IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	CIVIL ACTION NO. 1:16-cv-10184-WGY

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION OR CLARIFICATION

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6), the United States Department of the Interior ("Interior") et al. ("Defendants") respectfully request that the Court reconsider or clarify the portions of the July 28, 2016 Memorandum & Order ("Order") that went beyond the "narrow question of statutory construction," Order at 2 n.1, concerning the meaning of "such members" in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 479 ("Section 479"). The Court erred when, instead of remanding to Interior, it determined that the Mashpee Wampanoag Tribe ("Tribe")—based on the date that the Tribe obtained federal recognition—was not "under Federal jurisdiction" in 1934 for the purposes of the IRA. Order at 12, 14-15, 22. The Court's error in doing so is particularly manifest in light of—and, indeed directly conflicts with—the recent decision in *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, __F.3d__, No. 14-5326, 2016 WL4056092, at *4-10 (D.C. Cir. July 29, 2016).[1]

While Defendants disagree with the Court's interpretation of "such members," Defendants do not seek reconsideration of that aspect of the Order in this Motion. Defendants, however, seek reconsideration of the Court's determination to extend its analysis after interpreting "such members." The Court, consistent with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and settled principles of administrative law, should have remanded to Interior to reconsider its September 18, 2015 Record of Decision ("ROD") in light of the Court's reading of "such members." Instead, the Court summarily concluded—based on the Tribe's federal recognition in 2007—that the Tribe was not "under Federal jurisdiction" in 1934. In so doing, the Court made a factual determination that Interior expressly declined to make in the ROD, AR000131-32, even though the Court did not need to reach the issue to fully

[1] Attached hereto as Exhibit A for the Court's reference.

adjudicate Plaintiffs' First Cause of Action.

The Court compounded the error in reaching the issue of the Tribe's 1934 federal jurisdictional status by assuming that an Indian tribe recognized *after* 1934 could not have been "under Federal jurisdiction" *in* 1934. The Court's ruling directly conflicts with the recent decision in *Grand Ronde*, in which the D.C. Circuit, consistent with every district court that has addressed the issue, upheld Interior's determination that the Cowlitz Indian Tribe, federally recognized in 2002, was "under Federal jurisdiction" in 1934. The Court's contrary determination appears to be based on a misreading of *Carcieri v. Salazar*, 555 U.S. 379 (2009), Order at 15, reliance on facts in contention, *id.* at 3, and reliance on misguided assumptions concerning recognition and the effect of the assertion of state jurisdiction over Indians, *id.* at 3, 12, 14-15, 22. The Court, however, did not explain its conclusion even though it acknowledged, *id.* at 21 n.8, that courts have consistently held that "recognized Indian tribe" and "under Federal jurisdiction" are ambiguous phrases for which Interior's interpretation is afforded deference.[2]

Defendants thus urge the Court to reconsider or clarify its Order to limit its scope to the Court's reading of "such members" in Section 479, with a remand of the matter to Interior for further proceedings.

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[2] The Court cited to Defendants' Mem. Opp., ECF No. 38, which cited *Citizens for a Better Way v. U.S. Dep't of Interior*, No. 12-3021, 2015 WL5648925, at *21 (E.D. Cal. Sept. 24, 2015) ("'recognized Indian tribe,' as used in the IRA, does not equate to federal recognition . . . since 'federal recognition' in its modern legal sense post-dated the IRA"); *Cent. N.Y. Fair Bus. Ass'n v. Jewell,* No. 08-0660, 2015 WL1400384, at *7-11 (N.D.N.Y. Mar. 26, 2015) (finding ambiguous "recognized Indian tribe" and "under Federal jurisdiction" and deferring to Interior); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1183-87 (E.D. Cal. 2015) ("[T]here is far more ambiguity than not about what it means for a tribe to be 'under Federal jurisdiction' in 1934"); *Cty. of Amador v. U.S. Dep't of Interior,* 136 F. Supp. 3d 1193, 1207-08 (E.D. Cal. 2015) (finding "under Federal jurisdiction" ambiguous and deferring to Interior); *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 401-04 (D.D.C. 2014) (finding ambiguous "recognized Indian tribe" and "under Federal jurisdiction" and deferring to Interior); *Sandy Lake Band of Miss. Chippewa v. United States*, No. 11-2786, 2012 WL1581078, at *7-9 (D. Minn. May 4, 2012) (upholding Interior's interpretation of "recognized Indian tribe").

BACKGROUND

I. The Indian Reorganization Act's Definitions

Section 479 of the IRA defines the term "Indian" as including (1) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" ("First Definition"); (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation" ("Second Definition"); and (3) "all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

II. Record of Decision

Interior concluded in the ROD, AR00050-189, that the Tribe falls within the Second Definition of "Indian" in Section 479, such that it has the requisite authority to acquire land in trust for the Tribe pursuant to the IRA. AR00132-72. In making its decision, Interior expressly declined to opine on whether the Tribe also falls within the First Definition of "Indian" in Section 479. AR00131-32. With respect to the Second Definition, Interior made no determination as to whether the Tribe was "under Federal jurisdiction" in 1934, because Interior's interpretation of the Second Definition in the ROD did not require such analysis. *Id.* Interior's reading of Section 479 did, however, require that it determine whether the Tribe constituted a "recognized Indian tribe" under Section 479. Based on Interior's prior interpretation of the phrase as having no temporal requirement, Interior concluded that the Tribe was a "recognized Indian tribe" due to its 2007 federal acknowledgment. AR000145 n.237 (citing Interior's preexisting interpretation, set forth in M-37029 (AR000663-88), to support its conclusion that "[a] tribe, such as the Tribe, that has received formal recognition through the Departmental acknowledgment process at 25 C.F.R. Part 83 satisfies this part of the statute.").[3]

[3] A copy of M-37029 is attached hereto as Exhibit B for the Court's reference.

STANDARD OF REVIEW

This Court has "substantial discretion and broad authority to grant or deny" a motion for reconsideration made pursuant to either Fed. R. Civ. P. 59(e)[4] or 60(b). *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 81 (1st Cir. 2008). That discretion balances "the need for finality of judgments with the need to render a just decision." *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 190 (1st Cir. 2004). "In order to prevail on a Rule 59(e) motion based on manifest error or law of fact, the moving party must make a showing of some substantial reason that the court is in error." *Kalman v. Berlyn Corp.*, 706 F. Supp. 970, 974 (D. Mass. 1989) (citing *Robinson v. Watts Detective Agency Inc.*, 685 F.2d 729, 743 (1st Cir. 1982)).[5]

Rule 60(b)(6) provides for relief from a judgment or order for "any other reason that justifies relief" not specifically set forth in Rule 60(b)(1)-(5). And Rule 60(b)(6) is "peculiarly malleable," such that the Court's "decision to grant or deny such relief is inherently equitable in nature." *Ungar v. PLO*, 599 F.3d 79, 83-84 (1st Cir. 2010).

ARGUMENT

I. The Court Erred in Deciding an Issue that Interior Specifically Reserved

In light of its holding regarding the interpretation of "such members," the Court was correct in remanding to Interior. The Court erred, however, in deciding whether the Tribe was "under Federal jurisdiction" in 1934. Such determination is a complex, Indian tribe-specific inquiry, involving a mixed question of law and fact, which Interior had specifically reserved. AR000131-32. Remand is required under the APA by the ordinary remand rule, which

[4] "[I]t is settled in this circuit that a motion which asked the court to modify its earlier disposition of a case because of an allegedly erroneous legal result is brought under Fed. R. Civ. P. 59(e)." *Appeal of Sun Pipe Line Co.*, 831 F.2d 22, 24 (1st Cir. 1987).

[5] Rule 59 motions are not "confined to the six specific grounds for relief found in Rule 60(b)." *Pérez-Pérez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 284 (1st Cir. 1993).

recognizes that, except in rare instances, a court reviewing agency action "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry," and must instead "remand to the agency for additional investigation or explanation." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002) (internal citations omitted)).[6]

It likewise is a fundamental principle of administrative law that after determining that an agency has made an error of law, the court's inquiry is at an end. Thereafter, the case must be remanded to the agency for further action consistent with the correct legal standard. *See*, *e.g.*, *S. Prairie Constr. Co. v. Local No. 627*, 425 U.S. 800, 803-804 (1976) (court of appeals invaded the statutory province of the National Labor Relations Board by deciding the unit question in the first instance instead of remanding to the Board to make the initial determination). After the Court found that Interior's interpretation of "such members" was incorrect, it should have ended its analysis and remanded the matter for further proceedings consistent with the Court's ruling.

II. An Indian Tribe Recognized *after* 1934 Can Still Demonstrate Federal Jurisdiction *in* 1934, and the Court Manifestly Erred by Concluding Otherwise

In *Carcieri*, the Supreme Court held that the word "now" in the First Definition of "Indian" unambiguously meant 1934, the year the IRA was enacted. 555 U.S. at 395. The Court in *Carcieri*, however, "did not pass on the exact meaning of 'recognized' or 'under Federal jurisdiction'" in the First Definition. *Grand Ronde*, 2016 WL4056092, at *2. Nor did it determine whether the word "now" in the First Definition modified "recognized Indian tribe" in addition to the phrase "under Federal jurisdiction." *Id.*, at *5-6; *see also Mackinac Tribe v. Jewell*, No. 15-5118, 2016 WL3902667, at *2 (D.C. Cir. July 19, 2016).

[6] *See also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (the "reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed").

When the Court accepted Plaintiffs' interpretation of "such members," Order at 15, it concluded that the Second Definition should be read as "all persons who are descendants of such members [of any recognized Indian tribe now under Federal jurisdiction] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." The Order is silent as to the meaning of the phrases "recognized Indian tribe" or "under Federal jurisdiction," even though the Court acknowledged the ambiguity of the terms. Order at 21 n.8. When the Court concluded that because the Tribe obtained federal recognition in 2007, it was not "under Federal jurisdiction" in 1934, *id.* at 12, 14-15, 22, the Court appears to have conflated the phrases "recognized Indian tribe" and "under Federal jurisdiction." As discussed below, these terms have independent meaning and "now" only modifies "under Federal jurisdiction."

A. Interior's Interpretation of "Recognized Indian Tribe" is Reasonable and Entitled to Deference

In the ROD, Interior construed "such members" in the Second Definition as referring back to the phrase "members of any recognized Indian tribe" in the First Definition. AR000145-47. Interior then applied the agency's preexisting interpretation of "recognized Indian tribe," set forth in M-37029 (AR000685-88), which concluded that, because "now" in the First Definition does not modify "recognized Indian tribe," the tribal applicant need only be federally recognized when the Secretary invokes the IRA to fall within the scope of the phrase. AR000688. Accordingly, Interior concluded in the ROD that the Tribe's status as a federally recognized Indian tribe at the time the ROD was issued[7] established that it was a "recognized Indian tribe" for IRA purposes. AR000145 n.237. The Court erred by not explaining how Interior's interpretation was in error or otherwise not entitled to the deference consistently extended to it.

[7] *See* 80 Fed. Reg. 1,942, 1,944 (Jan. 14, 2015) (Tribe included on the annual *Federal Register* list of federally recognized Indian tribes).

Had the Court considered Interior's interpretation, the Court should have accorded it deference. Most recently the D.C. Circuit, in a case involving the Cowlitz Indian Tribe which obtained federal acknowledgment in 2002, applied "the familiar *Chevron* analysis" to hold that "'recognized' is ambiguous," and deferred to Interior's interpretation. *See Grand Ronde*, 2016 WL4056092, *5-7. The D.C. Circuit considered the grammatical structure of the First Definition, and after concluding that "now" is an adverb modifying the phrase "under Federal jurisdiction," it moved on to the "more difficult question" of whether the phrase "now under Federal jurisdiction" modifies only "tribe" or the entire phrase "recognized Indian tribe." *Id.*, at *5. After determining that the statute could be read either way and was therefore ambiguous, the D.C. Circuit then deferred to Interior's interpretation that the First Definition need not be read as requiring recognition in 1934. *Id.*, at *5-7. Other district courts have similarly held. *See Confederated Tribes of the Grand Ronde Cmty.*, 75 F. Supp. 3d at 400-01 (recognition in 1934 not required); *Citizens for a Better Way*, 2015 WL5648925, at *21 (same); *Cent. N.Y. Fair Bus. Ass'n*, 2015 WL1400384, at *10-11 (same). The Order concludes otherwise, but offers no explanation or rationale for its determination.

B. "Under Federal Jurisdiction" is a Distinct Inquiry from "Recognized" and Interior Expressly Reserved the Opportunity to Opine on the Issue in the First Instance

When it obtained federal recognition in 2007, the Tribe had to demonstrate, among other things, that it "had been identified as an American Indian entity on a substantially continuous basis since 1900," and that a "predominant portion" of that entity "comprises a distinct community [that] has existed as a community from historical times to the present." 25 C.F.R. §§ 83.7(a)-(b) (2007). Whether the Tribe was "under Federal jurisdiction" in 1934 is a different inquiry, one that Interior has construed as involving two fact-intensive components. The first

component examines whether, at some point in or before 1934, the United States had assumed duties, responsibilities or obligations to the Tribe, establishing that the federal government asserted its authority, i.e., jurisdiction, over the Tribe. The second component examines whether that jurisdictional relationship between the federal government and the Tribe remained intact in 1934. *See* M-37029 at 16-20 (AR000678-82); *Grand Ronde*, 2016 WL4056092, at *8-9 (discussing Interior's two-part inquiry and concluding it is reasonable). The complex task for Interior when considering whether a tribe was "under Federal jurisdiction" in 1934 is to review the historical record in its entirety, evaluating both positive and negative evidence, to determine whether on balance the record supports the factual and legal conclusion that the tribe was "under Federal jurisdiction" in 1934. *See Grand Ronde*, 2016 WL4056092, at *10. The Court's role under the APA, on the other hand, is to review Interior's actual decision, rather than rewrite or add to it. The ROD expressly declined to opine on the Tribe's "under Federal jurisdiction" status, thus reserving its determination for another day. AR000131-32. Interior should be permitted to determine whether the Tribe was "under Federal jurisdiction" in 1934 in the first instance, as "[t]here is an institution specifically designed and coordinated to have expertise in the social, cultural, political, and legal history of the indigenous peoples of the United States. This institution is not the Court. It is the Bureau of Indian Affairs." *New York v. Salazar*, No. 08-00644, 2012 WL4364452, at *13-15 (N.D.N.Y. Sept. 24, 2012) (remanding the "under Federal jurisdiction" inquiry to Interior to consider in the first instance).

III. Neither *Carcieri*, nor Plaintiffs' Disputed Factual Assertions Improperly Accepted by the Court, Actually Resolve Whether the Tribe was "Under Federal Jurisdiction" in 1934

In the Order, the Court appears to rely on Plaintiffs' assertion that "the Mashpees had been subject to colonial and state governmental jurisdiction" prior to the Tribe's federal

acknowledgment in 2007, Order at 3, as a basis for stating throughout the Order that the Tribe was not "under Federal jurisdiction" in 1934, *id.* at 12, 14-15, 22. But, as noted, Interior specifically stated that it had not addressed the issue, and Defendants never conceded it. The Court nonetheless appears to adopt Plaintiffs' erroneous legal and factual assumption that the presence or assertion of state jurisdiction necessarily and conclusively forecloses federal jurisdiction. The acceptance of Plaintiffs' assertion as "undisputed" followed by the erroneous conclusion drawn from it demonstrate that the Court manifestly erred.

A. *Carcieri* Does Not Require this Court to Opine, in the First Instance, on Whether the Tribe was "Under Federal Jurisdiction" in 1934

As set forth above, the Court did not need to opine on whether the Tribe was "under Federal jurisdiction" in 1934, and the *Carcieri* decision does not compel otherwise. The Supreme Court did not evaluate the meaning of the phrase "under Federal jurisdiction." Instead, it concluded, based on what it found to be a unique concession and the absence of contrary record evidence, that the Indian tribe in that case was not "under Federal jurisdiction" in 1934. *Carcieri*, 555 U.S. at 395-96. Those are not the facts here, as the ROD, the Administrative Record, and proceedings in this litigation establish that the question was not conceded. Thus, remand is required.

First, Interior's post-*Carcieri* practice when relying on the First Definition is to determine whether a tribal applicant was "under Federal jurisdiction" in 1934. The ROD expressly declined to opine on this question because the Secretary read the Second Definition as not requiring it. AR00131-32. Interior therefore reserved its opinion on, *and did not concede*, the issue of whether the Tribe was "under Federal jurisdiction" in 1934.

Nor did Defendants concede the issue in this litigation, as Defendants have consistently defended the rationale in the ROD—the challenged agency action at issue in this APA case—

arguing that a finding of "under Federal jurisdiction" is not required for Second Definition purposes.[8] Notably, because of the stipulated briefing process, Defendants never answered either of Plaintiffs' original or amended complaints. Defendants, in summary judgment briefing, properly referred the Court to the Administrative Record, which should have been the *only* basis for the Court's findings. In this APA case, Plaintiffs' factual assertions should not be weighed against the record to determine whether they are in "dispute." *See* Order at 2 n.1, 3. In APA cases, there are no "factual disputes" to resolve, as the "entire case on review is a question of law." *Patel v. Johnson*, 2 F. Supp. 3d 108, 117 (D. Mass. 2014) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). The Court's review is limited to the Administrative Record, not Plaintiffs' assertions that that the Court accepts as true. 5 U.S.C. § 706; *Lovgren v. Locke*, 701 F.3d 5, 20 (1st Cir. 2012).

Finally, the Administrative Record itself does not justify the Court's ruling. Given the voluminous materials in the Administrative Record concerning the Tribe's federal jurisdictional status, including numerous historical records, *see*, *e.g.*, AR001912-2112; AR002121-449; AR002458-96; AR002497-508; AR002510-32; AR002540-87; AR002587-6512; AR006518-31; AR006623-43, it cannot be said, as the Court did in *Carcieri*, that the Administrative Record only contains contrary evidence. Instead, the Administrative Record contains voluminous materials concerning the Tribe's history that Interior is entitled to evaluate in the first instance.

B. The Assertion or Presence of State Jurisdiction Does Not Displace Federal Jurisdiction

Even if Plaintiffs' assertions regarding the Tribe's relationship with the Commonwealth of Massachusetts were "undisputed" and the Court could properly rely on them, to the extent the Court's Order assumes that any assertion of state jurisdiction over the Tribe ousts or otherwise

[8] *See*, *e.g.*, Defs.' Mem., ECF No. 56, at 24 n.28.

forecloses federal jurisdiction, that view is legally erroneous. In *United States v. John*, 437 U.S. 634, 653 (1978), the Supreme Court stated that "the fact that federal supervision over [the Mississippi Choctaws] has not been continuous, [does not] destroy[] the federal power to deal with them." The First Circuit similarly concluded that the United States can have a relationship with Indians on the basis of protection of land even where in all other respects the Federal Government has not dealt with them. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). Simply put, assertions of state and federal jurisdiction are not mutually exclusive. Thus, the inquiry for Interior is whether the Tribe was under *federal* jurisdiction in 1934, which cannot be answered by merely looking to when the Tribe obtained federal recognition, or whether the state asserted authority over the Tribe.

CONCLUSION

Defendants respectfully ask that the Court reconsider or clarify the portions of the Order that go beyond the "narrow question of statutory construction" concerning the meaning of "such members," and remand to Interior so it can reconsider its decision in light of that ruling.

DATED: August 24, 2016

Respectfully submitted,

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