedman agreed with the Tribe and remanded to Interior for further proceedings consistent with the court's opinion. *Mashpee v. Bernhardt*, 466 F. Supp. 3d 199.

B. Judge Friedman's Opinion on the 2018 ROD

Judge Friedman's opinion and order are specific as to "ways in which the Secretary *misapplied the M-Opinion as to each category of evidence* that the Tribe maintains the Secretary

Defense Council, Inc., 467 U.S. 837, 840-43 (1984), found that Congress left a gap for the agency to fill. M-Opinion at 17. To fill the gap, Interior examined the IRA's text and remedial purposes, its legislative history and Interior's early practices. *Id.* at 8-20. Interior also considered the Indian canons of construction, *id*. at 5, 19, and Justice Breyer's concurring opinion in *Carcieri*. *Id*. at 23-25; *see also Mashpee v. Bernhardt*, 466 F. Supp. 3d at 207-08.

[8] In June 2017, Secretary Zinke released a "draft" decision finding that the Tribe was not under federal jurisdiction in 1934, AR0004667-699, although the regulations governing the Secretary's implementation of IRA Section 5 do not provide for the release of a "draft" decision, nor was there administrative precedent for doing so. To justify the procedural error of releasing a draft, on June 30, 2017, the Secretary unilaterally ordered supplemental briefing on whether the State's exercise of authority over the Tribe could be considered a federal surrogate for purposes of the "under federal jurisdiction" inquiry, although neither the Tribe nor Plaintiffs had advanced that theory. AR0005092. The Tribe and Plaintiffs submitted supplemental briefs on August 30, and responses on October 30, 2017. AR0007126, AR0008349, AR0009483, AR0009381.

[9] Letter from Assistant Secretary-Indian Affairs Tara Sweeney to Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe (Sep. 7, 2018). AR0005088-115.

improperly dismissed." *Id*. at 219 (emphasis added). Judge Friedman's guidance is clear:

- **On Mashpee Children Attending Bureau of Indian Affairs ("BIA") Schools:** "The Court holds that each reason provided in the 2018 ROD is inconsistent with the M-Opinion and is a misapplication of the M-Opinion's guidance on which Interior purports to rely." *Id*. at. 219-220. "The M-Opinion expressly lists the education of individual Indian students at BIA schools as evidence that supports a tribe being under federal jurisdiction." *Id*. at 221-222.

- **On Federal Management of Funds and Health and Social Services for Mashpee**: "The Secretary's failure to specifically address the federal management of student funds, the vocational training, and the health-care services provided to the Mashpee students at the Carlisle School in the 2018 ROD therefore was arbitrary and violated the APA." *Id*. at 223-224.

- **1911 BIA Carlisle Indian School Census:** "The Secretary's stated reason for discounting the 1911 BIA school census therefore is inconsistent with the M-Opinion. On remand, the Secretary must give a reasoned analysis as to whether the 1911 BIA school census is probative evidence and, if so, must view it 'in concert' with the rest of the probative evidence in the record and consistent with this Opinion." *Id*. at 225.

- **1912 BIA Carlisle Indian School Census**: "The 2018 ROD makes no reference to the 1912 BIA school census … On remand, the Secretary must address the 1912 BIA school census, give a reasoned analysis as to whether it is probative evidence and, if so, view it 'in concert' with the rest of the probative evidence in the record and consistent with this Opinion." *Id*. at 225.

- **1910 Indian Population Schedule/Federal Census:** "[The Secretary] must also explain why inclusion in federal census counts was treated as probative evidence that a tribe was under federal jurisdiction in the Tunica Biloxi ROD but not for the Mashpee Tribe … The failure to provide a reasoned explanation for why it matters that the 1910 Indian Population Schedule was not prepared under the 1884 Act renders the explanation arbitrary and capricious." *Id*. at 226. "The Secretary must explain why census evidence that was not prepared pursuant to the 1884 Act was treated as probative evidence in the Cowlitz ROD but not for the Mashpee Tribe." *Id*. at 227.

- **Federal Census:** "On remand, the Secretary must address the federal census evidence, give a reasoned analysis as to whether it is probative evidence and, if so, view 'in concert' with the rest of the probative evidence in the record." *Id*. at 227.

- **On Federal Reports that Address Mashpee:** "As discussed below, the reasons given by the Secretary for discounting various reports and surveys in the record are insufficient and conflict with the way in which Interior has treated similar evidence in the past." *Id*. at 228. Reports include:

- **Morse Report:** "On remand, the Secretary must analyze the Morse Report evidence in accordance with the M-Opinion – 'in concert' with other probative evidence – and

consistently with the way its prior determinations treated similar evidence." *Id.* at 230.

- **Use of Morse Report by Secretary of War, President, Congress:** "On remand, the Secretary must evaluate the House debate, the Secretary of War's recommendation to the President, and the President's transmittal to Congress under a proper application of the M-Opinion: first determining whether this evidence is probative of the tribe being under federal jurisdiction, and if so, considering it 'in concert' with the other probative evidence." *Id*. at 230-231.

- **McKenney Letters:** "On remand, the Secretary must give a reasoned analysis as to whether this evidence is probative of the Tribe being under federal jurisdiction and, if so, consider it 'in concert' with the other probative evidence." *Id*. at 231.

- **Schoolcraft Report:** "On remand, the Secretary must consider whether the Schoolcraft Report was similarly probative evidence in accordance with the M-Opinion – and if so, then 'in concert' with other probative evidence." *Id*. at 231-232.

- **Tantaquidgeon Report:** "It was the Secretary's obligation to first determine whether this report in fact provided some evidence that the Tribe was under federal jurisdiction – even if it was 'little' evidence – and, if so, to then consider it 'in concert' with the rest of the probative evidence: this is what the Secretary must do on remand." *Id*. at 232-233.

- **Commissioner of Indian Affairs Report**: "On remand, the Secretary must analyze this evidence consistently with prior Department decisions, adequately explaining any departure. If probative, the Secretary then must analyze the 1890 Annual Report evidence 'in concert' with the rest of the probative evidence in the record." *Id*. at 233.

C. The 2021 ROD and the Initiation of Proceedings Before this Court

On December 22, 2021, Interior issued the 2021 ROD[10] applying relevant legal standards consistent with Judge Friedman's opinion to find that the Tribe was under federal jurisdiction in 1934, thereby confirming its continuing authority to hold the Tribe's land in trust as the Tribe's reservation. On December 30, 2021 Judge Friedman closed the case after the parties, *including Plaintiffs*, acknowledged that Interior's 2021 ROD is consistent with his June 5, 2020 Opinion and Order and that it "conform[ed] with the M-Opinion's standard, the evidence permitted

[10] The 2021 ROD confirms Interior's 2015 decision to acquire the Tribe's land in trust as the Tribe's Reservation, and incorporates the 2015 ROD except for the analyses in Section 8.3 (statutory authority for acquisition, *i.e*., IRA second definition of Indian) and Section 7.0 (gaming eligibility under the Indian Gaming Regulatory Act), which are replaced by analyses in the 2021 ROD. The incorporated portions of the 2015 ROD are attached as an Appendix to the 2021 ROD (hereinafter "ROD Appendix"). *See* 2021 ROD at 2, ROD Appendix.

therein, and Interior's prior decisions applying the M-Opinion's two-part test." Order, *Mashpee v. Bernhardt*, No. 1:18-cv-02242-PLF (December 30, 2021) (Dkt. No. 86); *see also* Joint Status Report, *Mashpee v. Bernhardt*, No. 1:18-cv-02242-PLF (Dkt. No. 85). Less than 24 hours later Plaintiffs filed a motion for leave to file a second amended complaint in matter 16-cv-10184 before this Court (Judge Young) in an attempt to convert their challenge to the 2015 ROD (which was based on the second definition of Indian) into a challenge to the 2021 ROD (based on the first definition of Indian). On January 27, 2022, Judge Young rejected Plaintiffs' request, finding that the challenge to the 2015 ROD had "long since gone to judgment[.]" Electronic Order, Dkt. No. 173. Plaintiffs then filed the present action challenging the 2021 ROD.

III. ARGUMENT

A. Standard of Review – Administrative Procedure Act

Under the APA, agency decisions are entitled to a presumption of validity; judicial review is limited and deferential. A court may set aside an agency decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Associated Fisheries of Me. v. Daley*, 127 F.3d 104, 109 (1st Cir.1997) ("judicial review, even at the summary judgment stage, is narrow" because "the APA standard affords great deference to agency decision making" and "the Secretary's action is presumed valid"); *see also Lovgren v. Locke*, 701 F.3d 5, 20-21 (1st Cir. 2012) (same). Plaintiffs must show that Interior's decision was arbitrary and capricious. *Lovgren*, 701 F. 3d at 20; *Associated Fisheries*, 127 F. 3d at 109. A reviewing court may not substitute its judgment for that of the agency, even if it disagrees with the agency's decision. *Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015); *Associated Fisheries*, 127 F 3d at 109. When considering a motion for summary judgment, the Court's APA review "is limited to the administrative record." *Lovgren*, 701 F.3d at 20. At this

stage, "the district judge sits as an appellate tribunal," and "[t]he '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)).

B. Plaintiffs Are Estopped From Challenging the 2021 ROD's "Under Federal Jurisdiction" Determinations, and Are Precluded From Challenging its Key Findings.

The bulk of Plaintiffs' arguments seek to re-litigate claims and issues that Judge Friedman decided or that were conceded before him. This Court need not address the merits of these claims and issues because Plaintiffs' arguments are barred by judicial estoppel. Moreover, Plaintiffs' challenge to the import of specific evidence in the 2021 ROD (*e.g.*, tribal members' attendance at Carlisle Indian School, the exercise of state jurisdiction, and the *Carcieri* Court's treatment of the Narragansett Tribe) is subject to issue preclusion.

1. Judicial Estoppel Bars Plaintiffs' "Under Federal Jurisdiction" Challenge.

Plaintiffs attack the M-Opinion, labeling it "legal error" and claiming that it "creates a standardless test that violates the majority opinion in *Carcieri*." Pl. Br. 32; *see also* Complaint ¶39 (alleging that the M-Opinion "lies in tension with the IRA's legislative history and *Carcieri* . . ."). Before Judge Friedman, however, Plaintiffs repeatedly conceded the applicability of the M-Opinion,[11] affirmatively *abandoned* their appeal[12] of his orders directing Interior to apply the M-Opinion in its reconsideration on remand, and, following the issuance of the 2021 ROD, joined the government and the Tribe in acknowledging to Judge Friedman that

[11] *See, e.g.*, from *Mashpee v. Bernhardt,* No. 1:18-cv-02242-PLF, Littlefield Opposition to Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. No. 51) at 8 ("The M-Opinion expressly implements the dictates of *Carcieri*…."); Littlefield Supplemental Brief in Response to May 1, 2020 Memorandum Opinion and Order (Dkt. No. 55) at 2 ("For the purposes of this case, the applicable guidance remains the 2014 M-Opinion, and thus [*Carcieri* guidance issued after the Tribe's submissions, which since has been withdrawn by Interior] have no relevance to the instant case.").

[12] *Mashpee v. Bernhardt*, No. 20-5237, 2021 WL 1049822 (D.C. Cir. Feb. 19, 2021).

the 2021 ROD "conformed with the M-Opinion's standard, the evidence permitted therein, and Interior's prior decisions applying the M-Opinion's two part test." Order, *Mashpee v. Bernhardt*, No. 1:18-cv-02242-PLF (Dkt. No. 86). Judge Friedman's order closing the case stated that the 2021 ROD met the M-Opinion's "under federal jurisdiction" standards. *Id.* Plaintiffs did not seek clarification or reconsideration in response to Judge Friedman's closure order.

Judicial estoppel "prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32–33 (1st Cir. 2004) (quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003)). "In line with this prophylactic purpose, courts typically invoke judicial estoppel when a litigant is 'playing fast and loose with the courts.'" *Alternative Sys. Concepts, Inc.*, 374 F.3d at 33 (quoting *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). Two elements are required: (1) direct inconsistency – *i.e.*, the positions must be "mutually exclusive," and (2) "the responsible party must have succeeded in persuading a court to accept its prior position." *Alternative Sys. Concepts, Inc.*, 374 F.3d at 33.

Both elements are satisfied. Plaintiffs' direct challenge to the validity of the M-Opinion in this action squarely conflicts with their representations to Judge Friedman that the M-Opinion was the appropriate standard to determine if the Tribe was under federal jurisdiction in 1934. Moreover, that court accepted Plaintiffs' representation (along with those of the other parties) that the 2021 ROD met this standard in crafting its December 30, 2021 order closing the case. Plaintiffs are thus barred from challenging both Interior's reliance on the M-Opinion's standards in the 2021 ROD and its conclusion that the 2021 ROD met the standard of the M-Opinion. *See Howell v. Town of Leyden*, 335 F. Supp. 2d 248, 251 (D. Mass. 2004) (debtors who represented

to Florida bankruptcy court "that they had *no* claims among their assets," a position accepted by bankruptcy court, were judicially estopped from asserting the contrary position that they had multiple claims against defendants) (emphasis original).

2. Issue Preclusion Bars Plaintiffs' Challenge to Specific Evidence.

Other of Plaintiffs' arguments are barred by issue preclusion. Issue preclusion (sometimes called collateral estoppel) "renders conclusive the determinations reached in previous law suits between the same (and sometimes, different) parties." *Negron-Fuentes v. UPS Supply Chain Sols.*, 532 F.3d 1, 7 (1st Cir. 2008). The doctrine bars consideration of issues raised in prior proceedings where (1) both proceedings involved the *same issue* of law or fact; (2) the parties *actually litigated* the issue in the confirmation proceedings; (3) the issue was *actually resolved* in a final and binding judgment; and (4) court's resolution of that issue of law or fact was *essential* to its judgment (*i.e.*, necessary to its holding). *See Monarch Life Ins. Co. v. Ropes & Gray*, 65 F. 3d 973, 978 (1st Cir. 1995).

Judge Friedman rejected multiple arguments Plaintiffs seek to revive here. These issues include: ¶¶ 62-63 (alleging that "[a]s the [2018 ROD] found," the attendance of Mashpee children at the Carlisle Indian School was not a jurisdiction-conferring act over the Tribe); ¶¶ 36, 40, 59, 71 (alleging that the Tribe is "substantially similar to the Narragansetts" and so does not qualify under the IRA because the *Carcieri* Court found the Narragansett Tribe was not under federal jurisdiction in 1934); and ¶¶ 43, 90, 93, 106, 110, and 115 (alleging that Mashpee's supposed status as "under state jurisdiction" means that the Tribe was not under federal jurisdiction).[13] Judge Friedman specifically ruled against Plaintiffs' arguments on each of these

[13] Plaintiffs' argued these issues in *Mashpee v. Bernhardt.* Littlefield Reply in Support of Cross-Motion for Summary Judgment (Dkt.No. 38) at 11 (**Carlisle Indian School evidence**) ("the enrollment of Mashpee children at the Carlisle School could not have possibly shown that the Mashpees were under federal jurisdiction *in 1934.*"); Littlefield Cross-Motion for Summary Judgment (Dkt.No. 33-1) (**Narragansett connection**) ("Thus, both as a

issues in a final and binding judgment essential to his holding that Interior must consider appropriate evidence concerning the Tribe's jurisdictional status on remand. *See Mashpee v. Bernhardt*, 466 F. Supp. 3d at 222-23 (Carlisle School evidence); id. at 215 n.9 (Narragansett connection); *id*. at 216 (state jurisdiction issue). These issues are therefore subject to issue preclusion.

C. The 2021 ROD Properly Determined that Mashpee is Under Federal Jurisdiction.

Interior properly applied the IRA consistent with the M-Opinion's two-part test and relevant case law to determine that the Tribe was under federal jurisdiction in 1934. Interior faithfully followed Judge Friedman's remand instructions in its analysis of the evidence in the administrative record, considering all the evidence of federal jurisdiction together as a whole and explaining Interior's reasoning consistent with APA standards. The decision must be upheld.

1. The Secretary's Decision is Consistent with the M-Opinion, Judge Friedman's Remand Order, and Case Law.

The *Carcieri* majority decision did not address the meaning of "under federal jurisdiction," but Justice Breyer's concurrence provided three examples of jurisdiction-conferring evidence, "*for example,* a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) (emphasis added); *see also Mashpee v. Bernhardt,* 466 F. Supp. 3d at 207-08; 2021 ROD at 4-7. Interior's M-Opinion reflects the guidance provided by Justice Breyer, establishing a two-part test for determining that a tribe was under federal

matter of fact and law, the Supreme Court's holding in *Carcieri* [as to the Narragansetts] establishes a directly applicable benchmark against which to judge the Mashpees' evidence. With no material differences in their histories, the holding in *Carcieri* must be applied to the Mashpees as binding precedent."); *id.* at 16 (**state jurisdiction issue**) ("A number of documents submitted by the Tribe show actions by the State of Massachusetts—not federal actions—which reinforce the status of the Mashpees as under the jurisdiction of Massachusetts.")

jurisdiction. First,

> … whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had in 1934 or at some point in the tribe's history prior to 1934, *taken an action* **or** *series of actions* — through a course of dealings or other relevant acts *for or on behalf of the tribe or in some instance tribal members* — that are sufficient to establish, or *that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.*

M-Opinion at 19 (emphasis added). Second, did the tribe's jurisdictional status remained intact in 1934. *Id.*

Interior's M-Opinion describes the types of evidence it will accept to demonstrate whether a tribe was "under federal jurisdiction," including, *inter alia*:

- **Census Rolls:** Inclusion of tribes and their members on ***federal census rolls***.
- **Federal Reports and Surveys:** Inclusion of tribes in ***federal reports and surveys*** that address federal Indian policy and programs and acknowledge federal responsibility for such tribes.
- **Education:** Enrollment of tribal members at ***federal Indian schools*** or at federal expense.
- **Financial Management:** Holding and controlling ***funds for tribal members***.
- **Health Care:** Federal provision of ***health care services*** to tribal members.
- **Social Services:** Federal provision of ***social services*** to tribal members.
- **Protection of Indian Lands and Natural Resources:** Federal actions to ***protect Indian lands and natural resources***.

The M-Opinion has been applied in multiple Interior administrative decisions[14] and confirmed in

[14] *See, e.g.*, Dep't of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (April 2013) ("Cowlitz ROD") AR056975-7118, at AR057075, AR057078-83; Letter from Bureau of Indian Affairs Acting Director Eastern Region to the Honorable Earl Barbry, Sr., Chairman Tunica Biloxi Tribe of Louisiana (Aug. 11, 2011) ("Tunica Biloxi ROD"), AR0005524-43, at AR0005527-29, AR0005535; Solicitor's Opinion, Status of the Ottawa Tribe of Oklahoma as "under federal jurisdiction" on June 18, 1934, at 4-6 (Sept. 28, 2010), AR0008641-43.

numerous judicial decisions.[15] The M-Opinion also confirms what the *Grand Ronde* court earlier determined (*Grand Ronde,* 75 F. Supp. 3d at 403; *Grand Ronde,* 830 F.3d at 565): that the Secretary must consider the evidence of federal jurisdiction as a whole — the "variety of actions when viewed in concert," that demonstrate whether a tribe is "under federal jurisdiction." M-Opinion at 19. The requirement that all the jurisdictional evidence be considered together also has been confirmed by courts. *See, e.g., Mashpee v. Bernhardt*, 466 F. Supp. 3d at 217-18; *Grand Ronde,* 75 F. Supp. 3d at 403; *Grand Ronde,* 830 F.3d at 565; *Stand Up for California!*, 204 F. Supp. 3d at 278.

Against the weight of this authority, Plaintiffs seek to mischaracterize *Carcieri* and reject the M-Opinion with an incorrect and cramped interpretation of "under federal jurisdiction" that no court or administrative body has adopted.[16] Specifically, Plaintiffs argue that Justice Breyer's concurrence requires that a significant jurisdiction-conferring event must have taken place *in*

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[15] *See, e.g., Mashpee v. Bernhardt*, 466 F. Supp. 3d 199; *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 278 (D.D.C. 2016), *aff'd*, 879 F.3d 1177, 1183-86 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (2019); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015), *vacated and remanded sub nom*., *No Casino in Plymouth v. Zinke*, 698 F. App'x 531 (9th Cir. 2017) (vacated based on standing); *County of Amador v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1193, 1200, 1208-10 (E.D. Cal. 2015), *aff'd*, 872 F.3d 1012 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 64 (2018); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-cv-0660 (LEK/DEP), 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015), *aff'd*, 673 F. App'x. 63 (2d Cir. 2016), *cert denied*, 137 S. Ct. 2134 (2017); *Citizens for a Better Way v. U.S. Dep't of the Interior*, No. 2:12-cv-3021-TLN-AC, 2015 WL 5648925, at *21-22 (E.D. Cal. Sep. 24, 2015), *aff'd sub. nom., Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584 (9th Cir. 2018); *Village of Hobart v. Acting Midwest Reg'l Dir*., 57 IBIA 4, 20, 24-25 (May 9, 2013); *Shawano County v. Acting Midwest Reg'l Dir*., 53 IBIA 62, 74-76 (Feb. 28, 2011); *Grand Traverse Cty. Bd. of Comm'rs v. Acting Midwest Reg'l Dir*., 61 IBIA 273, 280-81 (Sept. 25, 2015); *State of New York v. Acting E. Reg'l Dir.,* 58 IBIA 323, 332-33 (June 11, 2014); *see also Carcieri*, 555 U.S. at 399 (Breyer, J., concurring); *Confederated Tribes of the Grand Ronde Cmty.*, 75 F. Supp. 3d 387, 402-05 (D.D.C. 2014); *Tribes of the Grand Ronde Cmty.,*830 F.3d 552, 564, 566 (D.C. Cir. 2016).

[16] In their complaint, Plaintiffs hint at another argument that no court or administrative body has adopted – that the Secretary's IRA authority also hinges on whether the Tribe was "federally recognized . . . in 1934" (¶ 7). The Department rejected this formulation in the M-Opinion (M-Opinion at 24-25), and the federal court have upheld as reasonable Interior's interpretation that a tribe need only be recognized at the time the land is acquired in trust. See County of Amador, 872 F.3d at 1021 ("Given the IRA's text, structure, purpose, historical context, and drafting history – and Interior's administration of the statute over the years – the better reading of § 5129 is that recognition can occur at any time. We therefore hold that a tribe qualifies to have land taken into trust for its benefit under § 5108 if it (1) *was* "under Federal jurisdiction" as of June 18, 1934, and (2) *is* "recognized" at the time the decision is made to take land into trust."); *see also Grand Ronde*, 830 F.3d at 559-563 (reaching the same conclusion).

1934. Pl. Br. at 8-9, 32. But one of Justice Breyer's examples — a "*pre*-1934" congressional appropriation — does not constitute a jurisdictional act *in 1934* and certainly does not, as Plaintiffs argue, "impart federal obligations … in 1934." Pl. Br. at 9 (emphasis added). In fact, the pre-1934 appropriation to which Justice Breyer referred appears to be an annuity received by the Mole Lake Band of Lake Superior Chippewa members under an *1854* treaty. *Carcieri*, 555 U.S. at 399.[17]

Plaintiffs further argue that the *only* types of evidence relevant to the "under federal jurisdiction" inquiry are the three examples specifically enumerated by Justice Breyer. But Justice Breyer's own plain language ("*for example*, a treaty with the United States….") demonstrates this too is incorrect. Plaintiffs take Justice Breyer's list of examples out of context — he provided his examples to illustrate three instances in which Interior had not believed tribes to have been under federal jurisdiction in 1934, but subsequently realized that this was an error. *Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring); *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 207-208. The point he was making is that there might be more such tribes. His list clearly was not intended to set out the "only" evidence that may show a jurisdictional relationship in 1934. *See, e.g., Grand Ronde,* 830 F.3d at 565 ("M-Opinion contextual analysis of a variety of actions viewed in context 'takes into account the diversity of evidence that a tribe may be able to produce… [i]t is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction'").

Plaintiffs also incorrectly claim that the M-Opinion allows tribes to rely on a "distant historical contact" that is unconnected to 1934. Pl. Br. at 9, 31-33. But the two-part test first

[17] *See also* Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Hearing Before the Senate Comm. on Indian Affairs, 111th Cong. 136 (May 21, 2009), available at: https://www.govinfo.gov/content/pkg/CHRG-111shrg52879/html/CHRG-111shrg52879.htm.

requires that Interior ascertain *whether the tribe's jurisdictional status remained intact in 1934.* M-Opinion at 17-19 (emphasis added); *see Mashpee v. Bernhardt,* 466 F. Supp. 3d at 208-09 (emphasis added). The M-Opinion correctly embodies earlier case law confirming that the federal government's failure to take action with respect to a tribe during a particular time period does not cause termination or loss of the tribe's jurisdictional status. *See United States v. John*, 437 U.S. 634, 652-53 (1978) (fact that federal supervision was not continuous did not destroy federal jurisdiction over the tribe). It recognizes "that the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 … strongly suggest[s] that such status was retained in 1934." M-Opinion at 20. The federal government's inattention to a tribe does not defeat federal jurisdiction once it has been established, as the federal government undeniably has made mistakes about a tribe's status or even its existence.[18] *Carcieri*, 555 U.S. at 397 (Breyer, J., concurring) ("a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time"); *Grand Ronde,* 830 F.3d at 562 (describing federal government's mistaken view that Stillaguamish was not a tribe under the IRA in 1934, which it later reversed).

2. The Secretary's Decision is Supported by the Administrative Record.

The Secretary properly applied the M-Opinion to the jurisdictional evidence, consistent with the instructions provided by Judge Friedman. The 2021 ROD's conclusion that the Tribe was under federal jurisdiction in 1934 must be upheld under the APA.[19]

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[18] As a legal matter, a tribe's status can be legally terminated only by congressional action. *See United States v. Nice*, 241 U.S. 591, 598-600 (1916) (Congress has the power to regulate tribes and tribal members; tribal relation may be dissolved only by Congress); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975) (citing *United States v. Nice,* 241 U.S. at 598; *Tiger v. W. Investment Co.,* 221 U.S. 286, 315 (1911)) ("… once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease.").

[19] Plaintiffs assert (incorrectly) that no tribe has ever been found to be under federal jurisdiction with such a paucity of evidence, referring to a chart. Mashpee prepared a chart in response, which corrects the numerous errors in

a) Carlisle School Records

The M-Opinion includes the "education of Indian students at BIA schools" as an example of evidence that supports a finding that a Tribe was under federal jurisdiction. M-Opinion at 19. Judge Friedman held that:

> The Secretary's rejection of the evidence [in the 2018 ROD] that individual Mashpee students were educated at a BIA school directly contradicted the M-Opinion, administrative precedent, and judicial precedent. *On remand, the Secretary must accept this evidence as probative evidence and view it "in concert" with the other probative evidence to determine whether the Tribe was under federal jurisdiction before 1934.*

Mashpee v. Bernhardt, 466 F. Supp. 3d at 220, 222-23 (emphasis added). His decision is consistent with administrative and judicial precedent. *See* Cowlitz ROD, AR0005705, AR0005709 (one form of evidence demonstrating that a Tribe was under federal jurisdiction in 1934 is *"the education of Indian students at BIA schools"*) (emphasis added); *Grand Ronde,* 75 F. Supp. 3d at 402-04 (documents showing that "*Cowlitz children attended schools operated by the Bureau of Indian Affairs*" constitute evidence that Cowlitz was under federal jurisdiction in 1934; and "[n]othing in [IRA Section 19] prohibits the Secretary from considering the relationship between the Federal government and individual Indians when determining whether the tribe itself was under federal jurisdiction in 1934 … it strikes the Court as perfectly reasonable for the Secretary to consider the relationship to the part (the tribal members) when trying to assess the relationship to the whole (the tribe).") (emphasis added); *Shawano County, WI,* 53 IBIA at 74 (attendance of individual tribal members at BIA schools was evidence that the tribe was under federal jurisdiction).

Plaintiffs' chart and includes the full range of Mashpee evidence. *See* Plaintiff's (Mashpee's) Corrections to Intervenors' Addendum, *Mashpee v. Bernhardt*, No. 1:18-cv-02242 (Dkt. No. 35-1). For the Court's convenience, a copy of the chart is attached to this Memorandum as Exhibit A. The record includes a detailed summary of the Mashpee Tribe's jurisdictional evidence in the August 31, 2017 Mashpee Submission to Interior, AR0008368-93.

The Carlisle Indian School ("Carlisle") was funded by federal appropriations for the education of members of Indian tribes. Act of May 17, 1882, 22 Stat. 68, ch. 163, p. 85; AR0008803-9030; AR0009238-321. The school was subject to congressional and federal administrative regulatory control and only Indian children were eligible to attend. *See, e.g.*, Act of July 1, 1892, 27 Stat. 120 (Indian Affairs regulatory authority), Education Circular No. 85 (rules for non-reservation schools), AR0009323-26; AR 0009033-234; AR0009235-321. Mashpee children had to demonstrate their tribal affiliation, blood quantum and meet other federally-imposed requirements. School records and the 1927 and 1928 GAO Reports show that at least a dozen Mashpee children attended the school between 1905 and 1918 when the school was closed. Interior correctly found this evidence probative of the Tribe's jurisdictional status.

Plaintiffs assert that Interior's analysis of the Carlisle records in the 2021 ROD constitutes an "inexplicable flip-flop … unsupported by the evidence," making the 2021 ROD "arbitrary and capricious," Pl. Br. at 15. In fact, it was the 2018 ROD's off-handed dismissal of probative evidence of Mashpee attendance at Carlisle that directly contradicted judicial precedent, the M-Opinion and administrative precedent, and caused Judge Friedman to find that Interior's analysis in the 2018 ROD violated the APA. *See Mashpee v. Bernhardt,* 466 F. Supp. 3d at 222. Plaintiffs' grousing about the general context provided in the 2021 ROD about the federal government's use of Indian boarding schools to assimilate Indian children does nothing to undermine the Tribe's specific record evidence showing that the federal government exerted control over Mashpee children at Carlisle. *See* ROD at 17-19.

Plaintiffs also assert that Massachusetts paid for the public school education of Mashpee children and "appears" to have paid for tuition and transportation to Carlisle. Pl. Br. at 17. That fact is irrelevant. Whatever funding was or was not provided clearly was inadequate, *see, e.g.*,

Tantaquidgeon Report at AR0008735-36,[20] which may be why some Mashpee families applied to send children to Carlisle. The statute cited by Plaintiffs to show the Commonwealth purportedly paid tuition for Mashpee children is also irrelevant: it provides funding for any Massachusetts child to attend high school in another Massachusetts town if their town does not have a high school. In fact, the record contradicts the notion that the Commonwealth covered tuition for Mashpee children at Carlisle, an out-of-state federal boarding school. *See, e.g.,* AR0008885 (Letter from Carlisle Superintendent approving Mashpee student travel home only if transportation costs were paid from his student account).

Plaintiffs' citation to a 1915 letter from the Carlisle Supervisor is uncompelling. A Supervisor's view about the potential enrollment of additional Massachusetts Indian students at a time when Carlisle was headed for closure (*see, e.g.,* AR0009276-321, excerpt from 1928 GAO Report with attendance from 1900-1918) does nothing to obviate the fact that Mashpee students were enrolled until the school closed in 1918. In sum, at least a dozen Mashpee children were enrolled at a federal Indian boarding school between 1905 and 1918 based on their tribal membership, blood quantum, and independently verified status of living in "Indian fashion." This is probative evidence of federal jurisdiction under all relevant precedent and Judge Friedman's remand order.[21]

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[20] The need for additional education funding for the Mashpee Tribe is confirmed by the fact that in the mid-1930's, federal officials (Office of Indian Affairs Director of Education W. Carson Ryan, Jr.) actively worked to secure *federal* funding to improve the conditions at the local public school that served only Mashpee children, visiting Mashpee with Gladys Tantaquidgeon. His efforts resulted in the federal Public Works Administration awarding a federal grant of $21,272 for a new school "for the Indian people of Mashpee," dedicated in September 1939. AR0008787-97; AR0008801-02, AR0008387-89. *See also* Mashpee student applications describing reasons for attending Carlisle. AR0008806; AR0008969; AR0008878; AR0009016.

[21] Plaintiffs' citation to disenrollment information from 1911 and 1916 (Pl. Br. at 17 n.12) should be dismissed as extra record evidence. Nonetheless, it shows that federal officials at Carlisle were evaluating students' eligibility, consistent with active exercise of federal jurisdiction. (The fact that in 1911, one of 100 students determined to be ineligible was Mashpee suggests that the other six Mashpee students attending Carlisle that year in fact *were* eligible (AR0009307), supporting the Secretary's determination of federal jurisdiction over the Tribe.)

In addition to being precluded, *see supra* at Section III.B.2., Plaintiffs' arguments regarding Carlisle evidence fall far short of meeting Plaintiffs' burden of showing that the Secretary's analysis or conclusions were arbitrary. *See Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 60 (1st Cir. 2001) ("[g]auzy generalizations and pin-prick criticisms, in the face of specific findings and a plausible result" are insufficient to overcome an agency's findings). Interior accepted the Carlisle evidence as probative and viewed it, together with the other evidence, as directed by Judge Friedman's order and consistent with APA standards.

b) Federal Management of Funds and Health and Social Services

Interior also considered evidence of the significant control over the Mashpee students' finances, physical health, career development and freedom of movement. Record evidence shows that the Carlisle School Superintendent, a federal official within the Office of Indian Affairs (now Bureau of Indian Affairs), controlled funds belonging to Mashpee members attending Carlisle. AR0008810; AR0008815; AR0008900; AR0008950; AR0008974. The record shows that the Carlisle Superintendent was required to seek additional approval from the Commissioner of Indian Affairs to transfer or use a Mashpee tribal members' funds. AR0008815. Federal officials at Carlisle also restricted access to the students' funds by Mashpee parents. AR0008816. In addition, federal Indian Office officials used federal funds to provide health care to Mashpee tribal members attending Carlisle (AR0008820-23; AR0008828; AR0008954-59; AR0008963), and federal supervising officials regularly approved and provided medical care, including surgery and other medical procedures for Mashpee students. AR0008823. The Indian Affairs office routinely expended federal funds and used federal officials to provide social services in the form of job training and placement to Mashpee tribal members at the school. AR0008411-14; AR0008803-9030. Mashpee students participated in

the federal government's "outing" program where they were assigned by federal officials to work for a variety of employers for vocational experience and training. *Id*.

The 2018 ROD improperly discounted this evidence. As Judge Friedman held in his decision remanding to Interior:

> The Secretary's failure to specifically address the federal management of student funds, the vocational training, and the health-care services provided to the Mashpee students at the Carlisle School in the 2018 ROD therefore was arbitrary and violated the APA … On remand, the Secretary must give a reasoned analysis as to whether this evidence is probative of the Tribe being under federal jurisdiction, and if so, consider it "in concert" with the other probative evidence.

Mashpee v. Bernhardt, 466 F. Supp. 3d at 224 (citations omitted). Interior did this in its 2021 ROD, consistent with its obligations under the APA. *See Associated Fisheries*, 127 F. 3d at 109. Interior concluded that this evidence, viewed in concert with the other evidence, supported a determination that Mashpee was under federal jurisdiction in 1934. *See* 2021 ROD at 18-19; M-Opinion at 19 (federal actions towards individual tribal members can serve as probative evidence that the tribe itself was under federal jurisdiction); *Grande Ronde*, 75 F. Supp. 3d at 404 (funds held by Interior for "health services, funeral expenses, or goods at a local store" on behalf of individual Cowlitz Indians is evidence that the Cowlitz Tribe was under federal jurisdiction in 1934); *Grand Ronde,* 830 F.3d at 564 (affirming federal jurisdiction determination based in part on government provision of services); Cowlitz ROD at AR0005705, AR0005709 (provision of health or social services, money held for services on behalf of individuals); Tunica-Biloxi ROD at AR0005527-28, AR0005535 ("the provision of health, education, or social services to a tribe or individual Indians" is one form of evidence that a tribe is under federal jurisdiction).

c) Protection from Removal/Federal Reports

In the early 1820s at the request of Congress Secretary of War John Calhoun ordered federal agent Jedidiah Morse to prepare a report regarding the state of Indian tribes "within the

jurisdiction of the United States." AR0008524. The Morse Report was commissioned as part of the federal government's initiatives for "civilization" of Indians,[22] and includes a statistical table that identifies Mashpee as a tribe "*within the jurisdiction of the United States.*" 2021 ROD at 13; AR0008531. Morse recommended that the federal government allow Mashpee to continue to occupy its existing lands rather than force the Tribe to be removed to other lands. AR0008526-27. The full Morse Report was printed and circulated to Congress and the Executive, debated in the House of Representatives, and formed the basis for the federal government's removal policy. *See* 2021 ROD at 14-15; AR0008533-37; AR0008561-63; AR0008577; AR0008688; AR0008692; AR0005329-30; *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 230-31. The Morse Report illustrates federal actions and assertions of federal authority; it is not a simple study. *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 229-31. Its recommendations about the tribes identified in the report were considered by Congress, adopted by the Secretary of War and presented to President James Monroe. AR0008533-37; AR0008561-63; AR0008577; AR0008688, AR0008692; AR0005329-30. In addition to the Morse Report, two letters from Colonel Thomas McKenney,[23] Superintendent of Indian Affairs, were relied on by Secretary of War Calhoun in recommending that Mashpee not be removed from its reservation.[24] President Monroe adopted that policy. AR0008533-37.

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[22] *See* AR0008521, Secretary Calhoun's letter to Morse, which states that Interior would like to have the report to determine "future application of the fund for the civilization of the Indians." In other words, the report would be used to determine the appropriate distribution of federal funding. It is reasonable to infer that Interior would only distribute federal funds to tribes that were "under federal jurisdiction."

[23] 1825 letter from Thomas McKenney to the Secretary of War, relying on Morse's 1822 table with "the names of the Indian tribes now remaining within the limits of the different states…" (Jan. 10, 1825), AR0008676; 1828 letter from Thomas McKenney to the Secretary of War, relying on Morse's 1822 table to show the Indian tribes "now resident within the United States…" (Dec. 15, 1828), AR0008683.

[24] The federal government considered the Tribe to be inhabiting a reservation when considering whether to remove the Tribe from its reservation to different lands. *See* AR0005091.

Given the Tribe's nearly exclusive occupation of the Town of Mashpee from 1665 through 1934 and the federal government's focus on removing eastern tribes to the west during the 1815-1845 time period, the 2021 ROD determined that the federal government's consideration and recommendation against removal of Mashpee based on the 1822 Morse Report and related actions and communications by Secretary of War Calhoun and President Monroe (including a recommendation to Congress) constituted evidence that the Tribe was under federal jurisdiction. 2021 ROD at 9-16. Interior explains that:

> Our review on remand makes plain that the federal government considered and ultimately rejected application of the removal policy to the Mashpee … The Morse report and federal officials' subsequent reliance on it, provide probative evidence that the Federal Government actively considered the Mashpee within its jurisdiction and subject to the removal policy, but chose instead to affirmatively protect the Tribe's occupancy of its land despite the overarching policy prerogative to remove tribes west to make their lands available for non-Indian settlement.

2021 ROD at 15-16.

This determination is consistent with Judge Friedman's order, which rejected the 2018 ROD's dismissal of the Morse Report as a passive compilation of general information about tribes and as inconsistent with prior precedent (citing *County of Amador v. Interior*, 136 F. Supp. 3d at 1208), and instructed the Secretary to analyze the Morse Report and the federal government's actions that relied on it in accordance with the M-Opinion and prior administrative precedent. *See Mashpee v. Bernhardt,* 466 F. Supp. 3d at 228-31. Judge Friedman specifically discussed the similarity of the *County of Amador* decision, wherein BIA had appointed Special Agent Kelsey to investigate dispossessed California tribal members, and later relied on a census prepared by Kelsey as evidence that the Ione Band of Miwok Indians was under federal jurisdiction. This fact pattern is directly analogous to the appointment of Morse as a special agent to investigate the condition of tribes in the United States, and his preparation of a statistical

table identifying the Mashpee Tribe. *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 229-30.

Plaintiffs argue that the Morse Report and McKenney letters are simply studies of all Indians living "within the jurisdictional borders" of the United States, and do not show that Mashpee was organized as a tribe or under federal jurisdiction, relying on *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 483 (1st Cir. 1987). Judge Friedman explicitly rejected this characterization:

> The Morse Report was more than a mere "compilation" of evidence; Reverend Morse made specific recommendations in his report about how the federal government should treat the various tribes, including the Mashpee Tribe … The making of a recommendation is, in and of itself, an action. Here, the report prepared at the direction of the Secretary of War – a federal executive official – included recommendations … Beyond a passive "compilation" or awareness of Congress' plenary authority … this report includes a representative of the Secretary of War – a federal Executive Branch official – making a recommendation about the Mashpee Tribe …

Mashpee v. Bernhardt, 466 F. Supp. 3d at 229. The ROD's thorough analysis of the Morse Report and the McKenney letters and accompanying federal actions recommending against removal of the Mashpee was appropriate and rational.

Mashpee Tribe v. Secretary of the Interior does not advance Plaintiffs' cause. There, members of several tribes (including Mashpee) sought to confirm tribal recognition and title to certain aboriginal lands, relying on four historical documents including excerpts from the Morse and McKenney Reports that the Court found insufficient to show the groups were *recognized* as tribes by the federal government. *Id.* at 482-84. The case occurred twenty years prior to Interior's formal acknowledgment of Mashpee through its administrative process in 25 C.F.R. Part 83; it is a case about federal recognition, not the IRA's under federal jurisdiction

requirement.[25] Interior's acknowledgment determination under 25 C.F.R. Part 83 took into consideration *Mashpee Tribe's* conclusions about whether Mashpee continued to exist as a tribe, but given the significant amount of additional evidence in the record before it, Interior determined that the Tribe had continued to exist continuously since the early 1620s. Recognition through the Part 83 Federal acknowledgement process "[s]ubjects the Indian tribe to the same authority of Congress and the United States as other federally recognized Indian tribes," 25 C.F.R. § 83.2(d). This determination ends the inquiry as to whether the Tribe exists or whether it is recognized. The holding in *Mashpee Tribe*, therefore, is irrelevant to whether the Morse Report and McKenney letters are probative of federal jurisdiction over Mashpee under the IRA.

Finally, Plaintiffs entirely fail to distinguish the relevant precedent that supports the Secretary's determination relating to the Morse Report and McKenney letters. *See* M-Opinion at 19 (annual reports, surveys, and census reports); *County of Amador,* 136 F. Supp. 3d at 1193, 1200, 1208, 1220 (upholding Interior's decision that the Ione Tribe was under federal jurisdiction based in part on two federal reports compiled in 1905-06 and 1915 by Indian agents); *No Casino in Plymouth v. Jewell,* 136 F. Supp. 3d at 1166 (same analysis and conclusion for same tribe, different plaintiff).[26] The 2021 ROD provides a reasoned analysis based on substantial evidence, consistent with legal precedent, that the Morse Report and McKenney

[25] The Court found that the claims brought by Mashpee individuals on behalf of the Tribe also were barred by res judicata, because the same issues had been litigated in the Tribe's 1978 Nonintercourse Act litigation, which is described in detail in Section III.C.3.b), *infra*.

[26] *See also* Cowlitz ROD, AR0005705; AR0005708-11 (relies in part on Cowlitz Indians being included in federal reports); Tunica Biloxi ROD, AR0005528 (Tribe's inclusion in Office of Indian Affairs reports relevant to federal jurisdiction inquiry); *Grand Ronde*, 75 F. Supp. 3d at 404 (inclusion of Cowlitz Indians in internal correspondence and memoranda demonstrates that Cowlitz was under federal jurisdiction in 1934); *Grand Ronde*, 830 F.2d at 564 (Cowlitz Tribe was under federal jurisdiction in 1934 based in part on Indian agency's enumeration of Cowlitz individual members in federal reports); *Village of Hobart,* 57 IBIA at 20, 24-25 (Commissioner of Indian Affairs 1934 annual report on the U.S. Indian population; tabulated population statistics including Oneida Tribe considered indicia of federal jurisdiction).

letters are probative evidence that Mashpee was under federal jurisdiction in 1934. This more than satisfies the APA's requirements. *See Lovgren*, 701 F. 3d at 20.

d) Other Federal Reports and Surveys

The Mashpee Tribe was included in multiple federal reports relating to federal Indian policy which included the enumeration of tribes under the jurisdiction of the United States from the late 1800s through 1935. AR0008382-84. The ROD also analyzed the 1851 Schoolcraft Report,[27] the 1890 Annual Report of the Commissioner of Indian Affairs, and the 1935 Tantaquidgeon Report to determine whether they were probative of federal jurisdiction over the Mashpee Tribe. ROD at 20-22. Judge Friedman's decision rejecting the 2018 ROD's dismissal of these reports as arbitrary and capricious held that the Schoolcraft Report, like the Morse Report and Kelsey Report concerning the Ione Band, was prepared at the request of a federal Indian Agent using federally appropriated funds. *Mashpee,* 433 F. Supp. 3d at 232. Because "efforts to document" the Ione Band's members and listing them on a census in the report was considered probative evidence that the Ione Band was under federal jurisdiction in *County of Amador*, on remand Judge Friedman instructed that Interior must explain if the Schoolcraft Report is similarly probative. *Id.* On remand, the Secretary determined that the 1851 Schoolcraft Report, published pursuant to Congressional direction, summarized Mashpee history and made policy recommendations, proposing a plan for the Tribe's improvement,[28] so that, like the Kelsey Report listing the Ione Band in *Amador County*, it is indicative of federal jurisdiction over the Tribe. 2021 ROD at 20-21.

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[27] 1851 Schoolcraft Report: A chart of tribes prepared by Indian Agent Henry Schoolcraft in 1851 in response to Congressional direction regarding trade and intercourse with Indian tribes. AR0008499.

[28] Although the plan was never implemented, the Office of Indian Affairs clearly considered that the Tribe was subject to federal jurisdiction, as it developed concrete plans pursuant to Congressional direction. 2021 ROD at 21.

The 1890 Annual Report of the Commissioner of Indian Affairs[29] reported that Mashpee occupied land in Barnstable County. Judge Friedman noted that prior Departmental decisions treated the inclusion of a tribe in the Commissioner's annual report as evidence that the tribe was under federal jurisdiction, citing *Village of Hobart v. Acting Midwest Reg'l Dir.,* 57 IBIA 4, 20, 24-25 (May 9, 2013). Here too Judge Friedman instructed the Secretary to explain why the 1890 Report was different, if at all, from prior decisions treating this type of evidence as probative. *Id.* On remand, the Secretary determined that the 1890 Annual Report of the Commissioner of Indian Affairs acknowledged that the Tribe maintained tribal relations and authority over its lands, and that including the Tribe in the 1890 Report was an explicit acknowledgement by the federal government that the Tribe was within its purview, consistent with Interior's prior decision in *Village of Hobart. Id.* at 21-22.

The Tantaquidgeon Report,[30] commissioned in 1934 and produced in 1935, provided a detailed narrative of the Tribe's history, language, government, social regulations, economic life and education, and was used by federal officials to secure federal funding to build a new school for Mashpee children. Judge Friedman instructed the Secretary to address whether this was probative evidence of federal jurisdiction. *Id.* at 232-33. On remand, the Secretary determined that the federally-commissioned Tantaquidgeon Report was "probative evidence of the Federal Government's authority over the Tribe, and its continuing efforts to document the Tribe's community and its needs. The Report informed federal officials, who subsequently relied on the Report." 2021 ROD at 22.

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[29] 1890 Commissioner's Annual Report to Congress: The 1890 annual report of the Commissioner of Indian Affairs, reporting that Mashpee continued to hold tribal relations and specific tracts of land. AR0008707-19.

[30] Survey of New England Tribes by Gladys Tantaquidgeon. Hired and paid by the Office of Indian Affairs for this task, her report was included in a larger report to the Commissioner of Indian Affairs, and relied on by federal officials. AR0008722-85.

In sum, the ROD concluded that these federal reports:

> ... provide probative evidence of the United States exercise of federal jurisdiction over the Tribe … The federally commissioned reports ... provide detailed information regarding the Tribe's status and set forth plans for exercising federal authority over the Tribe. The United States relied on these reports in making significant decisions regarding the Tribe … the reports here go beyond an isolated appearance or simple acknowledgment that the Tribe existed. Rather, these reports evidence the Federal Government's continuing responsibility for and authority over the Tribe and provided the basis for making decisions regarding the Tribe.

2021 ROD at 22-23.

Plaintiffs attack the ROD's evaluation of the 1890 Report of the Commissioner of Indian Affairs asserting that, because the report does not mention the Commonwealth's 1842 actions to allot the Tribe's communal landholdings, remove the restrictions against alienation and incorporate the Mashpee Indian district as the Town of Mashpee, it demonstrates that the federal government was "disconnected" or "unconcerned" about Mashpee. *See* Pl. Br. at 27. The ROD's assessment of the 1890 Report, however, explains Interior's reasoning: the Report's description of Mashpee as continuing to hold tribal relations and possess specific tracts of land, unlike most other tribes within the original thirteen colonies, is a reasonable basis to conclude that the 1890 Report constitutes an explicit acknowledgement that the Tribe fell within the federal government's purview. 2021 ROD at 21-22. This is particularly true in light of analogous precedent that treats the Commissioner's Annual Report as evidence that a tribe included in the report was under federal jurisdiction. *See Mashpee v. Bernhardt,* 466 F. Supp. 3d at 233 (citing *Village of Hobart,* 57 IBIA 4, 20, 24-25);[31] *see also* M-Opinion at 16 (Indian

[31] The fact that the Oneida Tribe was assigned to the jurisdiction of a BIA agency does not make the *Village of Hobart* case any less precedential, as Plaintiffs argue. It does not change the fact that it is a prior Departmental decision that treats the inclusion of the tribe in the Commissioner's annual report as evidence that supports a finding that the tribe was under federal jurisdiction. 57 IBIA 4, 20, 24-25; *see also Mashpee v. Bernhardt,* 466 F. Supp. 3d at 233.

Affairs produced annual reports on tribes under its jurisdiction, as part of the exercise of administrative jurisdiction). The Secretary's conclusion that the report constitutes probative evidence of the federal government's exercise of jurisdiction over and responsibility for the Mashpee Tribe is reasonable.

Plaintiffs make the same unpersuasive arguments regarding the Schoolcraft Report that it made about the Morse Report and McKenney letters, Pl. Br. at 24-26 – and these arguments fail for the same reasons. *See* Section III.C.2.c), *supra*. Finally, Plaintiffs address the Tantaquidgeon Report only in a footnote, Pl. Br. at 13, n. 8, questioning its value because the author "was a college student"[32] and the report was unpublished, while arguing that the Report's extensive review of the Mashpee Tribe's history and educational needs somehow undermines its evidentiary value as part of the *federal government's efforts* to document the Tribe's community and needs. These arguments are meritless – particularly when compared to the reasoned analysis in the ROD, which notes the subsequent use of the Tantaquidgeon Report by the Office of Indian Affairs' Director of Education as part of his efforts to obtain federal funding to build a new school for Mashpee children – a clear example of the report's use in the exercise of federal authority. *See* ROD at 22; *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 232; *see supra* note 19.

[32] Dr. Gladys Tantaquidgeon was a research assistant at the University of Pennsylvania to the renowned Anthropologist Frank Speck. *See* Gladys Tantaquidgeon, https://www.mohegan.nsn.us/explore/heritage/memoriam/medicine-woman-gladys-tantaquidgeon-memorial. Dr. Tantaquidgeon was hired by John Collier, Commissioner of Indian Affairs in 1934, to work on the Yankton Sioux Reservation in South Dakota. *Id.* She received honorary doctorates from the University of Connecticut and Yale, among other awards, and published several books, such as *A Study of Delaware Indian medicine Practice and Folk Beliefs* (reprinted as *Folk Medicine of the Delaware and Related Algonkian Indians*). *Id. See also* the Smithsonian's biography of her at https://womenshistory.si.edu/herstory/health-wellness/object/gladys-tantaquidgeon.

In sum, the Secretary complied with the D.C. federal district court's remand instructions, analyzed the record evidence and reached a reasoned conclusion that each of these three federal reports are probative evidence that the Mashpee Tribe was under federal jurisdiction, consistent with judicial and administrative precedent. The decision meets the APA's requirements.

e) Census Evidence

The 2021 ROD reviewed the different types of census evidence in the record that enumerate Mashpee tribal members – the 1911 and 1912 BIA school censuses, the 1910 Indian Population Schedule, and the federal general census records, 2021 ROD at 23-25. This was consistent with Judge Friedman's remand order, which explained that based on existing precedent, the 2018 ROD improperly ignored the general census evidence and gave insufficient reasons for discounting the other census evidence. *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 224-25. Judge Friedman instructed the Secretary to give a reasoned analysis of each type of evidence, determine whether it is probative, and if so, "view it 'in concert' with the rest of the probative evidence in the record and consistent with this Opinion." *Id.* at 225-226. The 2021 ROD did so.

1911 and 1912 Carlisle Census Reports. The ROD explains that the 1911 and 1912 Carlisle Indian School census reports were prepared pursuant to an 1884 Appropriations Act[33] that directed the federal government's Indian agents to identify and compile lists of Indians under their charge. 2021 ROD at 24. This included the Superintendents of federal Indian schools, including Carlisle. *Id.*, *see also* AR0008671; AR0008376-77. Although the records are incomplete (because Mashpee students attended the school before and after the 1910-1911 and 1911-1912 school years, *see* the 1927 and 1928 GAO Reports discussed *supra*), eight Mashpee

[33] 23 Stat. 76, 98 (July 4, 1884); AR0008671.

students are included on the rolls covering these two school years. AR0008629-36. The rolls reflect the expenditure of federally appropriated funds to educate and provide services to Mashpee students attending Carlisle. 2021 ROD at 24.

General Census and 1910 Indian Population Schedule. The 2021 ROD also analyzes the federal general census evidence, highlighting that between 1850 and 1930 the federal government consistently listed Mashpee tribal members as "Indian" in the general census. AR0009563; AR0009687-92; AR0008625; AR0008616-23. In addition, the 1910 Indian Population Schedule, a separate population schedule for Indians prepared in certain years, enumerates 200 Mashpee Indians living in the Town of Mashpee. AR002879; ROD at 23.[34]

Based on Judge Friedman's remand order and relevant precedent, the ROD found that this census evidence was probative, and when considered together with the rest of the evidence indicated that Mashpee was under federal jurisdiction in 1934. 2021 ROD at 25. *See also Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) ("enrollment (as of 1934) with the Indian Office" is evidence that a tribe was under federal jurisdiction in 1934); *Grand Ronde*, 75 F. Supp. 3d at 404 (local Superintendent's enumeration of Cowlitz tribal members, and inclusion of them on Office of Indian Affairs statistical tabulation, demonstrated "unambiguous federal jurisdiction"); *Grand Ronde,* 830 F.3d at 566 (jurisdictional evidence included 1934 instruction to include Cowlitz on Indian census roll); M-Opinion at 19.[35]

Plaintiffs argue that the general census rolls are not persuasive because they are not like

[34] The ROD mistakenly reports the number of Mashpee on the 1910 Population Schedule as 157, but the Schedule actually enumerates 200 Mashpee. The ROD also notes that the 1822 Morse Report provided early and detailed documentation of the Mashpee, which was relied on throughout the 1820s to respond to congressional requests.

[35] *See also* 2021 ROD at 25 n.183 and additional cases cited therein.

the evidence for Cowlitz in *Grand Ronde*,[36] because the census was not taken by the Office of Indian Affairs. Pl. Br. at 28-29. No legal authority supports the idea that only census information collected by the Indian Office is relevant, and Judge Friedman rejected that argument. *Mashpee v. Bernhardt*, 466 F. Supp. 3d at 225-27 (Interior must consider probative value of all census evidence). Indeed, Interior has relied on general federal census evidence in other cases. *See* Tunica Biloxi ROD, AR0005527-28 (inclusion in federal census counts is evidence that a tribe is under federal jurisdiction). The M-Opinion recognizes that tribes will have different types of evidence. M-Opinion at 19 (there may be other types of actions not specifically mentioned that evidence the federal government's obligations, duties or authority over a tribe); *see also Grand Ronde,* 830 F.3d at 565 (M-Opinion analysis of a variety of actions viewed in context takes into account the diversity of evidence that tribes may be able to produce).

In addition, in some cases the general federal census rolls relied on evidence prepared by the Indian Office. As the 2021 ROD indicates, the 1850 general federal census included a "Statement Showing the Number of Indians Within the Territory of the United States at Different Periods, Numbers in Each Tribe, Present and Past Location, Etc." which was based on the 1825 McKenney Report to the Secretary of War (AR0008536-37), which in turn incorporated information from the Statistical Table of Tribes in the 1822 Morse Report (enumerating tribes "within the jurisdiction of the United States)." AR0008625; AR0008524. In other words, while

[36] The Cowlitz census evidence, which Plaintiffs cite as being qualitatively different and acceptable to show a federal jurisdictional relationship, was not gathered pursuant to the 1884 Appropriations Act. The Cowlitz ROD states that Cowlitz Indians were included in the annual population reports prepared by Indian Affairs officials, and "although they were not enumerated in the annual censuses required by the Appropriations Act of July 4, 1884," and individual Cowlitz were not identified as a tribe, "the inclusion of Cowlitz Indians demonstrates evidence that those Indians were accounted for in official federal records and that while they lacked a land base they were still subject to federal oversight." AR0005710-11.

this general census "Statement" was prepared by the Census Office, it relied on information prepared by the Indian Office.[37] The 1910 Indian Population Schedule, a special separate Indian census used for the Indian population, which required enumerators to determine, *inter alia*, the individual's tribe and blood quantum, also relied on information collected and provided by the Indian Office. AR0007119.

Finally, it is not true that the Tribe was not enumerated on any Indian census roll taken by the Indian Office. The Carlisle census reports that list Mashpee students were compiled by the Carlisle Superintendent, a federal official acting pursuant to the 1884 Appropriations Act requiring the Indian Office to enumerate Indians on Indian census rolls. Plaintiffs appear to suggest that because the students' tribal affiliation was self-reported, the Carlisle rolls are not evidence of a jurisdictional relationship despite being prepared by the Indian Office. First, the Mashpee student applications included signed "vouchers of disinterested persons" that confirmed the student's tribal affiliation (and that the student "lives as an Indian"); the applications also were signed by two witnesses. *See, e.g.,* AR000738-39, AR000745-46; AR000790-91. The Mashpee students' Carlisle records, moreover, include their tribal affiliation as recorded by federal officials. *See, e.g.,* AR000719, AR000731-33, AR000741-42, AR000774, AR000778, AR000783, AR000794-95.

Plaintiffs rely on the 2018 ROD to discount the probative value of these census records. But Judge Friedman found the 2018 ROD analysis arbitrary and capricious, and instructed Interior to conduct a reasonable analysis to determine whether the evidence was probative and to view it in concert with other evidence. *Mashpee*, 466 F. Supp. at 225-226. Interior complied,

[37] The seven decades' worth of general federal censuses enumerating Mashpee tribal members in the Town of Mashpee was relied on by Interior when it federally acknowledged the Tribe. AR0009563, AR0009688-92; AR0008625; AR0008616-23.

providing a reasoned analysis consistent with the APA's requirements that must be upheld. *See Associated Fisheries of Me.,* 127 F.3d at 109 (court cannot substitute its judgment for that of the agency; review is only to determine whether the Secretary's decision was consonant with statutory powers, reasoned, and supported by substantial evidence).

3. Plaintiffs' Additional Arguments Fail to Undermine the 2021 ROD's Under Federal Jurisdiction Findings.

a) The *Carcieri* Determination Regarding Narragansett

Plaintiffs also argue that the Secretary cannot properly find that Mashpee was under federal jurisdiction because the *Carcieri* decision held that the Narragansett Tribe was not under federal jurisdiction and the two tribes are "identically situated." Pl. Br. at 9-11. Judge Friedman squarely rejected this argument, *Mashpee v. Bernhardt,* 466 F. Supp. 3d at 215 n.9, and thus Plaintiffs are precluded from advancing it here, *see* Section III.B.2, *supra*. *Carcieri* further reveals that the parties had not disputed Narragansett's status because Interior did not at that time think it was relevant.[38] *Carcieri*, 555 U.S. at 382, 395-96; *see* also M-Opinion at 17 ("the issue of whether the [Narragansett] Tribe was 'under federal jurisdiction' was not litigated before the Court nor had Interior considered that particular question . . . .").

Plaintiffs seize on the Court's few isolated statements about Narragansett's history to argue that Narragansett's record, if it existed, would be so similar to Mashpee's that *Carcieri* would preclude a finding that Mashpee was under federal jurisdiction in 1934. Pl. Br. at 9-11. Plaintiffs, however, cannot rely on the Narragansett's jurisdictional record because it was *not*

[38] The reason for the parties' concession was that Interior, in its decision, did not consider whether Narragansett was under federal jurisdiction, nor was evidence concerning that issue included in the record, because at that time, Interior's long-standing position was that the IRA applied to all federally recognized tribes. Because Narragansett was federally recognized, the administrative record did not address whether the Tribe had been under federal jurisdiction in 1934. *See* M-Opinion at 3 n.15.

before the court in *Carcieri.* Nor can plaintiffs point to any evidence in the Administrative Record that Mashpee and Narragansett – or that any two tribes — have "identical" or "indistinguishable" histories or relationships with the federal government. Plaintiffs provide no basis for the Court to disturb the Secretary's 2021 ROD.[39]

b) The Mashpee Nonintercourse Act Litigation is Irrelevant to the Under Federal Jurisdiction Inquiry.

Three decades before Mashpee's federal recognition was acknowledged by the federal government in 2007, the Tribe brought suit to recover possession of its historical lands pursuant to a statute not at issue in this case — the Indian Trade and Intercourse Act, more commonly known as the "Nonintercourse Act," 25 U.S.C. § 177 — which prohibits alienation of tribal lands absent Congressional consent.[40] Plaintiffs argue that the Tribe's suit to address the unlawful taking of its historical lands precludes the Tribe from meeting the IRA's "under federal jurisdiction" requirement. In Mashpee's earlier suit, a non-expert jury of local residents "found" that Mashpee was no longer a tribe pursuant to an antiquated federal common law standard (*Montoya v. United States*, 180 U.S. 261 (1901) and therefore the Nonintercourse Act's protections were unavailable to it. Of course, the Nonintercourse Act and the IRA are two separate statutes governing different issues with distinct requirements. *See City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 161 n.7 (D.D.C. 1980) (concession with respect to issues under one statute is not a concession with respect to issues under other statutes).[41] The

[39] Even the 2018 ROD, which Plaintiffs cite as the correct analysis of Mashpee's jurisdictional status (despite Judge Friedman's determination that it was arbitrary and capricious), does not accept Plaintiffs' interpretation of *Carcieri* or their arguments regarding the Narragansett Tribe. *See, e.g.,* 2018 ROD at 10, n.79, AR0005097.

[40] *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978); *Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575 (1st Cir. 1979).

[41] The federal district court in *Mashpee Tribe v. Town of Mashpee* also stated that nothing in that opinion "should be taken as holding or implying that the Mashpee Indians are not a tribe for other purposes, including participation in other federal … programs." 447 F. Supp. at 950 n.7.

issue there, whether or not the Tribe still existed as a Tribe, is not at issue in this case.

Today, the Part 83 regulations, implemented by expert staff, comprise a professional administrative process for establishing tribal existence. 25 C.F.R. § 83.2; *see Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt,* CV No. 17-0038 (ABJ), 2020 WL 1451566 (D.D.C. Mar. 25, 2020), *appeal dismissed sub nom. Burt Lake Band of Ottawa and Chippewa Indians v. U.S. Dep't of the Interior,* No. 20-5152, 2020 WL 3635122 (D.C. Cir. June 29, 2020).[42] In its Part 83 acknowledgment decision for the Tribe, Interior explicitly rejected a similar argument about the Tribe's earlier Nonintercourse Act litigation, determining that the tribal existence findings made in that litigation were inapplicable to the federal acknowledgement determination. *See* AR0005557-58, 0005560; 72 Fed. Reg. 8007, 8008. Interior also underscored that the acknowledgment decision was made on the basis of considerably more factual evidence than what was available in the trial record. AR0005558. Consequently, the holding in the Mashpee Nonintercourse land claims litigation has no bearing on whether the Mashpee Tribe was under federal jurisdiction in 1934 under the IRA. *See* AR0007099-101; AR0009502-03.[43]

The same is true for the dicta in *Elk v. Wilkins,* 112 U.S. 94 (1884), several state law cases from the 1800s, and *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480,[44] relied on

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[42] *See also Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n,* 459 F. Supp. 3d 256, 260 (D.D.C. 2020), *appeal docketed*, No. 20-5157 (D.C. Cir. Jun. 5, 2020) (even under the IRA, Interior made recognition determinations on an *ad hoc* basis until 1978 federal acknowledgment regulations were established); *Muwekma Tribe v. Babbitt,* 133 F. Supp. 2d 42, 43 (D.D.C. 2001) (same).

[43] Plaintiffs failed to contest the federal government's acknowledgment of the Mashpee Tribe's existence in 2007, and that decision is no longer subject to challenge because the six-year statute of limitations under the APA has run. *Trafalgar Capital Assocs., Inc. v. Cuomo,* 159 F.3d 21, 34 (1st Cir. 1998).

[44] Plaintiffs' assertion that the Supreme Court's 1884 decision in *Elk v. Wilkins* "reviewed the history of the Massachusetts Indians" and described them as not constituting distinct political communities is not only a gross mischaracterization of the case (there is one line of dicta about Massachusetts tribes), but it also has no bearing on whether Mashpee was under federal jurisdiction in 1934. The state law cases (describing Massachusetts tribes as remnants under state control) and *Mashpee Tribe v. Secretary of the Interior* (suit by tribal members failed to establish recognition of Mashpee and four other tribal entities, based in part on Morse and Schoolcraft Reports) are irrelevant to the under federal jurisdiction inquiry for the same reasons, as explained *supra*.

by Plaintiffs. Plaintiffs use these cases together to assert that Mashpee and other Indians in Massachusetts were "remnants" of tribes never "recognized" by the United States as distinct political communities. Pl. Br. at 19-20.[45] Here again, Plaintiffs conflate recognition (a separate legal question) with the "under federal jurisdiction" inquiry. In 2007, the federal government officially recognized the Tribe. *See supra,* at 1-2. The 2021 ROD concerns the federal government's determination that the Tribe was under federal jurisdiction in 1934.

In sum, there is nothing in these earlier cases that is relevant to the Secretary's inquiry into whether the Tribe was under federal jurisdiction in 1934. Plaintiffs' arguments relating to these cases have no bearing on the Secretary's proper application of the M-Opinion consistent with prior precedent as directed by the D.C. District Court's remand order.

c) Letters from Federal Officials Erroneously Disclaiming Jurisdiction Over Mashpee

As Justice Breyer's concurrence in *Carcieri* states, a tribe may have been under federal jurisdiction even though the Federal Government did not believe so at the time, and Interior made mistakes about tribes' jurisdictional status. *See Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring). This is why Interior and the courts have rejected similar erroneous statements in upholding favorable jurisdictional determinations for multiple other tribes (including several

[45] Plaintiffs also argue, *see* Pl. Br. at 20, n.14, 24, 26, that Mashpee (and other East Coast tribes) were under the jurisdiction of the states and therefore were not under federal jurisdiction. Plaintiffs are precluded from making this argument, *see supra* Section III.B.2. In any event, Interior consistently has opined that state jurisdiction over a tribe does not preclude federal jurisdiction (even in the 2018 ROD – AR0005104 (Supreme Court has confirmed "that the Continental Congress assumed management of Indian affairs 'first in the name of these United Colonies; and, afterwards, in the name of the United States'" (citations omitted)), AR0005107 ("federal authority over Indian affairs included tribes within the original 13 states.")). *See also* AR0005480, U.S. Dep't of the Interior, Assistant Secretary-Indian Affairs, Amendment to the May 20, 2008 Record of Decision for Oneida Indian Nation of New York Fee-to Trust Request (Dec. 23, 2013) (recognizing Congress' authority over Indian affairs and dismissing statements by federal officials to the contrary regarding the interplay of state authority over Indian tribes in New York vis-à-vis federal jurisdiction over those tribes); *see also Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 568 n.14 (2d Cir. 2016) (confirming same); *United States v. John*, 437 U.S. at 652-53 (even when state authority over a tribe goes unchallenged for a long period of time, federal authority over the tribe is not destroyed).

eastern tribes). *See* AR057068, AR057079 (Cowlitz ROD); AR0005480-81, AR0005492-93 (Oneida ROD); AR0005535 (Tunica Biloxi ROD); *Grand Ronde*, 75 F.Supp.3d at 407; *Grand Ronde*, 830 F.3d at 567 (rejecting statements by federal officials (*including 1933 letter from Commissioner Collier*) that the Cowlitz Tribe was not under federal jurisdiction in light of other evidence supporting jurisdictional determination); *Upstate Citizens for Equal., Inc. v. Jewell*, No. 5:08- CV-0633 LEK/DEP, 2015 WL 1399366, at *5-6 (N.D.N.Y. Mar. 26, 2015), *aff'd sub nom. Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016) (rejecting statements by federal officials that the Oneida Indian Nation of New York was under the control of the State of New York and no longer under federal jurisdiction); *Grand Traverse County Board of Comm's,* 61 IBIA at 282-283 (concluding that Grand Traverse Band was under federal jurisdiction, despite contrary statements from Departmental officials "based more on funding considerations than on the jurisdiction and authority of" the federal government under the IRA, and misinterpretation of treaty); *Shawano County, WI,* 53 IBIA at 73-74 (rejecting Departmental statements that the Stockbridge Munsee Community was no longer under federal control in light of other evidence, including tribal members attending government-run Indian schools); *Village of Hobart,* 57 IBIA 4, 11-12, 24-25 (May 9, 2013) (rejecting 1934 Commissioner of Indian Affairs' statement that the Oneida Tribe of Wisconsin was not under federal jurisdiction given longstanding relationship with the federal government, including tribal vote to accept the IRA); *Franklin County, NY v. Acting E. Regional Director*, 58 IBIA 323, 333-334 (June 11, 2014) (rejecting statements that the St. Regis Mohawk Tribe was under state not federal jurisdiction due to long periods of federal inaction; federal inaction does not destroy the federal government's jurisdiction over a tribe).

Plaintiffs nevertheless argue that several letters from federal officials in the 1930s

summarily stating that Mashpee is not under federal jurisdiction are conclusive evidence that Mashpee was not under federal jurisdiction in 1934 for IRA purposes. Pl. Br. at 11-14. Plaintiffs are incorrect.

First, there is no question that the federal government has plenary authority over Indian tribes and, as long as any tribe continues to exist, the exercise of that authority cannot be *terminated* except by an Act of Congress. This principle applies to all tribes, including eastern tribes. *See United States v. Nice,* 241 U.S. 591, 600 (1916). Congress never adopted or considered any termination legislation for Mashpee, and through its exhaustive Part 83 Federal Acknowledgment Process, Interior determined in 2007 that the Tribe had maintained a continuous tribal existence during the 1930s. *See* 2021 ROD at 29; *see also supra* at n.2.

Second, the fact that some Interior officials made statements in the early twentieth century that are inconsistent with federal law (and inconsistent with evidence of prior exercises of jurisdiction) means that such statements are made without authority by those agents, and the government cannot be bound by unauthorized acts of its agents. *See Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947). These letters are legally ineffective to disclaim jurisdiction over Mashpee, and rather, as the 2021 ROD explains, are merely "reflections of evolving federal policy, practical constraints on implementing the IRA, and factual mistakes, rather than termination of the Tribe's jurisdictional status." 2021 ROD at 27.

The letters also are factually incorrect. The 1934 letter from Indian Affairs Education Director W. Carson Ryan, rejecting a funding request for a school for Mashpee children, asserts that the United States has not yet undertaken to educate Indian children except in "Federal Indian areas" — yet the United States had operated off-reservation Indian schools like Carlisle well before that time. *See* Act of May 17, 1882, 22 Stat. 68. The very next year (1935), the *very*

same federal official, Carson Ryan, began working to secure *federal* funding from the Public Works Administration to build a new school "for the Indian people of Mashpee," eventually securing a $21,272 federal grant for the school — further illustrating that the federal government did not have a consistent policy or understanding at that time of tribes under its jurisdiction.[46] The ROD highlights similar factual errors in the 1936 and 1937 letters. *See* 2021 ROD at 28.

Plaintiffs rely in particular on a letter from Commissioner of Indian Affairs John Collier that refuses assistance to a Mashpee tribal member, stating that there is no federal policy regarding Indian groups "under the State" as he "understands Mashpee to be." *Id.* at 27. Plaintiffs insist that because a similar letter regarding the Narragansett was referenced by the Court in *Carcieri,* that the Collier letter conclusively demonstrates that Mashpee was under state, not federal, jurisdiction. Plaintiffs, again, are incorrect. While the *Carcieri* court did reference as persuasive the Collier letter stating that the federal government lacked jurisdiction over the Narragansett, there was no factual record pertaining to whether the Narragansett were under federal jurisdiction before the Court. *See Mashpee v. Bernhardt*, 466 F. Supp. 3d at 215, n.9.; Section III.C.3.a)., *supra.* In the Mashpee case, the Collier letter must be weighed against all the other jurisdictional evidence in the record, as required by the M-Opinion and Judge Friedman's remand order — which is what the Secretary did.

As the Secretary explains in the 2021 ROD, the Collier letter reflects the "contemporaneous federal policy of deferring to state jurisdiction over New England tribes at the time," and does "not rest on a legal analysis as to whether the BIA had legal authority over the Tribe." The letter also reflects the practical budgetary constraints on full implementation of the IRA during the Depression, and the (incorrect) assumption that tribes in the original states were

[46] *See* detailed description of 1935 W. Carson Ryan correspondence on behalf of Mashpee at AR0008387-90.

being provided for by state and local officials. *Id.* at 27-28.[47] The Secretary's analysis is consistent with the M-Opinion, which specifies that "evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action." M-Opinion at 20.

The Secretary properly considered and rejected the erroneous statements of Interior officials regarding the Mashpee Tribe's jurisdictional status, concluding that the weight of the probative evidence, when viewed in its entirety, demonstrates that the Tribe's jurisdictional status remained intact.

D. Interior Properly Exercised Statutory and Regulatory Authority to Proclaim the Tribe's Initial Reservation.

1. Statutory and Regulatory Requirements

Section 7 of the IRA authorizes the Secretary to proclaim new reservations for tribes. 25 U.S.C. § 5110. Its plain language allows the inclusion of multiple parcels in a proclamation ("the Secretary … is authorized to proclaim new Indian reservations on *lands* acquired [in trust] pursuant to any authority conferred by this Act…). *Id.* (emphasis added). The Secretary exercises IRA Section 7 authority pursuant to publicly-available guidelines.[48]

The Indian Gaming Regulatory Act (IGRA) (25 U.S.C. §§ 2701 *et seq.*) generally restricts Indian gaming to reservations in existence when the statute was enacted in 1988, but

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[47] Contrary to Plaintiffs' relentless drumbeat that the Tribe was under state and not federal jurisdiction the ROD also confirms, that under controlling precedent, the Tribe's relationship with the state does not supplant federal authority over the Tribe. 2021 ROD at 29-30, citing *United States v. John,* 437 U.S. 634; *Joint Tribal Council of Passamaquoddy*, 528 F.2d at 378. *See also* n. 44, *supra.*

[48] The Administrative Record includes an older version of the proclamation guidelines. ARSupp0000635, 0000636 (guidelines "for adding *lands* to a reservation or establishing a new reservation"). The guidelines have since been updated and are now incorporated into BIA's Fee-to-Trust Handbook ("A reservation proclamation can encompass multiple trust parcels or a portion of a parcel taken into trust.") BIA Fee-to-Trust Handbook (June 28, 2016) at 5 https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf).

IGRA Section 20 provides certain exceptions to this rule to "ensure that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). The relevant exception here is the "initial reservation exception" for tribes acknowledged under Part 83's Federal acknowledgment process. *Id*. § 2719(b)(1)(B)(ii). Section 20's implementing regulations explicitly acknowledge that multiple parcels may be included in an initial reservation. (Indian gaming may take place when "*lands* are taken into trust as part of … the initial reservation of an Indian tribe acknowledged … under the Federal acknowledgement process" (emphasis added)).

The Secretary's regulations implementing IGRA Section 20's "initial reservation" provision also include geographical requirements:

> the land [must be …] located within the State or States where the Indian Tribe is now located … and within an area where the tribe has significant historical connections and one or more … modern connections ...[49]

25 C.F.R. § 292.6(d). These regulations provide that "significant historical connections" may be established by "historical documentation [of] the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2.[50] Interior's

[49] Plaintiffs have not argued that the Tribe does not meet the "modern connections" test.

[50] A significant body of administrative and federal case law interpreted Section 20's restored lands provision (25 U.S.C. § 2719(b)(1)(B)(iii)), and this served as the basis for the Secretary's development of the "significant historical connections" regulatory requirement. *See Butte County v. Hogen*, 613 F.3d 190, 192 (D.C. Cir. 2010) (test for "historical connections" in pre-existing case law codified in Part 292 regulations. The Secretary's regulatory standard further reflects the holdings in the foundational cases of *City of Roseville v. Norton*, 348 F.3d at 1027-30 (IGRA's Section 20(b) should be "interpreted consistent with the broad purposes it serves including restitution for historical wrongs;" Section 20(b) "ensur(es) that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones"); and *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for West. Dist. Mich.*, 198 F. Supp. 2d 920, 936 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) (even if there are other locations which "were of historical significance and arguably were more important" to the tribe, the parcel of lesser historical importance nevertheless met the historical connections test for "restored lands"). Interior and the National Indian Gaming Commission (NIGC) continue to rely heavily on these earlier federal court opinions. *See Butte County*, 613 F.3d at 192; *see also NIGC Fort Sill Op.* at 24 (May 19, 2008); *Interior Upper Lake Op*. at 6 (Nov. 21, 2007); *NIGC Mechoopda Op.* at 6 (March 14, 2003); *NIGC Wyandotte Op.* at 8 (Sept. 10, 2004); *NIGC Rohnerville Op.* at 1 (Aug. 5, 2002); *NIGC Karuk Op.* at 8 (Apr. 9, 2012), available at https://www.nigc.gov/general_counsel/indian_lands_opinions.. At least one court has determined that the "significant historical connections" test should be applied more leniently for newly recognized tribes relying on

Application of The Historical Connections Standard to the Tribe is Well-Documented and Reasonable. Interior's conclusion that the Tribe has significant historical connections to the Tribe's Taunton land tracks the directions provided by Judge Friedman and is amply supported by the evidence in the administrative record. *See* 2021 ROD at 45-46 (**burial sites**) ("Recent archeological work performed pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.,* conclusively links sites in the vicinity [11 miles] of the Taunton site to the Tribe."); *id.* at 47 (detailing additional cultural items found at Burr's Hill, approximately 20 miles from the Taunton site); i*d.* at 48 (detailing "numerous other cultural items linked to the Mashpee tribe that have been recovered" 14 and 20 miles, respectively from the Taunton Site); *id.* at 49 (**use and occupancy; village sites**) (evidence from the Massachusetts Historical Commission of Wampanoag settlements and sites containing evidence of use and occupancy "within six and 11 miles of the Taunton Site"). Indeed, much of the evidence in the ROD demonstrates that the Tribe has closer connections to the Taunton site than those found sufficient by Interior and the courts for other tribes. *See* 2021 ROD at 34; *NIGC Karuk Op.* at 10-12 (Apr. 9, 2012) (parcel 38 miles from tribal headquarters and not in area of exclusive use by tribe nevertheless warrants a finding of significant historical connections); *see also Grand Ronde*, 830 F.3d (parcel with significant historical connections 14 miles outside of court-determined boundary of where the tribe historically exercised exclusive use and occupancy"); *City of Roseville v. Norton*, 348 F.3d at 1023, 1033 (land 40 miles from the tribe's former reservation satisfied historical connection inquiry); *NIGC St. Ignace Op.* at 12

Section 20's "initial reservation" provision. *Grand Ronde*, 830 F.3d at 566 ("Interior regulations require a tribe seeking to come within [the initial reservation] exception to show, *inter alia*, that the land in question is '*within* an area where the tribe has significant historical connections.' 25 C.F.R. § 292.6(d) (emphasis added). This is in contrast to the restored-lands exception, which requires at least 'a significant historical connection *to the land*' itself. *Id.* § 292.12 (b) (emphasis added).")

(July 31, 2006) (tribe had significant historical connection to a parcel 50 miles from the tribe's center).

The Secretary's interpretation of the "significant historical connections" requirement is entitled to deference particularly since the Secretary is interpreting regulations established by her own agency that implement a statute she is charged with administering. *See S. Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 97 (1st Cir. 2002) ("where Congress has entrusted rulemaking and administrative authority to an agency, courts normally accord the agency particular deference in respect to the interpretation of regulations promulgated under that authority"). The Secretary's determination that the Tribe has a significant historical connection to the Taunton site was more than reasonable and must be upheld under the APA. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

2. The Secretary's Decision to Include Two Parcels Within the Tribe's Initial Reservation Was Reasonable.

Plaintiffs assert that "in no prior case has Interior connected such distant[51] parcels to form a single initial reservation." The plain language of the IRA clearly authorizes the Secretary to include multiple parcels in a reservation proclamation, and IGRA's Section 20 clearly allows multiple parcels to be included in an "initial" reservation proclamation.[52] This legal reality is reflected in the fact that Interior's determination and proclamation for the Tribe is the fifth "initial reservation" composed of multiple non-adjacent parcels proclaimed for tribes newly recognized through the Part 83 Federal Acknowledgment Process. *See* 82 Fed. Reg. 43784

[51] Plaintiffs randomly assert that the Taunton and Town of Mashpee parcels are 50 miles apart, but in fact they are 35 miles apart. *See* Map, AR 013451-52. It is not uncommon for tribes to have reservations lands at some distance from one another, reflecting the fact that tribes' historical territories were much more far reaching than what lands are left to them in their modern reservation. *See* https://biamaps.doi.gov/indianlands/.

[52] *See* discussion *supra* at III.D.1.

(Sept. 19, 2017) (placing 14 parcels in trust for Jamestown S'Klallam Tribe); 72 Fed. Reg. 15711 (Apr. 2, 2007) (placing 6 parcels in trust for the Jena Band of Choctaw Indians of Louisiana); 74 Fed. Reg. 41740 (Aug. 18, 2009) (placing 2 parcels in trust for the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, aka, Gun Lake Tribe); 82 Fed. Reg. 6612 (Feb. 14, 2018) (placing 3 parcels in trust for the Nottawaseppi Huron Band of Potawatomi).

Plaintiffs cite to no statute, regulation or judicial opinion requiring non-contiguous lands in an initial reservation comply with some random *specific distance* requirement from one another – because there is none. Rather, as discussed *supra* at III.D.1., the geographic requirements imposed by IGRA's implementing regulations are the substantive requirements that the lands forming a tribe's initial reservation be those with which the tribe has specific modern connections, 25 C.F.R. Part 292, § 292.6(d)(1)-(3) and "significant historical connections," 25 C.F.R. §§ 292.2, 292.6(d). Having no authority to support the assertion that parcels must be located within a certain *distance* from one another, Plaintiffs next try to insist that non-contiguous parcels must at least be within the "historic boundaries" of a reservation, relying on Interior's decision to proclaim an initial reservation encompassing three parcels within an historic reservation for the Nottawaseppi Huron Band of Pottawatomi. Plaintiffs' assertion entirely ignores the disjunctive "or" in IGRA's implementing regulations defining "significant historical connections" to include lands that are:

> located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, ***or*** *[lands that] a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.*

25 CFR 292.2 (emphasis added). As discussed *supra* at III.D.2, Interior amply studied and confirmed the Tribe's historical connections to the two parcels that make up the Tribe's initial reservation and confirmed that both meet these geographic requirements. The Secretary's

inclusion of the Taunton and Town of Mashpee sites within an initial reservation proclamation for the Tribe is fully consistent with statutory, regulatory and precedential authority, and should be affirmed under the APA. *See Associated Fisheries of Me.,* 127 F.3d at 109 (agency decision is consistent with APA if it is consonant with statutory powers, reasoned, and supported by the evidence).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgement should be denied. Defendant Intervenors' Motion for Summary Judgement seeking an order that the 2021 ROD is reasonable and consistent with the APA should be granted.

Respectfully Submitted,

MASHPEE WAMPANOAG TRIBE

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CERTIFICATE OF SERVICE

I, Tami Lyn Azorsky, hereby certify that this document has been filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 2, 2022.

/s/ *Tami Lyn Azorsky*