United States Court of Appeals for the First Circuit

Case No. 23-1197

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

v.

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

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

BRIEF FOR MASHPEE WAMPANOAG INDIAN TRIBE, *Defendant-Appellee*

Dated: July 28, 2023

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INTRODUCTION

The Mashpee Wampanoag Tribe has lived in what in now southeastern Massachusetts for centuries and has a history, government, language and culture that predate the founding of the United States. The Tribe's ancestors fed the starving Pilgrims, launching the tradition that has become Thanksgiving. Yet over time, the Tribe was rendered unrecognized and landless. Finally, in 2007, the federal government formally acknowledged its recognition of the Tribe and in 2015 took land into trust to form a federally protected reservation for the Tribe. Since that time, Mashpee has been continuously under attack by the Littlefields (funded by a commercial gaming company).[1]

The 2021 Record of Decision (2021 ROD) was issued by the Department of the Interior (Interior) to confirm the status of the Tribe's reservation. Interior properly developed the 2021 ROD based on record evidence consistent with relevant case law, administrative precedent, Interior's own internal, binding legal guidance, and the federal district court opinion overturning the 2018 ROD as arbitrary, capricious, and an abuse of discretion. It should be upheld.

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[1] Charles Winokoor, Latest Mashpee Wampanoag land-in-trust decision elicits joy and dismay, The Herald News (Sept. 8, 2018), https://www.heraldnews.com/story/news/2018/09/09/latest-mashpee-wampanoag-land-in/10806770007/.

STATEMENT OF THE ISSUES

The only issue before this Court is whether the Littlefields can demonstrate that the 2021 ROD determining that the Mashpee Tribe was under federal jurisdiction in 1934 is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under APA Section 706(2)(A).

STATEMENT OF THE CASE

I. THE 2015 ROD

In 2007, Interior acknowledged federal recognition of the Tribe pursuant to a rigorous, document-intensive review procedure known as the Federal Acknowledgment Process, 25 C.F.R. Part 83. A tribe whose recognition has been acknowledged through this process successfully has demonstrated, *inter alia,* that it has maintained its tribal identity on a substantially continuous basis. 25 C.F.R. § 83.10 (formerly § 83.3). Interior concluded that the Tribe has been a distinct Indian community in existence since at least the 1620s.[2]

The Tribe had no federally protected reservation land within which it could exercise its jurisdiction and provide for its people. Accordingly, the Tribe petitioned Interior to exercise its authority under Sections 5 and 7 of the Indian

[2] *See* JA788-801 at JA792-93, JA800-01; *see also* 72 Fed. Reg. 8007-08 (2007). The Tribe's federal acknowledgment cannot be challenged in this case; any challenge would have had to be filed within 6 years of the decision. *See Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998).

Reorganization Act ("IRA")[3] (25 U.S.C. §§ 5108, 5110, earlier codified at 25 U.S.C. §§ 465 and 467, respectively) to place land in trust and proclaim it a reservation for the Tribe. The Tribe's petition encompassed two sites within its historical territory, one in Mashpee and another in Taunton.[4] JA1062. The Town and the City actively supported the Tribe's petition. JA110-11; JA816-817, JA897-98.

To exercise its authority under IRA Sections 5 and 7, Interior must determine whether the Tribe meets any of the three definitions of "Indian" in IRA Section 19. 25 U.S.C. § 5129. *Carcieri v. Salazar*, 555 U.S. 379, 387-88 (2009). Section 19 defines "Indian" as:

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[3] The IRA was enacted to reverse the disastrous impacts of these earlier federal policies of forced assimilation and removal. H.R. Rep. No.73-1804, at 6 (1934), JA654. A key tool is its delegation of authority to the Secretary to acquire land in trust for tribes that did not already benefit from possession of federally-held reservation lands, or in the words of the bill's chief sponsor, 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." *See* S. Rep. No. 73-1080, at 1 (1934), JA649 (statement of Sen. Burton Wheeler); H.R. Rep. No.73-1804, at 6 (1934), JA654 (IRA would help to "make many of the now pauperized, landless Indians self-supporting").

[4] The Littlefields erroneously assert without citation or argument for relevance that the Taunton parcel is 50 miles away from the Mashpee parcel. Br., 1, 8. The actual distance is 35 miles. *See* map at JA815. It is not uncommon for tribes to have reservation lands at a distance from one another, reflecting the reality that tribes' historical territories were far reaching. *See* U.S. Domestic Sovereign Nations: Land Areas of Federally-Recognized Tribes, https://bia-geospatial-internal.geoplatform.gov/indianlands/.

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

25 U.S.C. § 5129.

On September 18, 2015, Interior determined that the Tribe met the second definition of Indian in the 2015 ROD. JA103-243 at 110-12, 242-43. The Littlefields assert, without citation, that Interior's reliance on the second definition demonstrates that Interior "recognize[d] that *Carcieri* stood as a barrier to finding the Mashpee Tribe was under federal jurisdiction in 1934[.]" (Br., 23.) In fact, Interior explicitly stated otherwise in the 2015 ROD: "*[w]e have not determined whether Mashpee could also qualify under the first definition of 'Indian,'* as qualified by the Supreme Court's decision in *Carcieri v. Salazar*." (footnote omitted) (emphasis added.) JA185-86.

The Littlefields challenged the 2015 ROD. In July 2016, the court rejected Interior's interpretation of the IRA's second definition of Indian, holding that the second definition necessarily incorporates the first definition, whereas Interior had interpreted the second definition as having an independent meaning. *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016). The court ruled, however, that Interior was free to determine whether the Tribe met the first

definition. *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).

II. THERE IS NO "2017 ROD"

Thereafter, the Tribe and the Littlefields submitted evidence and arguments on whether the Tribe was under federal jurisdiction in 1934. Relevant to these submissions was legal guidance governing the agency's analysis of the first definition of Indian issued by Interior's Solicitor. M-37029, Memorandum on the Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014) ("M-Opinion").[5] JA869-94.

In February 2017, briefing from both parties on the question of whether the Tribe meets the IRA's first definition of Indian was completed. In March 2017 Ryan Zinke became Secretary of the Interior, a position he held until January 2019. In June 2017, Interior unexpectedly provided both the Tribe and the Littlefields with an unsigned draft of a decision. In identical letters to each party dated June 30, 2017,[6] Interior invited both to brief a new question that had never been raised

[5] The majority opinion in *Carcieri* did not address the meaning of "under federal jurisdiction in 1934," *see Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 207-208 (D.D.C. 2020), and it is not defined in the statute. To guide how the agency should determine whether a tribe was under federal jurisdiction in 1934, Interior's M-Opinion examined the IRA's text and remedial purposes, its legislative history and Interior's early practices. M-Opinion at 8-20.

[6] *See* June 30, 2017 Letter to David H. Tennant, from Associate Deputy Secretary James E. Cason, JA976-79 (the full attachment is at JA935-67).

by either party (one that turned out to be irrelevant to the 2021 ROD). The June 30 letters identify the attached draft as unfinished: "[o]nce Interior has received all of the submissions [on the new question], it will review the materials … and will *complete* its review of whether the Tribe was under Federal jurisdiction in 1934[.]" JA977. The draft decision includes a header on each page that includes the word: "DRAFT." JA976-79, JA935-67.

The Littlefields repeatedly characterize the draft as "the 2017 ROD," Br., 8, 9, 10, 38, 39, 43, 44, 48, 60, and repeatedly argue that it was a "second" ROD that reached the same conclusions as the 2018 ROD. Br., 2, 4, 9, 12, 15, 37, 40, 45, 46, 48. They try to bolster their "second ROD" argument by underscoring that the "2017 ROD" and 2018 ROD were produced by "different Secretaries of the Interior, Secretary Dirk Kempthorne in 2017 and Ryan Zinke in 2018." Br., 12. Dirk Kempthorne served as Secretary of the Interior a decade earlier in the George W. Bush Administration (2006-2009). The 2017 draft was prepared during Secretary Zinke's tenure and finalized as the 2018 ROD during Secretary Zinke's tenure. (2018 ROD) JA1061-88.

A basic tenet of the Administrative Procedure Act is:

> "[a]gency action is final if it constitutes a 'definitive statement [ ] of [the agency's] position' with 'direct' and immediate consequences."

Association of Int'l Automobile Manufacturers v. Commissioner, Massachusetts Dep't of Envtl. Protection, 208 F.3d 1, 5, citing *Trafalgar Capital Assocs., Inc. v. Cuomo,* 159 F.3d 21, 35 (1st Cir. 1998) (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 241, 101 S. Ct. 488 (1980) (quotations and alterations in original). Interior's 2017 draft was not a "definitive statement of the agency's position." JA977. Interior did not issue a final decision until more than a year later.

There is only one ROD, produced during the tenure of only one Secretary (Zinke), that found the Tribe not to have been under federal jurisdiction in 1934, and that Secretary appears to have been under political pressure to deliver a negative answer to the Tribe.[7]

III. THE 2018 ROD (FOUND TO BE ARBITRARY AND CAPRICIOUS)

The Tribe challenged the 2018 ROD in the District of Columbia where the Assistant Secretary (the decision-maker) is headquartered. On June 5, 2020, Judge Paul Friedman found that the 2018 ROD failed to follow the directives of the M-Opinion to consider evidence in concert, failed to consider the evidence

[7] Secretary Zinke served in President Donald Trump's cabinet, and President Trump personally sought to interfere with the passage of federal legislation (H.R. 312, 116th Congress) that would have protected the Tribe from the consequences of the negative decision issued by his Administration. Just as the bill was to receive a vote on the House floor, President Trump tweeted, "Republicans shouldn't vote for H.R. 312, a special interest casino Bill, backed by Elizabeth (Pocahontas) Warren [ ]" (parenthetical in the original). *House Dems delay votes on tribal bills after Trump lashes out*, POLITICO (May 8, 2019), https://www.politico.com/story/2019/05/08/congress-tribal-bills-1311890.

consistently with prior relevant case law and Departmental decisions, and accordingly determined that the 2018 ROD was arbitrary, capricious, an abuse of discretion, and contrary to law. Judge Freidman remanded to Interior "for a thorough reconsideration and re-evaluation of the evidence" consistent with the court's opinion, relevant precedent, the M-Opinion, and Interior's prior decisions applying the M-Opinion. *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 236 (D.D.C. 2020) ("*Bernhardt*"). Judge Friedman's opinion is specific about "ways in which the Secretary *misapplied the M-Opinion as to each category of evidence* that the Tribe maintains the Secretary improperly dismissed." *Id*. at 219 (emphasis added). Those specific categories of evidence included the education of Mashpee students at Bureau of Indian Affairs (BIA) schools,[8] federal management of funds and health and social services for the Tribe, various types of census evidence, and various federal reports and surveys. *Id*. at 221-225, 227-228, 230-233.

[8] The name "Bureau of Indian Affairs" was formally adopted by Interior in 1947; prior to that it was known by various variants of "the Indian Office." The Indian Office was originally part of the Department of War; it was transferred to Interior when it was created in 1849. U.S. Dept of the Interior, What is the BIA's History? https://www.bia.gov/faqs/what-bias-history#:~:text=Calhoun%20administratively%20established%20the%20BIA,the%20newly%20created%20Interior%20Department.

IV. THE 2021 ROD

On December 22, 2021, Interior issued the 2021 ROD.[9] JA48-102. The 2021 ROD confirmed that the Tribe was under federal jurisdiction in 1934. The Littlefields challenged the 2021 ROD. Judge Angel Kelley held that "the Secretary was not arbitrary and capricious in determining that the Tribe was under federal jurisdiction in 1934 within the meaning of the IRA, nor was she arbitrary and capricious in proclaiming the Designated Lands as the Tribe's initial reservation."[10] Appellant ADD30-31.

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[9] 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. *See* 2021 ROD at 2, JA49. The incorporated portions of the 2015 ROD are attached as an Appendix to the 2021 ROD. JA103-243.

[10] In footnote 2, the Littlefields claim without support that the Tribe lacks historical ties to the Taunton parcel. To the extent the Littlefields make this assertion in the context of whether the Taunton parcel qualifies as the Tribe's "initial reservation" for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, and its implementing regulations, 25 C.F.R. § 292.6, they have abandoned this argument. "Few principles are more sacrosanct in this circuit than the principle that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *Redondo–Borges v. U.S. Dep't of Housing & Urban Dev.*, 421 F.3d 1, 6 (1st Cir. 2005) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). "Simply noting an argument in passing without explanation is insufficient to avoid waiver … A party must 'provide ... analysis of the statutory scheme,' or 'present ... legal authority directly supporting their thesis.'" *DiMarco-Cappa v. Cabanillas*, 238 F.3d 25, 34 (1st Cir. 2001) (quoting *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991)). Even if it

The Littlefields complain that the only thing that changed between 2018 and 2021 "was the identity of a new Secretary of the Interior, Deb Halland [sic], the first Native American to head Interior." Br., 12. The Tribe does not pretend to understand why the Littlefields think it relevant that Secretary Haaland is Native American, but so is Tara Sweeney, the Assistant Secretary who issued the 2018 ROD.[11]

SUMMARY OF ARGUMENT

I. The holding in *Carcieri v. Salazar*, 555 U.S. 379 (2009) that Narragansett was not under federal jurisdiction in 1934 is not based on record evidence, does not require a finding that Narragansett and Mashpee histories are indistinguishable, and, therefore, does not require a finding that Mashpee was not under federal jurisdiction in 1934. The *Carcieri* decision itself establishes the fallacy of the Littlefields' argument. Every court to consider this Narragansett comparison argument has rejected it, as did Interior in both the 2018 and 2021 RODs. (*See infra* at 36-42.)

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were not waived, the record is replete with conclusive evidence of this connection. *See* JA167-80; JA821-34; JA92-99. The district court agreed. Appellant ADD30.

[11] U.S. Dept. of the Interior Press Release, https://www.doi.gov/pressreleases/history-made-alaskan-leader-tara-mac-lean-sweeney-becomes-first-female-alaska-native.

II. The Littlefields' argument regarding judicial precedent concerning Mashpee's land claims relies on cases that do not address whether Mashpee was under federal jurisdiction in 1934 and conflates questions of tribal recognition and tribal existence (neither at issue in this case) with the question of whether Mashpee was under federal jurisdiction in 1934. The cases accordingly are inapposite to whether Mashpee was under federal jurisdiction in 1934. (*See infra* at 44-49.) Similarly, the Littlefields' reliance on a 1786 ordinance to argue that Mashpee's jurisdictional status is governed by actions of the Confederation Congress before the United States' Constitution had even been drafted is precluded by the Constitution itself and cases interpreting the constitutional relationship between the federal government and Indian Tribes. (*See infra* at 42-43.)

III. Interior's change in position in between the 2021 ROD and the 2018 ROD reflects the fact that a federal district court overturned the 2018 ROD as arbitrary, capricious and an abuse of discretion because Interior failed to follow the directives of the M-Opinion to consider evidence in concert and failed to consider evidence consistently with relevant case law and prior departmental decisions. The court directed Interior to conduct a thorough reconsideration and re-evaluation of the evidence. Further, the Littlefields' insistence that a draft of the 2018 ROD is the "2017 ROD" is fiction. (*See supra* at 2-10.)

IV. The 2021 ROD is reasonable agency action that addresses the evidence in the record in finding that Mashpee was under federal jurisdiction in 1934. The Littlefields' disagreement with how Interior weighed the evidence is not grounds to set aside the 2021 ROD. (*See infra* at 13-36.)

ARGUMENT

I. STANDARD OF REVIEW

The APA provides the standard for review. A court may set aside an agency's decision only if that action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 601 (1st Cir. 2016); *see also Associated Fisheries v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) (same); *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir. 1992) (same). The review is narrow; it is highly deferential and the Court must presume the Secretary's action to be valid. *Associated Fisheries*, 127 F.3d at 109 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) and *Sierra Club*, 976 F.2d at 769). Even if the reviewing court disagrees with the agency's conclusions, the Court may not substitute its judgment for that of the agency. *Sig Sauer*, 826 F.3d at 601; *Associated Fisheries of Maine*, 127 F.3d at 109. If the agency's decision is supported by any rational view of the record, the reviewing court must uphold it. *Associated Fisheries*, 127 F.3d at 109. Finally, "statutes affecting Indian Tribes [such as the IRA] must be construed liberally in

favor of the tribes." *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 555 (1st Cir. 1997) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

II. INTERIOR HAS A RATIONAL BASIS FOR ITS DETERMINATION IN THE 2021 ROD

A. The Littlefields Misconstrue the Under Federal Jurisdiction Standard

Justice Breyer's concurrence[12] in *Carcieri* 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 and parentheticals in the original); *see also Bernhardt*, 466 F. Supp. 3d at 207-08; JA51-55. Interior's M-Opinion establishes a two-part test for determining that a tribe was under federal jurisdiction.[13] First, Interior must determine

> … 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

[12] Concurring opinions routinely and properly are relied upon for guidance in applying a majority opinion. *See Rodriguez v. Bennett*, 303 F.3d 435, 438-39 (2d Cir. 2002) (Justice Stevens' concurring opinion made "explicitly clear" the "'Court's narrow holding'").

[13] Congress expressly authorized Interior to manage Indian affairs and matters arising out of Indian relations and to enact regulations to implement any Act relating to Indian affairs. 25 U.S.C. §§ 2, 9. (Interior Statutory Addendum 002).

> 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, Interior must determine whether the tribe's jurisdictional status remained intact in 1934. *Id.*

Interior's M-Opinion describes the types of evidence that demonstrate whether a tribe was "under federal jurisdiction." M-Opinion at 4, 19-23. Interior extensively has applied the M-Opinion's two part test,[14] and Interior's reliance on it has been confirmed in numerous judicial and administrative decisions.[15] The M-

[14] *See, e.g.*, 2013 Cowlitz ROD, JA835-57, at JA849, JA852-57; Aug. 11, 2011 Tunica Biloxi ROD, JA806-814, at JA809-11, JA814; Solicitor's Opinion, Status of the Ottawa Tribe of Oklahoma as "under federal jurisdiction" on June 18, 1934, at 4-6 (Sept. 28, 2010), JA802-05.

[15] *See, e.g.*, *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 of Colusa Indian Cmty. 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. of Oregon*

Opinion also confirms that the Secretary must consider the "variety of actions when viewed in concert." *See Bernhardt*, 466 F. Supp. 3d at 217-18; *Stand Up for California!*, 204 F. Supp. 3d at 278; M-Opinion at 19, JA887; *see also Grand Ronde*, 75 F. Supp. 3d at 403; *Grand Ronde*, 830 F.3d at 565.

The Littlefields argue that Justice Breyer's concurrence requires proof of "positive" jurisdictional action, Br., 35, that "carr[ies] with it federal obligations that are present *in 1934*." Br., 36[16] (emphasis added). But Justice Breyer's example of a "*pre*-1934" congressional appropriation" entirely undermines the Littlefields argument. Federal appropriations are made for particular fiscal years. Under the Littlefields' reading, only appropriations made in 1933 to fund activity in 1934 would meet Justice Breyer's test, a reading inconsistent with the plain language of his concurrence. *Carcieri*, 555 U.S. at 399.

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

1. Carlisle Indian School Records

The 2018 ROD's off-handed dismissal of probative evidence of Mashpee attendance at Carlisle contradicted judicial precedent, administrative precedent,

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v. Jewell, 75 F. Supp. 3d 387, 402-05 (D.D.C. 2014); *Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 564, 566 (D.C. Cir. 2016).

[16] The Littlefields also argue that the *majority opinion* requires that "whatever jurisdictional act that brings a tribe under federal jurisdiction in 1934, it has to carry with it federal obligations that are present in 1934." Br., 36. They offer no citation or explanation for this characterization of the majority's view.

and the M-Opinion, and caused Judge Friedman to find that Interior's analysis in the 2018 ROD violated the APA. *See Bernhardt*, 466 F. Supp. 3d at 222. 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.*

Bernhardt, 466 F. Supp. 3d at 220, 222-23 (emphasis added). His decision is consistent with judicial and administrative precedent. *See Grand Ronde*, 75 F. Supp. 3d at 402-04 (documents showing that "Cowlitz children attended schools operated by the Bureau of Indian Affairs" is jurisdictional evidence.) (emphasis added); *Shawano County, WI*, 53 IBIA at 74 (attendance of tribal members at BIA schools was evidence of federal jurisdiction); Cowlitz ROD, JA835, JA853 (evidence demonstrating federal jurisdiction was "the education of Indian students at BIA schools").

Congress took affirmative action when it authorized the establishment and funding of Carlisle to educate members of Indian tribes (Act of May 17, 1882, 22 Stat. 68, ch. 163, p. 85; JA383-568; JA608-40), and it continued to take affirmative action in every year that it enacted appropriations legislation to provide funding for Indian children to be educated and cared for at the school, including the years

during which Mashpee Indians attended the school.[17] Congress directed the Office of Indian Affairs to operate the school. *See, e.g.*, Act of July 1, 1892, 27 Stat. 120 (Indian Affairs regulatory authority). The school, and the tribal members in it, were under the active supervision of both Congress and a federal agency. The Littlefields argue that Massachusetts "appears" to have paid for tuition and transportation to Carlisle. Br., 57. The statute they cite, however, provides funding for any Massachusetts child to attend high school in another Massachusetts town if their town does not have a high school. Carlisle, of course, is an out-of-state federal boarding school.

To be eligible to attend Carlisle, Mashpee children had to demonstrate their tribal affiliation, blood quantum and meet other federally-imposed requirements. Education Circular No. 85 (rules for non-reservation schools), JA362-65; JA569-640. School records, JA383-568, and the 1927 and 1928 federal GAO Reports, JA569-640, show that at least a dozen Mashpee children attended the school from 1905-1918 when the school was closed.

Because the Littlefields have no authority to support their contention that closing an Indian boarding school before 1934 can terminate federal jurisdiction,

[17] *See* Appropriations Acts between 1905 and 1918 at Mashpee Authority Addendum 011-023, *e.g.*, Act of March 2, 1917, 39 Stat. 969, 987, Ch. 146 ("For support and education of eight hundred pupils at the Indian school at Carlisle, Pennsylvania, including pay of superintendent, $132,000 . . ."). *Id*. at 022.

they restate their assertion that a jurisdiction-conferring event must take place "*in 1934*[.]" Br. 53 (emphasis added). This is not the law. *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"); *see United States v. John*, 437 U.S. 634, 653 (1978) (the fact that federal supervision over them has not been continuous does not "destroy[] the federal power to deal with them."). Only Congress has jurisdiction to terminate federal jurisdiction over a tribe, and such termination must be explicit.[18]

The Littlefields also assert that Massachusetts paid for public school education of Mashpee children without any explanation of why this is relevant. Whatever funding was or was not provided for public school education clearly was inadequate, *see*, *e.g.*, Tantaquidgeon Report at JA696-97.[19]

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[18] *See United States v. Nice*, 241 U.S. 591, 598-600 (1916); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975) (citing *Nice*, 241 U.S. at 598; *Tiger v. W. Investment Co.*, 221 U.S. 286, 315 (1911)). The Littlefields' contention that "Congress never thought to pass an act declaring the Mashpees were not wards of the federal government" (Br., 53) is unsupported.

[19] The need for additional education funding for the Mashpee Tribe is confirmed by the fact that in the mid-1930s, federal officials actively worked to secure *federal* funding to improve the conditions at the local public school that served only Mashpee children. His efforts resulted in the federal Public Works Administration awarding $21,272 for a new school "for the Indian people of Mashpee," in 1939. JA716-25; JA732-34; JA1025-27.

The Littlefields' citation to letters from a Carlisle superintendent (Br., 57) is uncompelling. This one superintendent's view about the potential enrollment of additional Massachusetts Indian students at a time when Carlisle was headed for closure (*see, e.g.*, JA608-40, excerpt from 1928 GAO Report with attendance from 1900-1918) does nothing to undercut the attendance of at least a dozen Mashpee students at a federal Indian boarding school between 1905-1918.[20]

The Littlefields' Carlisle arguments do not demonstrate that Interior'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).

2. Federal Management of Funds and Health and Social Services

Interior considered evidence of the significant federal control over the Mashpee tribal members' finances, physical health, career development and personal movement at Carlisle. The School Superintendent, a federal official, controlled funds belonging to Mashpee members. JA389; JA391; JA451; JA497;

[20] The Littlefields' citation to disenrollment information from 1911-1916 (Br., 57-58 n.23) should be dismissed as extra record evidence, and actually 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. JA626.)

JA515. The Superintendent was required to seek additional approval from the Commissioner of Indian Affairs to transfer or use a Mashpee tribal members' funds. JA391. Federal officials at Carlisle also restricted Mashpee parents' access to students' funds. JA392. Federal Indian Office officials used federal funds to provide health care to Mashpee tribal members (JA393-96; JA397; JA500-05; JA506), and regularly approved and provided medical care, including surgery and other medical procedures for Mashpee students. JA396. Indian Affairs officials expended federal funds for job training and placement for Mashpee tribal members. JA1041-44; JA383-568. Mashpee students participated in the federal government's "outing" program where they were assigned by federal officials to work for employers for vocational experience and training. *Id*.

Judge Friedman found the 2018 ROD improperly discounted this evidence:

> 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.

Bernhardt, 466 F. Supp.3d at 224 (citations omitted). In its 2021 ROD, Interior conducted a reasoned analysis and concluded that this evidence supported a determination that Mashpee was under federal jurisdiction in 1934, consistent with prior judicial and administrative precedent. *See* JA65-66; *Grande Ronde*, 75 F.

Supp.3d at 404 (funds for "health services, funeral expenses, or goods at a local store" 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 federal provision of services); Cowlitz ROD at JA849, JA853 (provision of health or social services, money held for services on behalf of individuals); Tunica-Biloxi ROD at JA809-10, JA814 ("provision of health, education, or social services to a tribe or individual Indians" is evidence of federal jurisdiction).

3. Federal Reports/ Protection from Removal

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." JA250. The Morse Report was commissioned as part of the federal initiatives for "civilization" of Indians,[21] and includes a table that identifies Mashpee as a tribe "*within the jurisdiction of the United States.*" JA60; JA277. Morse recommended that the federal government allow Mashpee to continue to occupy its existing lands in lieu of removal. JA265-66. The Morse Report was circulated to Congress and the Executive, debated in the House of Representatives, and formed the basis for the federal government's tribal removal decisions. *See* JA61-62; JA210-11; JA278;

[21] *See* JA246, Secretary Calhoun's letter to Morse, which states that Interior wished to have the Report to determine "future application of the fund for the civilization of the Indians."

JA288-92; JA323; JA327; *Bernhardt,* 466 F. Supp. 3d at 230-31. The Morse Report illustrates assertions of federal authority; it is not a simple study. *Id.* at 229-31. The recommendations about tribes identified in the report were considered by Congress, adopted by the Secretary of War and presented to President James Monroe. JA288-92; JA278; JA323, JA327; JA210-11. Colonel Thomas McKenney,[22] Superintendent of Indian Affairs, relied on the Morse Report and two letters to Secretary of War Calhoun. Based on these, the Secretary recommended that Mashpee not be removed from its reservation;[23] President Monroe adopted that policy. JA288-92.

The 2021 ROD reasonably determined that federal consideration and recommendation against removal of Mashpee based on the 1822 Morse Report and related actions constituted evidence that the Tribe was under federal jurisdiction. JA56-63.

This determination is consistent with Judge Friedman's order, which rejected the 2018 ROD's dismissal of the Morse Report as a passive compilation and as inconsistent with prior precedent (citing *County of Amador v. Interior*, 136

[22] 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), JA291; 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), JA319.

[23] JA292; s*ee also* JA185-86.

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 judicial precedent, prior administrative precedent, and the M-Opinion. *See Bernhardt*, 466 F. Supp. 3d at 228-31.

The Littlefields contend that the 2021 ROD conflicts with the 2015 ROD's treatment of the Morse Report. To the contrary, the 2015 ROD provides that:

> [s]hortly before the Commonwealth converted it to an Indian district, the Town was also subject to federal oversight as part of the Federal Government's larger agenda to remove Indians from their aboriginal territories . . . Reverend Morse described the Tribe's "reservation" and recommended against the Tribe's removal due to its particular utility in that region and due to its members' strong attachments to their home. *The Federal Government agreed and ultimately declined to remove the Tribe from its native reservation.*

JA221 (emphasis added). While the 2015 ROD mentions the historical federal acquiescence to state jurisdiction over the New England tribes (JA224-25), nowhere in the 2015 ROD did Interior conclude that such acquiescence divested the federal government of its jurisdiction over the tribes – nor could it, as that would be contrary to judicial precedent.[24]

The Littlefields also argue that the Morse Report and McKenney letters are simply studies of all Indians living "within the jurisdictional borders" of the United

[24] As a legal matter, a tribe's jurisdictional status can be terminated only by congressional action. *See supra* at 18 and n.18.

States, and do not show that Mashpee was under federal jurisdiction in holding the 2018 ROD Was arbitrary and capricious. Judge Friedman explicitly rejected this characterization. *Bernhardt*, 466 F. Supp. 3d at 229 (emphasis added).

The Littlefields fail to distinguish the relevant precedent supporting the Secretary's determination on the Morse Report and McKenney letters. *See County of Amador*, 136 F. Supp. 3d at 1193, 1200, 1208, 1220 (upholding Interior's decision that the Ione Band was under federal jurisdiction based in part on two federal reports compiled in 1905-06 and 1915 by Indian agents); *No Casino in Plymouth*, 136 F. Supp. 3d at 1166 (same analysis and conclusion for same tribe, different plaintiff); M-Opinion at 19 (annual reports, surveys, and census reports).[25] The 2021 ROD provides a reasoned analysis based on substantial evidence, consistent with legal and administrative precedent, that the Morse Report and McKenney letters are probative evidence that Mashpee was under federal jurisdiction in 1934

[25] *See also Grand Ronde*, 75 F. Supp. 3d at 404 (internal agency correspondence and memoranda demonstrates that Cowlitz was under federal jurisdiction in 1934); *Grand Ronde*, 830 F.2d at 564 (Cowlitz Tribe 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 (tabulated population statistics including Oneida Tribe considered indicia of federal jurisdiction); Cowlitz ROD at JA852-55 (relies in part on Cowlitz Indians being included in federal reports); Tunica Biloxi ROD, JA814 (Tribe's inclusion in Office of Indian Affairs reports relevant to federal jurisdiction).

4. Other Federal Reports and Surveys

The Mashpee Tribe was included in multiple federal Indian policy reports which enumerate tribes under the jurisdiction of the United States from the late 1800s through 1935. JA1020-22. The ROD also analyzed the 1851 Schoolcraft Report,[26] the 1890 Annual Report of the Commissioner of Indian Affairs, and the 1935 Tantaquidgeon Report. JA67-69. Judge Friedman held that the 2018 ROD's dismissal of these reports was arbitrary and capricious.

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 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 whether the Schoolcraft Report is similarly probative. *Id.* Interior determined that the Schoolcraft Report was published pursuant to congressional direction, and made policy recommendations and proposed a plan for the Tribe's improvement, so is indicative of federal jurisdiction over the Tribe. JA67-68.

[26] 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. JA332.

With respect to the 1890 Annual Report of the Commissioner of Indian Affairs, Judge Friedman noted that prior Departmental decisions treated the inclusion of a tribe in the Annual Report as evidence that the tribe was under federal jurisdiction, citing *Village of Hobart*, 57 IBIA 4, at 20, 24-25, and instructed Interior to explain why Mashpee inclusion in the 1890 Report was different, if at all. *Id.* The 2021 ROD found that the 1890 Annual Report recognized that Mashpee maintained tribal relations and authority over its lands, and that including the Tribe in the Report was an explicit acknowledgement by the federal government that the Tribe was within its purview, consistent with Interior's *Village of Hobart* decision. *Id.* at 21-22.

The Littlefields assert that the ROD's evaluation of the 1890 Report fails to show that Mashpee was under federal jurisdiction because it "resulted in no actions." Br., 44-45. But as the ROD explains, the fact that Mashpee continued to maintain tribal relations and possessed specific tracts of land, unlike many other tribes within the original thirteen colonies, is a reasonable basis to conclude that the 1890 Report is evidence of federal jurisdiction over the Tribe. JA68-69. Interior's conclusion that the report constitutes probative evidence of the federal government's exercise of jurisdiction over the Mashpee Tribe is reasonable. *See Bernhardt*, 466 F. Supp. 3d at 233 (citing *Village of Hobart*, 57 IBIA 4, 20, 24-25);

see also M-Opinion at 16 (Indian Affairs produced annual reports on tribes under its jurisdiction, as part of the exercise of administrative jurisdiction).

The Tantaquidgeon Report,[27] commissioned by BIA 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. The Littlefields insist that the 2018 ROD correctly dismissed the Report as not showing any 'formal action' by a federal official 'determining any rights of the Tribe,'" but Judge Friedman rejected that assessment as inconsistent with the M-Opinion, noted that the 2018 ROD in fact acknowledged that it may have probative value, and directed Interior to make a proper determination of that value, *Bernhardt*, 466 F.Supp.3d at 232-33. On remand, Interior determined that the Tantaquidgeon Report was "probative evidence of the Federal Government's authority over the Tribe," and "informed federal officials, who subsequently relied on the Report." JA69.

The Littlefields question the Tantaquidgeon Report's evidentiary value because the author was a "student"[28] and the Report was unpublished. Br., 32.

[27] 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. JA687-715.

[28] Dr. Gladys Tantaquidgeon was a research assistant at the University of Pennsylvania. John Collier, the Commissioner of Indian Affairs, hired her in 1934

These arguments are senseless – particularly when compared to the reasoned analysis in the ROD, which highlights that the Office of Indian Affairs' Director of Education relied on the Tantaquidgeon Report in connection with obtaining federal funding to build a new school for Mashpee children, an example of an "active" use of the Report in the exercise of federal authority. *See* JA69.

5. Census Evidence

The 2021 ROD reviewed the different types of census evidence in the record enumerating Mashpee tribal members – the 1911 and 1912 Office of Indian Affairs school censuses, the 1910 Indian Population Schedule, and the federal general census records, JA70-72. This was consistent with Judge Friedman's remand order, which held that the 2018 ROD improperly ignored the general census evidence and gave insufficient reasons for discounting the other census evidence. *Bernhardt*, 466 F. Supp. 3d at 224-25. Judge Friedman instructed Interior to give a reasoned analysis of each type of evidence, determine whether it is probative, and

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to work on the Yankton Sioux Reservation. She received honorary doctorates from Yale and the University of Connecticut, and published several books. Mohegan Tribe, Gladys Tantaquidgeon, https://www.mohegan.nsn.us/explore/heritage/memoriam/medicine-woman-gladys-tantaquidgeon-memorial. *See also* the Smithsonian's biography at Smithsonian American Women's History Museum, Gladys Tantaquidgeon, https://womenshistory.si.edu/herstory/health-wellness/object/gladys-tantaquidgeon.

if so, "view it 'in concert' with the rest of the evidence in the record." *Id.* at 225-226.

The ROD explains that the 1911 and 1912 Carlisle Indian School census reports were prepared pursuant to an 1884 Appropriations Act[29] directing the federal government's Indian agents (including the Carlisle Superintendents) to compile lists of Indians under their charge. JA71; JA335; JA1014-15. Although the records are incomplete (Mashpee students attended the school before and after the 1910-1911 and 1911-1912 school years, *see supra* II.B.1), eight Mashpee students are included on the rolls covering these two school years. JA367-74. The rolls reflect the expenditure of federally appropriated funds to educate and provide services to Mashpee students attending Carlisle. JA71.[30]

The 2021 ROD also analyzes the federal general census evidence, highlighting that between 1850-1930 the federal government consistently enumerated Mashpee tribal members as "Indian." JA781; JA782-87; JA333; JA641-48. 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. JA366; JA70.[31]

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[29] 23 Stat. 76, 98 (July 4, 1884); JA335.

[30] *See also* supra at 15-19.

[31] The ROD mistakenly reports the number of Mashpee on the 1910 Population Schedule as 157, but the Schedule actually enumerates 200 Mashpee. JA70. The

The 2021 ROD found this census evidence was probative, and when considered with the rest of the evidence indicated that Mashpee was under federal jurisdiction in 1934. JA72. *See 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,* 830 F.3d at 566 (jurisdictional evidence included 1934 instruction to include Cowlitz on Indian census roll); *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"); M-Opinion at 19.[32]

The Littlefields argue, without authority, that these rolls are unpersuasive because they were not prepared by the Indian Office. Br., 48-50. Not true. The Carlisle census reports listing 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 its census rolls. Moreover, Judge Friedman rejected the Littlefields' argument that only Office of Indian Affairs census records are relevant. *Bernhardt*, 466 F. Supp. 3d at 225-27. Interior

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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. JA70.

[32] *See also* 2021 ROD at 25 n.183 (JA72) and additional cases cited therein.

has relied on general federal census evidence in other RODs. *See* Tunica Biloxi ROD, JA809-10.

In addition, the general federal census rolls sometimes relied on information 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." based on the 1825 McKenney Report to the Secretary of War (JA291-92), 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)." JA333; JA250. This general census "Statement" was prepared by the Census Office but it relied on information prepared by the Indian Office.[33] 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. JA366; *see also* 1910 Census Indian Schedule Form, available at: https://www.archives.gov/files/research/genealogy/charts-forms/1910-indians.pdf.

[33] Interior relied on the seven decades' worth of general federal censuses enumerating Mashpee tribal members in the Town of Mashpee when it federally acknowledged the Tribe. JA781 -87; JA333; JA641-48.

Judge Friedman found the 2018 ROD's analysis of census records to be arbitrary and capricious, *Mashpee*, 466 F. Supp. at 225-226. In contrast, the 2021 ROD provides a reasoned analysis of the probative value of the census records, in concert with other evidence, and Mashpee's jurisdictional status, that must be upheld under the APA. *See Associated Fisheries*, 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).

6. The 2021 ROD Properly Addresses Federal Correspondence Contemporary with the IRA.

The Littlefields argue that the 2021 ROD improperly dismisses letters from federal officials that disclaim jurisdiction over the Tribe. The Littlefields focus on a letter from Commissioner of Indian Affairs Collier that refuses assistance to a Mashpee tribal member, JA726, Br., 30-31, saying that because a Collier letter regarding the Narragansett was referenced by the *Carcieri* Court, the Collier letter concerning Mashpee mandates a negative determination. As discussed in Section III.A, no factual record pertaining to whether Narragansett was under federal jurisdiction was before the Court in *Carcieri*.[34] *See also Bernhardt*, 466 F. Supp.

[34] The Littlefields say the *Carcieri* Court "emphasized" not only Collier's letter but other records (1927 to 1937), in which federal officials declined the Narragansett's request for federal support because the Tribe was under the jurisdiction of the state. Br., 31. The Court hardly "emphasized" them – the Court's reference to these

3d at 215, n.9. Unlike Narragansett, the record here includes substantial evidence that Mashpee was under federal jurisdiction in 1934, evidence which Interior properly weighed against the Collier letter.

As Justice Breyer noted in his concurrence, a tribe may have been under federal jurisdiction "even though the Federal Government did not believe so at the time," and even where Interior made mistakes about tribes' jurisdictional status. *Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring).[35] This is why Interior and the courts have rejected similar erroneous disclaimers from federal officials in upholding favorable jurisdictional determinations for multiple other tribes (including several Eastern tribes). *See Grand Ronde*, 75 F.Supp.3d at 407; *Grand Ronde*, 830 F.3d at 567 (rejecting statements by federal officials (including 1933 letter from Collier); *Upstate Citizens for Equal., Inc. v. Jewell*, No. 5:08- CV-0633, 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

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facts was made in passing (the Collier letter is in a footnote), 555 U.S. at 384, 390 n.10, and both the majority and Justice Breyer acknowledged that "[n]either the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction." *Id.* at 399 (Breyer, J., concurring); *see also* 395-96.

[35] The Littlefields misinterpret Justice Breyer's concurrence, arguing without authority that Interior and Judge Kelley improperly rely on his discussion of Interior making mistakes about tribes' jurisdictional status as being limited to tribes that were left off the Haas list (a 1947 list of tribes organized under the IRA). But Breyer's concurrence has nothing to do with the Haas list. *See Carcieri*, 555 U.S. at 397-99.

statements by Collier and others that the Oneida Indian Nation was under the control 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 was under federal jurisdiction, despite contrary statements from Departmental officials); *Shawano County, WI*, 53 IBIA at 73-74 (rejecting Departmental statements that the Stockbridge Munsee Community was no longer under federal control); *Village of Hobart*, 57 IBIA at 11-12, 24-25 (rejecting 1934 Collier statement that the Oneida Tribe of Wisconsin was not under federal jurisdiction); *Franklin County, NY v. Acting E. Regional Director*, 58 IBIA 323, 333-334 (June 11, 2014) (rejecting statements that the Mohawk Tribe was under state not federal jurisdiction due to long periods of federal inaction); *see also* JA846, JA853 (Cowlitz ROD); JA861-64 (Oneida ROD); JA814 (Tunica Biloxi ROD).

As Interior explains in the 2021 ROD, the Collier letter concerning Mashpee 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[36] on full implementation of the IRA during the

[36] Nor does the IRA's legislative history "prove" that these practical constraints were "hard-wired" into the IRA, as the Littlefields suggest, referring to arguments they made to Interior to show the IRA was not intended to reach Mashpee or other Eastern tribes. The Littlefields have forfeited these arguments based on the IRA's legislative history because they did not brief them, but instead refer only to their

Depression, and the (incorrect) assumption that tribes in the original states were being provided for by state and local officials. JA74-75. Interior'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." JA888.[37]

The Littlefields point to other letters like a 1937 letter from John Herrick stating that the Indian Office did not have any information on Mashpee, JA731, Br., 32, an obvious mistake because the same Office had commissioned the Tantaquidgeon Report three years earlier. *See* discussion, *supra,* Part IV.B.4.[38] JA726.

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, JA716-17, asserts that the United States has not yet undertaken

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remand submissions to Interior. Br., 34. This Court does not permit parties to incorporate by reference arguments made in memoranda filed in the district court (or before an agency): "'[t]his court "will only consider arguments made before this court; everything else is deemed forfeited.'" *Galvin v. U.S. Bank, N.A.*, 852 F.3d 146, 159 (1st Cir. 2017) (citations omitted); *Lawrence v. Gonzales*, 446 F.3d 221, 226 (1st Cir. 2006) (same).

[37] See supra at 18 and n.18.

[38] The Court should reject Littlefields' attempt to undermine the Tantaquidgeon Report by referring to a 1936 letter from an anthropologist saying the Report has "no material of ethnographic interest not previously published," and recommends it not be copied (due to its "bulk"). Federal officials commissioned and used the report for funding. *See* discussion, *supra*, Part II.B.4.

to educate Indian children except in "Federal Indian areas" — yet the United States 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 began working to secure federal funding from the Public Works Administration to build a new school "for the Indian people of Mashpee," *see supra* at 19. The 2021 ROD (at 28) highlights similar factual errors in the 1936 and 1937 letters and properly considered and rejected statements regarding the Tribe's jurisdictional status as erroneous, concluding that the weight of the probative evidence demonstrates that the Tribe's jurisdictional status remained intact in 1934.[39]

III. THE LITTLEFIELDS' ADDITIONAL ARGUMENTS FAIL TO UNDERMINE THE 2021 ROD'S CONCLUSIONS.

A. *Carcieri v. Salazar* Does Not Prohibit a Finding that the Mashpee Tribe was Under Federal Jurisdiction in 1934.

The Littlefields argue that because the *Carcieri* Court held that Narragansett was not under federal jurisdiction in 1934, and because the Narragansett and

[39] The Littlefields erroneously assert that no tribe ever has been found to be under federal jurisdiction with such paucity of evidence based on a chart which includes incomplete and inaccurate information. Mashpee provided a corrected chart addressing the Littlefields' errors and adding in 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). The record includes a detailed summary of the Mashpee Tribe's jurisdictional evidence in the August 31, 2017 Mashpee Submission to Interior, JA1006-31.

Mashpee histories are "indistinguishable," Br. 18-20, this Court must hold the same for Mashpee. Br., 22-23. the Littlefields mischaracterize the Court's ruling as it relates to Narrangansett, and they conflate what may or may not be Narragansett's *history* with what historical evidence was actually in the *record* before the *Carcieri* Court.

1. The Supreme Court Did Not Determine Narragansett's Jurisdiction Status Based on its Historical Record.

A jurisdictional record for Narragansett was never developed before the *Carcieri* Court. Interior's long-standing position was that the IRA only required a showing that a tribe was federally recognized at the time Interior issued its decision.[40] Narragansett was federally recognized, so neither Narragansett nor the federal government submitted jurisdictional evidence for the record or briefed the question[41] -- in fact both *conceded* that Narragansett was not under federal jurisdiction in 1934. *Carcieri, 55 U.S.* at 395-96. The Court held:

> We hold that the term "now under federal jurisdiction" in § 479 [IRA Section 19, now codified at § 5129] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. *None of the parties, or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934.* And the evidence in the record is to the contrary. 48 Fed.

[40] *See* M-Opinion at 3 n.15, JA871.

[41] The United States' Supreme Court brief, *see* Brief for Respondents, *Carcieri v. Kempthorne*, No. 07-526, 2008 WL 3883433 (Aug. 18, 2008).

> Reg. 6177. Moreover, the petition for writ of certiorari … specifically represented that "[i]n 1934, the Narragansett Indian Tribe … was neither federally recognized nor under the jurisdiction of the federal government." … *Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case.*

Id. at 395-96 (first emphasis added) (citation omitted); *see also* M-Opinion at 17, JA885.

The Littlefields say the Court's brief reference to "evidence in the record" -- two pages in the Federal Register -- demonstrates that the decision was based on Narragansett's "well-documented history[.]" Br., 18, 22-23. But the majority decision never analyzed the phrase "under federal jurisdiction," *Carcieri*, 555 U.S. at 388-96, and so its reference to the Federal Register notice is at best non-binding dictum that "constitutes neither the law of the case nor the stuff of binding precedent." *Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc*., 972 F.2d 453, 459 (1st Cir. 1992); *see also United States v. Barnes*, 251 F.3d 251, 258 (1st Cir. 2001) (language that can be removed from the opinion without impairing the analytical foundations of the court's holding or altering the result is classic dictum, not binding authority).

Justice Breyer explicitly states that "[n]either the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934." *Carcieri* at 399. Justice Souter further explains that the Secretary had:

> … "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same" … *Given the Secretary's position, it is not surprising that neither he nor the Tribe raised a claim that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present* …

Id. at 401 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part) (citation omitted). On that basis, he and Justice Ginsburg would have remanded to allow Narragansett the opportunity to develop evidence it was under federal jurisdiction. There simply was not an evidentiary record presented on Narragansett in *Carcieri*.

2. The Littlefields' Mashpee-Narragansett "Comparator" Argument Fails.

Judge Kelley rejected the Littlefields' "comparator" argument below, ADD 15, n.6, as did Judge Friedman in his decision. S*ee Bernhardt*, 466 F. Supp. 3d at 215, n.9:

> The Supreme Court accepted as fact that the Narragansett Tribe was not under federal jurisdiction because the parties did not contest this point. *Carcieri v. Salazar*, 555 U.S. at 395-96, 129 S.Ct. 1058. Indeed, Justices Souter and Ginsburg would have remanded to [Interior] to allow an opportunity for the Narragansett Tribe to show that it was under federal jurisdiction in 1934. *Id.* at 400-01, 129 S.Ct. 1058. But the majority chose to accept the parties' factual concession. *Id.* at 395-96, 129 S.Ct. 1058.

Bernhardt, 466 F. Supp. 3d at 215 n.9.[42]

Every other court and agency to consider the issue has reached the same conclusion. *See No Casino in Plymouth*, 136 F. Supp. 3d at 1183-1184, *Cent. N.Y. Fair Bus. Ass'n*, 2015 WL 1400384, at *7; *see also Village of Hobart*, 57 IBIA at 11; *Shawano Cty.*, 53 IBIA at 70. Similarly, every Departmental administrative decision addressing the issue has rejected this argument, *including even the 2018 ROD* on which the Littlefields extensively rely. *See* 2018 Mashpee ROD at 10, JA1070; 2021 ROD at 4, n.30, JA51 (same); Cowlitz ROD at 81, JA842 (same); *see also* M-Opinion at 3, n.15, JA871 (same).

3. The Narragansett Is Not "Indistinguishable" from Mashpee.

The Littlefields' argument that the Narragansett and Mashpee histories are "indistinguishable" is flawed because it is not their *histories*, but rather the *records*

[42] Judge Kelley also correctly rejected the Littlefields' comparator theory on the basis of issue preclusion. The Littlefields advance two arguments to the contrary; neither withstands scrutiny. First, they claim that Judge Friedman's rejection of this argument "should not be given preclusive effect, as it was not 'essential to the judgment.'" Br., 20. But Judge Friedman clearly treated it as such, noting that if the Littlefields' argument were to control, "this Court must also find that the Mashpee Tribe was not under federal jurisdiction in 1934." 466 F.Supp.3d at 215 n.9. Second, the Littlefields speculate that the "ordinary remand rule" compelled them to withdraw the appeal. Br., 21. Courts (including both the D.C. Circuit and this Circuit) find exceptions to this principle. *See, e.g., Littlefields v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 36 (1st Cir. 2020) (listing multiple exceptions to remand rule); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (noting that the remand rule "is not absolute."). Of course, the D.C. Circuit never had the opportunity to address these points, because the Littlefields abandoned their appeal without ever raising them.

before each court, that would be compared. What little jurisdictional evidence that made it into the *Carcieri* record is meager when viewed against the hundreds of pages of jurisdictional evidence in Mashpee's record. *See supra* Section II.

Further, the Littlefields' laundry list[43] of purported historical similarities between Mashpee and Narragansett are largely irrelevant to the categories of evidence that are considered to determine jurisdictional status. Other "similarities" are equally immaterial, such as the fact that both Mashpee and Narragansett brought unsuccessful land claims–so have other federally recognized tribes that later were found to have been under federal jurisdiction in 1934.[44]

B. The 1786 Pre-Constitutional Ordinance Is Irrelevant.

The Littlefields cite a 1786 Ordinance[45] enacted pursuant to Article IX of the pre-constitutional Articles of Confederation to argue that "the New England States

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[43] Based on the authorities cited in n.6, *supra*, the Littlefields have forfeited any further argument beyond their bullet point summary of the Narragansett and Mashpee histories. They have not fully briefed this argument, instead attempting to rely on their remand submission to Interior. Br., 18.

[44] *See, e.g., City of Sherrill v. Oneida Indian Nation of NY*, 544 U.S. 197 (2005) (New York Oneida Nonintercourse Act claims barred by equitable defenses), but *Upstate Citizens*, 841 F.3d at 577, upheld Interior's determination that New York Oneida was under federal jurisdiction in 1934; *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014) (equitable principles of laches, acquiescence, and impossibility barred Tribe's Nonintercourse Act (and other) claims), but *Shawano County*, 53 IBIA at 75-76, held that Stockbridge-Munsee was under federal jurisdiction in 1934.

[45] The Ordinance of 1786, 31 J. Continental Cong. 491 (August 7, 1786), was largely a product of unrest on the frontier. *See generally* Richard P. McCormick,

were carved out from the jurisdiction of the Indian Department from the outset in 1786," and that "Congress" made an important "policy choice" that the Indians in New England were "members" of these states and subject to their exclusive jurisdiction. Br., 24-25. This Ordinance has no bearing on the federal government's exercise of its jurisdiction over all tribes under our current Constitution. Indeed, the framers of our current Constitution viewed Article IX as problematic. *See, e.g.*, The Federalist No. 42 (James Madison), p. 284 (J. Cooke ed. 1961) (describing Article IX's limitation against Indians as "members of states" as "obscure and contradictory," and acknowledging that "[w]hat description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (describing Article IX's limitations as "ambiguous"). Article IX "fueled the disagreement over the scope of federal and state powers with respect to Indian affairs" – that disagreement that was resolved in 1789 with the adoption of the Constitution, which "remov[ed] all references to state power with respect to Indian affairs." *Cohen's Handbook of Federal Indian Law* § 1.02[2] (2023).

Ambiguous Authority: *The Ordinances of the Confederation Congress*, 1781-1789, Am. J. Legal Hist. Vol. 41, No. 4 at 431 (1997).

In contrast to the Articles of Confederation, in our Constitution, states are "divested of virtually all authority over Indian commerce and Indian tribes," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996), and "Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985). This included the original thirteen states, *City of Sherrill*, 544 U.S. 197, 204 n.2 (2005) (federal statute govern[s] Indian lands within the boundaries of the original 13 states"); *see also Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980) (rejecting notion of state control over eastern tribes).

C. The Littlefields' Unrelated Cases Should Be Discounted.

The Littlefields argue that *Elk v. Wilkins*, 112 U.S. 94, 108 (1884), "documents" the long-standing status of Mashpee as wards of the state. Br., 26-27. The Court there held that an Indian from Nebraska who had severed all tribal relations was not entitled to vote in his state of residence because he was still considered an Indian and not a citizen of the United States. *Id.* The Court cites in passing to *Danzell v. Webquish*, 108 Mass. 133, 134 (1871), which describes Massachusetts tribes as "remnants"[46] not "*recognized* by the … United States as distinct political communities." 112 U.S. at 108 (emphasis added). The Tribe's recognition status is irrelevant to the under federal jurisdiction question. Also this reference is classic dicta. *See United States v. Barnes*, 251 F.3d at 258.

Moreover, the *Elk* Court's subsequent suggestion that another Eastern tribe (the Oneida Indian Nation) was a tribal remnant and therefore no longer existed is factually and legally incorrect.[47] Only two years after its decision in *Elk*, the

[46] The Littlefields repeatedly use the term "remnants" to imply that Mashpee no longer existed as a tribe "Remnant," however, is defined as "a small *surviving* group." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/remnant (emphasis added). Moreover, under Interior's rigorous administrative process, 25 C.F.R. Part 83, Interior found that Mashpee has existed since at least the 1620s. *See supra* at 2; *United States v. John*, 437 U.S. at 653 (fact that tribe is a "remnant" does not destroy the federal power to deal with it).

[47] *See Upstate Citizens*, 841 F.3d at 577 (Oneida is under federal jurisdiction for purposes of the IRA).

Supreme Court opined in *United States v. Kagama*, 118 U.S. 375, 384 (1886) that "[t]he power of the General Government" extended over all tribes, which the Court explicitly describes as "these *'remnants'* of a race once powerful, now diminished in numbers." (Emphasis added.) The Court rejected any concept of state power over such "remnants," finding that the federal power "must exist in that Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." *Id*. at 385. *See also County of Oneida*, 470 U.S. 226, 234 ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law"); *United States v. John*, 437 U.S. 634, 653 (1978) ("the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians" does not "destroy[] the federal power to deal with them.").[48]

Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 483 (1st Cir. 1987), is not to the contrary. There, members of several tribes (including Mashpee) sought to confirm aboriginal title to certain lands pursuant to a different

[48] *See also Mohegan*, 638 F.2d at 624 (rejecting argument of state control over Eastern tribes); *Upstate Citizens*, 841 F.3d at 568 n.14 (recognizing congressional authority over Indian affairs; dismissing contrary statements by federal officials regarding state authority).

federal statute (the Nonintercourse Act, 25 U.S.C. § 177),[49] relying on four historical documents including excerpts from the Morse and McKenney Reports that the court found insufficient to show that the tribes were *recognized* by the federal government. *Id.* at 482-84. The Littlefields conflate "recognition" (the establishment of a formal government-to-government relationship) with "under federal jurisdiction" to try to import the common law recognition standard into the under federal jurisdiction standard. The common law recognition cases are inapposite because their test for recognition has long since been replaced by the administrative process in 25 C.F.R. Part 83, and Mashpee was recognized under that process. 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).

The Littlefields also misconstrue another older case[50] involving the Tribe. Br. 27-30. In that suit, a non-expert jury of local residents "found" that Mashpee was no longer a "tribe" under the antiquated standard in *Montoya v. United States*, 180 U.S. 261 (1901), so the Nonintercourse Act's protections were not available to it. Again, the Nonintercourse Act and the IRA are two different statutes governing

[49] The Nonintercourse Act prohibits the alienation of Indian lands absent express congressional consent.

[50] *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).

different issues with distinct requirements.[51] *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); *see also Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. at 950 n.7 (nothing in the 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."). In the Tribe's 2007 acknowledgment decision Interior explicitly determined that the tribal existence findings made in the litigation were inapplicable to the federal acknowledgement determination. *See* JA797-98, JA800; 72 Fed. Reg. 8007, 8008, and that the acknowledgment decision was made on the basis of considerably more factual evidence than what was available in the trial record. JA798.

The Littlefields also assert that neither the District Court nor Interior considered what Congress intended in 1934 when it used the word "tribe" in the IRA, and they assert that Congress must have meant that a tribe must demonstrate that it existed as a "tribe" in 1934 under the common law *Montoya* test.[52] In fact,

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[51] The *Montoya* Court, 180 U.S. at 266, used its test to distinguish whether a group of Indians was a "tribe" or a separate "band" for purposes of liability under the Indian Depredation Act of 1891.

[52] Judge Kelley addresses and rejects the Littlefields' arguments relating to the IRA and the Tribe's Nonintercourse Act claims/*Montoya* standard based on the interpretation of the IRA's first definition of Indian in the M-Opinion. *See* ADD25-26. The 2021 ROD necessarily rejects these arguments by relying on

the IRA defines "tribe" as one that is "recognized" – not as one that "existed in 1934." This statutory language necessarily controls. *See United States v. Locke*, 471 U.S. 84, 98 (1985) ("reference to common law conceptions … is not to be applied in defiance of a statute's overriding purpose and logic").[53]

Indeed, the whole thrust of *Carcieri* is that "now" in the statutory language modifies the words that follow it, not the words that precede it, in the phrase "members of a recognized *tribe* now under federal jurisdiction." 555 U.S. at 388-392. Justice Breyer explicitly rejected the idea that a tribe has to *prove existence in 1934* to qualify for the IRA. *Carcieri*, 555 U.S. at 398-99. The M-Opinion incorporates Justice Breyer's guidance, (M-Opinion at 3-4) and has been upheld by multiple courts.

Further, Supreme Court decisions that post-date *Montoya* and pre-date the IRA hold that determinations of federal existence are within the political province of Congress and the Executive Branch, not the courts. *See* Cohen, 1942 ed. at 268 ("the courts have said that it is up to Congress and the executive to decide whether a tribe exists … In this respect the question of tribal existence has been classed as a "political question"….), *citing United States v. Rickert*, 188 U.S. 432, 445 (1903);

Justice Breyer's concurrence (tribes thought not to exist were later recognized, and there is no time limit on recognition in the IRA) and the M Opinion. JA52.

[53] Interior's regulations implementing the IRA also define "tribe" as one that is recognized. 25 C.F.R. § 151.2(b).

see also United States v. Sandoval, 231 U.S. 28, 46 (1913) (questions "of whether, to what extent, and for what time" Indian communities shall be recognized are to be determined by Congress, not the courts); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865).

In sum, the Littlefields' effort to graft a common law test onto the statutory language must be rejected.

CONCLUSION

Mashpee requests that the Court affirm the district court decision granting Defendants' motions for summary judgment and denying Plaintiffs' motion for summary judgment on grounds that Interior had a rational basis for its determination in the 2021 ROD that Mashpee was under federal jurisdiction in 1934 within the meaning of the IRA.

Respectfully Submitted,

MASHPEE WAMPANOAG
INDIAN TRIBE

Dated: July 28, 2023

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 12,007 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ *Tami Lyn Azorsky*

Attorney for Appellee
MASHPEE WAMPANOAG INDIAN TRIBE

Dated: July 28, 2023

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 July 28, 2023.

/s/ *Tami Lyn Azorsky*

MASHPEE AUTHORITY ADDENDUM

Mashpee Authority Addendum
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Federal Statutes

Federal Regulations

Federal Register Notices

Other Federal Statutes

25 U.S.C. § 5110

New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 C.F.R. § 83.2(d)

§ 83.2 What is the purpose of the regulations in this part?

The regulations in this part implement Federal statutes for the benefit of Indian tribes by establishing procedures and criteria for the Department to use to determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians. A positive determination will result in Federal recognition status and the petitioner's addition to the Department's list of federally recognized Indian tribes. Federal recognition:

(a) Is a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States;

(b) Means the tribe is entitled to the immunities and privileges available to other federally recognized Indian tribes;

(c) Means the tribe has the responsibilities, powers, limitations, and obligations of other federally recognized Indian tribes; and

(d) Subjects the Indian tribe to the same authority of Congress and the United States as other federally recognized Indian tribes.

25 C.F.R. § 83.10

How will the Department evaluate each of the criteria?

(a) The Department will consider a criterion in § 83.11 to be met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.

(1) The Department will not require conclusive proof of the facts relating to a criterion in order to consider the criterion met.

(2) The Department will require existence of community and political influence or authority be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years will not in themselves be a cause for denial of acknowledgment under these criteria.

(3) The petitioner may use the same evidence to establish more than one criterion.

(4) Evidence or methodology that the Department found sufficient to satisfy any particular criterion in a previous decision will be sufficient to satisfy the criterion for a present petitioner.

(b) When evaluating a petition, the Department will:

(1) Allow criteria to be met by any suitable evidence, rather than requiring the specific forms of evidence stated in the criteria;

(2) Take into account historical situations and time periods for which evidence is demonstrably limited or not available;

(3) Take into account the limitations inherent in demonstrating historical existence of community and political influence or authority;

(4) Require a demonstration that the criteria are met on a substantially continuous basis, meaning without substantial interruption; and

(5) Apply these criteria in context with the history, regional differences, culture, and social organization of the petitioner.

25 C.F.R. § 151.2(b)

Definitions.

(b) Tribe means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, “Tribe” also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

25 C.F.R. § 292.6

What must be demonstrated to meet the "initial reservation" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(ii), known as the "initial reservation" exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe has been acknowledged (federally recognized) through the administrative process under part 83 of this chapter.

(b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.

(c) The land has been proclaimed to be a reservation under 25 U.S.C. 467 and is the first proclaimed reservation of the tribe following acknowledgment.

(d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has significant historical connections and one or more of the following modern connections to the land:

(1) The land is near where a significant number of tribal members reside; or

(2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing marine mammals (50 CFR Part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: Charles P. Kupfer, Millbury, MA, PRT–143853.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Northern Beaufort Sea polar bear population in Canada for personal, noncommercial use.

Dated: January 19, 2007.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E7–2939 Filed 2–21–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final determination.

SUMMARY: Pursuant to 25 CFR 83.10(l)(2), notice is hereby given that the Department of the Interior (Department) has determined that the Mashpee Wampanoag Indian Tribal Council, Inc., P.O. Box 1048, Mashpee, Massachusetts, 02649, is an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner satisfies all seven mandatory criteria set forth in 25 CFR 83.7, and thus meets the requirements for a government-to-government relationship with the United States.

DATES: This determination is final and will become effective 90 days from publication of this notice in the **Federal Register** on May 23, 2007, pursuant to 25 CFR 83.10(l)(4), unless a request for reconsideration is filed pursuant to 25 CFR 83.11.

ADDRESSES: Requests for a copy of the Summary Evaluation of the Criteria should be addressed to the Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, 1951 Constitution Avenue, NW., MS: 34B–SIB, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513–7650.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the ADS by Secretarial Order 3259, of February 8, 2005, as amended on August 11, 2005, and on March 31, 2006. This notice is based on a determination that the Mashpee Wampanoag Tribal Council, Inc. (MWT) meets all of the seven mandatory criteria for acknowledgment in 25 CFR 83.7.

The Department considered the Mashpee petition under slightly modified timeframes set by a July 22, 2005, Joint Settlement Agreement and Stipulated Dismissal (Agreement) resolving the case of *Mashpee Wampanoag Tribal Council, Inc.* v. *Norton*, 180 F. Supp. 2d 130 (D.D.C. 2001), rev'd, 336 F.3d 1094 (D.C. Cir. 2003), *on remand*, No. CA 01–111 JR (D.D.C.).

A notice of the proposed finding (PF) to acknowledge the petitioner was published in the **Federal Register** on April 6, 2006 (71 FR 17488). Publishing notice of the PF initiated a 180-day comment period during which time the petitioner, and interested and informed parties, could submit arguments and evidence to support or rebut the PF. The comment period ended on October 3, 2006. The regulations at 25 CFR 83.10(k) provide the petitioner a minimum of 60 days to respond to comments that interested and informed parties submitted on the PF during the 180-day comment period. The Agreement modified this timeframe, providing the petitioner a 30-day response period, which ended on November 1, 2006. This final determination (FD) is made following a review of the petitioner's and public comments as well as the petitioner's response to the public comments.

During the comment period, the petitioner submitted an updated membership list, supplemental genealogical and governmental materials, and historical documents, in response to requests for information made by the Department in the PF and in an informal technical assistance teleconference with the petitioner. These materials did not change the conclusions of the PF. The Department received several letters of support from the public for the Mashpee group. These letters did not provide substantive comment. The Department also received a letter from a former selectman of the Town of Mashpee pertaining to negotiations between the petitioner and the Town. This letter did not comment substantively on the PF. The only substantive comment by interested or informed parties came from the Office of the Massachusetts Attorney General (Massachusetts AG), to which the petitioner submitted a response on October 30, 2006. The Massachusetts AG's comments are discussed under criteria 83.7(b) and 83.7(c) below.

Criterion 83.7(a) requires external identifications of the petitioner as an American Indian entity on a substantially continuous basis since 1900. The PF concluded external observers identified the petitioning group as an American Indian entity on a substantially continuous basis since 1900. However, it pointed out that the available identifications of the Mashpee in the record for 1900–1923 constituted sufficient but minimal evidence for substantially continuous identification for those years, and encouraged the petitioner to strengthen its evidence for criterion 83.7(a) by submitting additional identifications for that period. In response, the petitioner submitted a new argument concerning a 1907 document. As reevaluated for the FD, this document provides an additional identification of the Mashpee. When combined with the other identifications in the record for the PF for those years, the additional evidence is sufficient to show consistent identifications of the Mashpee from 1900 to 1923. The evidence submitted for both the PF and the FD demonstrates external observers identified the Mashpee as an Indian entity on a substantially continuous basis since 1900. Therefore, the petitioner meets the requirements of criterion 83.7(a).

Criterion 83.7(b) requires that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. The PF concluded that the petitioner presented sufficient evidence to satisfy this criterion. During the comment period, in response to the Department's request for information, the petitioner submitted a copy of the 1776 Gideon Hawley census of Mashpee. As part of an analysis of residential patterns of the Mashpee group for the colonial and Revolutionary periods, the PF described this document's details using only descriptions of it from both State reports and secondary sources. For the FD, Department researchers analyzed the newly-submitted 1776 Hawley census

and found that it supported the PF's conclusions regarding the residential patterns of the group for the colonial and Revolutionary periods.

In its comments on the PF dated October 2, 2006, the Massachusetts AG expressed concern that the PF did not adequately consider the evidence contained in the record of the lengthy jury trial in the Mashpee's land claim suit of 1977–1978. The jury concluded that the Mashpee group did not constitute an Indian tribe for purposes of the Indian Nonintercourse Act (25 U.S.C. 177). See *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), aff'd, *Mashpee Tribe* v. *New Seabury Corp.*, 592 F. 2d 575 (1st Cir. 1979). In particular, the Massachusetts AG cited the testimony of the defendants' two expert witnesses at specific sections of the trial transcript as examples of evidence that appeared to militate against Federal acknowledgment of the group. The Massachusetts AG then urged the Department to give the trial record of the case the fullest review before issuing the FD. In a follow-up letter dated October 3, 2006, the Massachusetts AG clarified that it was not taking a position on the recognition of the Mashpee in its October 2, 2006, comments, but was simply addressing those issues related to its concerns about adequate consideration of the evidence in the 1978 trial record.

The Department gave the evidence from the trial record a thorough review at the time of the PF. The Department examined all of the transcripts of the testimony (over 7,300 pages) as part of its evaluation of the Mashpee petition before the PF's issuance. Although quality, not quantity, is critical, the Department also based the PF on considerably more evidence, over 10,100 documents totaling about 54,000 pages in the petition record. In contrast, there were only about 274 exhibits before the Court. None of these materials with the exception of the exhibits were available to the court at the time of the trial. In response to the Massachusetts AG's comments, the Department reviewed again the evidence from the trial record, particularly the cited testimony of the defendants' two expert witnesses. This review did not change the findings in the PF.

The PF additionally examined the group's community and politics for the lengthy period since the suit, approximately 30 years, as well as the earlier periods. It also incorporated more in-depth evaluations of the evidence, including detailed marriage and residency analyses, as well as 31 interviews conducted by the Department's anthropologist during an on-site investigation in 2006.

Criterion 83.7(b) requires that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. The PF addressed the issues dealing with distinct community raised by the defendants' expert witnesses in the trial transcript pages cited by the Massachusetts AG. Generally, the two witnesses argued the Mashpee lacked cultural distinctiveness and economic autonomy from the wider society and therefore were not a tribe. The Federal acknowledgment regulations, however, do not require a petitioner to maintain cultural distinctiveness or economic autonomy to be an Indian community. Instead, the regulations require the petitioner to be a socially distinct group of people within the wider society. In the Mashpee case, the PF described at length their continued community cohesion and social distinction from non-Indian populations since first sustained contact.

In sum, neither the comments of the Massachusetts Attorney General nor the evidence in the trial transcript it referenced changed the PF's conclusions that the Mashpee were a distinct community (criterion 83.7(b)). The Massachusetts AG raised concerns that the Department may not have fully considered the evidence and issues raised in the trial transcript. The PF was thorough in its review of the materials in the trial transcript and a larger body of evidence that the court did not have in the land claim suit. This FD reevaluated the evidence in the trial testimony. In response to the comments submitted by the Massachusetts AG citing the testimony of the two defendants' witnesses, the FD reviewed this testimony and finds that the standards and definitions of a tribe used by these witnesses differ substantially from the requirements in the seven mandatory criteria of the regulations. The FD also finds that the trial testimony did not provide any evidence or arguments not already discussed in the PF, and did not merit a change in the evaluation of the evidence under criterion 83.7(b) in the PF. Therefore this FD affirms the PF's conclusions. The petitioner meets the requirements of criterion 83.7(b).

Criterion 83.7(c) requires that the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. The PF concluded that the petitioner presented sufficient evidence to satisfy this criterion. Neither the petitioner nor any third parties submitted new evidence related to the PF's conclusions regarding criterion 83.7(c). Several of the pages in the trial transcript of the 1977–1978 land claim suit that the Massachusetts AG cited in its comments dealt with issues related to criterion 83.7(c). The defendants' expert witnesses claimed, for instance, that the Mashpee were not a tribe because they lacked political autonomy from the wider society. The acknowledgment regulations only require political autonomy in relation to other Indian groups, defining autonomy as the exercise of political authority independent of any other Indian governing entity (See 25 CFR section 83.1). Participation in the political processes of the wider society, as in the Mashpee's case, is not evidence that a group does not exist as an Indian tribe exercising political influence or authority over its members. These witnesses also tended to ignore or minimize informal forms of leadership based on consensus and persuasion, and alternative forms of governance the Mashpee adopted in response to their unique history, geography, culture, and social organization, in favor of restrictive and limited notions of Indian leadership.

Political influence over the group's members was demonstrated by a long line of Mashpee leaders. Since the colonial period, the Mashpee have had sachems, proprietors, spiritual leaders, informal leaders, district and town officials, and council members who influenced and were influenced by the members on political matters of importance. The PF also showed group members considered the actions of their leaders important and were highly involved in political processes.

In sum, the reevaluation of the evidence in the trial transcript referenced in the comments of the Massachusetts AG did not result in a modification of the PF's conclusions that the Mashpee demonstrated political influence (criterion 83.7(c)). The PF dealt with the issues raised in the trial testimony affecting the evaluation of evidence under criterion 83.7(c) in its review of the materials in the trial transcript and a larger body of evidence that the court did not have in the land claim suit. This FD reevaluated the evidence in the trial testimony. In response to the comments submitted by the Massachusetts AG citing the testimony of the two defendants' witnesses, the FD reviewed this testimony and finds that the standards and definitions of a tribe used by these witnesses differ substantially from the requirements in the seven mandatory

MISCELLANEOUS.

Miscellaneous.

Indian police.

Pay of Indian police: For the service of not exceeding one thousand privates at five dollars per month each, and not exceeding one hundred officers at eight dollars per month each, of Indian police, and for the purchase of equipments and rations for policemen of non-ration agencies, to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations eighty-two thousand dollars

Industrial schools.

For support of industrial schools and for other educational purposes for the Indian tribes, one hundred and fifty thousand dollars.

Carlisle, Pa.

For support of Indian industrial school at Carlisle, Pennsylvania, and for transportation of children to and from said school, sixty-seven thousand five hundred dollars; for annual allowance to Captain R. H. Pratt, in charge of said Indian industrial school one thousand dollars; in all, sixty-eight thousand five hundred dollars.

Hampton, Va.

For support and education of one hundred Indian children at the school at Hampton, Virginia, sixteen thousand seven hundred dollars.

Forest Grove, Oreg.

For support of Indian industrial school at Forest Grove, Oregon, thirty thousand dollars; and said sum shall be disbursed upon the basis of an allowance of two hundred dollars for the support and education of each scholar, and not exceeding five hundred dollars of said sum may be used for the transportation of children to and from said school.

Industrial schools to be established in—
Indian Territory.

And the Secretary of the Interior is hereby authorized to cause to be constructed, at a point in the Indian Territory adjacent to the southern boundary of the State of Kansas and near to the Ponca and Pawnee reservations, and upon a section of land suitable in quality and location for the industrial purposes of said school, which section of land is hereby reserved for said purpose, a building suitable in size and convenience for the instruction and care of one hundred and fifty Indian children, and shall cause to be instructed therein, in the English language and in industrial pursuits, the children of such of the Indian tribes located in the Indian Territory as are least provided for under existing treaties or laws; and for this purpose there is hereby appropriated the sum of twenty-five thousand dollars, or so much thereof as may be necessary, to be immediately available: *Provided*, That not exceeding fifteen thousand dollars of this sum shall be expended in the erection, completion, and furnishing of said building.

Proviso.

Dakota Territory.

And the Secretary of the Interior is hereby further authorized to cause to be constructed, at some suitable point on the Sioux reservation, in Dakota Territory, and upon a section of land suitable in quality and location for the industrial purposes of said school, which section of land is hereby reserved for said purpose, a building suitable in size and convenience for the instruction and care of one hundred and fifty Indian children, and shall cause to be instructed therein, in the English language and in industrial pursuits, the children of the Indian tribes located on said reservation, or in his discretion the Secretary of the Interior may establish said school in the school building now standing on the Pawnee reservation, in State of Nebraska; and for this purpose there is hereby appropriated the sum of twenty-five thousand dollars, or so much thereof as may be necessary, to be immediately available: *Provided*, That if the Secretary of the Interior shall not establish said school in the buildings on the late Pawnee reservation, that not exceeding fifteen thousand dollars of this sum shall be expended in the erection, completion, and furnishing of said building.

Proviso.

Education of Indian children at schools in the States.

And the Secretary of the Interior is further authorized and directed to provide for the care, support, and education of one hundred Indian children not belonging to the five civilized tribes in the Indian Territory at any established industrial, agricultural, or mechanical school or schools other than those herein provided for, in any of the States of the United States, such schools to be selected by him from applications

lar, shall not be entitled to payment or credit for any part of said voucher, account, or claim; and if any such credit shall be given or received, or payment made, the United States may recharge the same to the officer or person receiving the credit or payment, and recover the amount from either or from both, in the same manner as other debts due the United States are collected: *Provided*, That where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentation: *And provided further*, That the officers and persons by and between whom the business is transacted shall, in all civil actions in settlement of accounts, be presumed to know the facts in relation to the matter set forth in the voucher, account, or claim: *And provided further*, That the foregoing shall be in addition to the penalties now prescribed by law, and in no way affect proceedings under existing law for like offenses. That where practicable this section shall be printed on the blank forms of vouchers provided for general use.

Provisos.

Indian agents to make annual report.

SEC. 9. That hereafter each Indian agent be required, in his annual report, to submit a census of the Indians at his agency or upon the reservation under his charge, the number of males above eighteen years of age, the number of females above fourteen years of age, the number of school children between the ages of six and sixteen years, the number of school-houses at his agency, the number of schools in operation and the attendance at each, and the names of teachers employed and salaries paid such teachers.

Proceeds of sale of Indian lands, etc., not applicable to expenses of public lands service.

SEC. 10. That no part of the expenses of the public lands service shall be deducted from the proceeds of Indian lands sold through the General Land Office, except as authorized by the treaty or agreement providing for the disposition of the lands.

Sale of Government property on Indian reservations; disposal of proceeds.

SEC. 11. That at any of the Indian reservations where there is now on hand Government property not required for the use and benefit of the Indians at said reservations the Secretary of the Interior is hereby authorized to move such property to other Indian reservations where it may be required, or to sell it and apply the proceeds of the same in the purchase of such articles as may be needed for the use of the Indians for whom said property was purchased; and he shall make report of his action hereunder to the next session of Congress thereafter.

Approved, July 4, 1884.

July 4, 1884.

CHAP. 181.—An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes.

Pensions.
Appropriations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of pensions for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes, namely:

Army and Navy pensions.

For Army and Navy pensions as follows: For invalids, widows, minor children, and dependent relatives, and survivors and widows of the war of eighteen hundred and twelve, twenty million dollars; and any balance of the appropriation for the above purposes for the current fiscal year that may remain unexpended on the thirtieth of June, eighteen hundred and eighty-four, estimated at sixty-six million dollars, is hereby reappropriated and made available for the service of the year ending June thirtieth, eighteen hundred and eighty-five: *Provided*, That the appropriations aforesaid for Navy pensions shall be paid from the income of the Navy pension fund, so far as the same may be sufficient for that

Unexpended balance of appropriation re-appropriated.

Proviso: income of Navy pension fund to apply to appropriation for Navy pensions.

and the sum of six thousand dollars, or so much thereof as may be necessary, is hereby appropriated for the purpose of defraying the expense of the proposed negotiations.

Support of schools.

FOR SUPPORT OF SCHOOLS.

Day and industrial schools.

For support of Indian day and industrial schools, and for other educational purposes not hereinafter provided for, including pay of draftsman to be employed in the office of the Commissioner of Indian Affairs, one million and seventy-five thousand dollars; for construction, purchase, and repair of school buildings, one hundred thousand dollars, of which sum not exceeding five thousand dollars shall be expended for a school building and furnishing same complete on the Sac and Fox Indian Reservation in Iowa; and for purchase of horses, cattle, sheep, and swine for schools, twenty thousand dollars, five thousand dollars of which shall be immediately available: *Provided*, That the entire cost of any boarding-school building, exclusive of outbuildings, to be built from the moneys appropriated hereby, shall not exceed fifteen thousand dollars, and the entire cost of any day-school building to be so built shall not exceed six hundred dollars; in all, one million one hundred and ninety-five thousand dollars: *Provided*, That not more than two hundred dollars shall be expended for any one pupil, and that all school houses erected under this appropriation, shall be built on reservations or as near the boundary lines as practicable, but this provision shall not affect schools in course of construction in any county where a reservation exists or the construction of schools where land has been already purchased in such county as a site.

Building and repairs.

Sac and Fox Reservation, Iowa.

Horses, etc.

Proviso.
Cost of buildings.

Expense per pupil.

Location of new buildings.

Albuquerque, N. Mex.

For support and education of Indian pupils at Albuquerque, New Mexico, at one hundred and seventy-five dollars per annum for each pupil, and for the erection, repairs of buildings and pay of superintendent, at one thousand eight hundred dollars per annum, sixty thousand dollars: *Provided*, That not more than eight thousand dollars shall be used for erecting, repairing, and furnishing buildings.

Proviso.
Limit.

Carlisle, Pa.

For support of Indian industrial school at Carlisle, Pennsylvania, at not exceeding one hundred and sixty-seven dollars for each pupil, for transportation of pupils to and from Carlisle school, and for the repair of buildings, one hundred and five thousand dollars; and the sum of five thousand dollars of this amount to be immediately available for the transportaion of pupils to and from said school: *Provided*, That not more than five thousand dollars of this amount shall be used in repairing buildings: *And provided further*, That no more Indian children shall enter and be educated and supported at said school who have not attended some other school for a period of at least three years. For additional to the salary of any military officer, while acting as superintendent, one thousand dollars; in all, one hundred and six thousand dollars.

Provisos.
Repairs.

Qualification for admission.

Allowance to superintendent.

Chillocco, Ind. Ter.

For support of Indian pupils, at one hundred and sixty-seven dollars per annum each; purchase of material, heating appliances, erection of barn, and repairs of buildings at Indian school at Chillocco, Indian Territory (formerly near Arkansas City, Kansas), and for pay of superintendent of said school, at two thousand dollars per annum, sixty-two thousand one hundred and ten dollars: *Provided*, That not more than fifteen thousand dollars of this amount shall be used in repairs, heating, and furnishing buildings.

Proviso.
Repairs, etc.

Carson City, Nev.

For support of Indian pupils, at one hundred and seventy-five dollars per annum each; erection and repairs of school buildings at the Indian school at Carson City, Nevada, and for pay of superintendent of said school at one thousand five hundred dollars per annum, twenty-four thousand dollars: *Provided*, That not more than five thousand dollars shall be used for the erection and repairs of school buildings.

Proviso.
Repairs, etc.

Pierre, S. Dak.

For support of Indian pupils, at one hundred and sixty-seven dollars

and two, respecting the sale of such lands, shall be entitled to receive patent therefor upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence and are exclusively grazing lands, incapable of any profitable use other than for grazing purposes.

That the Secretary of the Interior be and he is hereby authorized and directed to investigate the number of Clatsop Indians of Oregon and Washington, Tillamook Indians of Oregon, Lower Band of Chinook Indians of Washington and Kathlamet Band of Chinook Indians of the State of Oregon, or their heirs, who can be identified as belonging to said tribes at the time of executing certain agreements dated August fifth, August seventh and August ninth, in the year eighteen hundred and fifty-one, and report his findings to Congress at its next session. Oregon and Washington Indians. Investigation.

SUPPORT OF SCHOOLS.

Indian schools.

For support of Indian day and industrial schools, and for other educational purposes not hereinafter provided for, one million three hundred thousand dollars. Support, etc.

For construction, purchase, lease, and repair of school buildings, and sewerage, water supply, and lighting plants, and purchase of school sites, and improvement of buildings and grounds, four hundred thousand dollars; in all, one million seven hundred thousand dollars. Buildings, etc.

For support and education of three hundred Indian pupils at Albuquerque, New Mexico, fifty thousand one hundred dollars; for pay of superintendent of said school, one thousand eight hundred dollars; for improvements to water supply, four thousand dollars; general repairs and improvements, five thousand dollars; in all, sixty thousand nine hundred dollars. Albuquerque, N. Mex.

For the support and education of two hundred Indian pupils at Chamberlain, South Dakota, thirty-three thousand four hundred dollars; for pay of superintendent of said school, one thousand six hundred dollars; for general repairs and improvements, two thousand five hundred dollars; in all, thirty-seven thousand five hundred dollars. Chamberlain, S. Dak.

For support and education of one hundred and sixty pupils at the Indian school at Cherokee, North Carolina, twenty-six thousand seven hundred and twenty dollars; for pay of superintendent of said school, one thousand five hundred dollars; for general repairs and improvements, two thousand five hundred dollars; for laundry, four thousand dollars; in all, thirty-four thousand seven hundred and twenty dollars. Cherokee, N. C.

For support of Indian school at Carlisle, Pennsylvania, for transportation of pupils to and from said school, and for general repairs and improvements, one hundred and fifty thousand dollars; for an addition to hospital, ten thousand dollars; for additional salary for superintendent in charge, one thousand dollars; in all, one hundred and sixty-one thousand dollars. Carlisle, Pa.

For support and education of three hundred Indian pupils at the Indian school at Carson City, Nevada, fifty thousand one hundred dollars; for pay of superintendent at said school, one thousand eight hundred dollars; for general repairs and improvements, four thousand dollars; for pumping and power plant, two thousand dollars; in all, fifty-seven thousand nine hundred dollars. Carson City, Nev.

For support and education of seven hundred Indian pupils at the Indian school at Chilocco, Oklahoma Territory, one hundred and sixteen thousand nine hundred dollars; for pay of superintendent at said school, three thousand dollars; for general repairs and improvements, ten thousand dollars; for cottage for assistant superintendent, three thousand dollars; for steam boilers, three thousand dollars; for ice plant, five thousand dollars; in all, one hundred and forty thousand nine hundred dollars. Chilocco, Okla.

SALEM SCHOOL.

Salem school.

For support and education of six hundred Indian pupils at the Indian school, Salem, Oregon, one hundred thousand two hundred dollars;

For pay of superintendent at said school, two thousand dollars;

For general repairs and improvements, including construction of viaduct, five thousand dollars;

For bakery and equipment, four thousand dollars;

In all, one hundred and eleven thousand two hundred dollars.

Incidentals.

For general incidental expenses of the Indian Service in Oregon, including traveling expenses of agents, and support and civilization of Indians of Grande Ronde and Siletz agencies, three thousand dollars;

Pay of employees at the same agencies, three thousand dollars;

In all, six thousand dollars.

MOLELS. (Treaty.)

Molels.

Schools.

Vol. 12, p. 981.

For pay of teachers and for manual-labor schools, and for all necessary materials therefor, and for the subsistence of the pupils, per second article of treaty of December twenty-first, eighteen hundred and fifty-five, three thousand dollars.

Chinook Indians. Investigation of claims.

That the Secretary of the Interior is hereby authorized and directed to investigate as to the validity of the following claims against the United States, namely, the claims, respectively, of the Waukikum bands of the Chinook Indians of the State of Washington, of the Nuc que clah we muck band of the Chinook Indians of the State of Oregon, of the Chehalis tribe of Indians of the State of Washington, and of the Wheelappa band of the Chinook Indians of the State of Washington; and to report said investigation, with such recommendation as he may deem proper.

Umatilla Reservation. Crossing of sheep and cattle.

That the Secretary of the Interior is hereby authorized subject to such regulations as he may prescribe, to permit owners of sheep and cattle to cross the Umatilla Indian Reservation, in the State of Oregon, with their flocks in going to and returning from summer ranges.

PENNSYLVANIA.

Pennsylvania.

Carlisle school.

For support and education at Indian school at Carlisle, Pennsylvania, for transportation of pupils to and from said school, and for general repairs and improvements, one hundred and fifty-eight thousand five hundred dollars, three thousand five hundred dollars of which shall be made immediately available;

For additional salary for superintendent in charge, one thousand dollars;

For cottage for physician, two thousand five hundred dollars;

For new hospital, ten thousand dollars, and the amount of ten thousand dollars for addition to hospital, Act of March third, nineteen hundred and five, is hereby reappropriated for this purpose;

In all, one hundred and seventy-two thousand dollars.

SOUTH DAKOTA.

South Dakota.

Agents at agencies.

For pay of Indian agents in South Dakota at the following-named agencies at the rates respectively indicated, namely:

Cheyenne River.

At the Cheyenne River Agency, one thousand eight hundred dollars;

Crow Creek.

At the Crow Creek Agency, one thousand six hundred dollars;

Lower Brulé.

At the Lower Brulé Agency, one thousand four hundred dollars;

Pine Ridge.

At the Pine Ridge Agency, one thousand eight hundred dollars;

Rosebud.

At the Rosebud Agency, one thousand eight hundred dollars;

Pennsylvania.

PENNSYLVANIA.

Carlisle school.

For support and education at Indian school at Carlisle, Pennsylvania, for transportation of pupils to and from said school, and for general repairs and improvements, one hundred and sixty-three thousand dollars:

For additional salary for superintendent in charge, one thousand dollars:

For employees' quarters, five thousand dollars;

In all, one hundred and sixty-nine thousand dollars.

South Dakota.

SOUTH DAKOTA.

Agents at agencies.

For pay of Indian agents in South Dakota at the following-named agencies at the rates respectively indicated, namely:

Cheyenne.
At the Cheyenne River Agency, one thousand eight hundred dollars;

Crow Creek.
At the Crow Creek Agency, one thousand six hundred dollars;

Lower Brulé.
At the Lower Brulé Agency, one thousand four hundred dollars;

Pine Ridge.
At the Pine Ridge Agency, one thousand eight hundred dollars;

Rosebud.
At the Rosebud Agency, one thousand eight hundred dollars;

Sisseton.
At the Sisseton Agency, one thousand five hundred dollars;

Yankton.
At the Yankton Agency, one thousand six hundred dollars;

In all, eleven thousand five hundred dollars.

Buildings, etc.

For buildings and repairs of buildings at agencies and for water supply at agencies, ten thousand dollars.

CHAMBERLAIN SCHOOL.

Chamberlain school.

For the support and education of two hundred Indian pupils at the Indian school at Chamberlain, South Dakota, thirty-three thousand four hundred dollars, and for pay of superintendent, one thousand six hundred dollars;

For general repairs and improvements, two thousand five hundred dollars;

For office building and enlarging boys' dormitory, seven thousand dollars;

In all, forty-four thousand five hundred dollars.

FLANDREAU SCHOOL.

Flandreau school.

For support and education of three hundred and seventy-five Indian pupils at the Indian school at Flandreau, South Dakota, sixty-two thousand eight hundred and twenty-five dollars, and for pay of superintendent, one thousand eight hundred dollars;

For general repairs and improvements, including completion of industral and domestic building and veneering old building, eight thousand dollars, of which three thousand dollars shall be immediately available;

In all, seventy-two thousand six hundred and twenty-five dollars.

PIERRE SCHOOL.

Pierre school.

For support and education of one hundred and fifty Indian pupils at the Indian school at Pierre, South Dakota, twenty-five thousand one hundred and fifty dollars, and for pay of superintendent, one thousand five hundred dollars;

For office building, warehouse, and enlarging workshop, seven thousand dollars;

For rebuilding and repairing boiler house and installing and equipping heating and lighting plant, four thousand dollars, to be immediately available;

For interest on twenty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of the Seminole government, as per same article, same treaty, one thousand dollars;

In all, twenty-eight thousand five hundred dollars.

Care of insane Indians.

For the care and support of insane Indians in Oklahoma, to be expended under the direction of the Secretary of the Interior, twenty thousand dollars, or so much thereof as may be necessary.

Oregon.

OREGON.

Klamath Agency. Support, etc., of Indians.

For support and civilization of the Klamath, Modocs, and other Indians of the Klamath Agency, Oregon, including pay of employees, eight thousand dollars.

California and Oregon Land Company. Payment to Klamath Agency Indians for lands conveyed to. Vol. 34, p. 368

That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath agency for the lands conveyed to the California and Oregon Land Company, in accordance with the provisions of the Act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: *Provided*, That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved.

Proviso. Release from Indians.

Warm Springs Agency. Support, etc., of Indians.

For support and civilization of the confederated tribes and bands under Warm Springs Agency, and for pay of employees, four thousand dollars.

Walla Wallas, etc. Support, etc.

For support and civilization of the Walla Walla, Cayuse, and Umatilla tribes, Oregon, including pay of employees, three thousand dollars.

SALEM SCHOOL.

Salem school.

For support and education of six hundred Indian pupils at the Indian school, Salem, Oregon, and for pay of superintendent, one hundred and two thousand two hundred dollars;

For general repairs and improvements, nine thousand dollars;

In all, one hundred and eleven thousand two hundred dollars.

Incidentals.

For general incidental expenses of the Indian Service in Oregon, including traveling expenses of agents, and support and civilization of Indians of Grande Ronde and Siletz agencies, three thousand dollars;

Pay of employees at the same agencies, three thousand dollars;

In all, six thousand dollars.

Modocs.

MODOCS. (TREATY.)

Schools. Vol. 12, p. 981

For pay of teachers and for manual-labor schools, and for all necessary materials therefor, and for the subsistence of the pupils, per second article of treaty of December twenty-first, eighteen hundred and fifty-five, three thousand dollars.

Pennsylvania.

PENNSYLVANIA.

Carlisle school.

For support and education at Indian school at Carlisle, Pennsylvania, for transportation of pupils to and from said school, for pay of superintendent, and for general repairs and improvements, one hundred and sixty-four thousand dollars;

In all, one hundred and sixty-four thousand dollars.

Pennsylvania.

PENNSYLVANIA.

Carlisle school.

For support and education of Indian school at Carlisle, Pennsylvania, for transportation of pupils to and from said school, for pay of superintendent, and for general repairs and improvements, one hundred and sixty-four thousand dollars.

South Dakota.

SOUTH DAKOTA.

Agents at agencies.

For pay of Indian agents in South Dakota at the following named agencies at the rates respectively indicated, namely:

Crow Creek. At the Crow Creek Agency, one thousand six hundred dollars.

Pine Ridge. At the Pine Ridge Agency, two thousand two hundred dollars.

Rosebud. At the Rosebud Agency, one thousand eight hundred dollars.

Sisseton. At the Sisseton Agency, one thousand five hundred dollars.

Yankton. At the Yankton Agency, one thousand six hundred dollars.

CHAMBERLAIN SCHOOL.

Chamberlain school. Grant of, to State.

There is hereby granted to the State of South Dakota upon the terms and conditions hereinafter named the following-described property, known as the Chamberlain School, including the lands, buildings, and fixtures pertaining to said school: *Provided*, That said lands and buildings shall be held and maintained by the State of South Dakota as an institution of learning, and that Indian pupils shall at all times be admitted to such school free of charge for tuition and on terms of equality with white pupils: *Provided further*, That this grant shall be effective at any time before July first, nineteen hundred and ten, if before that date the governor of the State of South Dakota files an acceptance thereof with the Secretary of the Interior accepting for said State said property, upon the terms and conditions herein prescribed. If said property is not accepted by the State of South Dakota, as hereinbefore provided, the Secretary of the Interior is hereby authorized to dispose of and convey the real estate, including buildings and fixtures, of the Chamberlain School, South Dakota, for a price not less than twenty-six thousand dollars, upon condition that the property shall continue to be maintained and operated as an educational institution, and that children of Indian parents shall have the same privilege of education as white children, but with tuition free: *Provided*, That the Commissioner of Indian Affairs is authorized and directed to dispose, by sale or transfer to other schools, such property as is not covered by the transfer of the realty, buildings, and fixtures.

Provisos. Indian pupils, etc. Acceptance of grant.

Sale in case of non-acceptance.

Minimum price. Requirements.

Sale, etc., of residue of property.

Indian pupils, etc.

For the support and education of one hundred and fifty Indian pupils at the Indian school at Chamberlain, South Dakota, twenty-five thousand and fifty dollars, and for pay of superintendent, one thousand six hundred dollars;

For general repairs and improvements, one thousand dollars;

In all, twenty-seven thousand six hundred and fifty dollars:

Proviso. Pro rata share of appropriation, etc.

Provided, That if such school is disposed of as above authorized at any time during the fiscal year of nineteen hundred and ten the pro rata share only of the appropriation for the maintenance of said school for the portion of the year which the school is maintained by the United States shall be available.

Edward N. Vandall. Land on former Yankton Reservation allotted to, etc.

That the Secretary of the Interior be, and he is hereby, authorized to allot eighty acres of land on the former Yankton Reservation in South Dakota, now reserved for Indian administrative purposes to Edward N. Vandall, a Yankton Sioux allottee, in consideration that said Vandall relinquish eighty acres of land, more or less, which he now holds in allotment.

For support and civilization of the Wallawalla, Cayuse, and Umatilla tribes, Oregon, including pay of employees, three thousand dollars.

Wallawallas, Cayuses, and Umatillas, support, etc., of.

For support and education of six hundred Indian pupils, including native pupils brought from Alaska, at the Indian school, Salem, Oregon, and for pay of superintendent, one hundred two thousand two hundred dollars; for purchase of additional farming land, twenty thousand three hundred and fifty dollars; for general repairs and improvements, ten thousand dollars: in all, one hundred thirty-two thousand five hundred and fifty dollars.

Salem school.

For support and civilization of Indians of Grande Ronde and Siletz agencies, Oregon, including pay of employees, five thousand dollars.

Grande Ronde and Siletz agencies, support, etc., of Indians.

For support of Molels, Oregon: For pay of teachers and for manual-labor schools and for all necessary materials therefor, and for the subsistence of the pupils (article two, treaty of December twenty-first, eighteen hundred and fifty-five), three thousand dollars.

Molels, schools. Vol. 12, p. 981.

PENNSYLVANIA.

Pennsylvania.

SEC. 21. For support and education of Indian pupils at the Indian school at Carlisle, Pennsylvania, for transportation of pupils to and from said school, for pay of superintendent, and for general repairs and improvements, one hundred and sixty-two thousand dollars; for steam heating plant, ten thousand dollars; in all, one hundred and seventy-two thousand dollars.

Carlisle school.

SOUTH DAKOTA.

South Dakota.

SEC. 22. For support and education of three hundred and seventy-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, sixty-four thousand four hundred and twenty-five dollars; for general repairs and improvements, five thousand dollars, of which two thousand five hundred dollars shall be immediately available; in all, sixty-nine thousand four hundred and twenty-five dollars.

Flandreau school.

For support and education of one hundred and [illegible]ty Indian pupils at the Indian school at Pierre, South Dakota, and for pay of superintendent, twenty-six thousand five hundred and fifty dollars; for new building, twenty-five thousand dollars; for general repairs and improvements, five thousand dollars; in all, fifty-six thousand five hundred and fifty dollars.

Pierre school.

For support and education of two hundred and fifty Indian pupils at the Indian school, Rapid City, South Dakota, and pay of superintendent, forty-three thousand three hundred and fifty dollars; for general repairs and improvements, seven thousand five hundred dollars; in all, fifty thousand eight hundred and fifty dollars.

Rapid City school.

For the support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of five teachers, one physician, one carpenter, one miller, one engineer, two farmers, and one blacksmith (article thirteen, treaty of April twenty-ninth, eighteen hundred and sixty-eight), ten thousand four hundred dollars; for pay of second blacksmith, and furnishing iron, steel, and other material (article eight of same treaty), one thousand six hundred dollars; for pay of additional employees at the several agencies for the Sioux in Nebraska, North Dakota, and South Dakota, eighty-eight thousand dollars; for subsistence of the Sioux, and for purposes of their civilization (Act of February twenty-eighth, eighteen hundred and seventy-seven), three hundred and fifty thousand dollars: *Provided*, That this sum shall include transportation of sup-

Sioux of different tribes.
Teachers, etc.
Vol. 15, p. 640.
Employees.
Subsistence, etc.
Vol. 19, p. 256.
Provisos.
Transportation.

OREGON.

Oregon.

Klamath Agency. Support, etc., of Indians.

SEC. 18. For support and civilization of the Klamath, Modocs, and other Indians of the Klamath Agency, Oregon, including pay of employees, six thousand dollars.

Warm Springs Agency. Support, etc., of Indians.

For support and civilization of the confederated tribes and bands under Warm Springs Agency, and for pay of employees, four thousand dollars.

Walla Wallas, etc. Support, etc.

For support and civilization of the Wallawalla, Cayuse, and Umatilla tribes, Oregon, including pay of employees, three thousand dollars.

Salem school.

For support and education of six hundred Indian pupils, including native pupils brought from Alaska, at the Indian school, Salem, Oregon, and for pay of superintendent, one hundred two thousand two hundred dollars; for general repairs and improvements, ten thousand dollars; for extension of wing of present brick school building, fifteen thousand dollars; in all, one hundred twenty-seven thousand two hundred dollars.

Grande Ronde and Siletz agencies. Support, etc., of Indians.

For support and civilization of Indians of Grande Ronde and Siletz agencies, Oregon, including pay of employees, four thousand dollars.

Modoc irrigation system. Continuing through Klamath Reservation.

For continuing the construction of the Modoc Point irrigation project, including drainage and canal systems, within the Klamath Indian Reservation, in the State of Oregon, in accordance with the plans and specifications submitted by the chief engineer in the Indian Service and approved by the Commissioner of Indian Affairs and the Secretary of the Interior in conformity with a provision in section one of the Indian appropriation act for the fiscal year nineteen hundred and eleven, fifty thousand dollars: *Provided*, That the total cost of this project shall not exceed one hundred and fifty-five thousand dollars, including the sum of thirty-five thousand one hundred and forty-one dollars and fifty-nine cents expended on this project to June thirtieth, nineteen hundred and ten, and that the entire cost of the project shall be repaid into the Treasury of the United States from the proceeds from the sale of timber or lands on the Klamath Indian Reservation.

Ante, p. 220.

Proviso. Cost.

Repayment.

PENNSYLVANIA.

Pennsylvania.

Carlisle school.

SEC. 19. For support and education of Indian pupils at the Indian school at Carlisle, Pennsylvania, and for pay of superintendent, one hundred forty-two thousand dollars; for general repairs and improvements, five thousand dollars; in all, one hundred forty-seven thousand dollars.

SOUTH DAKOTA.

South Dakota.

Flandreau school.

SEC. 20. For support and education of three hundred and seventy-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, sixty-four thousand four hundred and twenty-five dollars; for general repairs and improvements, five thousand dollars; in all, sixty-nine thousand four hundred and twenty-five dollars.

Pierre school.

For support and education of one hundred and seventy-five Indian pupils at the Indian school at Pierre, South Dakota, and for pay of superintendent, thirty-two thousand dollars; to complete irrigation plant, seventeen thousand dollars; to complete new building, ten thousand dollars; for general repairs and improvements, five thousand dollars; in all, sixty-four thousand dollars.

For support and education of Indian pupils at the Indian school at Pierre, South Dakota, and for general repairs and improvements, to be immediately available, six thousand dollars.

Pennsylvania

PENNSYLVANIA.

Carlisle School.

SEC. 20. For support and education of Indian pupils at the Indian school at Carlisle, Pennsylvania, and for pay of superintendent, one hundred and thirty-two thousand dollars; for general repairs and improvements, twenty thousand dollars; for completing steam heating plant, seven thousand five hundred dollars, to be immediately available; in all, one hundred and fifty-nine thousand five hundred dollars.

South Dakota.

SOUTH DAKOTA.

Flandreau School.

SEC. 21. For support and education of three hundred and sixty-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, sixty-one thousand five hundred dollars; for the construction and equipment of a gymnasium building, eight thousand dollars; for general repairs and improvements, five thousand dollars; in all, seventy-four thousand five hundred dollars.

Pierre School.

For support and education of one hundred and seventy-five Indian pupils at the Indian school at Pierre, South Dakota, and for pay of superintendent, thirty-two thousand dollars; for general repairs and improvements, eleven thousand dollars: *Provided*, That four thousand dollars of this amount shall be used in the construction and maintenance of an irrigation system for the use of said school; in all, forty-three thousand dollars.

Proviso. Irrigation.

Rapid City School.

For support and education of two hundred and fifty Indian pupils at the Indian school, Rapid City, South Dakota, and for pay of superintendent, forty-eight thousand five hundred dollars; for general repairs and improvements, nine thousand dollars; for completion and extension of heating plant, five thousand dollars; in all, sixty-two thousand five hundred dollars.

Sioux of different tribes.

Teachers, etc. Vol. 15, p. 640.

For support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of five teachers, one physician, one carpenter, one miller, one engineer, two farmers, and one blacksmith (article thirteen, treaty of April twenty-ninth, eighteen hundred and sixty-eight), ten thousand four hundred dollars; for pay of second blacksmith, and furnishing iron, steel, and other material (article eight of same treaty), one thousand six hundred dollars; for pay of additional employees at the several agencies for the Sioux in Nebraska, North Dakota, and South Dakota, eighty-eight thousand dollars; for subsistence of the Sioux, and for purposes of their civilization (Act of February twenty-eighth, eighteen hundred and seventy-seven), three hundred and fifty thousand dollars: *Provided*, That this sum shall include transportation of supplies from the termination of railroad or steamboat transportation, and in this service Indians shall be employed whenever practicable; and additional to the appropriation of three hundred and fifty thousand dollars herein made for the purposes of civilization, and supplemental thereto, there is hereby appropriated the balance of eighty-five thousand five hundred and eighteen dollars and twenty cents from the tribal funds of the Indians on the Cheyenne River and Standing Rock Reservations, in South Dakota and North Dakota, appropriated by section eight of the Act of May twenty-ninth, nineteen hundred and eight, which amount belongs exclusively to the Indians on the Cheyenne River Reservation, and to be expended for their benefit; in all, five hundred and thirty-five thousand five hundred and eighteen dollars and twenty cents.

Employees.

Subsistence. Vol. 19, p. 256.

Proviso. Transportation.

Cheyenne River and Standing Rock Reservations.

Payment from tribal funds to Indians on.

Vol. 35, p. 463.

Schools.

For support and maintenance of day and industrial schools among the Sioux Indians, including the erection and repairs of school buildings, two hundred thousand dollars, to be expended under the agreement with said Indians in section seventeen of the Act of March second, eighteen hundred and eighty-nine, which agreement

Vol. 15, p. 637. Vol. 25, p. 894.

Salem School.

For support and education of six hundred Indian pupils, including native pupils brought from Alaska, at the Indian school, Salem, Oregon, and for pay of superintendent, $102,000; for general repairs and improvements, $12,000; in all, $114,000.

Grande Ronde and Siletz Agencies.
Support, etc., of Indians.

For support and civilization of Indians at Grande Ronde and Siletz Agencies, Oregon, including pay of employees, $4,000.

Modoc Point irrigation project.
Completing, in Klamath Reservation.

For completion of the construction of the Modoc Point irrigation project, including drainage and canal systems within the Klamath Indian Reservation, in the State of Oregon, in accordance with the plans and specifications submitted by the chief engineer in the Indian service and approved by the Commissioner of Indian Affairs and the Secretary of the Interior in conformity with a provision in section one of the Indian appropriation Act for the fiscal year nineteen hundred and eleven, $105,000, to remain available until expended.

Vol. 36, p. 270.

E. L. Chalcraft.
Payment to.

For salary due E. L. Chalcraft, former superintendent of the Salem Indian School, Oregon, from April twenty-eighth, nineteen hundred and eleven, to September eighth, nineteen hundred and eleven, four months and eleven days, at $2,025 per annum, $736.88.

Pennsylvania.

PENNSYLVANIA.

Carlisle School.

SEC. 20. For support and education of Indian pupils at the Indian school at Carlisle, Pennsylvania, and for pay of superintendent, $132,000; for lavatories and bathing facilities, $10,000; for general repairs and improvements, $20,000; in all, $162,000.

South Dakota.

SOUTH DAKOTA.

Flandreau School.

SEC. 21. For support and education of three hundred and sixty-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, $61,500; for general repairs and improvements, $5,000; in all, $66,500.

Pierre School.

For support and education of one hundred and seventy-five Indian pupils at the Indian school at Pierre, South Dakota, and for pay of superintendent, $32,000; for construction of employees' quarters, $15,000; for general repairs and improvements, $10,000; in all, $57,000.

Mary Sully, etc.
Payments to attorneys.

That the Secretary of the Treasury be, and he is hereby, authorized to pay to the attorneys of record in the case entitled "Mary Sully and others against The United States and John H. Scriven, allotting agent," and in the case entitled "Narcissus Drapeau and others against The United States and John H. Scriven, allotting agent," in the United States Circuit Court for the District of South Dakota, the sum of $780.70, to reimburse said attorneys for costs paid and disbursements in the above-named cases: *Provided*, That before said amount is paid the said attorneys shall file with the Secretary of the Treasury a receipt in full for the costs so paid and disbursements in said cases and in full of all claims.

Proviso.
Receipts required.

Rapid City School.

For support and education of two hundred and fifty Indian pupils at the Indian school, Rapid City, South Dakota, and for pay of superintendent, $48,500; for general repairs and improvements, $5,000; in all, $53,500.

Sioux of different tribes.
Teachers, etc.

For support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of five teachers, one physician, one carpenter, one miller, one engineer, two farmers, and one blacksmith (article thirteen, treaty of April twenty-ninth, eighteen hundred and sixty-eight), $10,400; for pay of second blacksmith, and furnishing iron, steel, and other material (article eight of same treaty), $1,600; for pay of additional employees at the several agencies for the Sioux in Nebraska, North Dakota, and South

Vol. 15, p. 640.

Additional employees.

Additional oil and gas inspectors on leased allotments.

For the salaries and expenses of not to exceed six oil and gas inspectors, in addition to those now employed, under the direction of the Secretary of the Interior, to supervise oil and gas mining operations on allotted lands leased by members of the Five Civilized Tribes from which restrictions have not been removed, and to conduct investigations with a view to the prevention of waste, $25,000, to be immediately available.

Oregon.

OREGON.

Support, etc., of Indians.
Klamath Agency.
Warm Springs Agency.
Umatilla Agency.
Salem school.
Grande Ronde and Siletz Agencies.
Support, etc., of Indians.
Klamath Reservation.
Modoc Point irrigation system in.

SEC. 18. For support and civilization of Indians of the Klamath Agency, Oregon, including pay of employees, $6,000.

For support and civilization of the confederated tribes and bands under Warm Springs Agency, Oregon, including pay of employees, $4,000.

For support and civilization of the Indians of the Umatilla Agency, Oregon, including pay of employees, $3,000.

For support and education of six hundred Indian pupils, including native pupils brought from Alaska, at the Indian school, Salem, Oregon, including pay of superintendent, $102,000; for general repairs, additions to buildings, and improvements, $12,000; for addition to assembly hall, $10,000; in all, $124,000.

For support and civilization of Indians at Grande Ronde and Siletz Agencies, Oregon, including pay of employees, $4,000.

For maintenance and operation of the Modoc Point irrigation system within the Klamath Indian Reservation, in the State of Oregon, $4,740, reimbursable in accordance with the provisions of the Act of March third, nineteen hundred and eleven.

Pennsylvania.

PENNSYLVANIA.

Carlisle School.

SEC. 19. For support and education of Indian pupils at the Indian school at Carlisle, Pennsylvania, including pay of superintendent, $132,000; for general repairs and improvements, $20,000; in all, $152,000.

South Dakota.

SOUTH DAKOTA.

Flandreau School.
Pierre School.
Rapid City School.

SEC. 20. For support and education of three hundred and sixty-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, $61,500; for general repairs and improvements, $6,000; for the repair of buildings and the purchase of equipment destroyed or damaged by the tornado of June tenth, nineteen hundred and fourteen, $10,000; in all, $77,500.

For support and education of two hundred and fifty Indian pupils at the Indian school at Pierre, South Dakota, including pay of superintendent, $43,750; for new buildings, including equipment, $22,000; for completion of irrigation system, $7,000; for general repairs and improvements, $6,000; for the purchase of ten acres of land adjoining the school grounds, $3,500; in all, $82,250.

For support and education of two hundred and fifty Indian pupils at the Indian school, Rapid City, South Dakota, including pay of superintendent, $48,500; for general repairs and improvements, $5,000; in all, $53,500.

Sioux of different tribes.
Teachers, etc.
Vol. 15, p. 640.
Additional employees.

For support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of five teachers, one physician, one carpenter, one miller, one engineer, two farmers, and one blacksmith (article thirteen, treaty of April twenty-ninth, eighteen hundred and sixty-eight), $10,400; for pay of second blacksmith, and furnishing iron, steel, and other material (article eight of same treaty), $1,600; for pay of additional employees at the several agencies for the Sioux in Nebraska, North Dakota, and South Dakota,

Per capita distribution of proceeds.

public domain. That the proceeds derived from the sale of any lands hereunder, after reimbursing the United States for the expense incurred in carrying out the provisions of this Act, shall be paid, share and share alike, to the enrolled members of the tribe."

Klamath Reservation.
Modoc irrigation system on.
Vol. 35, p. 1071.
Proviso.
Limit of cost increased.
Vol. 37, p. 534.

For construction, maintenance, and operation of the Modoc Point irrigation system within the Klamath Indian Reservation, in the State of Oregon, $20,000, reimbursable in accordance with the provisions of the Act of March third, nineteen hundred and eleven: *Provided*, That the limit of cost of said project fixed by the Act of August twenty-fourth, nineteen hundred and twelve, is hereby changed from $155,000 to $170,000.

Klamath Indians.
Expenses of delegation to Washington, D. C., from tribal funds.

That the sum of $1,000, or so much thereof as may be necessary, of the tribal funds of the Klamath Indians of the State of Oregon, is hereby appropriated to pay the actual expenses of the two delegates of the said tribe who have been elected by the general council of the Klamath Indians to attend to the business of the tribe and pay their expenses to Washington in February and March, nineteen hundred and sixteen, to present the affairs of the said Klamath Indians of the State of Oregon to the officials of the United States.

Williamson River.
Construction of bridges across, on Klamath Reservation.

The Secretary of the Interior is hereby authorized to withdraw from the Treasury of the United States the sum of $3,000, or so much thereof as may be necessary, of the funds on deposit to the credit of the Klamath Indians of the State of Oregon, and use the same for the construction of a bridge across the Williamson River, on the Klamath Indian Reservation, Oregon, under such rules and regulations as he may prescribe.

Umatilla Reservation.
Construction of bridges authorized on.
Location.

For the construction of two bridges on the Umatilla Indian Reservation, in Oregon, suitable for wagon and other purposes, across the Umatilla River, at a limit of cost of $28,000, the first at or near Thorn Hollow Station, the second at or near Mission Station, the sum of $18,666 is hereby appropriated to be expended under the direction of the Secretary of the Interior and to be reimbursable from any funds now or hereafter placed in the Treasury to the credit of said Indians: *Provided*, That no part of the money herein appropriated shall be expended until the Secretary of the Interior shall have obtained from the proper authorities of the State of Oregon, or from the county of Umatilla, at least one-third of the cost of said bridges, and that the proper authorities of the said State of Oregon or the said county of Umatilla shall assume full responsibility for, and agree at all times to maintain and repair, said bridges and construct and maintain the approaches thereto: *Provided further*, That any and all expenses above the amount herein named in connection with the building and maintenance of said bridges shall be borne by the said State of Oregon or the said county of Umatilla.

Provisos.
Cooperation of State authorities.

Maintenance.

Excess expenditures.

Pennsylvania.

PENNSYLVANIA.

Carlisle School.

SEC. 21. For support and education of Indian pupils at the Indian school at Carlisle, Pennsylvania, including pay of superintendent, $132,000; for general repairs and improvements, $20,000; in all, $152,000.

South Dakota.

SOUTH DAKOTA.

Flandreau School.

SEC. 22. For support and education of three hundred and sixty-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, $61,500; for general repairs and improvements, $6,000; in all, $67,500: *Provided*, That the unexpended balance of $1,607.44 appropriated by the Act approved August first, nineteen hundred and fourteen, for repairing buildings and replacing equipment destroyed or damaged by the tornado of June tenth,

Proviso.
Water tank and dairy cattle.
Vol. 38, p. 502.

That the Secretary of the Interior is hereby authorized to make allotments to any living Indians on the Umatilla Reservation, Oregon, of not exceeding eighty acres to each person entitled to rights thereon but who have not heretofore been allotted, so long as any of the lands within said reservation remain available for the purpose, and to issue trust patents for the selections so made in accordance with the Act of February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), as amended; such allotments to be made under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the application of this provision shall not interfere with any rights guaranteed by treaty to any allotted Umatilla Indian or Indians.

Umatilla Reservation.
Trust allotments to Indians on.
Selections.
Vol. 24, p. 388; Vol. 34, pp. 182, 327.
Proviso.
Treaty rights not affected.

PENNSYLVANIA.

Pennsylvania.

SEC. 20. For support and education of eight hundred Indian pupils at the Indian school at Carlisle, Pennsylvania, including pay of superintendent, $136,250; for general repairs and improvements, $15,000; in all, $151,250.

Carlisle School.

The sum of $1,000 bequeathed to the Carlisle Indian Industrial School, under the will of Bradford R. Wood, late of Albany, New York, and deposited in the Treasury of the United States, is hereby appropriated and shall remain available until expended for the purpose of assisting needy students from the Carlisle Indian School in extending their education to become trained nurses.

Acceptance of bequest for training nurses.

SOUTH DAKOTA.

South Dakota.

SEC. 21. For support and education of three hundred and sixty-five Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, $62,955; for general repairs and improvements, $8,000; for new barn, $3,000; in all, $73,955.

Flandreau School.

For support and education of two hundred and fifty Indian pupils at the Indian school at Pierre, South Dakota, including pay of superintendent, $43,750, of which amount not exceeding $900 may be expended for the purchase of two new busses; for general repairs and improvements, $6,000; for new boiler and boiler stack and installation thereof, $4,000; in all, $53,750.

Pierre School.

For support and education of two hundred and seventy-five Indian pupils at the Indian school, Rapid City, South Dakota, including pay of superintendent, $47,925; for general repairs and improvements, $5,000; for remodeling buildings, $9,000; for construction and repair of road through school farm, $4,000; for irrigation, drainage, and improving school farm, $3,000; in all, $68,925.

Rapid City School.

For support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of five teachers, one physician, one carpenter, one miller, one engineer, two farmers, and one blacksmith (article thirteen, treaty of April twenty-ninth, eighteen hundred and sixty-eight), $10,400; for pay of second blacksmith, and furnishing iron, steel, and other material (article eight of same treaty), $1,600; for pay of additional employees at the several agencies for the Sioux in Nebraska, North Dakota, and South Dakota, $95,000; for subsistence of the Sioux other than the Rosebud, Cheyenne River, and Standing Rock Tribes, and for purposes of their civilization (Act of February twenty-eighth, eighteen hundred and seventy-seven), $200,000: *Provided*, That this sum shall include transportation of supplies from the termination of railroad or steamboat transportation, and in this service Indians shall be employed whenever practicable; in all, $307,000.

Sioux of different tribes.
Teachers, etc.
Vol. 15, p. 640.
Additional employees.
Subsistence.
Vol. 19, p. 256.
Proviso.
Transportation.

equipment necessary in the discretion of the Secretary of the Interior to enable the Klamath Indians to become self-supporting, to be reimbursed, within five years from the date of this Act, from the funds accruing to the credit of said tribes in the Treasury of the United States from the sale of timber and unallotted lands on the Klamath Reservation, under such rules and regulations as the Secretary of the Interior may prescribe.

Repayment from timber sales, etc.

PENNSYLVANIA.

Pennsylvania.

SEC. 20. For support and education of seven hundred Indian pupils at the Indian school at Carlisle, Pennsylvania, including pay of superintendent, $132,000; for general repairs and improvements, $15,000; in all, $147,000.

Carlisle School.

SOUTH DAKOTA.

South Dakota.

SEC. 21. For support and education of three hundred and fifty Indian pupils at the Indian school at Flandreau, South Dakota, and for pay of superintendent, $72,000; for general repairs and improvements, $8,000; for repairing damages caused by fire in industrial building, $4,500; for replacing and repairing equipment contained in industrial building, $2,000, the last two sums to be immediately available; in all, $86,500.

Flandreau School.

For support and education of two hundred and fifty Indian pupils at the Indian school at Pierre, South Dakota, including pay of superintendent, $52,000; for general repairs and improvements, $6,000; for installation of new boilers and construction of boiler stack, $5,000; in all, $63,000.

Pierre School.

For support and education of two hundred and seventy-five Indian pupils at the Indian school, Rapid City, South Dakota, including pay of superintendent, $57,000; for general repairs and improvements, $5,000; for irrigation, drainage, and improving school farm, to remain available until expended, $3,000; additional appropriation for new school building, $15,000; in all, $80,000.

Rapid City School.

For support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of five teachers, one physician, one carpenter, one miller, one engineer, two farmers, and one blacksmith (article thirteen, treaty of April twenty-ninth, eighteen hundred and sixty-eight), $10,400; for pay of second blacksmith, and furnishing iron, steel, and other material (article eight of same treaty), $1,600; for pay of additional employees of the several agencies for the Sioux in Nebraska, North Dakota, and South Dakota, $95,000; for subsistence of the Sioux and for purposes of their civilization (Act of February twenty-eighth, eighteen hundred and seventy-seven), $200,000: *Provided*, That this sum shall include transportation of supplies from the termination of railroad or steamboat transportation, and in this service Indians shall be employed whenever practicable; in all, $307,000.

Sioux of different tribes.
Teachers, etc.
Vol. 15, p. 640.
Additional employees.
Subsistence.
Vol. 19, p. 256.
Proviso.
Transportation.

For support and maintenance of day and industrial schools among the Sioux Indians, including the erection and repairs of school buildings, $200,000, in accordance with the provisions of article five of the agreement made and entered into September twenty-sixth, eighteen hundred and seventy-six, and ratified February twenty-eighth, eighteen hundred and seventy-seven (Nineteenth Statutes, page two hundred and fifty-four): *Provided*, That the unexpended balance of the sum of $300,000 appropriated by section twenty-one of the Act of March second, nineteen hundred and seventeen (Thirty-ninth Statutes at Large, page nine hundred and eighty-eight), for acquiring, constructing, or enlargement and equipment of school buildings on the Crow Creek, Pine Ridge, Rosebud, Standing Rock,

Schools.
Vol. 19, p. 254.
Proviso.
Reservation school buildings.
Reappropriation.
Vol. 39, p. 988.