United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

SEP 07 2018

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

Dear Chairman Cromwell:

On July 28, 2016, the United States District Court for the District of Massachusetts remanded to the Department of the Interior (Department) to consider whether the Mashpee Wampanoag Tribe (Mashpee Tribe or "Tribe) meets one or more of the definitions of "Indian" in Section 19 of the Indian Reorganization Act (IRA).[1] The Court did so in light of its conclusion that the phrase "such members" in the IRA's second definition of "Indian" referred to the phrase "members of a recognized Indian tribe now under Federal jurisdiction" in the first.[2] To consider this issue consistent with the Court's reading of the second definition, the Department must therefore determine whether the Mashpee Wampanoag Tribe (Mashpee Tribe or Tribe) was "under federal jurisdiction" in 1934. Between December 2016 and November 2017, the parties submitted hundreds of pages of arguments and thousands of pages of exhibits addressing this question at the Department's invitation.[3] The Department has evaluated the parties' submissions within the framework established by the Department's Office of the Solicitor (Solicitor) for that purpose.[4] Based on my review and consideration of these submissions, I cannot conclude that the Tribe was "under Federal jurisdiction" in 1934. As a result, the Tribe does not satisfy the "under Federal jurisdiction" requirement of the first definition of "Indian," and it also does not satisfy such requirement with respect to the second definition as that definition has been interpreted by the United States District Court for the District of Massachusetts.

I. BACKGROUND

In 2007, the Department formally acknowledged the Mashpee Tribe pursuant to the administrative procedures set forth at 25 C.F.R. Part 83 (Part 83).[5] The Department based its decision on evidence showing that the Tribe's members and ancestors had substantially

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[1] Act of June 18, 1934, ch. 576, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 et seq.
[2] *Littlefield, et al. v. United States DOI*, 199 F.Supp.3d 391 (D. Mass. 2016).
[3] *See infra* § I.C.
[4] The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, Op. Sol. Interior Sol. Op. M-37029 (Mar. 12, 2014) ("Sol. Op. M-37029").
[5] U.S. Dep't of the Interior, Associate Deputy Secretary, Summary under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. (Feb. 15, 2007) ("Mashpee FD"); Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007). *See also* U.S. Dep't of the Interior, Associate Deputy Secretary, Summary under the Criteria and Evidence for the Proposed Finding on the Mashpee Wampanoag Indian Tribal Council, Inc. (Mar. 31, 2006) ("Mashpee PF").

maintained consistent interaction and significant social relationships from the time of first sustained contact with Europeans in the seventeenth-century, through the colonial and Revolutionary eras, and 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) that was inhabited almost exclusively by the Tribe and its members.[6] The Department also relied on evidence showing that the Tribe had maintained an autonomous political existence from the time of first sustained contact to the present.[7] The Tribe's acknowledgment became effective on May 23, 2007.[8]

A. 2015 Record of Decision

After its Federal acknowledgment, the Tribe in 2007 asked the Department to acquire certain lands in trust for the Tribe's benefit pursuant to Section 5 of the IRA. As later amended, these lands included a parcel totaling approximately 170 acres in Mashpee, Massachusetts and a 150-acre parcel near the City of Taunton, Massachusetts. The Tribe sought trust lands to meet the present and future needs of its members by providing land for self-determination and self-governance, housing, education, and cultural preservation.[9] The Tribe intended to use the Mashpee parcel, which included culturally significant sites such as the Mashpee Old Indian Meeting House and an historic Tribal burial ground used by the Tribe for centuries, for tribal administrative purposes, tribal housing, and cultural purposes.[10] 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.[11] 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;[12] to generate revenue to meet the needs of tribal members, many of whom are unemployed with incomes below the poverty level;[13] and to fund construction of tribal housing and tribal programs such as the Wampanoag Housing Program and the Low Income Home Energy Assistance Program.[14]

On September 18, 2015, the Department issued a record of decision to acquire the Mashpee and Taunton parcels in trust for the Tribe.[15] The Department determined that it had statutory authority to acquire the lands in trust for the Tribe under the second definition of "Indian" set forth in IRA Section 19, which includes "all persons who are descendants of such members who

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[6] Mashpee FD at 9.
[7] Mashpee FD at 18. The evidence further demonstrated that nearly all of the Tribe's members (97%) descended from the historical Tribe identified by outside observers in the nineteenth-century. *Id.* at 30, 34; 72 Fed. Reg. at 8,009.
[8] 72 Fed. Reg. at 8,009.
[9] U.S. Dep't of the Interior, Assistant Secretary – Indian Affairs, Record of Decision, Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe at 7 (Sep. 18, 2015) ("2015 ROD"); U.S. Dep't of the Interior, Bureau of Indian Affairs, Notice of Final Agency Determination, 80 Fed. Reg. 57,848 (Sep. 25, 2015).
[10] 2015 ROD at 6, 15, 110.
[11] 25 U.S.C. § 2701 et seq.
[12] 2015 ROD at 8.
[13] 2015 ROD at 7.
[14] 2015 ROD at 8.
[15] *See supra* n. 9.

were, on June 1, 1934, residing within the present boundaries of any Indian reservation."[16] As a result, the Department did not decide whether the Tribe could also qualify under the first definition[17] pursuant to the U.S. Supreme Court in *Carcieri v. Salazar*, which was handed down while the Tribe's application was pending.[18]

As relevant here, Section 19 of the IRA defines "Indian" to 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..."[19] The Department found it unclear whether the phrase "such members" in the second definition referred only to "members of any recognized Indian tribe" in the first definition, or whether it was intended to incorporate the expression "members of any recognized Indian tribe *now under Federal jurisdiction.*"[20] Concluding that "such members" was ambiguous, the Department construed it as referring only to "members of any recognized Indian tribe," since construing it as incorporating all of the first definition would render the second definition largely redundant.[21]

The Department also conducted a comprehensive, fact-intensive analysis of whether the Tribe occupied a "reservation" as of June 1, 1934.[22] The Department examined the Tribe's continuous history in the Town of Mashpee from before European contact until modern times,[23] 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 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.[24] It also showed 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

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[16] 2015 ROD at 79.

[17] 2015 ROD at 79. 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. U.S. Dep't of the Interior, Bureau of Indian Affairs, Proclaiming Certain Lands as Reservation for the Mashpee Wampanoag, 81 Fed. Reg. 948 (Jan. 8, 2016).

[18] 555 U.S. 379 (2009) ("*Carcieri*").

[19] 25 U.S.C. § 5129 (numbers in brackets added).

[20] 2015 ROD 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.

[21] 2015 ROD 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. *Id.* at 94.

[22] *See* 2015 ROD at 101-120.

[23] 2015 ROD at 101ff.

[24] 2015 ROD at 102.

Non-Intercourse Act.[25] The record showed that the Federal Government considered the Tribe as inhabiting a reservation in the 1820s when considering implementation of the Federal removal policy,[26] and that a reservation had been set aside for the Tribe's occupation and use under the protection of the colonial court and government, which continued to exist and continued to be occupied by Mashpee tribal members through 1934.[27] Because it met the second definition of "Indian," the Department found the Tribe eligible for trust land acquisitions under Section 5 of the IRA.

B. Litigation

In 2016, several residents of the City of Taunton (collectively, the Littlefields) challenged the 2015 ROD in the United States District Court for the District of Massachusetts.[28] Among their claims, the Littlefields challenged the Department's interpretation of the IRA's second definition of "Indian."[29] On cross-motions for summary judgment on that issue,[30] the District Court ruled against the Department, concluding that the second definition unambiguously incorporates the antecedent phrase "members of any recognized Indian tribe now under Federal jurisdiction."[31] The court remanded to the Secretary of the Interior (Secretary) for further proceedings consistent with the court's opinion. Because the decision suggested that the Tribe was not under Federal jurisdiction in 1934, an issue the 2015 ROD had expressly declined to reach,[32] the court later clarified that the Department could, consistent with its opinion, evaluate whether the Tribe was under federal jurisdiction in 1934.[33] Thus on remand, the Department either could consider the Tribe's eligibility under the first definition of "Indian" or "reassess" its eligibility under the second consistent with the court's interpretation.[34]

C. Remand Proceedings

The Department established remand procedures for considering the Tribe's eligibility under either the first definition of "Indian" or the second definition as interpreted by the district court[35]

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[25] 2015 ROD at 110-112. 25 U.S.C. § 177.
[26] 2015 ROD at 104-105.
[27] 2015 ROD at 113-119. 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 ROD at 100.
[28] *Littlefield, et al. v. United States Dep't of the Interior*, Case No. 16-CV-10184 (D. Mass) ("*Littlefield*").
[29] The Littlefields also challenged whether the Tribe had significant historical connection to the City of Taunton; whether the Mashpee and Taunton parcels could together form the Tribe's "initial reservation"; and whether the Tribe's lands in in the Town of Mashpee constituted a "reservation" for IRA purposes. The Littlefields further challenged the constitutionality of the IRA as well as the Tribe's federal acknowledgment. *See id.*, Complaint, Dkt. No. 1, ¶¶ 91-96.
[30] *Littlefield,* Parties' Motions for Partial Summary Judgment, Dkt. Nos. 55, 59 (July 7, 2016).
[31] *Littlefield*, 199 F.Supp.3d at 400.
[32] *Littlefield,* Memorandum & Order, Dkt. No. 87 at 22.
[33] *Littlefield,* Order, Dkt. No. 121 at 2.
[34] *Littlefield,* Order, Dkt. No. 121 at 2.
[35] Though the Department initially filed a notice of appeal challenging the district court's interpretation of Section 19 of the IRA, it ultimately moved for voluntarily dismissal of its appeal. Motion to Voluntarily Dismiss Appeal, *Littlefield, et al. v. U.S. Dep't of the Interior*, No. 16-2481 (U.S.C.A. 1st Cir. Apr. 27, 2017). The Tribe's appeal of the district court's decision remains pending before the United States Court of Appeals for the First Circuit. *See*

and notified the parties of the procedures and schedule to be followed on remand.[36] The Tribe commenced by submitting evidence and arguments for the Department's consideration in determining whether the Tribe was under federal jurisdiction in two parts.[37] The Littlefields filed a response within 30 days,[38] to which the Tribe had 15 days to respond.[39] Remand briefing concluded on February 28, 2017.

The Department had intended to issue a remand decision on or before June 19, 2017.[40] However the parties' remand submissions raised new and potentially important issues that neither party had explored. Both parties relied on the First Circuit decision in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*,[41] which found that in considering legislation to admit Maine as a state, Congress had had notice of Massachusetts' exercise of authority over Indian affairs.[42] This raised the question whether such exercise could be a surrogate for Federal jurisdiction for purposes of the *Carcieri* analysis. To further consider that question, the Department delayed issuing a remand decision. On June 30, 2017, the Department denied a Tribal request to suspend remand proceedings and instead sought supplemental briefing on the question of the effect of Massachusetts' exercise of authority over the Tribe for purposes of the "under federal jurisdiction" inquiry.[43]

Pursuant to procedures established by the Department, the parties simultaneously submitted supplemental evidence and arguments on August 30, 2017[44] and their mutual responses thereto on October 30, 2017.[45] The Department granted a request by the Wampanoag Tribe of Gay Head (Aquinnah) to also respond,[46] to which the parties replied in turn.[47] Supplemental briefing on the issue raised by *Passamaquoddy* concluded on November 13, 2017.

Order of Court, *Littlefield v. Mashpee Wampanoag Indian Tribe*, Case No. 16-2484 (U.S.C.A 1st Cir. May 15, 2017) (staying proceedings until issuance of Department's remand decision).

[36] *See* Letters, Principal Deputy Assistant Secretary- Indian Affairs Lawrence Roberts to Adam Bond, Cedric Cromwell, Matthew Frankel, David Tennant (Dec. 6, 2016).

[37] 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) ("Mashpee Op. Br. Part 1"); 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) ("Mashpee Op. Br. Part 2").

[38] Littlefields, Submission on Remand (Feb. 13, 2017) ("Littlefields Resp.").

[39] Mashpee Wampanoag Tribe, Reply to Citizens' Group Submission on Remand (Feb. 28, 2017) ("Mashpee Reply").

[40] Email, U.S. Dep't of the Interior, Associate Solicitor – Indian Affairs Eric Shepard to the parties (Apr. 19, 2017).

[41] 528 F.2d 370 (1st Cir. 1975) ("*Passamaquoddy*").

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

[43] The Department enclosed a draft of its initial remand analysis with its request for supplemental briefing.

[44] Mashpee Wampanoag Tribe, Supplemental Submission on the Two-Part Under Federal Jurisdiction Test: The Commonwealth of Massachusetts Acted as an Agent of the Federal Government (Aug. 30, 2017) ("Mashpee Supp. Br."); Littlefields, Supplemental Submission on Remand (Aug. 30, 2017) ("Littlefields Supp.").

[45] Mashpee Wampanoag Tribe, Response to the Littlefield August 30, 2017 Submission (Oct. 30, 2017); Littlefields, Supplemental Reply Submission (Oct. 30, 2017).

[46] Wampanoag Tribe of Gay Head (Aquinnah), Request to Participate in the Mashpee Supplemental Briefing Request (Oct. 30, 2017).

[47] Mashpee Wampanoag Tribe, "Response to the Submission from the Wampanoag Tribe of Gay Head (Aquinnah)" (Nov. 13, 2017); Littlefields, "Response to Submission of Wampanoag Tribe of Gay Head (Aquinnah)" (Nov. 13, 2017). A separate submission was received from the Towns of Ledyard, North Stonington, and Preston, Connecticut (Nov. 20, 2017).

II. ARGUMENTS

A. Previous *Carcieri* Submissions

In September 2012, the Tribe submitted a detailed discussion of its statutory eligibility with supplementary exhibits totaling more than 300 pages.[48] The 2012 submission offered two different views of why the Tribe should be considered to have been "under federal jurisdiction" in 1934.[49] First the Tribe argued it had been under Federal jurisdiction since 1789 by operation of law.[50] This relied on three subsidiary claims: 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;[51] that the Tribe always exercised and maintained aboriginal fishing and other usufructuary rights;[52] and that a Federal trust relationship had always existed by virtue of federal common law and the Indian Trade and Intercourse Act.[53] Second the Tribe argued that it remained under Federal jurisdiction in 1934 by virtue of affirmative acts of Federal supervision from before 1934. These included Federal consideration and ultimate rejection of whether to remove the Tribe in the 1820s; Federal supervision of Mashpee students at the Carlisle Indian School in the early twentieth century; and the inclusion of Mashpee Indians in both general and Indian-specific Federal censuses.[54]

B. Submissions on Remand

1. Opening Brief

The Tribe submitted its opening remand submission in two parts.[55] The first part addresses the single question of whether the Tribe's historical relationship with the Commonwealth of Massachusetts precluded Federal jurisdiction over the Tribe. 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

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[48] Letter, Chairman Cedric Cromwell to Assistant Secretary Donald "Del" Laverdure (Sep. 4, 2012) ("Mashpee 2012 Ltr."). The Tribe provided further arguments and evidence. *See* Letters, Arlinda Locklear, Esq. to Bella Wolitz, Dep't of the Interior, Knoxville Field Solicitor's Office (Nov. 5, 2012; 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. *See* Mashpee Wampanoag Tribe, Amendment to Existing Application (Jul. 13, 2010). The Tribe there 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, further claiming that amendments to the IRA in 1994 prohibited the Department from making any decision or determination that disadvantaged or diminished its rights as a federally recognized tribe relative to other recognized tribes. *Id.* at 9, citing 25 U.S.C. § 476(f).

[49] The Tribe also argued that it independently satisfied the second definition of "Indian." Mashpee 2012 Ltr. at 31-36.

[50] Mashpee 2012 Ltr. at 2.

[51] Mashpee 2012 Ltr. at 2.

[52] Mashpee 2012 Ltr. at 3.

[53] Mashpee 2012 Ltr. at 3.

[54] Mashpee 2012 Ltr. at 3.

[55] *See supra* n. 37.

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.

The second part discusses evidence of Federal jurisdictional status before and in 1934. The Tribe claims that its evidence indisputably shows Federal jurisdiction over the Tribe when viewed as a whole.[56] Largely repeating the arguments submitted in 2012, the Tribe offers general and particular grounds why it was "under federal jurisdiction" in 1934. The Tribe argues for being generally under Federal jurisdiction as a matter of law based on "treaty-like" obligations of the British Crown to which the United States succeeded; Federal restraints against alienation of the Tribe's aboriginal lands; and the continuing existence of usufructuary rights into the twentieth-century. In particular terms, the Tribe claims it came 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 School in the early 1900s. The Tribe also relied on references to the Tribe and its history in federal reports or studies prepared 1888, 1890 and 1935.

2. Response

The Littlefields' devote nearly half of their 112-page response to the Tribe's submissions to arguing for the "vacatur" of Sol. Op. M-37029, which we address below. The remainder offers arguments to refute the Tribe's claims and to show that the Tribe could not have been under Federal jurisdiction under any test.

First the Littlefields contend that the United States is judicially estopped from finding that the Tribe was recognized and under Federal jurisdiction in 1934 because of a 1970s decision finding that the Tribe lacked standing to bring claims under the Nonintercourse Act. Next the Littlefields argue that the Tribe cannot have been under Federal jurisdiction if its history of state jurisdiction cannot meaningfully be distinguished from the Narragansett Tribe's, which *Carcieri* concluded was not under Federal jurisdiction in 1934.

The Littlefields then attack the particular forms of evidence submitted by the Tribe, arguing that *Carcieri* requires dispositive evidence of jurisdiction akin to a treaty, legislation, or formal benefits enrollment with the Office of Indian Affairs (OIA). The Littlefields conclude by arguing that disclaimers of responsibility for the Tribe in and around 1934 by OIA officials conclusively show that the Tribe was not under federal jurisdiction at that time.

[56] Mashpee Op. Br. Part 2.

3. *Reply*

The Tribe's reply to the Littlefields' response includes a new argument not raised in the Tribe's opening submissions.[57] Its reply additionally argues that because the Tribe occupied a reservation in 1934, as the Department determined in the 2015 ROD, the Tribe was thus eligible at that time to vote on whether to accept the IRA pursuant to Section 18,[58] and that such eligibility alone is dispositive of its being "under federal jurisdiction" in 1934.

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 disputing the relevance of the Narragansett Tribe's history to the inquiry. 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' 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 Sol. Op. 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.[59] 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.

C. Supplemental Submissions

The parties' supplemental briefing contains over 200 pages of argument and over 1700 pages of exhibits. Their response briefs further contain 250 pages of argument and over 1500 pages of additional exhibits. The Tribe's supplemental submissions argue that the Commonwealth of

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

[58] 25 U.S.C. § 5125 (requiring the Secretary to hold elections for the adult Indian residents of reservations to provide such residents the opportunity to vote to reject the application of the IRA to their reservation).

[58] 25 U.S.C. § 5125 (requiring the Secretary to hold elections for the adult Indian residents of reservations to provide such residents the opportunity to vote to reject the application of the IRA to their reservation).

[59] Mashpee Reply at 31 ff.

Massachusetts acted as an agent of the United States pursuant to a delegation of authority.[60] The Tribe specifically suggests that in admitting Maine to the Union, Congress "allowed" the Commonwealth to assume a portion of the Federal Government's trust responsibilities[61] and legislatively "acknowledged" the Commonwealth's "acceptance" of duties and obligations to Massachusetts Indians.[62] The fact that such delegation was implicit is immaterial, the Tribe contends.[63] The Tribe also claims that the Commonwealth assumed responsibility for Massachusetts Indians in 1789 when the Constitution was adopted.[64] If states lack inherent authority over Indian affairs, the Commonwealth must have "necessarily agreed" to act as agents of the Federal Government and carry out its responsibilities owed to Massachusetts Indians.[65] The Tribe further claims that the United States exercised authority over the Mashpee in coordination with Commonwealth officials, relying as evidence thereof on a 1798 state trespass action litigated on behalf of the Marshpee proprietors by a United States attorney.[66] The Tribe argues that Congressional approval of the "cooperative exercise" of trust responsibilities constitutes federal validation of previous state actions.[67] The Tribe claims its evidence of federal actions over the Tribe also constitute federal approval of the Commonwealth's role as an agent.[68]

The Littlefields' supplemental submissions first dispute the premises of the Department's request for supplemental briefing, arguing that the United States "surrendered" authority over Indian affairs to the Commonwealth; lacked authority over Indian affairs in the 13 original states; and that any conflation of state and Federal authority over Tribes was unconstitutional.[69] They then generally advance a combination of legal and historical arguments, for a series of sweeping propositions, including that the original 13 states retained inherent authority over Indian affairs during the Confederation and Constitutional periods; that Congress acquiesced to state jurisdiction over Indians;[70] that the Trade and Intercourse Act did not apply in New England or to "assimilated" Indians;[71] that New England "operated free of" Federal Indian affairs authority;[72] that New England states enacted legislation governing Indian affairs from before 1789 until the 1970s[73] and that the United States acquiesced to such authority;[74] and that reading the Commonwealth's actions over the Mashpee Tribe as a "surrogate" for Federal authority

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[60] The Tribe devotes only a third of its supplemental submission to the question presented, using the remainder to re-argue why its previous evidence satisfies Sol. Op. M-37029's two-part inquiry.
[61] Mashpee Supp. Br. at 7.
[62] Mashpee Supp. Br. at 7-8, 14.
[63] Mashpee Supp. Br. at 14.
[64] Mashpee Supp. Br. at 10.
[65] Mashpee Supp. Br. at 11.
[66] Mashpee Supp. Br. at 7, citing *Proprietors of Marshpee v. Crocker*, cited in Benjamin Franklin Hallett, "Legal Opinion of Council in the case of *Marshpee Indians vs. Revd. Phineas Fish*, May 20, 1835," Harvard University Archives, PAPERS RELATING TO THE MARSHPEE INDIANS, 1811-1841; *id.* at 9.
[67] Mashpee Supp. Br. at 14.
[68] Mashpee Supp. Br. at 15-16 (noting reliance by Rev. Jedidiah Morse, as federal agent, on report commissioned by Massachusetts legislature on the status of Massachusetts Indians, including Mashpee).
[69] Littlefields Supp. at 15, 46-57.
[70] Littlefields Supp. at 29.
[71] Littlefields Supp. at 31, 33.
[72] Littlefields Supp. at 36.
[73] Littlefields Supp. at 41.
[74] Littlefields Supp. at 42.

would create "absurd results."[75] The Littlefields also claim that the IRA's "under federal jurisdiction" requirement removes state-recognized tribes from the IRA's coverage.

III. ANALYSIS

Sol. Op. M-37029 requires that I determine whether there is a sufficient showing in the Tribe's history that the United States took an action or series of actions that sufficiently establish or reflect Federal obligations, duties, responsibility for or authority over the Tribe in or before 1934, and whether such jurisdictional status, if obtained, remained intact as of 1934.[76] The Tribe claims that the evidence shows that it came under Federal jurisdiction before 1934 by operation of law as well as by virtue of specific exercises of federal authority. The evidence, according to the Tribe, supports 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.

A. Standard of Review

1. Sol. Op. M-37029

Section 5 of the IRA provides the Secretary discretionary authority to acquire land in trust for "Indians," which Section 19 of the IRA defines as including:

> "[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."[77]

In *Carcieri v. Salazar*,[78] the Supreme Court held that the term "now" in the first definition means 1934, the time of the IRA's passage. The Court did not address the meaning of "under federal jurisdiction," however, finding no need to do so in the context of the case.[79] The IRA does not define "under federal jurisdiction." The Department's Solicitor concluded that because the phrase had no clear and unambiguous meaning, Congress left an interpretive gap for the agency to fill.[80] In 2014 the Solicitor therefore issued a signed M-Opinion for use by the Department in determining when an Indian tribe was "under federal jurisdiction" in 1934 for purposes of

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[75] Littlefields Supp. at 66 (*e.g.*, the Commonwealth's disposition of aboriginal lands would thereby not violate the Trade and Intercourse Act).
[76] Sol. Op. M-37029 at 18-19.
[77] 25 U.S.C. § 5129.
[78] 555 U.S. 379 (2009).
[79] The Court concluded that the parties had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 382, 395. The Court also did not address the Secretary's authority to acquire land in trust for groups that fall under Section 19's other definitions of "Indian."
[80] Sol. Op. M-37029 at 17, citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 840-843 (1984).

implementing Section 5 of the IRA ("Sol. Op. M-37029").[81] Because a signed M-Opinion binds the Department and its officials until modified by the Solicitor, Deputy Secretary, or Secretary or otherwise overruled by the courts,[82] Sol. Op. M-37029 guides this analysis.

Sol. Op. M-37029 rejected the argument that Congress' constitutional plenary authority over tribes standing alone may be sufficient to show that a tribe was "under federal jurisdiction."[83] It concluded that the decision in *Carcieri* requires some indicia of Federal authority beyond the general principle of plenary authority,[84] in the form of evidence that demonstrates the Federal government's exercise of responsibility for and obligation toward a tribe and its members in or before 1934.[85] Sol. Op. M-37029 therefore establishes a two-part inquiry for determining whether a tribe was "under federal jurisdiction" in 1934.[86] The first part looks for evidence that the United States acted in a manner that sufficiently shows or generally reflects Federal obligations, duties, responsibility for or authority over a tribe in or before 1934.[87] Where the evidence establishes that a tribe was under Federal jurisdiction *before* 1934, the inquiry moves to the second part to determine whether that jurisdictional status continued through 1934.

Sol. Op. M-37029 explains that some Federal actions can dispositively show that a tribe was under Federal jurisdiction at a particular time, such as treaty negotiations or specific Federal enactments.[88] The absence of a formal political relationship with the United States in 1934 does not in itself preclude a tribe from being considered under Federal jurisdiction at that time, however.[89] Tribes without a recognized political relationship may be able to exercise treaty

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[81] Sol. Op. M-37029 at 18. The Department announced its framework for interpreting "now under federal jurisdiction" in a December 2010 record of decision to acquire land in trust for the Cowlitz Indian Tribe. *See* 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 (April 2013) ("Cowlitz ROD").

[82] U.S. Dep't of the Interior, 209 Departmental Manual 3.2(A)(11).

[83] Sol. Op. M-37029 at 17-18.

[84] Sol. Op. M-37029 at 18.

[85] Sol. Op. M-37029 at 17.

[86] Sol. Op. M-37029 at 18-19.

[87] Sol. Op. M-37029 at 19.

[88] *See e.g., Shawano County, Wisconsin v. Acting Midwest Reg'l Dir. Bureau of Indian Affairs,* 53 IBIA 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) (listing the reservations where such elections were held between 1934-1936).

[89] Cowlitz ROD at 104 (Tribe's admission that it lacked formal political relationship with United States in 1934 does not necessarily also mean it was not under federal jurisdiction in 1934).

rights, for example.[90] Thus in some cases a range of Federal actions when viewed in totality might demonstrate that a tribe was under Federal jurisdiction.[91]

Federal activities relevant to the "under federal jurisdiction" inquiry may include guardian-like actions undertaken on behalf of a tribe or a continuous course of dealings with the tribe or its members.[92] They may also include the negotiation of treaties; Federal approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe.[93] They may further include actions by Office of Indian Affairs in administering a reservation's affairs or in implementing specific Federal legislation, such as Section 18 elections under the IRA.[94] The range of evidence that may be used reflects that the Federal Government's Indian policies, which were applied "to numerous tribes with diverse cultures," necessarily "fluctuate[d] dramatically as the needs of the Nation and those of the tribes changed over time."[95]

For tribes that establish a Federal jurisdictional status before 1934, the second part of the inquiry turns to whether that status remained intact in 1934. The absence of probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 suggests that such status was retained in 1934.[96] The failure by Federal officials to take any actions toward or on behalf of a tribe in a particular period may not necessarily reflect a termination or loss of the tribe's jurisdictional status.[97] Indeed, evidence that officials disavowed legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action.[98]There may also be periods where Federal jurisdiction exists but lies dormant.[99]

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[90] *See, e.g., United States v. Washington*, 641 F.3d 1368, 1371 (9th Cir. 1981), citing *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968); *Kimball v. Callahan*, 493 F.2d 564, 568 (9th Cir.), cert. denied, 419 U.S. 1019 (1974). Sol. Op. M-37029 explains that "recognized Indian tribe" as used in the first definition of "Indian" is ambiguous because "recognition" has historically been understood in two different senses, one cognitive or quasi-anthropological sense, the other a more formal legal sense connoting a political relationship with the United States. Sol. Op. M-37029 at 23. The latter sense has evolved into the contemporary notion of "federal acknowledgment." *Id. See* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 268 (1942 ed.); *Carcieri*, 555 U.S. at 400 (Souter, J.) (dissent) (noting majority opinion does not foreclose giving recognition and jurisdiction separate content, and pointing out that whether the United States was ignorant of a tribe in 1934 would not preclude the tribe from having been under federal jurisdiction).

[91] *See, e.g.*, Cowlitz ROD.

[92] Sol. Op. M-37029 at 19.

[93] Sol. Op. M-37029 at 19.

[94] Sol. Op. M-37029 at 19.

[95] *United States v. Lara,* 541 U.S. 193, 202 (2004).

[96] Sol. Op. M-37029 at 20.

[97] *See* Memorandum, Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, *Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe* (Oct. 1, 1980) ("Stillaguamish Memorandum").

[98] "Once recognized as a political body by the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1] (2012 ed.) ("COHEN 2012"), citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142-43 (D.D.C. 1976).

[99] *See* Stillaguamish Memorandum at 2 (noting that enduring treaty obligations maintained federal jurisdiction, even if the federal government did not realize this at the time); *United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost

2. *The Littlefields' "Vacatur" Request*

The Littlefields' remand submissions attack the legal validity and sufficiency of Sol. Op. M-37029 and request its "vacatur."[100] Consistent with the Department's procedures, I interpret this as a request to withdraw or modify Sol. Op. M-37029. As explained above, I lack the authority to modify or withdraw a signed Solicitor's M-Opinion, for which reason I must deny the Littlefields' request.[101] Even if I had the authority to consider it, however, I would conclude that the Littlefields fails to show that Sol. Op. M-37029's interpretation of "under federal jurisdiction" or the two-part inquiry are contrary to law. The courts to have considered the issue have upheld the Department's interpretation of "under federal jurisdiction" and its application.[102]

B. Jurisdiction by Operation of Law

The Tribe first argues that it came under Federal jurisdiction before 1934 by operation of law. It accurately notes that tribes lacking dispositive jurisdictional evidence in 1934 may show that their jurisdictional status arose before then.[103] The Tribe further states that the analysis under Sol. Op. 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.[104] The Tribe argues that it came under Federal jurisdiction as a matter of law in the early constitutional period.[105] The Tribe argues that after the American Revolution, the United States automatically succeeded to "treaty-like" obligations of the British Crown to the Tribe. [106] As evidence of these obligations

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100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

[100] *See* Littlefields Resp. at 2, 8-49. Despite being aimed at Sol. Op. 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 Sol. Op. M-37029.

[101] To the extent that the Littlefields' arguments against Sol. Op. M-37029 raise issues that go to the merits of the "under federal jurisdiction" inquiry instead, I address them in §III below. *See, e.g.,* Littlefields Resp. at 15 (effect of extending state citizenship in 1869); 30 (significance of federal-tribal correspondence in 1930s); 44-45 (effect of Tribal land-claim litigation); 25-32 (significance of parallels with Narragansett Tribe's history in *Carcieri*); 39-40 (significance of Mashpee student enrollment at Carlisle Indian School).

[102] *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) ("*Grande Ronde*"); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015) (not reported), *aff'd*, 673 Fed. Appx. 63 (2d Cir. 2016) (not reported), *cert den.*, 137 S.Ct. 2134 (2017); *Citizens for a Better Way v. United States DOI*, 2015 WL 5648925 (E.D. Cal. Sep. 23, 2015) (not reported), *aff'd sub. nom. Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584 (9th Cir. 2018); *Stand Up for Cal.! v. United States DOI*, 204 F. Supp. 3d 212, 282 (D.D.C. 2016), 879 F.3d 1177 (D.C. Cir. 2018), *reh'g en banc den.,* Apr. 10, 2018, cert pet. docketed, No. 18-61 (U.S. Jul. 11, 2018); *County of Amador v. Jewell*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015), *aff'd,* 872 F.3d 1012, 1025 (9th Cir. 2017), *reh'g en banc den.* (Jan. 11, 2018), cert pet. docketed, No. 17-1432 (U.S. Apr. 13, 2018). *See also Shawano County, Wisconsin v. Acting Midwest Reg'l Dir.*, 53 IBIA 62 (2011); *Village of Hobart, Wisc. v. Acting Midwest Reg'l Dir., Bureau of Indian Affairs*, 57 IBIA 4 (2013).

[103] Mashpee Op. Br. Part 2 at 3.

[104] Mashpee Op. Br. Part 2 4-5, citing Sol. Op. M-37029 at 18, 19, 23.

[105] Mashpee Op. Br. Part 2 at 10-21.

[106] 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. United States v. Lara,* 541 at 202 (in first century of America's national existence,

the Tribe points to seventeenth-century colonial deeds from Wampanoag sachems to the Tribe conveying their lands in perpetuity. The Tribe also cites a 1763 law by the Massachusetts Bay Province recognizing Mashpee as a self-governing Indian district.[107]

Though the Mashpee Tribe asserts otherwise, the absence of any Federal action with respect to its "treaty-like" rights distinguishes the Tribe from the Tunica-Biloxi Tribe, for whom the Department issued a favorable *Carcieri* analysis in 2011.[108] 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.[109] 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.[110] 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.[111]

The Mashpee Tribe elsewhere seeks to rely on the Nonintercourse Act to establish its jurisdictional status;[112] yet the evidence shows that the Federal Government took no action to protect the Tribe's lands despite invitations to do so.[113] Sol. Op. 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.[114] 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.

Indian affairs were aspect of military and foreign policy, not domestic or municipal law). *See also* Robert N. Clinton, *The Dormant Commerce Clause*, 27 CONN. L. REV. 1055, 1064 (1995) ("Clinton 1995") (" The roots of both the Indian affairs clause of the Articles of Confederation and the Indian Commerce Clause lie deep in the history of colonial regulation of the management of Indian affairs").

[107] Mashpee Op. Br. Part 2 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* MASS. ACTS 1763-64, ch. 3 (June 14, 1763).

[108] *See* Mashpee Op. Br. Part 2, Ex. D (Letter, Randall Trickey, Acting BIA Eastern Regional Director to Early Barbry, Sr., Chairman, Tunica-Biloxi Tribe of Louisiana (Aug. 11, 2011)).

[109] Mashpee Op. Br. Part 2, Ex. D at 8-9.

[110] Mashpee Op. Br. Part 2, 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.

[111] Mashpee Op. Br. Part 2 at 6-7 (discussing Tunica-Biloxi); *id.*, Ex. D.

[112] Mashpee Op. Br. Part 2 at 16-17.

[113] Mashpee Op. Br. Part 2 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).

[114] Sol. Op. M-37029 at 19.

By contrast, the Tribe here relies merely on colonial-era title deeds and legislation, which in themselves are not comparable to treaties since they are not "contracts between governments" and do not evidence mutual commitments between the Tribe and Crown, nor any reciprocal grant of rights by the Tribe to the Crown.[115] Further, while the Tribe characterizes the 1763 colonial act that established Mashpee as an Indian district as being the result of a "negotiated relationship" with the Crown,[116] the Office of Federal Acknowledgment found it was the result of Tribal appeals to the Provincial legislature and Crown and that it was enacted in response to "diplomatic pressure" from the King.[117] The absence of any evidence of subsequent Federal action in acknowledging or relying on these deeds or provincial acts, though not dispositive, diminishes their significance for our purposes.

In its Reply, the Tribe makes a similar argument for jurisdiction by operation of law based on 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 Sol. Op. M-37029 analysis.[118] 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.[119] Based on that, the Tribe claims the Department's 2015 ROD 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 ROD 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 to address the Tribe's Federal jurisdictional status.

Section 18 requires that the Secretary call elections at reservations, to allow the adult Indians residing thereon the opportunity to vote to reject application of the IRA.[120] A Section 18 vote is dispositive evidence of a tribe's jurisdictional status because inherent in the calling of such election is that a reservation existed and that the adult residents thereon 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 actual calling of a Section 18 election is an unmistakable assertion of Federal jurisdiction.[121] Whether the Tribe had a qualifying "reservation" within the meaning of Section 18 based on the analysis in the 2015 ROD, which arose in the unique situation where the land at issue was not set aside by the United States, does not necessarily resolve whether the Tribe's members were "Indians" within the meaning of that statutory provision. As a result, the Tribe's argument in effect begs the question of whether its members were "Indians" under the IRA, the same question addressed herein.

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[115] *United States v. Washington*, 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.")
[116] Mashpee Op. Br. Part 2 at 14.
[117] Mashpee PF 96.
[118] Mashpee Reply at 2, citing Ex. A (2015 ROD) at 120.
[119] Mashpee Reply at 2.
[120] 25 U.S.C. § 5125.
[121] Sol. Op. M-37029 at 20-21.

C. Commonwealth Exercise of Authority as Evidence of Federal Jurisdiction

The parties' remand submissions discuss the significance of Massachusetts' historical exercise of authority over Indians in the state.[122] The Tribe argues that the United States retained paramount authority over Indian affairs within the original thirteen states despite state actions and the slow development of Federal authority in the early constitutional period. Regardless, the Tribe adds, any exercise of state authority over Indians did not oust or otherwise limit Federal authority.[123] The Littlefields respond that the Commonwealth's exercises of authority over the Tribe precluded a Federal relationship in or before 1934, and that because the Tribe was always under the Commonwealth's care and authority, its members could not have been wards of the United States.[124] The parties' discussion of whether the United States could have exercised authority over Massachusetts Indians, however, was somewhat misplaced. The analysis for determining a recognized tribe's eligibility for statutory benefits under the IRA already presumes it is subject to the Federal Government's plenary power over Indian affairs.[125] The question for determining eligibility under the IRA's first definition of "Indian" is instead whether Federal officials ever *exercised* that authority with respect to the Tribe or its members and when.

After its initial review of the parties' submissions, the Department tentatively concluded that the Tribe's evidence did not demonstrate Federal jurisdiction in or before 1934 beyond the general principle of plenary authority.[126] Given the jurisdictional uncertainty over Indian affairs in the early national period, the question arose whether the Commonwealth's exercises of authority over the Mashpee Tribe and its affairs could be interpreted as a surrogate for, or indicia of some federal authority based on *Passamaquoddy*'s conclusion that Congress knew of and tacitly acknowledged Massachusetts' authority over Indians in the state.[127]

The historical record plainly shows that as a colony and state, Massachusetts exercised considerable authority over the Mashpee Tribe and its members, treating them as a self-governing Indian community distinct from non-Indians.[128] As a colony, Massachusetts enacted

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[122] *See, e.g.*, Mashpee Op. Br. Part 1; Littlefields Resp. at 1-5.
[123] Mashpee Op. Br. Part 1.
[124] Littlefields Resp. at 2-3.
[125] Sol. Op. M-37029 instructs that to demonstrate being "under federal jurisdiction" requires indicia of federal jurisdiction *beyond* the general principle of plenary authority. Sol. Op. M-37029 at 18. In acknowledging the Tribe under the administrative procedures at Part 83, the Department determined that the Tribe had demonstrated a continuous tribal existence since first sustained contact with European settlers.
[126] While Sol. Op. M-37029 acknowledged in passing that some tribes might be unable to make the required showing, it declined to address that situation or any legal authority that might be pertinent. Sol. Op. M-37029 at 19, n. 118.
[127] *See* Littlefields Supp. at 29-39 (discussing jurisdictional conflicts between the national government and the original states over the exercise of Indian affairs authority). *See also* Clinton 1995 (discussing conflicts over responsibility for management of Indian affairs between the Crown and colonies and, later, between the national government and the original states); *See* Letter, U.S. Dep't of the Interior, Assoc. Dep. Secy. to Hon. Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe (Jun. 30, 2017).
[128] The records of the Secretary of the Commonwealth of Massachusetts, Massachusetts Archive Division show interactions between Massachusetts authorities and Mashpee Indians dating back to the 17th-century. *See* http://www.sec.state.ma.us/ArchivesSearch/RevolutionarySearch.aspx (subject search "Mashpee Indians").

legislation governing Indian affairs generally[129] and the Mashpee Tribe specifically.[130] Indeed, John Adams, a drafter of the Massachusetts state constitution and second President of the United States, was an elected member of the colonial legislature that reauthorized laws setting Mashpee aside as a self-governing Indian district.[131] Though it is somewhat unclear, the Littlefields appear to argue that the Commonwealth assumed authority over Indian affairs in the state directly from colonial authorities and exclusive of the Federal Government.[132] Yet the Supreme Court long ago held that the Continental Congress assumed management of Indian affairs "first in the name of these United Colonies; and, afterwards, in the name of the United States."[133] It is moreover a fundamental tenet of Federal Indian law that national power over Indians arises in part from inherent powers originating in colonial prerogatives derived from discovery and from Indians' aboriginal status.[134]

After 1776, Massachusetts continued to exercise its authority over Massachusetts Indians and the Mashpee Tribe.[135] Between 1788 and 1882, the Commonwealth enacted a wide range of legislation affecting the rights and property of the Tribe and its members,[136] including laws providing for the appointment of guardians to oversee the Tribe and its resources;[137] establishing

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[129] *See, e.g.*, MASS. ACTS 1694-95, ch. 10 (Sept. 12, 1694), (removal and restriction of Indians); MASS. ACTS 1697, ch. 22 (Oct. 30, 1697), 1701-02, ch. 11 (Jun. 28, 1702) (preemption); MASS. ACTS 1758-59, ch. 6 (June 15, 1758) (appointing guardians for every Indian plantation); MASS. ACTS 1752-53, ch. 14 (Jan. 5, 1753) (governing trade with Indians).

[130] *See, e.g.*, MASS. ACTS 1763-64, ch. 3 (June 14, 1763) (incorporating the Indians of Mashpee) (reauthorized by MASS. ACTS 1766-67, ch. 20 (Mar. 20, 1767); MASS. ACTS 1770-71, ch. 6 (Nov. 20, 1770); MASS. ACTS 1775-76, ch. 14 (Feb. 9, 1776).

[131] *See Journals of the House of Representatives of Massachusetts, vol. 47, 1770-1771* (1978); MASS. ACTS 1770-71, ch. 6 (Nov. 20, 1770). The state legislature continued to reauthorize this legislation even after Independence. *See* MASS. ACTS 1775-76, ch. 14 (Feb. 9, 1776); MASS. ACTS 1779-80, ch. 18 (Nov. 25, 1779) (reauthorizing through 1785); Mashpee PF at 34. *See also* MASS. CONST. ch.VI art. VI (continuing in effect all laws of the Province, Colony, or State of Massachusetts Bay until legislatively altered or repealed unless otherwise repugnant to the state constitution).

[132] The Littlefields assert both that colonial authority over Indian affairs "lapsed" around 1777 (Littlefields Resp. at 63) yet "continued unabated" through 1789 (Littlefields Resp. at 62).

[133] *Worcester v. Georgia*, 31 U.S. 515, 558 (1832); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936) ("When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union").

[134] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The parties did not address any effects on the analysis if the Commonwealth derived its authority over Indians from the same colonial prerogatives.

[135] Commonwealth laws governing Indians generally included MASS. ACTS 1819, ch. 156 (Jun. 19, 1819) (transferring Commonwealth's authority over Indians within District of Maine to new State of Maine); MASS. ACTS 1846, ch. 216 (Apr. 14, 1846) (authorizing removal of guardians over Indians for cause); MASS. ACTS 1869, ch. 463 (Jun. 23, 1869) (extending state citizenship to Massachusetts Indians); MASS. ACTS 1870, ch. 350, § 1 (Jun. 13, 1870) (distributing state Indian School Fund to state towns; transferring Indian schools to local municipalities).

[136] Laws governing the Mashpee Wampanoag Tribe specifically included MASS. ACTS 1779-80, ch. 18 (Nov. 25, 1779)); MASS. RESOLVES 1792, ch. 148 (Mar. 26, 1793) (establishing boundaries of Mashpee); MASS. ACTS 1818-19, ch. 105. (Feb. 18, 1819) (restricting ownership of Mashpee lands to Mashpee children and lineal descendants); MASS. ACTS 1858, ch. 94 (Mar. 26, 1858) (fishing rights); MASS. ACTS 1870, ch. 293 (May 28, 1870) (establishing Mashpee as municipality under state constitution); MASS. ACTS 1878, ch. 248 (May 15, 1878) (distribution of funds from sale of Mashpee lands); Mass. Acts 1882, ch. 151 (Apr. 12, 1882) (authorizing sale of undisposed Mashpee lands).

[137] MASS. ACTS 1788, ch. 38 (Jan. 30, 1789); *see also* Mashpee PF at 13-14; Mashpee FD at 18.

Mashpee as a self-governing Indian district;[138] and the allotment of tribal lands.[139] In common with the thinking of the day, the Commonwealth considered the Mashpee Indians a distinct community apart from the state body politic and subject to the state's care and protection.[140] An 1849 report of the Massachusetts legislature characterized the Mashpee Tribe's "peculiar" condition under state laws that treated them like tribes elsewhere[141] as leaving the Mashpee "within the state, but not of it."[142]

The record demonstrates that the Mashpee Tribe had significant relations with the Commonwealth as a colony and state for nearly two centuries; that the Commonwealth's exercises of authority over the Tribe were extensive and pervasive; and that the laws enacted by the Commonwealth for the benefit of the Tribe were often similar in substance to Federal laws enacted for the benefit of tribes. Nevertheless the record contains practically no evidence of any dealings with the Federal Government in that period, which Sol. Op. M-37029 requires, and exercises of Commonwealth authority, without more, cannot in itself reflect *federal* obligations, duties, responsibilities for, or authority over the Tribe.[143]

The Tribe argues that Massachusetts agreed to act as an agent of the Federal Government to carry out Federal duties and obligations owed to Indians in the state.[144] But the record contains no evidence of any such agreement or similar understanding, either explicit or implicit, on the part of federal or state officials.[145] The Tribe also argues that the *nature* of Massachusetts' exercises of authority over the Mashpee were "quintessentially federal in nature."[146] I agree that Commonwealth's actions taken on behalf of the Mashpee Tribe addressed issues similar to Federal legislation enacted for the benefit of tribes elsewhere.[147] But that is not enough for the

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[138] MASS. ACTS 1834, ch. 166 (Mar. 31, 1834); *see also* Mashpee FD at 18-19.
[139] MASS. ACTS 1842, ch. 72 (Mar. 3, 1842).
[140] *Hall v. Gardner*, 1 Mass. 171, 179 (1804) (describing the Mashpee Indians a legally under the guardianship and care of state-appointed overseers because of their "weakness"); *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (tribal members not U.S. citizens under 14th Amendment, and their "alien and dependent condition" can only be put off by action or assent of the United States). *See also Jackson (ex dem. Gilbert) v. Wood*, 7 Johns. 290 (N.Y. 1810) (Kent, C.J.) (though dependent and having rights of protection, members of Oneida Tribe of New York have no allegiance to State); COHEN 2012, § 14.01[1] (noting prevailing 19th-century view that tribal affiliation was inconsistent with U.S. and state citizenship).
[141] Mass. H. Rep. No. 46, *Report of the Commissioners Relating to the Condition of the Indians in Massachusetts* at 30, 37 (Feb. 21, 1849); Mass. Sen Rep. No. 96, *Report to the Governor and Council, Concerning the Indians of the Commonwealth, under the Act of April 6, 1859* at 54 (Mar. 8, 1861) (referring to proposed extension of state citizenship to Mashpee members as change in political relations); *id.* at 120 (describing Mashpee has having reservation with little or no mixture with whites and distinguishing Tribe from Massachusetts Indians lacking distinct organization).
[142] Mass. H. Rep. No. 46 at 120 (describing Mashpee has having reservation with little or no mixture with whites and distinguishing from Massachusetts Indians lacking reservations or distinct organization).
[143] Sol. Op. M-37029 at 19.
[144] Mashpee Op. Br. Part 1 at 11.
[145] Mashpee Op. Br. Part 1 at 3-5.
[146] Mashpee Op. Br. Part 1 at 12.
[147] *Compare, e.g.*, MASS. ACTS 1834, ch. 166 (Mar. 31, 1834) (establishing Mashpee as self-governing Indian town) *with* Act of June 18, 1934, ch. 576, § 16, 48 Stat. 984 (granting reservation residents right to organize for common welfare); MASS. ACTS 1842, ch. 72 (Mar. 3, 1842) (providing for allotment of Mashpee land and restricted fee title) *with* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (General Allotment Act); MASS. ACTS 1869, ch. 463 (Jun. 23, 1869)

"under federal jurisdiction" inquiry. The Tribe provides no evidence to show that the Commonwealth ever acted at the request of the Federal Government. Nor does the Tribe offer evidence showing that the state viewed its actions as undertaken on behalf of the Federal Government, or as an exercise of a delegated Federal authority. To the contrary, reports prepared by the state legislature on the legal status of Massachusetts Indians show that it considered the issue without reference to federal authorities.[148]

The Tribe also argues that Congress' admission of Maine to the Union effected either an implicit delegation of Federal authority to Massachusetts[149] or a ratification of the Commonwealth's exercises of authority over tribes in the state.[150] But neither the text nor the legislative history of the Maine enabling act support the Tribe's construction. Maine's admission may have placed Congress on notice of the Commonwealth's assertion of authority over Massachusetts Indians, but it did so with respect to Indians in the district of Maine, not Mashpee. And the act's legislative history contains no evidence of congressional views on the subject. While the Maine enabling act, like the Tribe's other evidence, demonstrates a Federal awareness of the Massachusetts Indians and the Commonwealth's regulation of their affairs, it does not establish or reflect any Federal actions taken on behalf of, or for the benefit of, the Mashpee Tribe or its members as such.

The Tribe relies on *Proprietors of Marshpee v. Crocker*, a 1798 state ejectment action brought on behalf of the Tribe under state law, as evidence of Federal coordination with state officials to exercise trust responsibilities.[151] The Tribe bases its claim on the fact that the attorney representing the Tribe's interests, John Davis, was the United States Attorney for the District of Massachusetts and empowered to prosecute civil actions in which the United States was concerned.[152] However the Tribe fails to show that Davis acted on behalf of the United States in *Proprietors of Marshpee*, or that he represented any Federal interests or received authorization from the United States to do so. The record instead demonstrates that Davis received compensation for his services from the Commonwealth pursuant to state authority, further suggesting he acted in a non-Federal capacity.[153]

Having considered the Tribe's supplemental arguments and submissions, along with the Department's additional research, I conclude that Massachusetts' history of exercising authority over the Mashpee Indians provides no direct or indirect indicia of Federal authority sufficient to show that the Tribe was "under federal jurisdiction" within the framework set forth in Sol. Op. M-37029. Moreover, *Passamaquoddy* provides no assistance to the Tribe. The issue in that case was whether a state-recognized tribe lacking Federal acknowledgment was a "tribe" within the meaning of the Nonintercourse Act. Here the issue is whether a federally acknowledged tribe is

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(extending state citizenship to Massachusetts Indians) *with* Act of June 2, 1924, ch. 288, 43 Stat. 253 (extending United States citizenship to all Indians born in the United States).

[148] *See* Mass. H. Rep. No. 68 (Mar. 1, 1827) (reporting on condition of Indians in the state); Mass. Sen. Rep. No. 17 (Jan. 24, 1838) (report of Mashpee District commissioner on Tribe's socio-economic conditions); Mass. H. Rep. No. 46 (Feb. 21, 1849) (discussing legal condition of Mashpee Tribe); Mass. Sen Rep. No. 96 (Mar. 8, 1861) (same).

[149] Mashpee Op. Br. Part 1 at 10-12.

[150] Mashpee Op. Br. Part 1 at 14.

[151] Mashpee Op. Br. Part 1 at 8-10.

[152] Mashpee Op. Br. Part 1 at 9.

[153] *See* MASS. RESOLVES 1789-99, ch. 41 (Feb. 24, 1797).

eligible for statutory benefits under Section 5 of the IRA, which in turn requires a demonstration that the tribe was "under federal jurisdiction" in or before 1934. This in turn, according to Sol. Op. M-37029, requires evidence that demonstrates a *federal* exercise of responsibility for and obligation toward a tribe and its members. Federal awareness of Massachusetts' exercises of authority alone cannot satisfy the inquiry, and the Tribe offers no specific evidence of any Federal authorization, confirmation or ratification of state authority, or delegation of Federal authority to the state.

Any evidence of Federal participation in Commonwealth activities is at best tenuous and limited to the earliest, formative period of the national government. The evidence does not show any significant contacts between the United States and the Tribe through treaty, legislation, or Federal administrative action. While we agree with the Tribe that Federal authority over Indian affairs included tribes within the original 13 states, the record fails to sufficiently demonstrate the exercise of Federal authority with respect to the Tribe for the purposes of establishing that the Tribe was "under federal jurisdiction" for IRA purposes.

D. Evidence of Particular Federal Exercises of Authority

The Tribe also 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 Reverend Jedidiah Morse on the condition of Indians in the United States as a prelude to possible removal of eastern tribes;[154] the Office of Indian Affairs' reliance between 1825 and 1850 on statistical tables that referenced the Mashpee;[155] 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;[156] several Federal reports prepared between 1888 and 1934 that reference the Tribe and its history; Federal censuses from 1910 and 1911that list Tribal members;[157] the enrollment of Tribal children in the Carlisle Indian Industrial School between 1905 and 1918;[158] and the purported acknowledgment by the United States Navy of the Tribe's usufructuary rights around 1950. [159] I address each in turn.

1. Morse Report

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."[160] Morse spent four months traveling from the eastern seaboard to the Northwest Territory gathering information from some tribes himself.[161] Acknowledging the

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[154] Mashpee Op. Br. Part 2 at 21.
[155] Mashpee Op. Br. Part 2 at 25-28.
[156] Mashpee Op. Br. Part 2 at 28.
[157] Mashpee Op. Br. Part 2 at 29, 30, 38.
[158] Mashpee Op. Br. Part 2 at 32.
[159] Mashpee Op. Br. Part 2 at 38.
[160] Rev. Jedidiah Morse, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS 11-12 (1822) ("Morse Rpt.").
[161] Morse Rpt. at 13.

difficulty of personally visiting "the whole territory inhabited by the Indians,"[162] information about other tribes was collected from other materials, including questionnaires.[163] Morse compiled the information in statistical tables "embracing the names and numbers of all the tribes within the jurisdiction of the United States."[164] 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.[165] Congress ultimately took no steps to remove any tribes based on the Morse Report, however, and, despite its deliberations, enacted no national removal policy until the following decade.[166] The Morse Report shows 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' awareness of its plenary authority over tribes.[167] This is consistent with the Department's 2015 ROD, 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.[168] While the Morse Report provides evidence that the Federal Government was cognizant of the existence of the Tribe and its lands,[169] 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 Sol. Op. M-37029's two-part analysis.[170]

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.[171]

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[162] Morse Rpt. at 21.
[163] *See, e.g.,* Morse Rpt. at 22 (announcing intent to collect and arrange existing facts and materials presently scattered in books and manuscripts).
[164] Morse Rpt. at 23. *See also id.* 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).
[165] Mashpee Op. Br. Part 2 at 21.
[166] Mashpee Reply at 36, n. 33; *see also* Littlefields Resp. at 73. It thus also remains unclear what "course of dealings between the Tribe and the United States" the Morse Report initiated. Mashpee Op. Br. Part 2 at 21.
[167] Mashpee Reply at 22 (Administration's authority to consider Mashpee for removal based on federal jurisdictional authority over tribal lands wherever located).
[168] 2015 ROD at 115.
[169] *See* Mashpee PF at 40 (discussing Morse Report for evidence of Tribe's existence as a distinct community from historical times to the present).
[170] *See* Mashpee Op. Br. Part 2 at 25-28 (describing federal government's use of statistical information). *Cf.* Mashpee Reply at 38 (federal jurisdictional inquiry "is not limited to federal actions but the presence of federal jurisdiction").
[171] Mashpee Op. Br. Part 2 at 23 ff.

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.[172] 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.[173] The passage relied on by the Tribe further shows that Representative Metcalf recited passages verbatim from the Morse Report.[174] 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 demonstrates that Congress knew that Mashpee and other tribes existed and held lands, it fails to demonstrate that Congress or the Executive Branch took any further action with respect to the Tribe in response.

Similarly, the transmittal by Secretary of War John Calhoun of statistical information compiled by Colonel Thomas McKenney, based in part on 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."[175] 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.[176] President Monroe's transmittal to Congress is even less specific, as the Tribe notes.[177] It broadly recommends the removal of Indian tribes "from the lands they now occupy, within the limits of the several States and Territories,"[178] 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."[179] 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,"[180] 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.[181] 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 Sol. Op. M-37029 analysis.[182]

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[172] Mashpee Op. Br. Part 2 at 23, citing Ex. ZB (House of Representatives Report on Indian Trade, 17th Cong., 1st Sess., at 1794 (remarks of Rep. Metcalf)).
[173] Mashpee Op. Br. Part 2, Ex. ZB at 1792.
[174] Mashpee Op. Br. Part 2, Ex. ZB at 1793.
[175] Mashpee Op. Br. Part 2, Ex. ZC at 542.
[176] Mashpee Op. Br. Part 2, Ex. ZC at 542; *see also* Mashpee Op. Br. Part 2 at 24.
[177] Mashpee Op. Br. Part 2 at 25.
[178] Mashpee Op. Br. Part 2 Ex. ZC at 541.
[179] Mashpee Op. Br. Part 2 Ex. ZC at 542.
[180] Mashpee Op. Br. Part 2 at 25 (quoting Morse Report) (internal quotations omitted).
[181] Mashpee Op. Br. Part 2 at 25-26.
[182] Mashpee Op. Br. Part 2 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.

2. *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.[183] The report was prepared by Henry R. Schoolcraft, a United States Indian Agent, using funds appropriated by Congress in 1847 for that purpose.[184] 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 twice, once in a consolidated table listing the combined population of tribes existing within Massachusetts,[185] and later as part of a list of tribes residing in Massachusetts.[186]

The Schoolcraft Report describes a proposed plan of improvement for the Massachusetts Indians generally,[187] 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.[188] The Tribe claims that these recommendations evidence "a clear exercise of federal jurisdiction by the Office of Indian Affairs" because made by Schoolcraft himself.[189] 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.[190] 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.[191]

3. *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

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[183] Mashpee Op. Br. Part 2 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 Rpt."). The Schoolcraft Report did not form part of the evidence evaluated by the Department in preparing the 2015 ROD.

[184] Mashpee Op. Br. Part 2 at 27, citing Act of March 3, 1847, ch. 66, § 6, 9 Stat. 263.

[185] Schoolcraft Rpt. at 524.

[186] Schoolcraft Rpt. at 287.

[187] Schoolcraft Rpt. at 287.

[188] Schoolcraft Rpt. at 287.

[189] Mashpee Op. Br. Part 2 at 29; Mashpee Reply at 30.

[190] *See* Mass. House No. 46 at 24-38, 54-57.

[191] 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. Mashpee Reply at 38, citing Ex. D (U.S. Dep't 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.

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 Sol. Op. M-37029 points to "annual reports, surveys, and census reports" produced by the Office of Indian Affairs, 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.[192] 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 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. [193] 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.[194] The 2015 ROD 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.[195] On remand the Tribe also argues that, "acting effectively as an Indian agent," Mrs. Fletcher "confirmed the Tribe's tenacious ties to its land."[196] 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 ROD 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.[197] The 2015 ROD described the Tantaquidgeon report as providing "details on their 'reservation,' subsistence practices, education facilities, health needs, arts and language, and governance.[198] The 2015 ROD noted that though the BIA commissioned Tantaquidgeon's report, the BIA never officially published it.[199] On remand the Tribe now also claims that the Tantaquidgeon report demonstrates "federal treatment of the Tribe as having collective rights."[200] The Tribe relies on Tantaquidgeon's description of the Tribe as "in occupation of an

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[192] Sol. Op. M-37029 at 16.
[193] Mashpee Reply at 39; Mashpee Op. Br. Part 2 at 30.
[194] 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.
[195] 2015 ROD at 114; *see also id.* at 106.
[196] Mashpee Op. Br. Part 2 at 30.
[197] 2015 ROD at 109.
[198] 2015 ROD at 109.
[199] 2015 ROD 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. Mashpee PF at 23.
[200] Mashpee Op. Br. Part 2 at 6.

Indian town, also referred to by [Tantaquidgeon] as a reservation."[201] 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 ROD 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 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. 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.[202]

In finding that the Tribe occupied a reservation for IRA purposes, the 2015 ROD 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.[203] On remand the Tribe argues that the ARCIA "unambiguously acknowledges collective rights [on the part of the Tribe] in tribal land"[204] which, the Tribe claims, gives "rise to federal responsibilities toward the Tribe."[205] While the 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."[206] As noted in the 2015 ROD, 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.[207] The Tribe's claim that the 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."[208] These statements weigh heavily against the Tribe's interpretation of the ARCIA as acknowledging or assuming Federal responsibilities for the Tribe.

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[201] Mashpee Op. Br. Part 2 at 38.
[202] Mashpee PF at 23.
[203] 2015 ROD at 106, 114, citing U.S. Dep't of the Interior, Commissioner of Indian Affairs, Annual Report (1890).
[204] Mashpee Reply at 39; Mashpee Op. Br. Part 2 at 30-31.
[205] Mashpee Op. Br. Part 2 at 31.
[206] Mashpee Op. Br. Part 2 at 30. *See also* H. Ex. Doc. No. 51-1, Pt. 5, *Report of the Secretary of the Interior*, vol. II at XXVI (1890).
[207] 2015 ROD at 106, 114; Mashpee Op. Br. Part 2 at 30-31.
[208] ARCIA at xxix. A table showing the population of Indians by state and the areas of Indian reservations contained later in the ARCIA omits any reference to Massachusetts or to Massachusetts tribes. ARCIA at xxxvii, Table 10. 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." ARCIA at xxxix.

4. *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.[209] A title report[210] 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.[211] The title report states that the reservations of rights originated in deeds prepared by the Mashpee Commissioners.[212] 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.[213] The Tribe claims the deeds "confirm" the existence of aboriginal usufructuary rights that "are subject to federal protection."[214] 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, 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 Sol. Op. M-37029 analysis because it would not show any exercise of Federal authority with respect to such rights. As already described, the decision in *Carcieri* requires some indicia of Federal authority beyond the general principle of plenary authority.[215]

The absence of any Federal actions with respect to Mashpee's usufructuary rights distinguishes the Tribe from the case of the Stillaguamish Tribe.[216] 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 by the United States under the 1855 Treaty of Port Elliott, to which the Stillaguamish Tribe was a signatory.[217] For purposes of the Sol. Op. M-37029 analysis, the issue is not whether aboriginal usufructuary rights are subject to Federal protection as a matter of law[218] or whether they exist absent a tribe's Federal acknowledgment.[219] The issue instead is whether the Federal Government took any action or series of actions in the exercise of its plenary

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[209] Mashpee Op. Br. Part 2 at 38 ff.
[210] Mashpee Op. Br. Part 2, Ex. ZZD.
[211] Mashpee Op. Br. Part 2, Ex. ZZD at 3-4.
[212] Mashpee Op. Br. Part 2, Ex. ZZD at 3-4.
[213] Mashpee Op. Br. Part 2 at 39-40; *see also* Mashpee Reply at 46.
[214] Mashpee Op. Br. Part 2 at 42; *see also id.* at 6, 11, 16-17.
[215] Sol. Op. M-37029 at 18.
[216] *See* Mashpee Reply at 39, 47.
[217] Sol. Op. M-37029 at 20, 23; *see also Carcieri*, 555 U.S. at 398 (Breyer, J., concurring).
[218] Mashpee 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).
[219] Mashpee 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).

power over a tribe.[220] The reservation under state law of usufructuary rights for tribal members does not, standing alone, provide such evidence.

5. 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."[221] 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 the 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.[222] While such evidence clearly demonstrate exercises of Federal authority over Indians generally and individual Indians specifically, none suffice, in isolation, 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 a finding of Federal jurisdiction over a tribe,[223] and it notes that the provision of educational services was used to demonstrate Federal jurisdiction over other tribes like the Cowlitz Tribe.[224] 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 government-to-government treaty negotiations as well as a documented history of the BIA "supervising allotments, adjudicating probate proceedings, providing education services, assisting in protecting fishing activities, investigating tribal claims to aboriginal lands, and approving attorney contracts"[225] for the Cowlitz Tribe and its members, none of which the Tribe has shown here.

The evidence of Mashpee student enrollment at Carlisle, by itself, 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 or otherwise assumed jurisdiction over the Tribe, the Mashpee student records fall short of demonstrating that Tribe itself came under federal jurisdiction. Thus while the evidence of enrollment at Carlisle is plainly relevant to the Sol. Op. M-37029 inquiry, without more it is insufficient to show that the Tribe "was subjected to . . . clear, federal jurisdiction."[226]

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[220] Sol. Op. M-37029 at 17-19.
[221] Mashpee Op. Br. Part 2 at 36.
[222] Mashpee Op. Br. Part 2 at 32-36.
[223] Mashpee Reply at 44, citing Sol. Op. M-37029 at 16, 19.
[224] Mashpee Reply at 44, citing *Grand Ronde,* 75 F. Supp.3d at 403.
[225] Cowlitz ROD at 97-103 (describing course of dealings between Cowlitz Tribe and federal government between 1855 and 1932).
[226] Mashpee Op. Br. Part 2 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." Mashpee Op. Br. Part 2 at 32.

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."[227] The 1910 Indian census was prepared by the Director of the Census, not the Office of Indian Affairs, as the Tribe suggests.[228] Neither was it prepared under authority of the 1884 Act that directed Indian agents to submit an annual census of the Indians at the agency or on the reservation under their charge.[229] 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, and the Tribe provides no argument or evidence to suggest otherwise.[230]

CONCLUSION

Applying Sol. Op. M-37029's framework to my review of the parties' remand and supplemental submissions, I conclude that the evidence does not show that the Tribe was under Federal jurisdiction in 1934 within the meaning of the IRA's first definition of "Indian." The record before me contains little indicia of Federal jurisdiction beyond the general principle of plenary authority, and little if any evidence demonstrating that the United States took any actions establishing or reflecting Federal obligations, duties, responsibilities for or authority over the Tribe in or before 1934. Because the Tribe was not "under federal jurisdiction" in 1934, the Tribe does not qualify under the IRA's first definition of "Indian." Nor does it qualify under the second definition, as that definition has been interpreted by the United States District Court for the District of Massachusetts.

My analysis and decision on remand is strictly limited to the question of the Tribe's jurisdictional status in 1934, and does not otherwise revisit or alter the remainder of the Department's analysis of the second definition of "Indian" in the 2015 ROD. Nor does this decision revisit or alter the other conclusions reached in the 2015 ROD concerning the Indian Gaming Regulatory Act or the National Environmental Policy Act.

Respectfully,

Tara Sweeney
Assistant Secretary – Indian Affairs

Cc David Tennant, Esq.
Paula Hart, Director, Office of Indian Gaming
Chairwoman Cheryl Andrews-Maltais, Wampanoag Tribe of Gay Head (Aquinnah)

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[227] Mashpee Reply at 41, citing Memorandum, 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).
[228] *See* Act of March 3, 1899, ch. 419, 30 Stat. 1014; Act of March 6, 1902, ch. 139, 32 Stat. 51 (Permanent Census Act).
[229] *See* Mashpee Op. Br. Part 2 at 32, citing Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76, 98.
[230] Mashpee Op. Br. Part 2 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. Mashpee Op. Br. Part 2 at 31, n. 25.