THE ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON, DC 20240

JUN 30 2017

Honorable Cedric Cromwell
Chairman, Mashpee Wampanoag Tribe
483 Great Neck Road
Mashpee, Massachusetts 02649

Dear Chairman Cromwell:

On September 18, 2015, the Department of the Interior (Department) approved a request by the Mashpee Wampanoag Tribe (Tribe) to take certain lands in the Town of Mashpee and the Town of Taunton, Massachusetts into trust for the Tribe under Section 5 of the Indian Reorganization Act (IRA).[1] To be eligible for lands under the IRA, the Tribe must meet one of the IRA's definitions of "Indian." The Supreme Court has interpreted the IRA's first definition as including the temporal requirement that a tribe have been under Federal jurisdiction in 1934.[2] The Department's 2015 Decision concluded that the Tribe satisfied the second definition of "Indian" which, in the Department's view, did not incorporate the first definition's jurisdictional requirement. The United States District Court for the District of Massachusetts later concluded, to the contrary, that the second definition also requires the Tribe to have been under Federal jurisdiction in 1934,[3] and remanded to the Department for consideration of the issue.[4]

By letter dated December 6, 2016, the Department set forth procedures by which the Tribe and the *Littlefield* plaintiffs could submit evidence or argument on whether the Tribe satisfied the IRA's first definition of "Indian." At the Tribe's urging, the Department agreed to issue a decision on or before June 19, 2017. After review of the parties' substantial documentation, I prepared a decision on that date in keeping with the Department's commitment, providing the Tribe with a copy the same day.[5] Because of continuing concerns regarding the Department's analysis, however, the Department notified the parties that a final decision would not issue before June 27, 2017. On June 26, 2017, the Tribe asked the Department to suspend its remand proceedings.

This is to inform you that I am denying the Tribe's request to suspend my review, and that I further withdraw the decision prepared on June 19, 2017, for lack of full consideration of the complex issues arising from the unique historical relationship of the Commonwealth of Massachusetts with the Tribe and the Federal Government. The remand submissions of both the Tribe and the *Littlefield* plaintiffs referred to the decision of the United States Court of Appeals for the First Circuit in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370

[1] U.S. Dept. of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe (Sept. 18, 2015) (2015 Decision).
[2] *See Carcieri v. Salazar*, 555 U.S. 379 (2009).
[3] *Littlefield v. United States DOI*, 199 F.Supp.3d 391 (D.Mass. 2016).
[4] *Littlefield*, 199 F.Supp.3d at 400.
[5] A copy is enclosed.

(1st Cir. 1975). The First Circuit there found that before its admission to the Union as a state, Maine comprised a district within the Commonwealth of Massachusetts. In considering legislation to admit Maine as a state, Congress had notice of Massachusetts' exercise of authority over Indian affairs in the State.[6] This fact raises a potentially important issue for the remand analysis that neither the Tribe nor the *Littlefield* plaintiffs explored. To ensure a thorough analysis of this complex issue, I therefore request supplemental briefing from the parties on the question of whether the exercise of authority over the Tribe by the Commonwealth of Massachusetts could be considered a surrogate for federal jurisdiction for purposes of the IRA's first definition of "Indian."

If the Parties choose to submit supplemental materials, they must do so by August 31, 2017. A copy of each party's submission should be sent to the other party, as well as the Department. Following receipt of the other party's submission, each party shall have 60 days from receipt, or until October 30, 2017, whichever is later, to provide a reply.

Because of the potentially voluminous nature of the materials, we ask that the submissions be provided on compact disc or DVD. Each document or exhibit should be provided as a separate pdf document and identified on an index. Submissions should be sent to:

Matthew Kelly
Office of the Solicitor
Department of the Interior
1849 C Street, NW
Room 6516, MS-6513
Washington, DC 20240

Once the Department has received all of the submissions, it will review the materials, as well as any additional materials it determines necessary for its analysis, and will complete its review of whether the Tribe was under federal jurisdiction in 1934 and thus eligible to have land taken into trust for it.

The Mashpee and Taunton parcels remain in trust status, unless a court orders otherwise, while the Department considers the parties' supplemental submissions on remand.

Any questions of a procedural nature should be directed to Matthew Kelly, Division of Indian Affairs, Office of the Solicitor, at (202) 208-5353 (matthew.kelly@sol.doi.gov).

Sincerely,

James E. Cason

James E. Cason
Associate Deputy Secretary

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[6] *Passamaquoddy*, 528 F.2d at 374-75.

Enclosure

Cc: David Tennant, Nixon Peabody LLP
Matthew Frankel, Nixon Peabody LLP
Adam Bond, Law Office of Adam M. Bond

Chairman Cedric Cromwell
Mashpee Wampanoag Tribe
483 Great Neck Road
Mashpee, Massachusetts 02649

Dear Chairman Cromwell:

In 2012, the Mashpee Wampanoag Tribe (Mashpee Tribe or Tribe) submitted an amended fee-to-trust application to the Bureau of Indian Affairs (BIA) to acquire approximately 321 acres of lands in the Towns of Mashpee and Taunton, Massachusetts in trust for the Tribe pursuant to Section 5 of the Indian Reorganization Act (IRA or Act). Having been federally acknowledged in 2007 pursuant to 25 C.F.R. Part 83, the Tribe sought the land as its initial reservation for purposes of tribal government, tribal housing, and economic development, including Indian gaming. Section 5 of the IRA (Section 5) authorizes the Secretary of the Interior (Secretary) to acquire land in trust for "Indians."[1] The IRA, in Section 19, defines "Indian" in three ways:

> The term "Indian" as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.[2]

On September 18, 2015, the Department of the Interior (Department) determined that the Tribe satisfied the IRA's second definition of "Indian" as descendants of members of a recognized tribe occupying an Indian reservation in 1934.[3] The Department based its determination in part on the Tribe's long and continuous occupation of tribal lands in what is today Mashpee, Massachusetts. The Department also determined that phrase "such members" in the IRA's second definition of "Indian" was ambiguous and was properly construed as referring only to the phrase "members of any recognized Indian tribe" in the first definition, but not the entire phrase, "members of any recognized Indian tribe now under Federal jurisdiction." Accordingly, the Department's reading did not incorporate the phrase "now under federal jurisdiction" from the first definition which,

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[1] 25 U.S.C. § 5108. Prior to the 2016 reclassification of Title 25 by the Office of Law Revision Counsel, Section 19 had been codified as 25 U.S.C. § 465.
[2] 25 U.S.C. § 5129 (bracketed numerals added). Prior to the 2016 reclassification of Title 25 by the Office of Law Revision Counsel, Section 19 had been codified as 25 U.S.C. § 479.
[3] U.S. Dept. of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe (Sept. 18, 2015) (2015 Decision).

based on the Supreme Court's ruling in *Carcieri v. Salazar*,[4] requires a tribe seeking land in trust under the IRA to show it was under federal jurisdiction in 1934.

Residents of Taunton, Massachusetts filed suit challenging the 2015 Decision.[5] On July 28, 2016 the United States District Court for the District of Massachusetts ruled that the phrase "such members" in the IRA's second definition of "Indian" unambiguously incorporates the entire antecedent phrase "members of any recognized Indian tribe now under Federal jurisdiction," thereby incorporating the temporal limitation of the first definition.[6] Because the Department's decision had not considered that issue, the District Court remanded to the Department for consideration in the first instance whether the Tribe was under federal jurisdiction in 1934.[7] The Department thereafter established procedures by which the Tribe and the *Littlefield* plaintiffs (Littlefields) could submit evidence and arguments on the issue of whether the Tribe was under federal jurisdiction in 1934. The submission period closed on February 28, 2017.

I have assessed the parties' submission under the Department's two-part framework for interpreting "under federal jurisdiction" for purposes of the IRA, as set forth in M-37029.[8] Having completed my review of the submissions and supporting documentation provided by the parties, and as explained in more detail below, I conclude that the Tribe's evidence does not demonstrate that the United States took an action or series of actions in or before 1934 that sufficiently establishes or generally reflects federal obligations, duties, responsibility for or authority over the Tribe. Based on the record before the Department I cannot conclude that the Tribe was under federal jurisdiction in 1934.[9] I therefore regret to inform you that I cannot acquire land in trust for the Tribe under the IRA's first definition of "Indian," nor under the second definition as it has been interpreted by the United States District Court for the District of Massachusetts.

I. BACKGROUND

In 1975, the Tribe petitioned the Department for federal acknowledgment.[10] Thirty-two years later, in 2007, the Department determined that the Tribe was entitled to acknowledgment as a federally recognized Indian tribe pursuant to the administrative

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[4] 555 U.S. 379 (2009) (*Carcieri*).
[5] *Littlefield v. United States DOI*, 199 F.Supp.3d 391 (D.Mass. 2016).
[6] *Littlefield*, 199 F.Supp.3d at 399.
[7] The district court decision contained language to the effect that the Tribe was not under federal jurisdiction in 1934. *See, e.g., Littlefield*, 199 F.Supp.3d at 397. The district court subsequently issued an order on October 12, 2016 clarifying that the 2015 Decision contained no such finding concerning the Tribe's jurisdictional status in 1934 and that the Secretary had presented no such argument to the court. *See Littlefield v. United States DOI* , No. 16-cv-10184, Dkt. 121 at 2 (D. Mass. Oct. 12, 2016).
[8] The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, Op. Sol. Interior M-37029 (Mar. 12, 2014) (M-37029).
[9] As of April 6, 2017, the authority for off-reservation land-into-trust acquisitions for gaming lies with the Acting Deputy Secretary of the Department of the Interior. *See* Delegated Authority for Off-Reservation Fee to Trust Decisions, Acting Assistant Secretary – Indian Affairs to All Regional Directors (Apr. 6, 2017).
[10] Proposed Finding for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Incorporated of Massachusetts, 71 Fed. Reg. 17,488 (Apr. 6, 2006).

procedures set forth at 25 C.F.R. Part 83.[11] That determination was based on the research and analysis of the historians, anthropologists, and genealogists in the Department's Office of Federal Acknowledgment, who supported the conclusion that the Tribe satisfied the criteria for federal acknowledgment.[12] The Department based its decision on evidence showing that the Tribe's members and ancestors had maintained consistent interaction and significant social relationships since the time of first sustained contact with Europeans in the seventeenth-century, through the colonial and Revolutionary eras up until the present time. The Tribe presented evidence showing that nearly all the Tribe's members lived in a defined geographical area, namely, the Town of Mashpee (or "Marshpee" as it was formerly known), which was inhabited almost exclusively of the Tribe and its members.[13] The decision also relied on evidence showing that the Tribe had also continued to maintain an autonomous political existence as a tribe from the time of first sustained contact to the present.[14] Moreover, the Tribe had shown that nearly all of its members (97%) descended from the historical Tribe identified by outside observers in the nineteenth-century.[15] The Department published a proposed finding in favor of federal acknowledgment in 2006[16] and its final determination in 2007.[17] The Tribe's acknowledgment became effective on May 23, 2007.[18]

A. Fee-to-Trust Application

In 2007, the Tribe submitted applications seeking to have the Department acquire certain lands in trust for the Tribe's benefit pursuant to the authority of Section 5 of the IRA, including a parcel totaling approximately 170 acres in Mashpee, Massachusetts (Mashpee parcel). It later amended its application in March 2012 so as to remove certain parcels and add a 150-acre parcel near the Town of Taunton, Massachusetts (Taunton parcel).

The Tribe sought trust land in order to meet the present and future needs of its members by providing land for self-determination and self-governance, housing, education, and cultural preservation.[19] The Mashpee parcel included culturally significant sites such as the Mashpee Old Indian Meeting House and historic Tribal burial grounds that have been used by the Tribe and its members for centuries.[20] Revenue from economic development would be used to enhance the Tribe's ability to preserve its history and community by funding the preservation and restoration of culturally significant sites.[21] The Tribe showed a need for economic development to create sufficient revenue to meet the needs of tribal members, many of whom are unemployed with incomes below the poverty

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[11] Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).
[12] 2015 Dec. at 59.
[13] MWT FD at 9.
[14] MWT FD at 18.
[15] MWT FD 30, 34; 72 Fed. Reg. at 8,009.
[16] 71 Fed. Reg. 17,488 (Apr. 6, 2006).
[17] *See* 72 Fed. Reg. 8,007 (Feb. 22, 2007); 73 Fed. Reg. 18,553, 18553-54 (Apr. 4, 2008).
[18] 72 Fed. Reg. at 8,009.
[19] 2015 Dec. at 7.
[20] 2015 Dec. at 6, 15, 110.
[21] 2015 Dec. at 8.

level.[22] Because the Tribe's members also face serious needs for housing, the Tribe would use revenue for economic development to fund construction of tribal housing and programs such as the Wampanoag Housing Program and the Low Income Home Energy Assistance Program.[23] The Tribe intended to use the Mashpee parcel for tribal administrative purposes, tribal housing, and cultural purposes. It intended to use the Taunton parcel for economic development by the construction and operation of a gaming facility under the Indian Gaming Regulatory Act.[24]

1. *Carcieri v. Salazar*, 555 U.S. 379 (2009)

While the Tribe's 2007 application was pending, the U.S. Supreme Court rendered its decision in *Carcieri v. Salazar*,[25] which considered the Secretary's trust-acquisition authority under Section 5 of the IRA. Section 5 provides the Secretary discretionary authority to acquire land in trust for "Indians." As noted above, Section 19 of the IRA includes the following three definitions of "Indian":

> The term "Indian" as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.[26]

Carcieri held that the word "now" in the first definition of "Indian" refers to the time of the IRA's passage in 1934. The Court did not further address the meaning of the phrase "under federal jurisdiction," however, finding no need to do so in the context of the case.[27] As a result, it was left to the Department to utilize its expertise in interpreting and applying Section 19's temporal qualification and the meaning of "under federal jurisdiction."

2. Department's *Carcieri* Framework

To continue implementing the IRA in accordance with the holding in *Carcieri*, the Department was required to determine the meaning of the phrase "under federal jurisdiction" and to consider what evidence could demonstrate it.[28] The Department

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[22] 2015 Dec. at 7.
[23] 2015 Dec. at 8.
[24] 25 U.S.C. § 2701 et seq.
[25] 555 U.S. § 379 (2009).
[26] 25 U.S.C. § 5129.
[27] *Carcieri* also did not address the Secretary's authority to acquire land in trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.
[28] The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, Op. Sol. Interior M-37029 at 4 (Mar. 12, 2014) (M-37029). The Department announced its framework for interpreting "now under federal jurisdiction" in a December 2010 record of decision to acquire land in trust for another tribe, the Cowlitz Indian Tribe. U.S. Dep't of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark

considered the text of the IRA and concluded the Act did not establish the meaning of "under federal jurisdiction" and that the phrase itself had no plain meaning.[29] A review of its legislative history suggested only that Congress intended the phrase to qualify the expression "recognized Indian tribe" in some manner.[30] Based on this, the Department determined that the phrase "under federal jurisdiction" had no clear and unambiguous meaning and that Congress had left an interpretive gap for the agency to fill.[31]

The Solicitor closely considered the IRA's text, remedial purpose, and legislative history, as well as the Act's early implementation by the Department and concluded that "under federal jurisdiction" requires a tribe to show that the United States exercised jurisdiction over the tribe at some point in or before 1934 and that such jurisdictional status remained intact as of 1934.[32] By requiring evidence of particular exercises of federal jurisdictional authority, the Solicitor rejected the assertion that the phrase "under federal jurisdiction" has a plain meaning that is synonymous with Congress' plenary authority over tribes pursuant to the Indian Commerce Clause.[33] Under that view, every Indian tribe as such could be considered "under federal jurisdiction."[34] Agreeing that the general principle of plenary authority served as the relevant backdrop to the analysis, the Solicitor determined that *Carcieri* required a tribe to do more by showing indicia of federal jurisdiction that demonstrate the federal government's exercise of responsibility for and obligation toward a tribe and its members in or before 1934.[35]

M-37029 establishes a two-part inquiry for ascertaining whether a tribe was "under federal jurisdiction" as of 1934. The first step requires a tribe to show that the United States took an action or series of actions in or before 1934 that sufficiently established or generally reflected federal obligations, duties, responsibility for or authority over the tribe.[36] The second step of the inquiry is to ascertain whether that jurisdictional status continued through 1934.

M-37029 describes the types of evidence that may be used at step one of the "under federal jurisdiction" analysis.[37] A tribe might provide evidence of a course of dealings or

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County, Washington, for the Cowlitz Indian Tribe (Dec. 17, 2010). Issued while the Mashpee Tribe's own fee-to-trust application was pending, the Cowlitz analysis formed the basis for the framework in M-37029.

[29] M-37029 at 18.

[30] M-37029 at 17.

[31] M-37029 at 17, citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 840-843 (1984).

[32] M-37029 at 18-19.

[33] M-37029 at 17.

[34] *See United States v. Holliday*, 70 U.S. 407, 419 (1866) (tribes, as such, are placed by the Constitution within the control of Congress); William Wood, "Indians, Tribes, and (Federal) Jurisdiction," 65 KANSAS L. REV. 415, 422 (2017) (whether federal jurisdiction exists with respect to a particular people involves a singular inquiry into whether they continue to exist as a distinct Indian community such that the federal Indian affairs jurisdiction attaches to them). *See also United States v. Sandoval*, 231 U.S. 28, 46 (1913) (Congress may not arbitrarily bring a body of people within its plenary authority by arbitrarily calling them an Indian tribe).

[35] M-37029 at 17.

[36] M-37029 at 19.

[37] The broad range of the Solicitor's non-exclusive list of evidence reflects that the federal government applied its Indian policies "to numerous tribes with diverse cultures" and necessarily "fluctuate[d]

other relevant acts by the federal government for or on behalf of the tribe or, in some instances, its members.[38] In some cases, one federal action can, in and of itself, conclusively establish that a tribe was under federal jurisdiction in 1934, obviating the need to consider the tribe's broader history.[39] In other cases a variety of federal actions, when viewed together, can demonstrate that a tribe was under federal jurisdiction. This might include, for example, guardian-like actions taken by the United States, or a continuous course of federal dealings with a tribe.[40] Such evidence may include federal approval of contracts between a tribe and non-Indians or enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions).[41] Such evidence might also consist of actions by the Office of Indian Affairs or other federal officials with respect to the tribe and its affairs[42] evidencing the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe.[43]

Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934.[44] In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.[45]

3. Tribe's Prior *Carcieri* Submissions

In September 2012, the Tribe submitted a detailed discussion of its statutory eligibility with supplementary exhibits totaling more than 300 pages.[46] The Tribe's 2012

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dramatically as the needs of the Nation and those of the tribes changed over time." *United States v. Lara,* 541 U.S. 193, 202 (2004).

[38] M-37029 at 19.

[39] *See e.g., Shawano County v. Acting Midwest Regional Director, Bureau of Indian Affairs,* 53 I.B.I.A. 62 (2011) (Secretarial calling of vote to accept or reject IRA necessarily recognizes tribe as under federal jurisdiction). *See generally* Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.* (1947) (specifying, in part, tribes that either voted to accept or reject the IRA).

[40] M-37029 at 19.

[41] M-37029 at 19.

[42] The OIA had responsibility for the administration of Indian reservations and the implementation of Indian legislation. M-37029 at 19.

[43] M-37029 at 19.

[44] M-37029 at 19.

[45] M-37029 at 19.

[46] Letter, MWT Chairman Cedric Cromwell to Assistant Secretary Donald "Del" Laverdure (Sept. 4, 2012) (MWT 2012 Letter). The Tribe elaborated on the arguments and evidence contained its September 2012 submission with follow-up submissions in 2012 and 2013. *See* Chairman Cedric Cromwell to Assistant Secretary – Indian Affairs Donald "Del" Laverdure (Sept. 4, 2012); Arlinda Locklear, Esq. to Bella Wolitz, Esq. Dep't of the Interior, Knoxville Field Solicitor's Office (Nov. 5, 2012); *same* (Nov. 29, 2012). The Tribe had included a discussion of the Secretary's statutory authority to take land in trust for the Tribe in light of *Carcieri* when it amended its application in 2010. 2010 App. The Tribe asserted that *Carcieri* did not impair the Secretary's authority to acquire land in trust for the Tribe but deferred providing supplementary evidence or detailed discussion of the issue. 2010 App. at 9. The Tribe also claimed that amendments to the IRA in 1994 prohibited the Department from making any decision or determination that

submission offered two different views of why the Tribe should be considered to have been "under federal jurisdiction" in 1934 for purposes of the IRA's first definition of "Indian."

The Tribe first argued that, by operation of law, it had been under federal jurisdiction since 1789.[47] This argument relied on three separate claims. First, that by reserving specific rights to the Tribe in the colonial era, the British Crown had created "functional treaty" obligations to which the United States later succeeded.[48] Second, that the Tribe had always exercised and maintained aboriginal fishing and other usufructuary rights on lands the Tribe had ceded over time.[49] Third, a federal trust relationship had always existed by virtue of federal common law and the Indian Trade and Intercourse Act regardless of attempts by Massachusetts to extinguish the Tribe's title to its lands.[50] Next the Tribe argued that it was under federal jurisdiction in 1934 by virtue of particular, affirmative acts of federal supervision from before 1934, which included the federal government's consideration and ultimate rejection of whether to subject the Tribe to the federal Removal Policy in the 1820s; federal supervision of Mashpee students at the Carlisle Indian school at the turn of the twentieth century; and the inclusion of Mashpee Indians in both general and Indian-specific Federal censuses.[51]

In addition to arguing that the Tribe satisfied the IRA's first definition of "Indian," however, the Tribe's 2012 submission argued that the Tribe independently satisfied the second definition of "Indian," which defines "Indian" to include "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."[52] The Tribe argued that the lands in the Town of Mashpee that it had continuously occupied for centuries constituted a "reservation" for purposes of the IRA's second definition of "Indian."[53] It did not, however, address the other components of the second definition.

B. Department's September 2015 Decision

On September 18, 2015, Assistant Secretary – Indian Affairs (AS-IA) Kevin K. Washburn issued a record of decision (2015 Decision) to acquire the Mashpee and Taunton parcels in trust for the Tribe.[54] The Department determined that it had statutory authority to acquire the lands in trust for the Tribe under the second definition of "Indian"

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disadvantaged or diminished its rights as a federally recognized tribe relative to other recognized tribes. *Id.*, citing 25 U.S.C. § 5126(f) [476(f)].

[47] MWT 2012 Letter at 2.

[48] MWT 2012 Letter at 2.

[49] MWT 2012 Letter at 3.

[50] MWT 2012 Letter at 3.

[51] MWT 2012 Letter at 3.

[52] MWT 2012 Letter at 3; 25 U.S.C. § 5129.

[53] MWT 2012 Letter at 31-36.

[54] U.S. Dept. of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe (Sept. 18, 2015) (2015 Dec.).

set forth in IRA Section 19.[55] As a result, the Department found it unnecessary to decide whether the Tribe could also qualify under the first definition.[56]

The 2015 Decision detailed the Department's interpretation and application of Section 19's second definition of Indian, that is, "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." The Department found that the phrases "descendants," "such members," and "any Indian reservation" to be ambiguous, compelling the Department to review the statutory language and legislative history, and to consider the Department's prior implementation of the Act.[57]

1. Interpretation of Ambiguous Terms

The Department found it unclear whether the phrase "such members" in the second definition referred only to the expression "members of any recognized Indian tribe" or to "members of any recognized Indian tribe *now under Federal jurisdiction*."[58] Among other things, the Department concluded that "such members" was ambiguous and was properly construed as referring back to the phrase "members of any recognized Indian tribe" in the first definition of "Indian," and not the entire phrase "members of any recognized now under federal jurisdiction." The Department reasoned that incorporating all of the requirements of the first definition would render the second definition largely redundant of the first definition. .[59]

The Department found that the IRA does not define "Indian reservation"[60] and that Section 19 left unclear whether its residency requirement applied to the members of a recognized Indian tribe or to their "descendants." The Department concluded that Congress apparently removed the definitions of these terms contained in the original draft bill of the IRA[61] so as to leave such determinations to the Department's expertise in order

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[55] 2015 Dec. at 79.

[56] 2015 Dec. at 79. *See* 80 Fed. Reg. 57,848 (Sept. 25, 2015). The BIA accepted title to the parcels in trust on behalf of the United States for the benefit of the Tribe on November 10, 2015, and proclaimed them the Tribe's initial reservation.

[57] 2015 Dec. at 80.

[58] 2015 Dec. 93-95 (emphasis added for clarity). The Department also found ambiguous the phrase "descendants of such members who were, on June 1, 1934, residing...on an Indian reservation." Neither the Act's language nor its legislative history made clear whether it was the members or their descendants who had to be in residence on June 1, 1934. If the former, then the category of individuals eligible for trust acquisitions under the second definition of "Indian" would be open to all descendants. If the latter, however, eligibility would be limited to the closed class of descendants alive and residing on the reservation in 1934.

[59] 2015 Dec. at 93. The Department additionally determined that Congress intended the second definition to be independent of the first as shown by the use of the conjunction "and" to link the two definitions. *Id.* Further, it would have been redundant for Congress to incorporate "under federal jurisdiction" into the second definition at a time when it was well-established that Indian residents of a reservation were automatically under federal authority. 2015 Dec. at 94.

[60] 2015 Dec. at 81.

[61] 2015 Dec. at 82. While Congress did not explain its emendation, Commissioner John Collier elsewhere emphasized that the bill was designed to be flexible to meet unique problems arising across Indian country. *Id.* at 83.

to accommodate the particular circumstances of each tribe and reservation.[62] The Department's later implementation of the IRA showed that reservations established and primarily regulated under state law could be considered "reservations" for purposes of the second definition.[63] This was consistent with the historical evolution of the concept of a "reservation," which evolved alongside federal policy.[64] Current federal regulations contain different definitions of the term "reservation,"[65] while the Department's own Handbook on Federal Indian Law described the different forms a reservation may take and the different methods by which they are created.[66] The Department ultimately concluded that at the time Congress enacted the IRA, the generally accepted understanding of "Indian reservation" meant lands set aside for Indian use and occupation through a variety of ways,[67]which in turn required a case-by-case evaluation to determine whether a specific tract qualifies as such and what its "present boundaries" might be.[68]

The Department conducted a comprehensive, fact-intensive legal analysis of the Tribe's eligibility under Section 19 in light of the Department's interpretation of "reservation."[69] The Department examined the Tribe's continuous history in the Town of Mashpee from before European contact until modern times,[70] relying on extensive historical documentation, including materials assembled before the Office of Federal Acknowledgment when considering the Tribe's petition for federal acknowledgment. The record showed the Tribe's long-standing relationship with the lands now comprising the Town of Mashpee and the intertwined relationship between the Tribe, the British Crown and Province of Massachusetts before the United States was founded. [71] The record showed the recognition and protection of that relationship by the Crown and Colonial governments and by the Commonwealth of Massachusetts, separate and apart from protections later enacted by the United States, such as the Non-Intercourse Act.[72] It further showed that the federal government had considered the Tribe as inhabiting a reservation in the 1820s when considering implementation of the federal removal policy.[73]

The Department determined that the historical record showed that a reservation had been set aside for the Tribe's occupation and use under the protection of the colonial court and government, and that such reservation continued to exist and continued to be occupied by Mashpee tribal members through 1934.[74] Based on this information, the Department found that the Tribe was composed of descendants of members of a recognized Indian

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[62] 2015 Dec. at 83.
[63] 2015 Dec. at 87-88.
[64] 2015 Dec. at 95.
[65] 2015 Dec. at 95, comparing 25 C.F.R. §§ 151.20 and 292.2.
[66] 2015 Dec. at 96-97.
[67] 2015 Dec. at 98.
[68] 2015 Dec. at 98-99.
[69] *See* 2015 Dec. at101-120.
[70] 2015 Dec., at 101 ff..
[71] 2015 Dec. at 102.
[72] 2015 Dec. at 110-112. 25 U.S.C. § 177.
[73] 2015 Dec. at 104-105.
[74] 2015 Dec. at 113-119.

tribe.[75] Accordingly, the Department determined that it had the authority to acquire land in trust for the Tribe's benefit under the IRA's second definition of "Indian."

C. *Littlefield* Litigation

On February 4, 2016, certain residents of the City of Taunton brought suit in the United States District Court for the District of Massachusetts under the Administrative Procedure Act[76] challenging the Department's decision to acquire land in trust for the Tribe.[77] In addition to challenging the Department's interpretation of the IRA's second definition, the Littlefields claimed, among other things, that the Department erred by concluding that the Tribe satisfied the second definition.[78] The parties subsequently filed cross-motions for summary judgment on that claim.[79]

On July 28, 2016, the District Court ruled, contrary to the Department's position, that the phrase "such members" as it appears in the IRA's second definition of "Indian" unambiguously incorporates the entire antecedent phrase "members of any recognized Indian tribe now under Federal jurisdiction" in the first definition and remanded the matter to the Secretary for further proceedings consistent with the court's opinion.[80] The district court's decision included language suggesting that the Court further concluded that the Tribe was not under federal jurisdiction in 1934. Because the Department had expressly declined to reach that issue in the 2015 Decision, however,[81] the Department sought reconsideration or clarification by the court of its July 28, 2016 order.[82]

On October 12, 2016, the district court clarified its July 28, 2016 decision.[83] The court explained that its previous ruling had held that in order to qualify as an eligible beneficiary under the IRA's second definition of "Indian," the Tribe must have been under federal jurisdiction in 1934.[84] The court noted that the 2015 Decision included no such finding based on the Department's conclusion that the second definition did not incorporate the "under federal jurisdiction" phrase.[85] The court therefore clarified that it

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[75] 2015 Dec. at 112. Since the Tribe had also shown that its current members included persons who had resided on the Mashpee reservation in 1934 as well as descendants thereof, the Department found no need to address whether the second definition's residency requirement applied to "descendants" or "members." 2015 Dec. at 100.

[76] 5 U.S.C. §§ 701-706.

[77] *Littlefield, et al. v. United States Dep't of the Interior*, Case No. 16-CV-10184 (D. Mass).

[78] Plaintiffs' remaining causes of action challenged the Department's conclusions that the Tribe had significant historical connection to the City of Taunton; that the distinct Mashpee and Taunton parcels could together form the Tribe's "initial reservation"; and that the Tribe's Mashpee lands constituted a "reservation" for purposes of the IRA. Plaintiffs' fifth cause of action challenged Section 5 of the IRA as an unconstitutional delegation of legislative authority. Plaintiffs further sought to collaterally attack the Tribe's federal acknowledgment. *See* Complaint at ¶¶ 91-96.

[79] *Littlefield v. United States Dep't of the Interior,* 16-CV-10184 (D. Mass.), Dkt. Nos. 55, 59 (July 7, 2016).

[80] *Littlefield v. United States DOI*, 199 F.Supp.3d 391, 400 (D. Mass. 2016).

[81] Dkt. 87 at 22.

[82] Dkt. 99 (Aug. 24, 2016).

[83] Dkt. 121 (Oct. 12, 2016).

[84] Dkt. 121 at 2.

[85] Dkt. 121 at 2.

would be "no violation of the Court's [July 28] order should the agency wish to analyze the Mashpees' eligibility under the first definition of 'Indian'" or to "reassess the Mashpees' eligibility under the second definition consistent with the Court's ruling on the proper interpretation of that definition."[86]

Although the Department initially filed a notice of appeal challenging the district court's interpretation of the IRA, the Department ultimately moved for voluntarily dismissal of its appeal.[87] The United States Court of Appeals for the First Circuit granted the Department's motion for voluntary dismissal on May 8, 2017. Because the Department is bound to apply the district court's interpretation of the IRA's second definition in this remand proceeding, I therefore may grant the Tribe's land-into-trust application under the IRA's second definition only if I find that the Tribe was under federal jurisdiction in 1934.

D. Remand Proceedings

On December 6, 2016, the Department notified the parties to the *Littlefield* litigation of the procedures to be followed on remand.[88] The Department invited the Tribe to submit by January 6, 2017, any evidence or argument it wished the Department to consider in determining whether the Tribe was under federal jurisdiction in 1934 for purposes of the IRA. The Department provided Plaintiffs with a thirty-day window in which to respond to the Tribe's submission, and it provided the Tribe with a final 15-day window in which to reply. The Tribe provided its opening submissions on December 21, 2016 and January 5, 2017. Plaintiffs requested and received an extension of time to submit their response, which Plaintiffs ultimately filed on February 14, 2017. The Tribe's reply was timely submitted to the Department on February 28, 2017. On April 19, 2017, the Department notified the parties that its decision would issue by June 19, 2017.[89]

II. DISCUSSION

I first summarize the arguments presented by the Tribe and the Littlefields on remand. I next address the Littlefields' request for the "vacatur" of M-37029 and its two-part framework and explain why M-37029 governs my analysis. I then set out the standard of review under M-37029 and discuss the parties' interpretations thereof. Applying the M-37029 framework to the record before me, I conclude that the evidence submitted by the Tribe fails to show particular exercises of federal authority sufficient to conclude that the Tribe was under federal jurisdiction in or before 1934.

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[86] Dkt. 121 at 2.
[87] Motion to Voluntarily Dismiss Appeal, *Littlefield, et al. v. U.S. Dep't of the Interior*, No. 16-2481 (1st Cir. Apr. 27, 2017).
[88] *See* Letters, Principal Deputy Assistant Secretary- Indian Affairs Lawrence Roberts to Adam Bond, Cedric Cromwell, Matthew Frankel, David Tennant (Dec. 6, 2016).
[89] Email, Associate Solicitor – Indian Affairs Eric Shepard to the parties (Apr. 19, 2017).

A. Summary of Arguments

1. Mashpee Tribe Opening Brief

Part one of the Tribe's opening submissions addresses the single legal question of whether the historical relationship between the Tribe and the Commonwealth of Massachusetts (State) precludes the possibility of federal jurisdiction over the Tribe.[90] The Tribe argues that the federal government's authority over Indian affairs is paramount throughout the United States, including within the original thirteen states. While some of the original thirteen states exercised authority over tribes within their borders, the federal government assumed plenary authority over tribes everywhere upon ratification of the United States Constitution in 1788. Assertions of state authority over tribes within a state cannot and do not oust paramount federal authority, which may be exercised at any time and which can only be terminated by Congress. Based on these principles, the Tribe argues that Massachusetts's treatment of the Tribe and its members could not, as a matter of law, oust the federal government's supreme jurisdictional authority. The Tribe explained that by 1882 the State had ceased treating the Tribe as Indians, having enacted legislation making Tribal members state citizens and making Tribal lands into alienable fee property. The Tribe asserts that federal officials erred in and around 1934 in claiming that the Tribe remained under state jurisdiction. Instead, the Tribe argues, the Tribe at that time was solely within the federal government's Indian affairs authority.

Part two of the Tribe's opening submissions addresses the evidence of the Tribe's federal jurisdictional status before and in 1934. The Tribe claims that, viewed in totality, its evidence indisputably shows exercises of federal jurisdiction over the Tribe.[91] Largely repeating its 2012 arguments (*see above*), the Tribe offers general and particular grounds why it was "under federal jurisdiction" in 1934. Broadly, the Tribe argues for being under federal jurisdiction as a matter of law based on "treaty-like" obligations of the British Crown to which the United States later succeeded; federal restraints against alienation of the Tribe's aboriginal lands; and the continuing existence of usufructuary rights into the twentieth-century. More particularly, the Tribe claims it was placed under federal jurisdiction through specific federal activities, including considering the Tribe for removal in the 1820s; federal policy recommendations concerning Massachusetts tribes in the 1850s; mention of the Tribe on federal censuses between 1850 and 1910; and the enrollment of Tribal students at the Carlisle Indian Industrial School in the early decades of the 1900s. The Tribe offered as further evidence of specific federal acts including references to the Tribe and its history in federal reports or studies in 1888, 1890 and 1935.

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[90] Mashpee Wampanoag Tribe, "The Early Relationship Between The Mashpee Wampanoag Tribe And The Commonwealth Of Massachusetts Cannot Preclude Federal Jurisdiction Under The IRA" (Dec. 21, 2016).

[91] Mashpee Wampanoag Tribe, "The Mashpee Wampanoag Tribe Is Eligible For Land Into Trust Under the Indian Reorganization Act As A Tribe Under Federal Jurisdiction In 1934" (Jan. 5, 2017) (MWT Op. Br.).

2. Littlefield Response

The Littlefields submitted a 112-page response to the Tribe's submission on February 14, 2017.[92] They devote nearly half to arguing for the "vacatur" of Solicitor's Opinion M-37029. The remainder offers several arguments to refute the Tribe's claims and show that the Tribe could not be under federal jurisdiction under any test. The Littlefields first contend that the United States is judicially estopped from finding that the Tribe was recognized and under federal jurisdiction in 1934, based on 1970s litigation finding that the Tribe lacked standing to bring claims under the Nonintercourse Act. They next argue that the Tribe cannot show it was under federal jurisdiction because its history of state jurisdiction cannot meaningfully be distinguished from that of the Narragansett Tribe, which *Carcieri* concluded was not under federal jurisdiction in 1934. The Littlefields also reject the particular forms of evidence submitted by the Tribe, arguing that *Carcieri* requires evidence of federal actions akin to a treaty, legislation, or formal benefits enrollment with the Office of Indian Affairs. The Littlefields conclude by arguing that Office of Indian Affairs officials disclaimed responsibility for the Tribe in and around 1934, conclusively showing the Tribe could not then have been under federal jurisdiction.

3. Mashpee Tribe Reply

The Tribe submitted its reply to the Littlefield Response on February 28, 2017.[93] The Tribe's Reply includes a new argument not raised in the Tribe's opening submissions.[94]The Tribe in its Reply additionally argues that because the Tribe occupied a reservation in 1934, as the Department in its 2015 Decision determined, it was automatically eligible to conduct a vote under IRA Section 18 to approve the IRA, and that such eligibility alone should be dispositive of its jurisdictional status.

Second, the Tribe argues that its 2007 federal acknowledgment entailed a finding of continuous tribal existence for all purposes of federal law. Based on this, the Tribe also claims that the Littlefields' argument for collateral estoppel amounts to an improper collateral attack on the acknowledged status of the Tribe.

Third, the Tribe presents arguments showing why the Narragansett Tribe's history is not relevant. The Tribe contends that Narragansett's jurisdictional status was never at issue in the *Carcieri* litigation, which turned instead on the meaning of "now" in the IRA's first definition of "Indian." The Tribe further argues that unlike with Mashpee, the federal government retroactively disclaimed jurisdiction over the Narragansett in 1934.

The Tribe also challenges the evidentiary standard relied on by the Littlefields. The Tribe contends that the test does not require an active guardian-ward relationship in effect in 1934 or even specific evidence from the year 1934. The Tribe further contends that the Littlefield Response confuses two distinct issues, namely, whether Massachusetts'

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[92] Citizens Group, "Submission on Remand, *Littlefield, et al. v. Department of the Interior*, No. 16-10184 (D. Mass 2016) (Littlefield Resp.).

[93] Mashpee Wampanoag Tribe, "Reply to Citizens' Group Submission on Remand, Littlefield, et al. v. Department of the Interior, No. 16-10184 (D. Mass., 2016) (Feb. 28, 2017) (MWT Reply).

[94] The Littlefields raised no objection to the Tribe's new argument.

exercise of jurisdiction over the Tribe could preclude federal jurisdiction, and whether federal officials in 1934 could waive federal jurisdiction in favor of state jurisdiction over a tribe. The Tribe concludes that state jurisdiction cannot, as a matter of law, preclude federal jurisdiction over Indian affairs and, separately, that M-37029 specifically states that once federal responsibility to a tribe attaches, only Congress may terminate it.

The Tribe concludes by denying that its evidence is episodic or insubstantial, as the Littlefields claim. The Tribe further notes the Littlefields' purported failure to address the Tribe's continued occupation of its aboriginal territory and the unique legal consequences thereof.[95] According to the Tribe, this forms a "fundamental feature" of the Tribe's interaction with the United States that must be viewed with the Tribe's other evidence of federal jurisdiction.

B. Littlefield "Vacatur" Request

The Littlefields devote nearly half of their Response to argue for the "vacatur" of M-37029 for being contrary to law and for lacking any meaningful test for determining when a tribe is *not* under federal jurisdiction in 1934.[96] While signed M-opinions are binding on Departmental offices and officials, including the Assistant-Secretary – Indian Affairs,[97] they may be modified by the Secretary, Solicitor, or Deputy Secretary.[98] The courts to have thus far assessed its interpretive framework have upheld its interpretation of IRA Section 19 and its two-step procedure for determining when a tribe was under federal jurisdiction in 1934.[99]

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[95] MWT Reply at 31 ff.

[96] *See* Littlefield Resp. at 2, 8-49. Despite being aimed at M-37029, the Littlefields include numerous arguments in this section of their Response that in fact challenge the merits of the Tribe's submissions, not M-37029.

[97] U.S. Dep't of the Interior, Departmental Manual, Part 209, ch. 3.2(A)(11), available at *http://elips.doi.gov/elips/*. *See also Rocky Mountain Oil & Gas Ass'n v. Andrus*, 500 F. Supp. 1338, 1341-42 (D. Wyo. 1980), *rev'd on other grounds and remanded*, 696 F.2d 734 (10th Cir. 1982) (Solicitor's opinions considered the "law of the Department"). The Secretary has delegated the authority to perform all the legal work of the Department to the Solicitor, 209 DM 3.1(A), who has responsibility for issuing final legal interpretations in the form of published M-Opinions on all matters within the jurisdiction of the Department. 209 DM 3.2(A)(11).

[98] 209 DM 3.2(A)(11).

[99] *See Confederated Tribes of the Grande Ronde Cmty. of Or. v. Jewell*, 75 F.Supp.3d 387 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016), *cert. den. sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S.Ct. 1433 (2017); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-cv-0660 (LEK/DEP), 2015 U.S. Dist. LEXIS 38719 (N.D.N.Y. Mar. 26, 2015), *aff'd*, 2016 U.S. App. LEXIS 21965 (2d Cir. 2016), *petition for cert. filed*, (U.S. Mar. 9, 2017) (No. 16-1135) (deferring to Department's reasonable interpretation of "under federal jurisdiction"); *Citizens for a Better Way v. United States DOI*, No. 2:12-cv-3021-TLN-AC, 2015 U.S. Dist. LEXIS 128745, at *54 (E.D. Cal. Sep. 23, 2015) (upholding Department's reliance on IRA Section 18 vote in 1935 as dispositive evidence of being "under federal jurisdiction" for purposes of IRA Section 5); *Stand Up for Cal.! v. United States DOI*, 204 F. Supp. 3d 212, 282 (D.D.C. 2016) (same); *No Casino in Plymouth and Citizens Equal Rights Alliance v. Jewell*, 136 F. Supp. 3d 1166 (E.D. 2015), *appeal docketed*, No. 15-17189 (9th Cir. Nov. 3, 2015); *County of Amador v. Jewell*, 136 F. Supp. 3d 1193 (E.D. 2015), *appeal docketed*, No. 15-17253 (9th Cir. Nov. 13, 2015).

Many of the Littlefields' arguments for vacatur in addition seem misdirected, going as they do to the merits of the Tribe's remand submissions.[100] Such arguments have less to do with M-37029's interpretive framework than with how the Littlefields think it should be applied to the Tribe's submissions. The actual vacatur arguments the Littlefields proffer have two targets. The first is M-37029's interpretation of "under federal jurisdiction," which the Littlefields challenge as contrary to the IRA's purpose, intent, and historical context. The Littlefields claim that Congress intended to limit the IRA's benefits only to "restricted" Indians who were impoverished, uncivilized, and not state citizens. As explained below, such views have no support in the text or legislative history of the IRA.

The Littlefields' second aim is the two-step test for assessing jurisdictional status under M-37029. The Littlefields claim the test is inadequate since it can be satisfied easily by virtually any tribe, contrary to the decision in *Carcieri*. They further attack the kind of evidence M-37029 suggests may be used as insufficient. The Littlefields separately challenge the second step of M-37029's jurisdictional test, which considers whether a tribe's pre-1934 jurisdictional status (if any) continues or not through 1934. This includes two extraordinary claims: first, that Congress does not have sole authority to terminate a tribe; and second, that the courts may also terminate a tribe's acknowledged status when a tribe fails to continuously maintain a "tribal" status. These arguments find no support in judicial precedent or congressional enactments, and they run counter to the Constitutional foundations of the federal Indian affairs authority. I briefly address and reject the Littlefields' criticisms of M-37029 before turning to the question whether the Tribe's submissions meet its two-part framework, concluding that they unquestionably fall short.

1. Meaning of "UFJ"

The Littlefields claim that the interpretation of UFJ in M-37029 is contrary to law for several reasons. They first argue that UFJ must be interpreted narrowly to include only "restricted Indians" having a guardian-ward relationship with the United States who (1) had financial need; (2) were "unassimilated"; and (3) were not state citizens. Ignoring M-37029's exhaustive analysis of the legislative history behind the IRA, the Littlefields derive the requirement of financial need from the IRA's general "historical context." They assert that the Act was a "Depression-era" statute intended to limit benefits to Indians who "truly needed the Federal Government's ... support."[101] The Littlefields' suggested "restricted Indian" and "unassimilated" criteria derive from the Meriam Report, a *pre*-Depression study of the history and status of the federal government's implementation of the General Allotment Act. The plain language of the IRA, however, provides no support for the criteria suggested by the Littlefields, who do not dispute that the phrase "under federal jurisdiction" is ambiguous and subject to more than one interpretation. Neither the Act's plain terms nor its legislative history suggest that its

[100] *See, e.g.,* Littlefield Resp. at 15 (arguing legal effect of Massachusetts' extension of state citizenship to Tribe in 1869); 30 (significance of federal correspondence with Tribe in 1930s); 44-45 (discussing effect Mashpee land-claim litigation); 25-32 (arguing similar historical circumstances means that *Carcieri*'s finding of no federal jurisdiction for Narragansett Tribe renders Mashpee ineligible as well); 39-40 (challenging reliance on Carlisle Indian School records).

[101] Littlefield Resp. at 11.

benefits are conditioned by financial need, much less "civilizational" status. Nor would that make sense, since the Act's benefits are not directly financial, but instead meant to assist Indians in reorganizing their communities and replacing lost opportunities for economic development in the wake of the discredited General Allotment Act.

Next, the Littlefields argue that M-37029 is an "administrative nullification" of *Carcieri* that ignores the benchmark the Supreme Court set for the Narragansett Tribe.[102] This argument goes to the substance of the evidence submitted by the Tribe on remand, not the Solicitor's interpretation of UFJ in M-37029. It further misrepresents *Carcieri*, which did not offer an interpretation of UFJ, much less establish a "benchmark" for use by other tribes, finding instead that the parties had already conceded that the Narragansett were not under federal jurisdiction in 1934.[103]

2. Test of Federal Jurisdiction

a. Criteria

In addition to attacking M-37029's legal foundation generally, the Littlefields challenge its two-part framework for assessing federal jurisdiction particularly.[104] The Littlefields offer broad, conclusory assertions about the test while offering no evidence in support of their claims. For example, they claim that M-37029's two-step test is "too loosely structured"; may be satisfied by any listed evidence "*or, remarkably, without any of them*" (emphasis original); "basically any historical facts can count"; offers no meaningful guidance; amounts to "we know it when we see it" test; and is an "absurdity" that thwarts judicial review.[105] Courts, after considering arguments such as these, have consistently upheld the test set forth in M-37029 as reasonable,[106] and the Littlefields' own arguments rely on examples of its prior application.[107]

Consistent with their misunderstanding of the IRA's legislative intent, the Littlefields argue that the test under M-37029 should be narrower. The Littlefields inaccurately assert that M-37029 does not address "a key limiting principle" of the IRA, namely, "living under federal tutelage," which the Littlefields do not otherwise define.[108] To the contrary, M-37029's exhaustive review of the IRA's legislative history[109] expressly noted that it includes references to "more limiting terms such as 'federal supervision,' 'federal guardianship,' and 'federal tutelage.'"[110] Nevertheless the Solicitor concluded in M-37029 that, by relying "on the *broader* concept of under federal jurisdiction," Congress chose not to rely on those terms.[111] The Littlefields assert that the jurisdictional analysis

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[102] Littlefield Resp. at 25, 47.
[103] M-37029 at 5. *See Carcieri*, 555 U.S. at 399.
[104] Littlefield Resp. at 32-39.
[105] Littlefield Resp. at 32, 38, 39.
[106] *See, supra*, n. 97.
[107] Littlefield Resp., App. A (table detailing evidence relied on by the Department in prior determinations of "under federal jurisdiction" status).
[108] *See, e.g.*, Littlefield Resp. at 8.
[109] M-37029 at 6-12 (analyzing legislative history).
[110] M-37029 at 11, n. 71.
[111] M-37029 at 11-12, n. 71 (emphasis added).

should rely on criteria including financial need,[112] Indian service enrollment,[113] and "assimilated"[114] or civilizational status[115] (which the courts might evaluate at any time[116]), including state citizenship.[117] The Littlefields offer no authority for limiting the meaning of "under Federal jurisdiction" in this way, nor do they offer any examples of the type of records that might be used to satisfy their criteria.

I conclude that the Littlefields' interpretation runs counter to the plain text and legislative history of the IRA. Though they claim to derive their criteria from the IRA's historical context as a "Depression-era law,"[118] they rely primarily on a pre-Depression study of the General Allotment Act's implementation published six years before the IRA's enactment.[119] Further, as even the Littlefields note, Congress added the phrase "now under federal jurisdiction" to restrict the IRA's *first* definition of "Indian."[120] Its other provisions contain no reference to "assimilation" or state citizenship, and nowhere does the IRA require means-testing.[121] The remaining provisions of Section 19 make plain that the benefits of the IRA may extend to Indians based on their degree of Indian ancestry or on their status as Eskimos or aboriginal peoples of Alaska.[122]

b. Evidence

The Littlefields favorably offer Justice Breyer's view that the "under federal jurisdiction" requirement implies an obligation that is "jurisdictional in nature."[123] Under Justice Breyer's view, they claim, evidence to show a jurisdictional act must be more than a casual contact with a tribe. It must be dispositive, "something like a federal treaty, congressional appropriation, or direct supervision through the Indian Office," and must generally go beyond contacts with individuals.[124] Yet M-37029 already takes this approach. It rejects any test of under federal jurisdiction that relies only on Congress' plenary authority as inconsistent with the decision in *Carcieri*. Far from the

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[112] Littlefield Resp. at 11.
[113] *See* Littlefield Resp. at 16, n. 7.
[114] Littlefield Resp. at 11 (IRA distinguishes unassimilated "long hairs" from Indians "assimilated as state citizens").
[115] *See, e.g.*, Littlefield Resp. at 11ff. (purpose of IRA is to provide emergency relief to unassimilated Indians).
[116] Littlefield Resp. at 35.
[117] Littlefield Resp. at 16.
[118] Littlefield Resp. at 11, 15.
[119] *See* M-37029 at 6, n. 40, citing The Institute for Govt. Research, Studies in Administration, *The Problem of Indian Administration* (1928).
[120] *See* Littlefield Resp. at 13-14, citing *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 Before the Senate Committee on Indian Affairs*, 73rd Cong. at 237 (May 17,1934); *see also* M-37029 at 10. The District Court has since determined, contrary to the Department's interpretation of Section 19, that the second definition of "Indian" incorporates the jurisdictional requirement of the first.
[121] The IRA provides no direct financial benefits, but is instead intended to restore measures of political economic self-determination.
[122] The Littlefields err in their description of the IRA's third definition of "Indian," which does not, on its face, require a showing of "*more* than ½ [Indian] blood." Littlefield Resp. at 13 (emphasis added).
[123] Littlefield Resp. at 29, citing *Carcieri*, 555 U.S. at 399.
[124] Littlefield Resp. at 30.

"administrative nullification" the Littlefields claim,[125] M-37029 instead expressly acknowledges that *Carcieri* counsels the Department to point to "some indication...*beyond* the general principle of plenary authority to show that a tribe was under federal jurisdiction in 1934."[126]

M-37029 includes a discussion of the kinds of historical evidence that can show federal jurisdiction over a tribe, including treaties, congressional appropriations, and direct federal supervision.[127] But it also notes that a one-size-fits-all list of evidence types would not reflect the changing nature of federal Indian policy over time, from treaty-making to legislation to assimilation and allotment.[128] As a result, the types of federal actions that might show that a tribe was under federal jurisdiction may differ depending on the tribe and when first contact with non-Indians occurred.[129] However, my determination that the Tribe fails to satisfy the two-part analysis set forth in M-37029 eliminates any need to address the Littlefields' hypothetical claims whether a reasonable alternative analysis exists.

Finally, I note that the view that only Congress may terminate a tribe's government-to-government relationship with the United States, which the Littlefields characterize as "extreme,"[130] is in fact the view of Congress itself. In 1994 Congress expressly stated that a tribe acknowledged by Congressional legislation, administrative procedures, *or* judicial decision "may not be terminated *except by an Act of Congress*."[131]

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[125] Littlefield Resp. at 47.
[126] M-37029 at 18 (emphasis added).
[127] M-37029 at 14-16; 19-21.
[128] M-37029 at 14. *See also Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 565 (D.C. Cir.), *cert. denied sub. nom. Citizens Against Reservation Shopping v. Zinke*, 137 S.Ct. 1433 (2017) (contextual analysis takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian affairs and implementing the statute).
[129] The Littlefields also reject the jurisdictional significance of elections called by the Secretary pursuant to Section 18 of the IRA. Littlefield Resp. at 38. They equate a tribe's vote to reject the IRA with a rejection of federal jurisdictional authority. That mistakes the exercise of tribal self-determination for the federal exercise of Indian affairs jurisdiction, however, and neglects that the Indians who vote in a Section 18 election only do so *after* federal officials determine their eligibility – that is, conclude that they are eligible Indians over whom the federal government has jurisdiction. The Littlefields' view is also contrary to federal law. In 1983, Congress enacted the Indian Land Consolidation Act (ILCA). Pub. L. N. 97-459, 96 Stat. 2517, as amended. ILCA expressly directs that Section 5 of the IRA "shall apply to *all* tribes" notwithstanding the opt-out provisions of Section 18. 25 U.S.C. § 2202. As the majority in *Carcieri* stated, "[Section] 2202 by its terms simply ensures that tribes may benefit from [Section 5] *even if they opted out of the IRA pursuant to* [*Section 18*]." 555 U.S. at 394-95 (emphasis added). *See also Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 572 (2d Cir. 2016) (emphasis original), citing 25 U.S.C. § 2202.
[130] Littlefield Resp. at 36. M-37029 relies on this settled principle of law in pointing out that the failure by federal officials to take actions on behalf of a tribe or their disavowal of legal responsibility toward a tribe may not, in themselves, necessarily reflect a termination or loss of jurisdictional status "absent express congressional action." M-37029 at 20.
[131] Pub. L. No. 103-454, § 103, 108 Stat. 4791 (Nov. 2, 1994) (emphasis added). *See, e.g.*, *United States v. Zepeda*, 738 F.3d 201, 211 n.11 (9th Cir. 2013) ("Congress has declared that it alone has the authority to terminate a tribe's federally recognized status"); *Stand Up for Cal.! v. United States DOI*, 204 F. Supp. 3d 212, 301 (D.D.C. 2016) (tribe recognized through legislation, part 83 or by US court decision may not be terminated without an Act of Congress); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 37 (D.D.C. 2000). *See also Baker v. Carr*, 369 U.S. 186, 216 (1962), citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913)

C. Standard of Review

As already explained,[132] the Department construes the phrase "now under federal jurisdiction" in light of *Carcieri* as requiring a two-part inquiry.[133] The first part considers whether a tribe can show that the United States took an action or series of actions in or before 1934 that establish, or that generally reflect, federal obligations, duties, responsibility for or authority over the tribe by the federal government.[134] Such actions could include a course of dealings or other relevant acts for or on behalf of the tribe or, in some instances, its tribal members.[135] Evidence of such action might be specific to the tribe, such as treaties and treaty negotiations; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); or the provision of health or social services to a tribe. Other evidence might include actions by the Office of Indian Affairs, which exercised administrative jurisdiction over tribes, individual Indians, and their lands.

Where a tribe can establish it was historically under federal jurisdiction , the second part of the test ascertains whether there exists evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status remained intact as of 1934.[136] The lack of federal actions following the original establishment of jurisdiction does not, in itself, necessarily reflect a termination or loss of the tribe's jurisdictional status since in some instances a tribe's federal jurisdictional status may have continued even where federal officials thought otherwise.[137]

D. Analysis

M-37029 requires that I first determine whether the Tribe's submissions demonstrate a federal action or series of actions establishing or reflecting federal obligations, duties,

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(settled that Congress has right to determine for itself when guardianship over Indians shall cease); *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013 (JFB) (ARL), 2008 U.S. Dist. LEXIS 75826, at *28 (E.D.N.Y. Sep. 30, 2008) (federal recognition of Indian tribes poses a political question for Congress -- or, by delegation, the BIA -- to decide in the first instance and for federal courts to review pursuant to the APA only after a final agency determination), citing *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994); *Kahawaiolaa*, 386 F.3d at 1276; *Miami Nation of Indians of Ind., Inc. v. Dep't of Interior*, 255 F.3d 342, 346-48 (7th Cir. 2001); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993); *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D. C. Cir. 1987); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1372-73 (Fed. Cir. 2005). As this further suggests, there is no basis in law for the Littlefields' unusual claim that the courts may *revisit* acknowledgement determinations from time to time to ensure a tribe's continuing adherence to recognition criteria. Littlefield Resp. at 35 ("Should the facts on the ground change with respect to an Indian group's organizational status and ability to satisfy the Montoya test, as may happen over time, nothing would preclude a court from reaching a different decision at a later date, again without any need for congressional approval").

[132] *See* Sec. I.A.2 above.

[133] M-37029 at 18-19.

[134] M-37029 at 19.

[135] M-37029 at 19.

[136] M-37029 at 19-20.

[137] M-37029 at 20, citing Stillaguamish Memo.

responsibility for or authority over the Tribe at or before 1934.[138] The Tribe claims that its evidence shows it was under federal jurisdiction before 1934 by operation of law and by virtue of specific exercises of federal authority that include federal acknowledgment of the Tribe's collective rights in land and natural resources; federal acknowledgment of its jurisdiction over the Tribe; federal management of tribal funds; inclusion of the Tribe in federal censuses; enrollment of Tribal children at an off-reservation federal Indian school; agency jurisdiction over the Tribe; and the federal provision of healthcare to the Tribe. As explained in more detail below, however, I conclude that the Tribe's submissions fail to provide evidence to satisfy the first step of M-37029's two-part inquiry.

1. Jurisdiction by Operation of Law

In stating the standard of review under M-37029,[139] the Tribe accurately notes that tribes lacking dispositive jurisdictional evidence in 1934 may show that their jurisdictional status arose before then. In doing so the Tribe further states that the analysis under M-37029 may look to federal obligations as well as activities, "since federal jurisdiction can exist as a matter of law" even if the government is unaware that it does.[140] The Tribe appears to do so in order to suggest that it came under federal jurisdiction as a matter of law in the early constitutional period.[141] The Tribe argues that after the American Revolution, the United States automatically succeeded to "treaty-like" obligations of the British Crown to the Tribe. [142] As evidence of these obligations the Tribe points to seventeenth-century colonial deeds from Wampanoag sachems conveying lands to the Tribe in perpetuity. The Tribe also cites a 1763 law by the Massachusetts Bay Province recognizing Mashpee as a self-governing Indian district.[143]

I disagree, however, that these title deeds and legislative acts are comparable to treaties. They are not "contracts between governments" and do not evidence mutual commitments between the Tribe and Crown, much less any reciprocal grant of rights by the Tribe to the

[138] M-37029 at 18-19.
[139] MWT Op. Br. at 3. The Littlefields' objections to M-37029's analytic framework are addressed in Section II.B above.
[140] MWT Op. Br. 4-5, citing M-37029 at 18, 19, 23.
[141] MWT Op. Br. at 10-21.
[142] The Littlefields claim that any British obligations to the Tribe could only have been assumed by Massachusetts, since "[n]o Federal Government existed before 1789." Littlefields Resp. at 62. Yet the Supreme Court has held that when Britain's colonial sovereignty ceased, its powers in respect of external affairs passed to the American colonies "in their collective and corporate capacity as the United States of America." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936). As the Court noted, the purpose of the Constitution was to make "more perfect" that already existing Union. *Id. See also United States v. Lara,* 541 at 202 (in first century of America's national existence, Indian affairs were aspect of military and foreign policy, not domestic or municipal law).
[143] MWT Op. Br. at 13, citing Ex. E. By its terms, the 1763 Act incorporated the Mashpee Indians and their lands and provided for governance by five elected overseers, two of whom where to be Englishmen, with sole power to regulate the fishery at Mashpee and the allotment and leasing of Mashpee lands. *See* ACTS AND RESOLVES OF THE PROVINCE OF THE MASSACHUSETTS BAY. VOL. IV at 639-641 (1890).

Crown.[144] Further, while the Tribe characterizes the 1763 Act that established Mashpee as an Indian district to be the result of a "negotiated relationship" with the Crown,[145] the Office of Federal Acknowledgment showed it was the result of Tribal appeals to the Provincial legislature and Crown.[146] The Province passed the 1763 Act in response to "diplomatic pressure" from the King, not a treaty between Crown and Tribe.[147] The absence of any evidence of federal action in acknowledging or relying on the deeds or provincial acts, though not dispositive, diminishes the significance for our purposes.

Though the Mashpee Tribe asserts otherwise, the absence of any federal action with respect to its "treaty-like" rights distinguishes it from the Tunica-Biloxi Tribe, for whom the Department issued a favorable *Carcieri* analysis in 2011.[148] The Tunica-Biloxi Tribe fell under Spanish colonial authority before the United States acquired the Louisiana Territory through the 1803 Treaty of Paris. The Tribe held rights in its aboriginal lands by grant from Spain, and the Spanish government followed through on their commitment to defend the Tunica and their land by establishing a military post near the Tunica village to protect the Tunica and settlers from English and American colonists.[149] When the United States acquired the Louisiana Territory from France, the United States expressly assumed the same obligations to tribes in the Territory as those held by Spain.[150] To that end, Congress extended the Nonintercourse Act to the Louisiana Territory, and, more importantly, federal agents later used that law to affirmatively protect the Tunica-Biloxi Tribe's lands.[151]

The Mashpee Tribe elsewhere seeks to rely on the Nonintercourse Act to establish its own jurisdictional status;[152] yet the Tribe's own evidence shows that the federal government took no action to protect the Tribe's lands despite invitations to do so.[153] M-37029 makes clear that the *first* step of the jurisdictional inquiry looks to an "action or series of actions" or to "a course of dealings or other relevant acts" by federal officials demonstrating or reflecting the exercise of authority over the tribe at some point in or before 1934.[154] Only when that status is established does the inquiry turn to whether that jurisdictional relationship remained intact in 1934. As a result, the Tribe cannot rely on an inchoate jurisdictional status as the basis for being under federal jurisdiction.

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[144] *United States v. Wash.*, 520 F.2d 676, 684 (9th Cir. 1975), citing *United States v. Winans*, 198 U.S. 371, 381 (1905). *See also BG Grp. PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though between nations.")
[145] MWT Op. Br. at 14.
[146] MWT PF at 96.
[147] MWT PF 96.
[148] *See* MWT Op. Br., Ex. D (Letter, Randall Trickey, Acting BIA Eastern Regional Director to Early Barbry, Sr., Chairman, Tunica-Biloxi Tribe of Louisiana (Aug. 11, 2011)).
[149] MWT Op. Br., Ex. D at 8-9.
[150] MWT Op. Br., Ex. D at 9, citing The Treaty between the United States of America and the French Republic of April 30, 1803 at Art. 6, 8 Stat. 200.
[151] MWT Op. Br. at 6-7 (discussing Tunica-Biloxi); *id.*, Ex. D.
[152] MWT Op. Br. at 16-17.
[153] MWT Op. Br. at 20, citing Exhibits Y, Z (1886-1887 correspondence relating to state allotment of Tribe's lands); *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D. Mass. 1970), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (Tribe's Nonintercourse Act claims).
[154] M-37029 at 19.

In its Reply, the Tribe makes a similar argument for jurisdiction by operation of law based the Department's previous determination that the Tribe occupied a reservation in 1934. The Tribe claims the Department's determination has "legal consequences" for the M-37029 analysis.[155] The Tribe notes that after passage of the IRA, the Department's attorneys interpreted it as permitting any tribe in occupation of a reservation to vote in a Section 18 election, regardless how the tribe's reservation was established.[156] Based on that, the Tribe claims the Department's 2015 Decision entailed the finding that the Tribe was eligible to vote on the IRA in 1934 and was thus also under federal jurisdiction. I reject any claim that the 2015 Decision speaks to whether the Tribe was under federal jurisdiction in 1934 at all. The Department's inquiry there concerned only whether the Tribe occupied a "reservation" for IRA purposes. Based on the Department's understanding of the second definition of "Indian" at that time, it had no need address the Tribe's federal jurisdictional status. Moreover, the Tribe's argument misstates the role of the Secretary in conducting a vote on a tribe's reservation and misunderstands why the Department considers the calling of a Section 18 election to be dispositive evidence of a tribe's under federal jurisdiction status.

Whether the Secretary could have called a Section 18 election for the Tribe around 1934, a question we need not resolve here, the Tribe's eligibility alone would likely not satisfy the first step of the M-37029 analysis. As already noted, M-37029 requires evidence of particular federal acts. Before the Secretary could actually conduct any vote, he had to make an overt determination—i.e., take an action. He had to determine that adults lived on an eligible reservation and met the statute's definition of "Indian" such that they were entitled to the opportunity, provided by Section 18, to vote on whether to accept or reject the IRA. Indeed, the very reason a Section 18 vote is dispositive of a tribe's jurisdictional status is that it required the Secretary to determine the existence of a reservation and that the adult residents met the IRA's definition of "Indian," such that they were under federal jurisdiction and eligible for IRA benefits unless they opted out of the Act. In this way, the calling of a Section 18 election is an unmistakable assertion of federal jurisdiction.[157] As a result, the Tribe's argument in effect begs the question of whether it was under federal jurisdiction.

The parties also submit arguments concerning the import of Massachusetts' historical exercise of authority over Indians.[158] These arguments also do not address the issue of

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[155] MWT Reply at 2, citing Ex. A (2015 Dec.) at 120.

[156] MWT Reply at 2.

[157] M-37029 at 20-21.

[158] The state legislation referenced by the parties demonstrates the scope of authority that Massachusetts exercised over Indians in the Commonwealth. *See, e.g.*, Mass. Gen. L., ch. 148 (Mar. 26, 1793) (settling boundaries of Mashpee Tribe of Indians); Mass. Gen. L., ch. 27 (1798) (appropriating funds to compensate for costs incurred in recovering possession of Mashpee Indian lands); Mass. Gen. L., ch. 89 (1818) (appointing individuals to review Mashpee Indian system of governance); Mass. Gen. L., ch. 105 (1819) (requiring Indian descent to be Mashpee proprietor; granting overseers powers as "Guardians" over Mashpee Indians; penalizing liquor sales to Mashpee Indians; penalizing trespass and felling of timber on Mashpee lands; requiring annual review of overseer accounts by Court of Common Pleas); Mass. Gen. L., ch. 167 (1834) (establishing Mashpee plantation as district; limiting vote to proprietors; exempting proprietors from state and county taxes and prohibiting forfeiture of lands for taxes); Mass. Gen. L., ch. 72

particular exercises of federal authority. The Tribe argues that the United States retained paramount authority over Indian affairs in the original thirteen states, including Massachusetts, though it suggests that its exercise was slow to develop in the early constitutional period. It adds that, in any event, a state's relationship with a tribe does not oust or otherwise limit federal authority.[159] The Littlefields make several arguments in response why Massachusetts' authority over the Tribe precluded any federal jurisdictional relationship in or before 1934. The Littlefields assert that because the Tribe was always under the Commonwealth's care and authority, its members could never have been wards of the federal government.[160] They add that no Massachusetts tribe was ever recognized as a distinct political community by the United States via treaty or other legislative or executive act.[161] The Littlefields also claim that the Tribe's members voluntarily abandoned tribal relations when they acquired state citizenship[162] and that by 1934 they had fully assimilated into non-Indian society.[163]

The discussion by the parties of claimed state assertions of authority and provision of services and whether those assertions and provisions were illegal or improper miss the mark. The M-37029 analysis unfolds against the backdrop of federal plenary authority.[164] The question is not whether such authority exists, but whether federal officials ever exercised it with respect to a particular tribe at or before 1934. The inquiry is not a type of balancing test in which the instances of state assertions or exercises are compared and contrasted with exercises of federal authority. Instead, as M-37029 makes clear, in order to determine whether the Tribe was under federal jurisdiction for purposes of the M-37029 analysis, I must look instead to the arguments and evidence purporting to show specific exercises of federal authority over the Tribe.

2. Evidence of Particular Acts

The Tribe claims its submissions evidence particular exercises of federal authority over the Tribe in the years before 1934. These include an 1822 report prepared by the

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(1842) (allotting Mashpee lands in severalty; providing that remaining lands to be held in common exclusively for the use of Mashpee district; restricting alienation of allotted lands); Mass. Gen. L., ch. 463 (1869) (enfranchising all Massachusetts Indians; deeming all state lands held by Indians in severalty to be fee lands; restricting alienation of such lands for debts incurred before date of Act); Mass. Gen. L., ch. 293 (1870) (abolishing Mashpee Indian district; incorporating town of Mashpee; transferring all common lands, funds and all fishing and other rights to the town); Mass. Gen. L., ch. 248 (1878) (incorporating Town of Mashpee; ordering county register of deeds to record land records from prior Mashpee district in separate volume); Mass. Gen. L., ch. 151 (1882) (providing for appraisal and private sale of remaining common lands of Mashpee).

[159] Mashpee Wampanoag Tribe, "The Early Relationship Between The Mashpee Wampanoag Tribe And The Commonwealth Of Massachusetts Cannot Preclude Federal Jurisdiction Under The IRA" (Dec. 21, 2017).

[160] Littlefield Resp. at 2-3.

[161] Littlefield Resp. at 3.

[162] Littlefield Resp. at 15, 45, 52-53, 66. The Littlefields inaccurately assert that the Tribe's members "voted to become citizens of Massachusetts." *Id.* at 46. The enfranchisement of the Tribe's members came about through an act of the Massachusetts legislature aimed at all Indians in the Commonwealth. *See* Mass. Gen. L., ch. 463 (1869).

[163] *See, e.g.,* Littlefield Resp. at 32.

[164] M-37029 at 12-14 (discussing constitutional authorities that form backdrop of federal plenary authority).

Reverend Jedidiah Morse on the condition of Indians in the United States as a prelude to possible removal of eastern tribes;[165] the Office of Indian Affairs' reliance between 1825 and 1850 on statistical tables that referenced the Mashpee;[166] a six-volume work on the tribes of the United States commissioned by Congress and prepared by Henry Schoolcraft, which included a description of the Mashpee Tribe and policy recommendations concerning them;[167] several federal reports prepared between 1888 and 1934 that reference the Tribe and its history; federal censuses from 1910 and 1911that list Tribal members;[168] the enrollment of Tribal children in the Carlisle Indian Industrial School between 1905 and 1918;[169] and the purported acknowledgment by the United States Navy of the Tribe's usufructuary rights around 1950. [170] I address each in turn.

a. Morse Report

The discussion of the Tribe in an 1822 report commissioned by the United States from the Reverend Jedidiah Morse does not evidence the exercise of federal authority over the Tribe. In 1820, Secretary of War John C. Calhoun commissioned Reverend Morse, a reputable geographer, to visit various tribes in the country "in order to acquire a more accurate knowledge of their social and political conditions, and to devise the most suitable plan to advance their civilization and happiness."[171] Morse spent four months traveling from the eastern seaboard to the Northwest Territory gathering information from some tribes himself.[172] Acknowledging the difficulty of personally visiting "the whole territory inhabited by the Indians,"[173] information about other tribes was collected from other materials, including questionnaires.[174] Morse compiled the information in statistical tables "embracing the names and numbers of all the tribes within the jurisdiction of the United States."[175] The Report includes a 400-page appendix detailing the information Morse collected and summarizing it in several tables.

The Tribe fails to show how the Morse Report constitutes a federal action reflecting an exercise of authority over the Tribe. The Tribe characterizes the Morse Report as the "first explicit application of federal Indian policy" – not, however, to the Tribe in particular but "to eastern tribes" generally.[176] Yet as even the Tribe concedes, Congress ultimately took no steps to remove any tribes based on the Morse Report and, despite its

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[165] MWT Op. Br. at 21.
[166] MWT Op. Br. at 25-28.
[167] MWT Op. Br. at 28.
[168] MWT Op. Br. at 29, 30, 38.
[169] MWT Op. Br. at 32.
[170] MWT Op. Br. at 38.
[171] Rev. Jedidiah Morse, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS 11-12 (1822) (Morse Report).
[172] Morse Report at 13.
[173] Morse Report at 21.
[174] *See, e.g.,* Morse Report at 22 (announcing intent to collect and arrange existing facts and materials presently scattered in books and manuscripts).
[175] Morse Report at 23. *See also* at 22 (describing task as to "lay before the Government, as full and correct a view of the numbers and actual situation of the *whole* Indian population within their jurisdiction") (emphasis original).
[176] MWT Op. Br. at 21.

deliberations, enacted no national removal policy until the following decade.[177] The Tribe's evidence demonstrates that the federal government did little more than consider the Tribe, along with tribes across the United States, as *potentially* subject to the exercise of the federal Indian authority, in this case for the purpose of removal and resettlement. As this further suggests, the Morse Report only provides evidence of Congress' plenary authority over tribes.[178] This is consistent with the Department's 2015 Decision, which characterized the lands set aside for the Tribe as "subject to federal oversight as part of the Federal Government's larger agenda to remove Indians from their aboriginal territories" based on the Morse Report.[179] While the Morse Report provides evidence that the federal government was cognizant of the existence of the Tribe and its lands,[180] it does not further demonstrate any exercise of federal authority over any tribe, much less the Tribe itself. The Morse Report's compilation of general information about tribes in the United States, without more, does not amount to an action or course of dealings for purposes of the first part of M-37029's two-part analysis.[181]

The same is true of the subsequent use made of the Morse Report by Executive officials and Congress. The Tribe notes that the Morse Report was circulated to Congress and the Executive Branch for use in considering the development and application of federal trade and removal policies.[182]

The Tribe asserts that Congress "debated" the Morse Report, noting an express reference to Indians that "reside on their respective reservations" in Massachusetts, including the Mashpee Tribe.[183] But the House Report cited shows that the Morse Report was referred to the House Committee on Indian Affairs so its members could "know something of the situation of [the Indian tribes], and of their numbers" in considering proposed amendments to the Trade and Intercourse Act.[184] The passage relied on by the Tribe further shows that Representative Metcalf recited passages verbatim from the Morse Report.[185] As the full House Report makes clear, the Committee's concern was whether the government's plans for the "civilization of the Indians" was appropriately within the scope of federal authority generally. While such use of the Morse Report shows that the existence of certain tribes and their lands, including the Mashpee, was made known to Congress, it fails to demonstrate that Congress or the Executive Branch took any further action with respect to the Tribe in response.

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[177] MWT Reply at 36, n. 33; *see also* Littlefield Resp. at 73. It thus also remains unclear what "course of dealings between the Tribe and the United States" the Morse Report initiated. MWT Op. Br. at 21.
[178] MWT Reply at 22 (Administration's authority to consider Mashpee for removal based on federal jurisdictional authority over tribal lands wherever located).
[179] 2015 Decision at 115.
[180] *See* MWT PF at 40 (discussing Morse Report for evidence of Tribe's existence as a distinct community from historical times to the present).
[181] *See* MWT Op. Br. at 25-28 (describing federal government's use of statistical information). *Cf.* MWT Reply at 38 (federal jurisdictional inquiry "is not limited to federal actions but the presence of federal jurisdiction").
[182] MWT Op. Br. at 23 ff.
[183] MWT Op. Br. at 23, citing Ex. ZB (House of Representatives Report on Indian Trade, 17th Cong., 1st Sess., at 1794 (remarks of Rep. Metcalf)).
[184] MWT Op. Br., Ex. ZB at 1792.
[185] MWT Op. Br., Ex. ZB at 1793.

Similarly, the transmittal by Secretary of War John Calhoun of statistical information compiled by Colonel Thomas McKenney and based in part from the Morse Report reflects no exercise of federal authority over the Tribe. Indeed, when transmitting the information to President Monroe, Secretary Calhoun does not even mention the Tribe, but instead refers to "the small remnants of tribes in Maine, Massachusetts, Connecticut, Rhode Island, Virginia, and South Carolina."[186] He does so, moreover, for the limited purpose of reporting his presumption that any arrangement for the removal of Indians "is not intended to comprehend" those tribes.[187] President Monroe's transmittal to Congress is even less specific, as the Tribe notes.[188] It broadly recommends the removal of Indian tribes "from the lands they now occupy, within the limits of the several States and Territories,"[189] and it transmits the Department of War's best estimate of the number of Indians "within our States and Territories, and of the amount of lands held by the several tribes within each."[190] The Tribe concedes that this simply shows that the Tribe was "deemed subject to federal Indian policy, that is, within the jurisdiction of the United States,"[191] not that it was ever subjected to such authority by the federal government. The same is true of the subsequent uses of such statistical information noted by the Tribe.[192] For these reasons, the federal government's use of information compiled by Reverend Morse and Colonel McKenney do not, in and of themselves, satisfy the first-step of the M-37029 analysis.[193]

b. Schoolcraft Report

The Tribe submits for the first time on remand a survey of tribes in the United States published in 1851. The Tribe does so as particular evidence that federal Indian agents treated the Mashpee Tribe as subject to federal jurisdiction.[194] The report was prepared by Henry R. Schoolcraft, a United States Indian Agent, using funds appropriated by Congress in 1847 for that purpose.[195] His six-volume Report includes historical and statistical information on the condition and prospects of tribes in the United States and it totaled several thousand pages. The Schoolcraft Report refers to the Mashpee Tribe only

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[186] MWT Op. Br., Ex. ZC at 542.
[187] MWT Op. Br., Ex. ZC at 542; *see also* MWT Op. Br. at 24.
[188] MWT Op. Br. at 25.
[189] MWT Op. Br. Ex. ZC at 541.
[190] MWT Op. Br. Ex. ZC at 542.
[191] MWT Op. Br. at 25 (quoting Morse Report) (internal quotations omitted).
[192] MWT Op. Br. at 25-26.
[193] MWT Op. Br. at 25-28. The Tribe's evidence shows that McKenney later provided copies of the table in response to requests by Congress, the Executive, and private scholars for information about tribes in the United States.
[194] MWT Op. Br. 38-39. Henry R. Schoolcraft, HISTORICAL AND STATISTICAL INFORMATION RESPECTING THE HISTORY, CONDITION AND PROSPECTS OF THE INDIAN TRIBES OF THE UNITED STATES: COLLECTED AND PREPARED UNDER THE DIRECTION OF THE BUREAU OF INDIAN AFFAIRS. PT. I at 524 (1851) (Schoolcraft). The Schoolcraft Report did not form part of the evidence evaluated by the Department in preparing the 2015 Decision.
[195] MWT Op. Br. at 27, citing Act of March 3, 1847, ch. 66, § 6, 9 Stat. 263.

twice, once in a consolidated table listing the combined population of tribes existing within Massachusetts,[196] and later as part of a list of tribes residing in Massachusetts.[197]

The Schoolcraft Report describes a proposed plan of improvement for the Massachusetts Indians generally,[198] which includes the enactment of a uniform system of laws for the Indians, merging certain tribes (excluding the Mashpee) into one community, and appointing an Indian commissioner for the Indians' supervision and improvement.[199] The Tribe claims that these recommendations evidence "a clear exercise of federal jurisdiction by the Office of Indian Affairs." because made by Schoolcraft himself.[200] A closer examination reveals that Schoolcraft was merely reporting recommendations contained in an 1849 report of state commissioners to the Massachusetts legislature on the condition of Indians in the state.[201] While the recommendations suggest that Massachusetts considered the Tribe and its lands within the state's authority, in and of themselves the recommendations do not demonstrate any federal activity, and the Tribe offers no other evidence that the United States adopted or approved them. As with the Morse Report, the Schoolcraft Report at best suggests federal awareness of the existence of the Tribe and its lands, but does not demonstrate any exercise of federal authority over the Mashpee Tribe.[202]

c. Federal Reports

The Tribe also submits several reports prepared by or for federal officials between 1888 and 1934 as evidence of a continuing federal acknowledgment of the Tribe's collective rights in its tribal lands. These reports do not formally acknowledge Tribal rights as such, but rather provide accounts of the Tribe's historical and contemporary circumstances. None provides evidence of any exercises of federal authority by officials over the tribe. While M-37029 points to "annual reports, surveys, and census reports" produced by the Office of Indian Affairs as evidence of federal authority, it makes clear that such material may provide evidence of federal authority when produced "as part of the exercise of [the Office of Indian Affairs'] administrative jurisdiction" over a tribe.[203] While the reports might reflect that the federal government's authority to act persisted during this period, none of the reports submitted by the Tribe reflect that they were prepared as an exercise of administrative jurisdiction over the Tribe. Neither does the Tribe suggest that the

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[196] Schoolcraft at 524.
[197] Schoolcraft at 287.
[198] Schoolcraft at 287.
[199] Schoolcraft at 287.
[200] MWT Op. Br. at 29; MWT Reply at 30.
[201] *See* House No. 46, *Report of the Commissioners Relating to the Condition of the Indians in Massachusetts* at 24-38, 54-57 (Mass. 1849).
[202] The Tribe further argues that the Department has already determined that inclusion in a federal survey "for federal Indian policy purposes" is probative evidence of a tribe's jurisdictional status, relying on a record of decision prepared for the Tunica-Biloxi Tribe of Louisiana. MWT Reply at 38, citing Ex. D (Dept. of the Interior, Bureau of Indian Affairs, Record of Decision for the Tunica-Biloxi Tribe of Louisiana (Aug. 11, 2011)). The Tunica-Biloxi ROD relied instead on a federal agent's defense of the Tribe's aboriginal title under the Non-Intercourse Act, which "clearly demonstrated the Tribe's jurisdictional relationship with the Federal Government." Id. Ex. D at 11.
[203] M-37029 at 16.

reports provide evidence demonstrating a course of dealings over time that, when viewed as a whole, demonstrates a federal obligation to the Tribe beyond the general principle of plenary authority.

The 1888 report prepared by Alice C. Fletcher is a nearly 700-page account of the history and current state of administration of Indian affairs and Indian education on federal Indian reservations in the United States.[204] Prepared in response to a Senate resolution and under the direction of the Department's Commissioner of Education, it includes a brief, two-page account of the seventeenth-century history of Massachusetts tribes, including the Mashpees, and an account of contemporary state legislation affecting the Mashpees based on information from a Tribal member.[205] The 2015 Decision relied on Mrs. Fletcher's report as evidence of the existence of the Mashpee reservation and the external recognition of the Town's "reservation-like" character.[206] On remand the Tribe also argues that, "acting effectively as an Indian agent," Mrs. Fletcher "confirmed the Tribe's tenacious ties to its land."[207] While the Fletcher report does describe the Tribe's historical ties to its lands, it makes no assertion as to the federal government's role, if any, in establishing or maintaining such ties, and thus offers no evidence of the exercise of federal authority over the Tribe or its members beyond the general principle of plenary authority.

The 2015 Decision relied on a draft report on New England tribes prepared by Gladys Tantaquidgeon for the Office of Indian Affairs to show the Tribe's continuing occupation of its lands through 1934.[208] The 2015 Decision described the Tantaquidgeon report as providing "details on their 'reservation,' subsistence practices, education facilities, health needs, arts and language, and governance.[209] The 2015 Decision noted that though the BIA commissioned Tantaquidgeon's report, the BIA never officially published it.[210] On remand the Tribe now also claims that the Tantaquidgeon report demonstrates "federal treatment of the Tribe has having collective rights."[211] The Tribe relies on Tantaquidgeon's description of the Tribe as "in occupation of an Indian town, also referred to by [Tantaquidgeon] as a reservation."[212] Though the Tribe describes the contents of the Tantaquidgeon report, it does not address how the report demonstrates any exercise of federal authority over the Tribe. The 2015 Decision relied on the report for its contemporary and historical account of the Tribe's lands and its occupancy thereof. While such information supports the Department's earlier determination that the Tribe

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[204] MWT Reply at 39; MWT Op. Br. at 30.
[205] S. Ex. Doc. No. 48-95, *Indian Education and Civilization. A Report Prepared in Answer to Senate Resolution of February 23, 1885* at 59-60 (1888). Fletcher's account relied on information provided by a Mashpee tribal member who was also a sitting member of the Massachusetts state legislature. *Id.* at 60, n. 1.
[206] 2015 Decision at 114; *see also id.* at 106.
[207] MWT Op. Br. at 30.
[208] 2015 Decision at 109.
[209] 2015 Decision at 109.
[210] 2015 Decision at 109, n. 340. The 2005 Proposed Finding in favor of the Tribe's federal acknowledgment noted that Tantaquidgeon's findings were summarized in an Office of Indian Affairs newsletter. MWT PF at 23.
[211] MWT Op. Br. at 6.
[212] MWT Op. Br. at 38.

could be considered to have occupied a reservation for IRA purposes in 1934, it does not show any formal action by a federal official determining any rights of the Tribe. Neither does the Tribe offer any arguments or evidence demonstrating what use, if any, Department officials made of Tantaquidgeon's report. While the Tantaquidgeon report offers historical evidence of the Tribe's long-standing historical use and continued occupation of Tribal lands, it provides little if any demonstration of the exercise of federal jurisdictional authority over the Tribe.[213]

In finding that the Tribe occupied a reservation for IRA purposes, the 2015 Decision also relied on the 1890 Annual Report of the Commissioner of Indian Affairs (ARCIA) to show external recognition of the fact that the Tribe historically occupied lands set aside for its use.[214] On remand the Tribe argues that the ARCIA "unambiguously acknowledges collective rights [on the part of the Tribe] in tribal land"[215] which, the Tribe claims, gives "rise to federal responsibilities toward the Tribe."[216] While the 1890 ARCIA plainly notes the existence of the Tribe's Massachusetts reservation, that does not amount to an acknowledgment of federal responsibility for, or an exercise of federal authority over, the Tribe. The passage the Tribe cites occurs in a discussion of Indian title generally. It states that "only in Massachusetts, New York, and North Carolina are Indians found holding a tribal relation and in possession of specific tracts." However the Commissioner's statement follows his assertion that as of the early nineteenth century, "no Indians within the limits of the thirteen original States retained their original title of occupancy."[217] As noted in the 2015 Decision, the Commissioner explained that the Tribe had a State-appointed board of overseers that governed the Tribe's internal affairs and held the Tribe's lands in trust.[218] The Tribe's claim that the 1890 ARCIA constitutes an express acknowledgment of *federal* responsibility is also inconsistent with the remainder of the Commissioner's report, which describes the federal government's pursuit at that time of "a uniform course of extinguishing the Indian title."[219] A table showing the population of Indians by state and the areas of Indian reservations contained later in the 1890 ARCIA omits any reference to Massachusetts or to Massachusetts tribes.[220] The Commissioner concluded his discussion of Indian title with a statement of then-applicable federal policy: "The sooner tribal relations are broken up and the reservation system done away with the better it will be for all concerned."[221] These statements weigh heavily against the Tribe's interpretation of the 1890 ARCIA as acknowledging or assuming federal responsibilities for the Tribe.

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[213] MWT PF at 23.
[214] 2015 Decision at 106, 114.
[215] MWT Reply at 39; MWT Op. Br. at 30-31.
[216] MWT Op. Br. at 31.
[217] MWT Op Br. at 30. *See also* H. Ex. Doc. No. 51-1, Pt. 5, *Report of the Secretary of the Interior*, vol. II at XXVI (1890).
[218] 2015 Decision at 106, 114; MWT Op. Br. at 30-31.
[219] 1890 ARCIA at xxix.
[220] 1890 ARCIA at xxxvii, Table 10.
[221] 1890 ARCIA at xxxix.

d. Federal Acknowledgment of Usufructuary Rights

The Tribe relies on a title report prepared for condemnation proceedings brought by the Department of the Navy in the late 1940s against lands in which a Mashpee Tribal member had interests as evidence showing "clear federal knowledge of, and acquiescence to" aboriginal hunting, fishing and gathering rights of the Tribe.[222] A title report[223] prepared in connection therewith indicated that some of the lots in question were subject to the reserved right of the Proprietors of Mashpee to cross over the lots for the purpose of gathering seaweed and marsh hay.[224] The title report states that the reservations of rights originated in deeds prepared by the Mashpee Commissioners.[225] The Tribe states that the deeds were prepared pursuant to laws enacted by the State of Massachusetts for the purpose of allotting the Tribe's lands in the late nineteenth century.[226] The Tribe claims the deeds "confirm" the existence of aboriginal usufructuary rights that "are subject to federal protection."[227] This neglects several things. As noted above, the evidence of action by the State of Massachusetts with respect to the Tribe's property under state law does not provide evidence of federal action or authority, either expressly or by operation of law. Moreover, while the deeds on which the Tribe relies reserve to the Tribe's members the right to cross over the subject parcels to gather seaweed and marsh hay elsewhere, they nowhere indicate whether such rights arise as a matter of common law or aboriginal right. Even if the Tribe retained aboriginal rights at the time of the condemnation proceedings, rather than common law property rights under state law, that fact alone would not satisfy the M-37029 analysis because it would not show any exercise of federal authority with respect to such rights.

The absence of any federal actions with respect to Mashpee's usufructuary rights distinguishes the Tribe from the case of the Stillaguamish Tribe.[228] In 1976, the Department declined to take land into trust for Stillaguamish based on doubts whether it was under federal jurisdiction in 1934. In 1980, the Department found that the Tribe was a beneficiary of fishing rights acknowledged and protected under the 1855 Treaty of Port Elliott, to which the Stillaguamish Tribe was a signatory.[229] For purposes of the M-37029 analysis, the issue is not whether aboriginal usufructuary rights are subject to federal protection as a matter of law[230] or whether they exist absent a tribe's federal acknowledgment.[231] The issue instead is whether the federal government took any action or series of actions in the exercise of its plenary power over a tribe.[232] The reservation

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[222] MWT Op. Br. at 38 ff.
[223] MWT Op. Br., Ex. ZZD.
[224] MWT Op. Br., Ex. ZZD at 3-4.
[225] MWT Op. Br., Ex. ZZD at 3-4.
[226] MWT Op. Br. at 39-40; *see also* MWT Reply at 46.
[227] MWT Op. Br. at 42; *see also id.* at 6, 11, 16-17.
[228] MWT Reply at 47.
[229] M-37029 at 20, 23; *see also Carcieri*, 555 U.S. at 398 (Breyer, J., concurring).
[230] MWT Reply at 47, citing *Mitchel v. United States*, 34 U.S. 711, 748 (1835); *United States v. Michigan*, 471 F. Supp. 192, 256 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981).
[231] MWT Reply at 47, citing *Timpanogo Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002); *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th 1990).
901 F.2d 772, 776 (9th Cir. 1990).
[232] M-37029 at 17-19.

under state law of usufructuary rights for tribal members does not, standing alone, provide such evidence.

e. Censuses & School Enrollment

The Tribe on remand argues that by admitting Mashpee children as students to the Carlisle Indian School between 1905 and 1918, the federal government "explicitly acknowledged its jurisdiction over the Tribe."[233] The Tribe appears also to suggest that the direct supervision of Mashpee students by federal officials at Carlisle constitute indicia of federal jurisdiction over the Tribe. The Tribe's claim that the enrollment of students constituted an explicit acknowledgment of federal jurisdiction over Tribe appears to rely on several things. These include funding of Carlisle through congressional appropriations; the federal government's use of Carlisle as an instrument of Indian educational policy; Departmental regulations governing non-reservation Indian schools; and school records for individual Mashpee students.[234] While such evidence clearly demonstrate exercises of federal authority over Indians generally and individual Indians specifically, none suffice to show an exercise of federal authority over the Mashpee Tribe as distinct from some of its members.

The Tribe asserts that the provision of federal services to individual tribal members, such as health or social services, can be the basis for finding of federal jurisdiction over a tribe,[235] and it notes that the provision of educational services was used to demonstrate federal jurisdiction over other tribes like the Cowlitz Tribe.[236] While that is true, it neglects that the Cowlitz determination also relied on a wide range of other evidence covering an extended period of time. This included a history of the BIA regularly providing services to the Cowlitz Indians such as "supervising allotments, adjudicating probate proceedings, providing education services, assistance in protecting fishing activities, investigating tribal claims to aboriginal lands, and approving attorney contracts,"[237] none of which the Tribe has shown here.

The evidence of Mashpee student enrollment at Carlisle does not unambiguously demonstrate that such enrollment was predicated on a jurisdictional relationship with the Tribe as such. Without any other evidence that the federal government provided services to the Tribe, the Mashpee student records fall short of demonstrating that Tribe itself came under federal jurisdiction. Even if it could, however, the Tribe also offers no argument or evidence that any such jurisdictional status continued after Carlisle closed in 1918. Thus while the evidence of enrollment Carlisle is plainly relevant to the M-37029

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[233] MWT Op. Br. at 36.
[234] MWT Op. Br. at 32-36.
[235] MWT Reply at 44, citing M-37029 at 16, 19.
[236] MWT Reply at 44, citing *Confederated Tribes of the Grand Ronde Community v. Jewell,* 75 F. Supp.3d 387, 403 (D.D.C.) *aff'd* 830 F.3d 552, *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S.Ct. 1433 (2017).
[237] U.S. Dep't of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 97-103 (Apr. 22, 2013) (describing course of dealings between Cowlitz Tribe and federal government between 1855 and 1932).

inquiry, without more it is insufficient to show that the Tribe "was subjected to...clear, federal jurisdiction."[238]

The Tribe also argues that inclusion on a 1910 Indian census "reflects the existence of a federal-Indian relationship and demonstrates that the federal government acknowledged responsibility for the tribes and the Indians identified therein."[239] Yet as with the nineteenth-century federal reports referencing the Tribe and its lands, the listing of Tribal members on a federal census, though it may be probative of federal jurisdiction over the Tribe, in and of itself is inconclusive,[240] and the Tribe provides no argument or evidence to suggest otherwise.[241]

CONCLUSION

As explained in Section II.B above, the framework contained in M-37029 for determining whether a tribe was under federal jurisdiction for purposes of Section 19 of the IRA governs my analysis. Applying that framework here, I must conclude that the evidence submitted by the Tribe on remand provides insufficient indicia of federal jurisdiction beyond the general principle of plenary authority. The evidence does not demonstrate that the United States had, at or before 1934, taken an action or series of actions that sufficiently establish or reflect federal obligations, duties, responsibilities for or authority over the Tribe. As a result I conclude that the evidence does not show that the Tribe was under federal jurisdiction in 1934 for purposes of the IRA.

Based on that finding, I must also conclude that the Tribe cannot meet the IRA's first definition of "Indian," or its second definition as interpreted by the United States District Court for the District of Massachusetts in the *Littlefield* litigation. I therefore cannot grant the Tribe's land-into-trust application under either of those definitions. As discussed above, the Court's reading of the second definition of "Indian" in the IRA incorporates the "under Federal jurisdiction" requirement. Because I have concluded that the Tribe was not under federal jurisdiction in 1934, I need not reconsider or reevaluate whether

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[238] MWT Op. Br. at 34. The same is true of the listing of Mashpee students on a 1911 census entitled "Census of Pupils Enrolled at Carlisle Indian School." MWT Op. Br. at 32.

[239] MWT Reply at 41, citing Memorandum, Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs to Pacific Regional Director, *Determination of Whether Carcieri v. Salazar or Hawaii v. Office of Hawaiian Affairs limits the authority of the Secretary to Acquire Land in Trust for the Santa Ynez Band of Chumash Indians*, 9 (May 23, 2012).

[240] MWT Op. Br. at 31. The Tribe notes it members were listed as "Wampanoag." It further notes that a number of Indian families in Mashpee were shown on the general federal census in 1900, not the Indian census, an omission the Tribe describes as an error. MWT Op. Br. at 31, n. 25.

[241] The 1910 Indian census was prepared by the Director of the Census, not the Office of Indian Affairs as the Tribe suggests. *See* Act of March 3, 1899, ch. 419, 30 Stat. 1014; Act of March 6, 1902, ch. 139, 32 Stat. 51 (Permanent Census Act). Neither was it prepared under authority of the 1884 Act directing Indian agents to submit an annual census of the Indians at the agency or on the reservation under their charge. *See* MWT Op. Br. at 32, citing Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76, 98.

the Tribe meets the other requirements of the second definition of "Indian," nor do I need to reconsider any other determinations made in the 2015 Decision.

Respectfully,

James E. Cason
Associate Deputy Secretary