



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 22 2021

The Honorable Brian Weeden
Chairman, Mashpee Wampanoag Tribe
483 Great Neck Road South
Mashpee, Massachusetts 02649

Dear Chairman Weeden:

On June 5, 2012, the Mashpee Wampanoag Tribe¹ (Mashpee Tribe or Tribe) submitted an amended application to the Bureau of Indian Affairs (BIA) requesting that the Secretary of the Interior (Secretary) acquire approximately 170 acres in the Town of Mashpee, Massachusetts and approximately 151 acres in the City of Taunton, Massachusetts (collectively Parcels) in trust for the Tribe's benefit (Application).²

On September 18, 2015, the Department of the Interior (Department) issued a Record of Decision (2015 ROD) to acquire the Parcels in trust for the Tribe.³ The BIA accepted title to the Parcels in trust for the benefit of the Tribe on November 10, 2015, and proclaimed them the Tribe's initial reservation on December 30, 2015.⁴ The Parcels have remained in trust from the time BIA accepted title.

For the reasons set forth below, and based on my review of the record compiled in this matter and the matters that have been the subject of litigation, I find that statutory authority for acquiring the Parcels exists under Section 5 of the Indian Reorganization Act (IRA); the 2015 decision to acquire such Parcels in trust first made by then Assistant Secretary–Indian Affairs Kevin Washburn should be

¹ In 2007, the Department formally acknowledged the Tribe pursuant to the administrative procedures set forth at 25 C.F.R. Part 83, *see* Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007). The Tribe has appeared on the list of federally recognized tribes every year since. *E.g.*, Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7556 (Jan. 29, 2021).

² On August 30, 2007, the Tribe submitted an application requesting that 539 acres in Middleborough, Massachusetts, and 140 acres in Mashpee, Massachusetts, be acquired in trust. On July 13, 2010, the Tribe submitted an amendment requesting that the Department no longer acquire land in Middleborough and instead acquire a 300-acre parcel in Fall River, Massachusetts. On March 7, 2012, the Tribe amended its application to remove the request to take lands in trust in Fall River and add parcels in Taunton. On April 5, 2012, and April 30, 2012, the Tribe further amended its application to add additional parcels in Taunton. On June 5, 2012, the Tribe submitted a Consolidated and Restated Application. On November 7, 2012, the Tribe amended the application to add four additional parcels in Taunton for a total of approximately 151 acres.

³ 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 (Sept. 18, 2015) [hereinafter 2015 ROD]; U.S. Dep't of the Interior, Bureau of Indian Affairs, Notice of Final Agency Determination, 80 Fed. Reg. 57,848 (Sept. 25, 2015).

⁴ 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).

affirmed; that such Parcels are eligible for gaming under the Indian Gaming Regulatory Act (IGRA); and that the Department will retain the Parcels in trust as the Tribe's reservation.

Upon issuance, this letter confirms the 2015 decision to acquire the Parcels in trust as the Tribe's reservation. This decision incorporates the 2015 ROD except for the analyses contained in Sections 8.3 and Section 7.0 which are replaced by the analyses contained herein. This letter along with the incorporated portions of the attached Appendix, replace the 2015 ROD as the final agency action with respect to the Tribe's application.

I. Background

The Tribe submitted its Application pursuant to Section 5 of the Indian Reorganization Act⁵ (IRA or Act) and its implementing regulations.⁶ Section 5 of the IRA authorizes the Secretary to acquire lands in trust for "Indians." Section 19 of the IRA defines those "Indians" eligible for its benefits 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 shall further include [3] all other persons of one-half or more Indian blood."⁷

The 2015 ROD announced the Department's decision to acquire the Parcels in trust for the Tribe concluding the Secretary had statutory authority to do so under the IRA's second definition of "Indian."⁸ Following the decision, a group of residents from Taunton (collectively Littlefields) challenged the 2015 ROD in the United States District Court for the District of Massachusetts (MA District Court).⁹ Among their claims, the Littlefields challenged the Department's interpretation of the IRA's second definition of "Indian" and the corresponding determination that the Tribe was eligible for the IRA's land into trust provisions.¹⁰

On cross-motions for summary judgment, the MA District Court found that, contrary to the Department's interpretation, the phrase "such members" in the second definition unambiguously incorporated the entire antecedent phrase "members of any recognized Indian tribe now under Federal jurisdiction" from the first definition.¹¹ The MA District Court then further stated that the Department lacked authority to acquire land in trust for the Tribe because the Mashpee were not "under Federal jurisdiction" (UFJ) in 1934.¹²

⁵ Act of June 18, 1934, § 5, Pub. L. No. 73-383, 48 Stat. 984 (1934), codified at 25 U.S.C. § 5108.

⁶ 25 C.F.R. Part 151.

⁷ 25 U.S.C. § 5129 (bracketed numbers added).

⁸ 2015 ROD at 79.

⁹ *Littlefield v. United States Dep't of Interior*, 199 F. Supp. 3d 391, 396 (D. Mass. 2016), aff'd sub nom. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30 (1st Cir. 2020).

¹⁰ *Littlefield*, Amended Complaint for Declaratory and Injunctive Relief, ECF No. 12 at 24-26.

¹¹ *Littlefield*, 199 F.Supp.3d at 400. (The MA District Court did not reach the Department's conclusion that "the Indian character of the Reservation persisted up until and through the time in question, June 1, 1934.").

¹² *Id.*

Because the 2015 ROD expressly declined to reach the question of whether the Tribe was UFJ in 1934, the United States filed a motion for reconsideration seeking clarification that the Tribe's jurisdictional status in 1934 was a distinct inquiry reserved to the Department's consideration on remand.¹³ In response, the MA District Court explained that having remanded the matter to the Secretary, it would not violate its order for the Department to consider the Tribe's eligibility under the first definition of "Indian" or reassess its eligibility under the second definition consistent with the MA District Court's interpretation.¹⁴ In late 2016, the Department established remand procedures to consider whether the Tribe was UFJ in 1934 consistent with the MA District Court's clarified order.¹⁵

On September 7, 2018, after reviewing voluminous submissions from multiple parties,¹⁶ the Department issued a decision on the Tribe's UFJ status in 1934 (Remand Decision).¹⁷ Applying the two-step framework contained in Solicitor's Opinion M-37029 (M-37029),¹⁸ the Remand Decision concluded that the Tribe was not UFJ in 1934 and therefore ineligible for the IRA's land into trust provisions.¹⁹

The Tribe challenged the Remand Decision in the United States District Court for the District of Columbia (D.C. District Court)²⁰ asserting a single cause of action that the Remand Decision was arbitrary, capricious, and contrary to law because the Department failed to consider all of the relevant evidence or to consider the Tribe's evidence as a whole.²¹

Simultaneous to the Department's remand process and the D.C. District Court litigation, the Tribe appealed the MA District Court's ruling on the statutory construction of the second definition of "Indian" to the United States Court of Appeals for the First Circuit (First Circuit).²² While the challenge to the Remand Decision was pending before the D.C. District Court, the First Circuit affirmed the MA District Court's interpretation of the second definition and issued a mandate consistent with its decision.²³

¹³ *Littlefield*, Motion for Reconsideration, ECF No. 100 at 11.

¹⁴ *Littlefield*, Order, ECF No. 121 at 3.

¹⁵ See Letter from Tara Sweeney, Assistant Secretary for Indian Affairs to Hon. Cedric Cromwell, Chairman Mashpee Wampanoag Tribe, 1 (Sept. 7, 2018) [hereinafter Remand Decision].

¹⁶ See *id.* at 8. The Department accepted submissions from the Mashpee Tribe, Littlefields, Wampanoag Tribe of Gay Head (Aquinnah) and the Connecticut towns of Ledyard, North Stonington, and Preston.

¹⁷ *Id.* at 1.

¹⁸ Sol. Op. M-37029, Solicitor Hilary C. Tompkins, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 12, 2014). [hereinafter M-37029].

¹⁹ Remand Decision at 1. AS-IA Sweeney concluded that the Secretary did not have authority to acquire land in trust for the Tribe under the IRA's first definition of "Indian" or the second definition, as interpreted by the MA District Court.

²⁰ *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199 (D.D.C. 2020); see also *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-2242-PLF (D.D.C) Complaint, ECF No. 1, (Sept. 27, 2018).

²¹ *Id.* at ¶¶ 61-66.

²² *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 41 (1st Cir. 2020). The First Circuit stayed the appeal until the Department issued the Remand Decision.

²³ *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 41 (1st Cir. 2020).

On June 5, 2020, the D.C. District Court held that the Remand Decision misapplied M-37029 by evaluating each piece of the Tribe's evidence in isolation rather than "in concert"²⁴ and that the Department's analysis contradicted M-37029, as well as administrative and judicial precedent.²⁵ The D.C. District Court ordered the matter remanded to the Department for further proceedings consistent with its opinion and issued a temporary stay maintaining the *status quo* until fourteen days after the Department issues a decision on remand.²⁶ On remand, the D.C. District Court ordered that the Department evaluate the Tribe's evidence under the two-part test set out in M-37029.²⁷ The land has remained in trust throughout the various legal proceedings.

II. THE SECRETARY POSSESSES THE REQUISITE IRA AUTHORITY TO ACQUIRE THE PARCELS IN TRUST

Pursuant to the D.C. District Court's remand directive, this decision addresses whether the Tribe satisfies the IRA's first definition of "Indian" and is therefore eligible for the land into trust provisions of Section 5 under the two-part framework set forth in M-37029. For the reasons explained below, and after an in-depth reexamination of the Tribe's history and its interactions with the United States, I conclude that the evidence demonstrates the Tribe satisfies the IRA's first definition of "Indian" under such framework and, consequently, the Secretary possesses the requisite authority to acquire the Parcels in trust for the Tribe.

A. *Carcieri v. Salazar*

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the State of Rhode Island challenged a decision by the Secretary to acquire land in trust for the Narragansett Tribe on the basis that he lacked statutory authority to do so under the IRA due to that Tribe's 1934 status. To that end, the Supreme Court considered whether the term "now," in the phrase "now under Federal jurisdiction," meant 1934 when the IRA was enacted, or whether it referred to the time the Secretary invokes the authority provided by the Act. Looking to the ordinary meaning of "now," its meaning within the context of the IRA, as well as contemporaneous Departmental correspondence,²⁸ the Supreme Court concluded that the phrase "now under Federal jurisdiction" unambiguously referred to tribes "that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."²⁹ The majority did not, however, address the meaning of the term "recognized" or the phrase "under Federal jurisdiction. Based on what the Court construed as a concession by the parties and the lack of contrary record evidence, the Court further concluded that the Narragansett Tribe was not UFJ in 1934."³⁰

²⁴ *Mashpee*, Opinion, ECF No. 75 at 24 (Jun. 5, 2020).

²⁵ *Id.* at 26-51.

²⁶ *Mashpee*, Memorandum Opinion and Order, ECF No. 77 (Jun. 5, 2020).

²⁷ *Mashpee*, Opinion, ECF No. 75 at 55-56 (Jun. 5, 2020). The Remand Decision was issued under M-37029's two-part test. While the status of the Remand Decision was pending before the D.C. District Court, Solicitor Daniel H. Jorjani withdrew M-37029 and issued a new four-step procedure for evaluating whether a tribe was UFJ in 1934. As discussed in more detail below, on April 27, 2021, Principal Deputy Solicitor Robert T. Anderson reinstated M-37029 and the two-part test for making UFJ determinations.

²⁸ *Carcieri*, 555 U.S. at 388-90.

²⁹ *Id.* at 395.

³⁰ *Id.* at 382, 395.

In a concurring opinion, Justice Breyer concluded that an interpretation of “now” as referring to 1934 “may prove somewhat less restrictive than it first appears.”³¹ Citing to multiple examples of agency error during the period,³² Justice Breyer explained that “a tribe may have been ‘under Federal jurisdiction’ in 1934 even though the Federal Government did not believe so at the time.”³³ Justice Breyer further stated that the IRA “imposes no time limit upon recognition,” pointing to the fact that the first definition of “Indian” refers to “any recognized Indian tribe” as distinct from the temporal requirement of “now” that modifies “under Federal jurisdiction.”³⁴

B. The Department’s Implementation of *Carcieri v. Salazar*

To guide implementation of the Secretary’s discretionary authority under Section 5 after *Carcieri*, the Department in 2010 developed a two-part test for determining whether an applicant tribe was UFJ in 1934.³⁵ In 2014, the Solicitor of the Interior (Solicitor) Tompkins memorialized the Department’s interpretation in a Departmental M-Opinion, M-37029.³⁶

As reflected in M-37029, the Solicitor determined that because the IRA does not unambiguously give meaning to the phrase “under Federal jurisdiction,” Congress left a gap for the agency to fill.³⁷ When construing the phrase, the Solicitor considered the text of the IRA, its remedial purposes, legislative history, the Department’s early practices, as well as the Indian law canons of construction.³⁸

As a threshold matter, the Solicitor rejected the argument that Congress’s constitutional plenary authority over tribes standing alone is sufficient to show that a tribe was UFJ in 1934.³⁹ Rather, the Solicitor concluded, *Carcieri* requires indicia that federal officials exercised that authority with respect to the tribe or its members.⁴⁰ The analysis for determining a tribe’s eligibility for land into trust under M-37029 therefore presumes a tribe is subject to the federal government’s plenary authority over Indian affairs.⁴¹

³¹ *Id.* at 397 (Breyer, J. concurring).

³² *Id.* at 397-99.

³³ *Id.* at 397.

³⁴ *Id.* at 398-99.

³⁵ See U.S. Dep’t. of the Interior, Assistant Secretary, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) [hereinafter Cowlitz ROD]; see also *County of Amador v. U.S. Dep’t of the Interior*, 872 F.3d 1012, n.15 (9th Cir. 2017).

³⁶ M-37029.

³⁷ M-37029 at 17. The Secretary receives deference to interpret statutes consigned to their administration. See *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 558-59 (D.C. Cir. 2016), cert denied sub. nom *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017); See also *Chevron v. NRDC*, 461 U.S. 837, 842-45 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); see also, *Skidmore v. Swift*, 323 U.S. 134, 139 (1944) (holding that agencies merit deference based on “specialized experience and broader investigations and information” available to them).

³⁸ M-37029 at 19.

³⁹ *Id.* at 17-18.

⁴⁰ *Id.* at 18.

⁴¹ *Id.* M-37029 instructs that indicia of federal jurisdiction beyond the general principle of plenary authority is required to demonstrate that a tribe was “under federal jurisdiction.”

After establishing that plenary authority alone was insufficient to satisfy the requirements of the first definition, M-37029 construed the phrase “under Federal jurisdiction” as requiring the application of a two-part inquiry to determine eligibility for the IRA’s land into trust benefits.⁴² The first part examines whether evidence from the tribe’s history, at or before 1934, demonstrates that it came under federal jurisdiction.⁴³ This step looks to whether the United States, in 1934 or earlier, had taken an action or series of actions — through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members — that are sufficient to establish or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the federal government.⁴⁴

The Solicitor noted that certain federal actions in and of themselves demonstrate that a tribe was UFJ at some identifiable period in its history, such as treaties or the implementation of specific legislation (*e.g.*, votes conducted under Section 18 of the IRA).⁴⁵ While in “other cases, a variety of federal actions viewed *in concert* may demonstrate that a tribe was under federal jurisdiction.”⁴⁶ Such evidence might include guardian-like actions undertaken on behalf of a tribe or a continuous course of dealings with a tribe.⁴⁷ It could 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.⁴⁸ Finally, such evidence might also include actions by Office of Indian Affairs officials administering the affairs of Indian reservations or implementing federal legislation.⁴⁹ Evidence submitted as part of federal acknowledgment process, located at 25 C.F.R. Part 83 may also be highly relevant.⁵⁰ Finally, the Solicitor noted that this list was not comprehensive— there may be other types of evidence not enumerated in M-37029 that evidence federal obligations, duties to, acknowledged responsibility for, or power over a particular tribe which requires a fact and tribe-specific inquiry.⁵¹ Where a tribe established that it was under federal jurisdiction before 1934, the second part of the inquiry determined whether that jurisdictional status remained intact in 1934.⁵²

For over a decade, the Department relied on the criteria memorialized in M-37029 to prepare UFJ opinions for applicant tribes.⁵³ In 2016, the United States Court of Appeals for the District of Columbia

⁴² *Id.* at 18-19.

⁴³ *Id.* at 19.

⁴⁴ *Id.*

⁴⁵ *Id.* at 19-20.

⁴⁶ *Id.* at 19 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 25. The historical scope of the “under Federal jurisdiction” inquiry necessarily overlaps with the federal acknowledgment inquiry. Both focus on events taking place in or before 1934, and Part 83 requires petitioners to document tribal existence on a substantially continuous basis. 25 C.F.R. § 83.10(b)(4) (2015); *see also* 25 C.F.R. §83.3(a) (1994). As a result, the federal acknowledgment record generally will include evidence for the same period. And while satisfying Part 83’s mandatory criteria does not in and of itself mean that a tribe was UFJ in 1934, the Part 83 record may nonetheless include evidence highly relevant to the inquiry.

⁵¹ *Id.*

⁵² *Id.* at 19.

⁵³ The Solicitor’s Office has prepared analyses affecting more than 80 tribes using the eligibility procedures memorialized in M-37029.

upheld the two-part test as a reasonable interpretation of the statute⁵⁴ and multiple federal courts have affirmed land-into-trust decisions based on M-37029.⁵⁵ In March 2020, however Solicitor Jorjani issued Solicitor's Opinion M-37055 (M-37055)⁵⁶ withdrawing M-37029 and establishing an updated four-step procedure for making UFJ determinations (Solicitor's Procedures).⁵⁷

On January 20, 2021 President Biden issued Executive Order 13990 (EO 13990) directing all executive departments and agencies to review certain actions taken in the preceding four years.⁵⁸ Consistent with EO 13990, the White House issued a non-exclusive "List of Agency Actions for Review."⁵⁹ In accordance with White House's *List of Agency Actions for Review*⁶⁰ M-37055 and the attendant Solicitor's Procedures were subject to immediate review to determine if the action conflicted with or was inconsistent with policies announced in Executive Order 13990.⁶¹

Following his review, Principal Deputy Solicitor Anderson withdrew M-37055 and the Solicitor's Procedures issued concurrent with M-37055.⁶² The Principal Deputy Solicitor recommended that the BIA and the Office of the Solicitor (SOL) engage Tribal Nations in meaningful and robust consultation regarding the Department's interpretation of term "Indian" as used in Section 19 of the IRA and the process for determining whether a tribe was UFJ in 1934.

⁵⁴ *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 75 F.Supp.3d 387, 402-04 (D.D.C. 2014), *aff'd*, 830 F.3d 552, 564-65 (D.C. Cir. 2016), *cert. den. sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S.Ct. 1433 (2017).

⁵⁵ *County of Amador v. Jewell*, 136 F. Supp. 3d 1193, 1200, 1207-10 (E.D. Cal. 2015), *aff'd*, 872 F.3d 1012, 1025 (9th Cir. 2017), *reh'g en banc den.* (Jan. 11, 2018), *cert. denied*, 139 S. Ct. 64 (2018); *Cent. NY. 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. U.S. Dep't of Interior*, 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. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 278, 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); *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). *Confederated Tribes of the Grand Ronde Cmty. of Oreg. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014), *aff'd*, 830 F. 3d 552 (D.C. Cir. 2016); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015), *vacated and remanded sub nom., No Casino in Plymouth v. Zinke*, 698 F. App'x 531 (9th Cir. 2017) (vacated on other grounds).

⁵⁶ Sol. Op. M-37055, Solicitor Daniel H. Jorjani, *Withdrawal of M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act* (Mar. 9, 2020).

⁵⁷ *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 10, 2020) [hereinafter Solicitor's Procedures].

⁵⁸ Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

⁵⁹ THE WHITE HOUSE, BRIEFING ROOM, FACT SHEET: LIST OF AGENCY ACTIONS FOR REVIEW (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

⁶⁰ *See id.* (action number 16 under Department of the Interior heading).

⁶¹ Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

⁶² Sol. Op. M-37070, Principal Deputy Solicitor Robert T. Anderson, *Withdrawal of Certain Solicitor M-Opinions, Reinstatement of Sol. Op. M-37029 The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act*, and Announcement Regarding Consultation on "Under Federal Jurisdiction" Determinations (Apr. 27, 2021).

In the interim, the Principal Deputy Solicitor reinstated M-37029 as Departmental guidance for making UFJ determinations. Because a signed M-Opinion is binding on Department offices and officials until modified by the Secretary, the Deputy Secretary, or the Solicitor, I must rely on M-37029 to guide our analysis here.⁶³ Moreover, the D.C. District Court directed the Department on remand to evaluate the Tribe's 1934 jurisdictional status pursuant to the two-part framework set forth in M-37029, which guided the trust acquisitions at the time of the Tribe's Application.⁶⁴ Accordingly, I rely on M-37029 to guide our IRA analysis with due consideration of the D.C. District Court's directive to evaluate each piece of probative evidence in concert.⁶⁵

III. The Tribe Was Under Federal Jurisdiction in 1934

I conclude that the evidence demonstrates that the Tribe was UFJ in 1934 within the meaning of Section 19 of the IRA. The Federal Government's exercise of jurisdiction began as early as the 1820s when the United States considered the Mashpee in the context of determining whether to apply the contemporaneous removal policy. The United States excluded the Tribe from forced removal west of the Mississippi River, thereby protecting Mashpee land from non-Indian settlement. Rather than remove the Tribe west, the federal government recognized the Tribe's historic and tenacious ties to the land that would become the Town of Mashpee—a town which would remain under Mashpee cultural and political control up until the influx of year-round non-Mashpee residents in the late 1960s. When the United States considered whether to remove the Tribe and its members from its lands, the United States acknowledged the Tribe as an Indian tribe under federal jurisdiction. The Tribe's connection to and occupancy of this land, moreover, provides a framework for understanding the jurisdictional relationship with the United States and the various exercises of federal jurisdiction that demonstrate, when viewed in concert, the Tribe's eligibility for the land into trust provisions of the IRA.

Despite federal officials' frequent deferral to the Commonwealth of Massachusetts (Massachusetts or State) exercise of authority *vis-a-vis* the Tribe, the Federal Government never relinquished its overarching jurisdictional relationship. Federal officials understood they always had the prerogative to exercise federal Indian affairs jurisdiction over the Tribe and did so, even if they opted to do so infrequently. In the early twentieth century, the Federal Government, in the plainest means, demonstrated this jurisdiction by exercising federal authority over the Tribe by removing Mashpee children from their families and tribal community and relocating them hundreds of miles away to Carlisle Indian School, a BIA-operated industrial school, located on a military site, where the Federal Government exercised almost complete control over their affairs. Such removal of Mashpee children, as detailed below, was part of a broader federal Indian policy aimed at breaking up tribal communities throughout the country and assimilating tribal members into the American society. Cultural and religious assimilation of Native children into non-Indian society was seen as instrumental to fulfilling this policy goal. The jurisdictional relationship established over Mashpee prior to 1934, continued through and beyond 1934, as evidenced by the fact that the United States took no action to terminate its jurisdictional relationship with the Tribe.

⁶³ U.S. Dep't of the Interior, 209 Departmental Manual 3.2(A)(11).

⁶⁴ *Mashpee*, Order, ECF No. 76 at 2 (Jun. 5, 2020).

⁶⁵ *Mashpee*, Opinion, ECF No. 75 at 24 (Jun. 5, 2020).

A. The Mashpee Tribe's Historic Connection to the Town of Mashpee

In 1665 and 1666, Wampanoag leaders deeded territory to the Tribe in what is now the Town of Mashpee.⁶⁶ The Plymouth colonial court confirmed the deeds in 1685 and guaranteed that the lands belonged to “said Indians, to be perpetually to them and their children, as that no part of them shall be granted to or purchased by any English, whatsoever, by the Courts [sic] allowance, without the consent of all the said Indians.”⁶⁷ The land set aside for the Tribe, consisting of 25 square miles, was governed by a six-person council of Mashpee Indians exercising a high degree of political power and independence.⁶⁸

In 1746, the General Court of Massachusetts diminished the Tribe's control over the land by assigning three non-Mashpee overseers.⁶⁹ In 1763, after repeated complaints from the Tribe, the colonial government converted the Tribe's land into a self-governing “Indian district,” the only one of its kind in Massachusetts that would last until after the American Revolutionary War.⁷⁰ In 1788, a year after delegates to the Constitutional Convention agreed to the Great Compromise, the State terminated Mashpee control over the Indian district and the overseer system by installing three non-Indian guardians.⁷¹ In response to strong Mashpee resistance over the next 40 years, the State finally removed the overseers and converted the settlement back to a self-governing Indian district in 1834.⁷²

Under the Indian district system, the Tribe was able to exercise political and regulatory control over its land.⁷³ In 1842, however the State ordered the allotment of most of the Tribe's common lands in severalty to Mashpee tribal members,⁷⁴ while retaining the restrictions on alienation prohibiting land

⁶⁶ See Mashpee Grant Dec. 11, 1665, confirmed by the General Court of Plymouth Colony in 1689, located in Indian Deeds: Land Transactions in Plymouth Colony 1620-1691. Jeremy Dupertuis Bangs, New England Historical Genealogical Society (using the name “South Sea Indians”) [hereinafter 1665 Deed]; Sept. 20, 1666 Deed, 33 Massachusetts Archives Collection (1629–1799), p.149; see also Office of Federal Acknowledgment, Summary under the Criteria for the Proposed Finding on the Mashpee Wampanoag Indian Tribal Council, Inc., 13 (Mar. 31, 2006) [hereinafter OFA Proposed Finding].

⁶⁷ 1665 Deed at 350 (providing the court's confirmation of “said land to the said Indians, to be perpetually to them & their children, as that no part of them shall be granted to or purchased by any English whatsoever, by the Courts allowance, without the consent of all the said Indians”).

⁶⁸ OFA Proposed Finding at 32, 94–95.

⁶⁹ *Id.* at 96.

⁷⁰ *Id.* (during the Revolutionary War about half of the Tribe's adult male population died fighting for the colonial side).

⁷¹ *Id.* at 97. In 1976, the Tribe initiated a land claim against the Town of Mashpee and several land developers. Following a 40-day trial, a federal jury determined that the Mashpee did not meet the requirements for being an Indian tribe within the meaning of the Non-Intercourse Act; however, in response to several interrogatories, the jury found that the Mashpee constituted an Indian tribe on March 31, 1834 and March 3, 1842. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). The federal government was not a party to the Tribe's suit. During the Department's subsequent evaluation of the Tribe's petition for federal acknowledgement, the Department made clear that different standards applied under the Part 83 acknowledgement process and that its findings were based on considerably more evidence than what was available to the jury in that case. OFA Proposed Finding at 7.

⁷² OFA Proposed Finding at 98.

⁷³ *Id.* at 99.

⁷⁴ The record demonstrates that the federal government was aware of the arguably unauthorized State allotment action yet chose not to assert its authority under the Non-Intercourse Act, which was typical of the federal policy regarding

transfers to non-Mashpee members.⁷⁵ Post allotment, the Tribe retained approximately 3,150 acres in common ownership.⁷⁶ In 1869, the State terminated the restrictions on alienation and, in 1870, incorporated the Town of Mashpee⁷⁷ which was defined by the boundaries of the prior Indian district.⁷⁸

Despite State incorporation for the Town of Mashpee, federal officials continued to recognize the Tribe's reservation-like occupancy of the Town. In 1885 for example, the Department commissioned ethnologist Alice Fletcher to compile information on the status of Indian education across the country. The final report published in 1888, included the history and current status of the Mashpee.⁷⁹ Fletcher's report referred to the "Mashpee Plantation" and explained the history stemming from the 1660s deeds confirmed by the Plymouth colonial court, and the various forms of governance that followed.⁸⁰ In 1890, the Commissioner of Indian Affairs issued his annual report on the status of tribes and federal Indian policy, which included reference to the Mashpee and their continued occupation of the Town of Mashpee.⁸¹

During the early 1900s, the Tribe continued to form the majority of the Town's citizenry and control the Town's political and religious institutions.⁸² Some allotted lands had deeds that reserved access to usufructary rights for tribal members, such as the right to gather seaweed and marsh hay.⁸³ The Tribe also continued to exercise governmental authority "regulat[ing] access to and use of common resources by regulating fishing and hunting, tree harvest, and maintaining streams, rivers, and harbors."⁸⁴

Northeastern tribes at the time, *See* 2015 ROD at 111 n. 361. Despite the federal government's decision not to assert such authority, federal courts have made clear that Congress' exercise of plenary authority to protect tribal lands applied to tribes in the original thirteen states, *see Oneida Indian Nation of N.Y. State v. Oneida Cty., New York*, 414 U.S. 661, 670 (1974) ("[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13"), and the failure of federal officials to enforce against violations of the Non-Intercourse Act did not invalidate such transactions, *see Oneida Cty., New York v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 246-48 (1985).

⁷⁵ *See* An Act Concerning the District of Marshpee, Mass. Acts. Ch. 72 (1849); *see also* OFA Proposed Finding at 99.

⁷⁶ OFA Proposed Finding at 99.

⁷⁷ *See* An Act to Enfranchise the Indians of the Commonwealth, Mass. Acts ch. 463, § 2 (1869); An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293 (1870); *see also* OFA Proposed Finding at 100.

⁷⁸ An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 1 (1870) ("The district of Marshpee is hereby abolished, and the territory comprised therein is hereby incorporated into a town by the name of Mashpee.")

⁷⁹ Alice C. Fletcher, under the Direction of the Commissioner of Education, *Indian Education and Civilization: A Report Prepared in Answer to Senate Resolution of February 23, 1885*, 59-60 (1888).

⁸⁰ *Id.*

⁸¹ *Annual Report of the Commissioner of Indian Affairs (1890)* [hereinafter *ARCIA 1890*].

⁸² *See, e.g.*, OFA Proposed Finding at 100-01 (finding that the Tribe "monopolized the town's elected and appointed positions," where from 1870 to 1968, 85 percent of the town's selectmen and 88 percent of the town clerks, treasurers, and tax collectors were Mashpee). Federal census rolls dating from 1850 to 1930 enumerated Mashpee tribal members residing within the Town of Mashpee. *Id.* at 148-52.

⁸³ *See* Frederick D. Nichols, Title Report re: Condemnation Proceedings U.S. District Court No. 7359, Civil, 229 acres, South Mashpee, Mass., 1-2 (Aug. 10, 1949) (describing a deed to a 33-acre beachfront lot that "reserved the right of the Proprietors of Mashpee to go over [the] land to gather seaweed and marsh hay"); *see Id.* at 3 (describing allotted marsh lots that had deeds reserving "for the benefit of the Proprietors of Mashpee, the right to cross the several lots for the purpose of gathering haw and seaweed"). These deeds refer to the "Proprietors of Mashpee," who were tribal members.

⁸⁴ OFA Proposed Finding at 101.

Additional sources from the early 1900s continued to refer to the Town of Mashpee as an “Indian” town or “a little Indian settlement Mashpee.”⁸⁵ Around this same time, the BIA, for purposes of documenting Indian children at the Carlisle Indian School,⁸⁶ listed “Mashpee” as the home “agency” or “reservation” for Mashpee students.⁸⁷

By the 1930s, there were about 300 Mashpee members, almost all of whom lived in the Town.⁸⁸ The number of non-Indian seasonal residents, however, increased in the southern part of the Town along the beach front. These seasonal inhabitants lacked the right to vote or send their children to the local school.⁸⁹ The year-round population consisted almost entirely of Mashpee tribal members and their spouses. The 1930 federal census recorded that out of the 361 individuals living in the Town of Mashpee, 265 identified as Indian.⁹⁰

A 1934 BIA-commissioned report explained that the Town of Mashpee “has always been known as an Indian town and the town officials for the most part have been and still are persons of Indian extraction.”⁹¹ This conclusion was reinforced by the 1938 study by Harvard sociologist Carle Zimmerman, who found that certain Mashpee families dominated the town politics and effectuated a “tribal” government.⁹²

Following World War II, the Mashpee dominance over the Town diminished as the summer population continued to grow and the opening of the Cape Cod Air Force Base attracted additional non-Indian permanent residents.⁹³ By the 1970s, the Tribe became a minority of the Town’s population and no longer exerted its once dominant political control over the Town.⁹⁴

⁸⁵ See *id.* at 22 (citing a 1915 *Cape Cod Magazine* article and the 1928 academic study conducted by anthropologist Frank Speck).

⁸⁶ *In re: Carlisle Indian School, Carlisle, Pennsylvania*, GAO (Aug. 24, 1927) (showing Mashpee students enrolled in the years 1905 through 1918).

⁸⁷ See, e.g., Carlisle School Records for Alfred De Grasse (“agency”), Daisy Mingo (“agency”), Charles Peter (“agency” and “reservation”), Eva Simons (“agency” and “reservation”), and Lillian Simons (“agency” and “reservation”) (collected from NARA RG75, Entry 1327).

⁸⁸ OFA Proposed Finding at 48-49, 152 see also 1930 Mashpee Heads of Households map, prepared by the Tribe using as a base map the Massachusetts State Planning Board Roads and Waterways Map of the Town of Mashpee from July 1939.

⁸⁹ OFA Proposed Finding at 108.

⁹⁰ *Id.*

⁹¹ See Jan. 4, 1935 Tantaquidgeon Manuscript at 3 (the manuscript is not paginated but this information is located on the third page of substantive text); see also Dec. 6, 1934 Tantaquidgeon Manuscript at 10 (referring to Mashpee as a “recognized [] Indian town”).

⁹² See OFA Proposed Finding at 53, 103 (citing Carle C. Zimmerman, *THE CHANGING COMMUNITY* (1938)). Zimmerman also referred to the Town as a “reservation” at one point in his study. See Carle C. Zimmerman, *THE CHANGING COMMUNITY* at 173.

⁹³ OFA Proposed Finding at 105.

⁹⁴ *Id.* at 66.

Summary

The Department previously concluded that the Tribe had a centuries-old connection to land in the Town of Mashpee, providing the foundation for satisfying the IRA's second definition.⁹⁵ Because this opinion only analyzes the Tribe's eligibility under the first definition, I am not compelled to interpret the term "reservation" as it is used in the second definition or whether the land in the Town of Mashpee constituted a reservation in 1934.⁹⁶ I do however, conclude that the historical record demonstrates that the Tribe maintained nearly exclusive occupation of the Town of Mashpee in a reservation-like manner beginning in 1665 and lasting through 1934. The Tribe's continuous occupation of this land is a fundamental feature of its history and provides the backdrop for understanding the Tribe's relationship with the federal government and subsequent federal exercises of jurisdiction.⁹⁷

B. Federal Jurisdiction before 1934

The evidence reveals that the federal government took actions and engaged in a course of dealings that, when viewed in concert, establish that the Tribe was UFJ before 1934.

1. Federal Protection from Removal

One of the first clear considerations of the application of federal Indian policy to the Tribe occurred with regard to the federal government's Indian removal policy in the 1820s. During the almost 30-year period between 1815 and 1845, federal Indian policy focused almost entirely on removal of tribes like the Mashpee from the east to relatively less populated areas to the west with the dual purpose of making eastern tribal lands available for non-Indian settlement and alleviating conflicts caused by the presence of tribal nations within state boundaries.⁹⁸ Acting on a federally commissioned report, issued in 1820, the Secretary of War and the President considered, but ultimately recommended *against* removing the Mashpee from their lands in Massachusetts.

⁹⁵ 2015 ROD at 120; The 2015 ROD concluded that "the Indian character of the Reservation persisted up until and through the time in question, June 1, 1934." *Id.* at 116; The First Circuit did not rule on the Department's finding that the Tribe's land constituted an Indian reservation in 1934. Rather it found that the plain meaning of the phrase "such members" referred back to the "under federal jurisdiction" language in the first definition) *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 37 (1st Cir. 2020). (The 2018 Remand Decision, which addressed only whether the Tribe qualified under the first definition of Indian, did not "revisit or alter" the 2015 ROD's conclusion as to the second definition. See *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 34-35 (1st Cir. 2020).

⁹⁶ As discussed in more detail below, following the IRA's passage in 1934, even though the federal government had acknowledged the Mashpee reservation beginning as early as 1820, it did not seek to implement the IRA for the Tribe despite the reservation-like character of the Town and the enumeration of its members as Indian.

⁹⁷ As part of its submissions on remand, the Tribe argued that occupation of a reservation in 1934 constituted unambiguous evidence of UFJ. ("The M Opinion already establishes that the Department's decision to conduct a tribal vote on whether to opt out of the IRA was conclusive proof of that tribe's status as under federal jurisdiction. The Tribe proposes only a corollary to that decision - *i.e.*, to conclude that a tribe's clear eligibility to vote on the IRA (whether the Department held such a vote at the time) is likewise conclusive proof of a tribe's status under the IRA . . ."). I do not agree that the evidence is dispositive, but do find that the Tribe's reservation-like occupancy of the Town of Mashpee is relevant in understanding its jurisdictional relationship with the federal government.

⁹⁸ Cohen, Handbook of Federal Indian Law (1945) 53-54.

The Federal Government's explicit consideration of and decision to exempt Mashpee from removal, demonstrated an understanding that the Tribe was subject to federal jurisdiction. The decision against Mashpee removal also constitutes a federal decision to protect Mashpee lands from non-Indian settlement.

Morse Report

As part of the federal removal policy, Reverend Jedidiah Morse was commissioned by the Secretary of War, John C. Calhoun, as part of a presidential commission, to visit various tribes in the country "in order to acquire a more accurate knowledge of their actual condition, and to devise the most suitable plan to advance their civilization and happiness."⁹⁹ Morse's work, which commenced in the summer of 1820, was funded and assisted by the Indian Department¹⁰⁰ and was one of the Federal Government's first initiatives to "civilize" Indians, under the Civilization Fund Act of 1819.¹⁰¹

Morse and his son embarked on a nearly four-month tour travelling as far west as Green Bay in the Northwest Territory visiting the many Indian tribes they encountered along the way.¹⁰² Upon completion of his travels, Morse provided a report (Morse Report) explaining that it was his objective "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, as my information and materials would admit."¹⁰³

As part of his report, Morse set forth a statistical table "embracing the names and numbers of all the tribes *within the jurisdiction of the United States*."¹⁰⁴ The report lists the Mashpee Tribe and the Town of Mashpee as the Tribe's "place of residence."¹⁰⁵ Morse also included narratives for each state describing the status of tribes residing therein. Regarding the Massachusetts tribes, Morse reported that those tribes "reside on their respective Reservations at Marshpee, Herring Pond, Martha's Vineyard and Troy . . ."¹⁰⁶ In discussing the Mashpee Tribe specifically, Morse reported 320 members living on the reservation.¹⁰⁷ Morse further recommended against removing the Tribe west relating:

As to the plan of removing them, were they in favor of the measure, it would scarcely be an object. They are public utility here as expert whalers and manufacturers of various light articles; have lost their sympathy with their brethren of the forest; are in possession of many privileges, peculiar to a coast, indented by the sea; their local attachments are strong; they are tenacious of their lands; of course, the idea of

⁹⁹ Rev. Jedidiah Morse, *A Report to the Secretary of War of the United States on Indian Affairs*, 11 (New Haven, 1822) [hereinafter Morse Report].

¹⁰⁰ *Id.*

¹⁰¹ Civilization Fund Act of 1819, Pub. L. No. 15-85, 3 Stat. 516, 516-17 (Mar. 3, 1819) (part of the plan for "civilization" included removing tribes from the eastern states to the states and territories west of the Mississippi River).

¹⁰² Morse Report at 13.

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.* at 23 (emphasis added).

¹⁰⁵ *Id.* at app. (the statistical table lists the Tribe and town by the alternate spelling of "Marshpee").

¹⁰⁶ *Id.* at 68.

¹⁰⁷ *Id.*

alienating them and removing to a distance, would be very unpopular. This is evident from the feelings manifested by those whom I have sounded on the subject; I have reason, therefore, to believe that the scheme would not take with them.¹⁰⁸

The full Morse Report was printed, circulated to Congress, as well as within the Executive, and debated in the House of Representatives on May 4, 1822.¹⁰⁹ The Morse Report was described in the House debate as one produced so that Congress might “be well informed of the nature and condition of the materials upon which we are about to operate . . .”¹¹⁰

As discussed in more detail below, similar to Congress, President James Monroe and the executive relied on the Morse Report when formulating the Federal Government’s removal policy and the decision to protect the Tribe’s land. The Morse Report also served as the Office of Indian Affairs primary source for responding to Congressional requests for demographic information on tribes within the states and territories.

McKenney Letters

By 1825, President Monroe and Secretary Calhoun, had unfurled the federal plan to remove eastern tribes west of the Mississippi River. Colonel McKenney, who served within Secretary Calhoun’s War Department as Superintendent of Indian Affairs from 1824 to 1830,¹¹¹ promoted the removal policy.¹¹² In the early part of January 1825, McKenney submitted a report to Secretary Calhoun listing the different tribes within the limits of the several states and territories, which again listed the Mashpee as residing on their respective reservation.¹¹³ Relying on the McKenney report, on January 24, 1825, Secretary Calhoun transmitted to President Monroe “a statement of the names of the Indian tribes now remaining within the limits of the different States and Territories, the number of each tribe, and the quantity of land claimed by each . . .” to assist in developing a removal plan.¹¹⁴ Secretary Calhoun noted that “[t]he arrangement for the removal, it is presumed, is not intended to comprehend the small

¹⁰⁸ *Id.* at app. 69-70.

¹⁰⁹ House of Representatives Report on Indian Trade, 17th Cong., 1st Sess. [hereinafter House Report]

¹¹⁰ House Report at 1793. In the discussion of Massachusetts, Congressman Metcalf quoted the Morse Report narrative that “[a]ll the Indians remaining in this State reside on their respective reservations at Marshpee, Herring Pond, Martha’s Vineyard, and Troy. . .” *Id.* at 1794.

¹¹¹ Colonel McKenney was a significant policy maker at the time in Indian affairs. He had been head of the Office of Indian Trade from 1806 until 1822, the first administrative office established in the Department of War to manage relations with Indian tribes. When that office was abolished by Congress in 1824, Secretary Calhoun created the Bureau of Indian Affairs (without special congressional authorization) and made Colonel McKenney the first head of that office. Congress authorized the office in 1832, by which time McKenney had left government service. (F.P. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts of 1790-1834*, 57-60 (U. Neb. Press 1970)).

¹¹² See *The North American Review*, Volume 30, July 22, 1829, 106. In Colonel McKenney’s address to the Indian Board for the Emigration, Preservation, and Improvement of the Aborigines of America, he set forth his belief that Indians who did not assimilate or move west of the Mississippi River would perish.

¹¹³ Letter from Thomas L. McKenney, Superintendent of Indian Affairs to Secretary of War, James C. Calhoun (Jan. 10, 1825) (The information in McKenney’s report relied on the statistical table in the Morse Report).

¹¹⁴ Letter from James C. Calhoun, Secretary of War to President Monroe (Jan. 24, 1825).

remnants of tribes in Maine, Massachusetts, Connecticut, Rhode Island, Virginia, and South Carolina, amounting to 3023.”¹¹⁵

President Monroe acting on Secretary Calhoun’s recommendation transmitted to Congress his own recommendation that Indian tribes be removed from the lands they occupied.¹¹⁶ In his January 27, 1825 address to Congress, President Monroe explained that he was:

deeply impressed with the opinion that the removal of the Indian tribes from the lands which they now occupy within the limits of the several States and Territories, to the country lying westward and northward thereof, within our acknowledged boundaries, is of very high importance to our Union, and may be accomplished, on conditions, and in a manner, to promote the interest and happiness of those tribes, the attention of the Government has long been drawn, with great solicitude, to the subject.¹¹⁷

The President’s brief narrative recommended to Congress the adoption of a general removal plan without making a distinction among tribes; even so, it included Secretary Calhoun’s full report which recommended excluding the Mashpee from the removal policy due to their industriousness and tenacious ties to their land.¹¹⁸ It also included Colonel McKenney’s statistical report identifying the Tribe and its continued occupation of a reservation.¹¹⁹

Summary

The Remand Decision determined that the record evidence showed that the Tribe was *potentially* subject to the exercise of federal Indian authority, but that such authority was never actually exercised.¹²⁰ Our review on remand however makes plain that the federal government considered and ultimately rejected application of the removal policy to the Mashpee. In so doing, the United States took specific action, in addition to acknowledging the Tribe’s existence, which constitutes the exercise federal Indian authority over the Tribe.

The Morse Report concluded that the Federal Government would be ill advised to remove the Mashpee from their current territory because “the scheme [of removal] would not take with them.” President Monroe and Congress relied on the Morse Report applying the Federal Government’s removal policy and the ultimate decision not to remove the Tribe from its land. The Morse report and federal officials’ subsequent reliance on it, provide probative evidence that the Federal Government actively considered the Mashpee within its jurisdiction and subject to the removal policy, but chose instead to

¹¹⁵ *Id.*

¹¹⁶ President Monroe, *Message from the President of the United States, Transmitting Sundry Documents in Relation to the Various Tribes of Indians within the United States, and Recommending a Plan for their Future Location and Government* (Jan. 27, 1825).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See, e.g.*, Remand Decision at 21 (“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.”)

affirmatively protect the Tribe's occupancy of its land despite the overarching policy prerogative to remove tribes west to make their lands available for non-Indian settlement.

2. Carlisle School Records

Mashpee children attended the federally-operated Carlisle Indian School located in Carlisle, Pennsylvania (Carlisle School) between 1905 and 1918. While enrolled in the Carlisle School, the BIA operated school maintained extensive federal supervision over Mashpee students' education, health and finances.¹²¹ Consistent with the guidance in M-37029 this assertion of jurisdiction over Mashpee tribal members constitutes the exercise of federal jurisdiction over the Tribe.

Carlisle School Attendance Records

In the late nineteenth century thousands of Indian children were removed from their homes by the Federal Government and enrolled at off-reservation Indian boarding schools operated by the Federal Government or pursuant to contract with or authority delegated by the federal government.¹²² These off-reservation boarding schools were meant to further the federal government's "civilization" policy and sought to eliminate Indian culture.¹²³ As the Commissioner of Indian Affairs wrote in 1896, the intent was "for the strong arm of the nation to reach out, take [Indian children] in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, . . . instead of allowing them to grow up as barbarians and savages."¹²⁴

As one scholar has explained:

The boarding school heyday spanned from the late 19th century to the mid-20th century. Congress ended the policy of making treaties with Indian tribes in 1871, putting new emphasis on legislation geared toward civilization and assimilation. The goal of the policy included detribalization through the division of communally held tribal land and indoctrination into a Western, capitalist way of life through individualized property ownership. The federal government established a policy that Native children should be removed from their homes and placed in church or government-run boarding schools. Thousands of children were institutionalized in government-run schools, often far from their families. Boarding schools introduced the American educational, child welfare, and juvenile justice systems to Native children as brutal instruments of acculturation designed to produce subservient Americans.

¹²¹ See *United States v. Erickson*, 436 F. Supp. 3d 1242, 1267 (D.S.D. 2020), *aff'd*, Case No. 20-1861 (8th Cir. June 2, 2021).

¹²² *Brackeen v. Haaland*, 994 F.3d 249, 282–83 (5th Cir. 2021) (citing Fletcher, Federal Indian Law, § 3.6.); *see also*, The Carlisle Indian Industrial School: Assimilation with Education after the Indian Wars (Teaching with Historic Places) <https://www.nps.gov/articles/the-carlisle-indian-industrial-school-assimilation-with-education-after-the-indian-wars-teaching-with-historic-places.htm> (over ten thousand children attended Carlisle Industrial School between 1879 and 1918).

¹²³ *Id.*; *see also*, 146 CONG. REC. E1453 (Sept. 12, 2000) (quoting remarks from AS – IA Kevin Gover reflecting on the Department's role in boarding school education and the pernicious impacts that resulted from the boarding school era).

¹²⁴ *Brackeen*, 994 F.3d at 282–83 (5th Cir. 2021) (citing T.J. Morgan, A Plea for the Purpose, 18 Baptist Home Mission Monthly 402, 404 (1896)).

The goal was to “civilize” Native children by forcing them to adopt the norms of Christian Anglo-American culture. Children were often sent hundreds or thousands of miles away from their homes in order to separate them from the traditional practices of their people. Once they arrived, children were punished for speaking their languages and engaging in non-Christian spiritual practices. Native children were forced to cut their hair and were punished for speaking Native languages.¹²⁵

Congress first appropriated federal funds to establish these off-reservation boarding schools, including the Carlisle School in 1882.¹²⁶ The 1882 federal appropriation made clear that the school was funded to further the federal Indian policy:

For support of industrial schools and for other educational purposes *for the Indian tribes*, one hundred and fifty thousand dollars. For support of Indian industrial school at Carlisle, Pennsylvania, and for transportation of children to and from said school, sixty-seven thousand five hundred dollars; for annual allowance to Captain R. H. Pratt,¹²⁷ in charge of said Indian industrial school one thousand dollars; in all, sixty-eight thousand five hundred dollars.¹²⁸

Attendance at the Carlisle School was subject to significant federal control. Students at off-reservation schools like Carlisle were taken from their homes and reservations and were forced to adopt different names, clothing, haircuts, faith, language, and cultural practices in an effort to assimilate the next generation of Indian children.¹²⁹ In 1892, Congress authorized the Commissioner of Indian Affairs to “make and enforce by proper means such rules and regulations as will secure the attendance of Indian children of suitable age and health at schools established and maintained for their benefit.”¹³⁰ The Commissioner adopted rules governing admission into the off-reservation schools which made clear the schools were part of the Federal Government’s “civilization” (*i.e.*, adopt non-Indian culture) policy.¹³¹ The Commissioner’s “Rules for the Collection of Pupils for Nonreservation Schools” made plain that the schools were meant to further the federal Indian policy of the time by indoctrinating children perceived as being too “Indian” or too connected to tribal culture. For example, a child with one-eighth or less Indian blood, “whose parents do not live on an Indian reservation, who are presumed to have adopted the white man’s manners and customs, and are to all intents and purposes white

¹²⁵ Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 Colum. J. Race & L. 811, 826-27 (2021).

¹²⁶ Act of May 17, 1882, 22 Stat. 68, ch. 163, p. 85.

¹²⁷ Captain Pratt is infamous for his support of the goal to “kill the Indian” to “save the man.” *United States v. Erickson*, 436 F. Supp. 3d 1242, 1267 (D.S.D. 2020), *aff’d*, Case No. 20-1861 (8th Cir. June 2, 2021).

¹²⁸ Act of May 17, 1882, 22 Stat. 68, ch. 163, p. 85 (emphasis added.).

¹²⁹ See *supra* n.127.

¹³⁰ Act of July 1, 1892, 27 Stat. 120.

¹³¹ See, Education Circular No. 85, Rules for the Collection of Pupils for Nonreservation Schools. The circular required an application and consent form that were to be maintained as records of the school. *Id.*, § 3. In addition, the circular restricted nonreservation school enrollment to certain geographic areas, except for the Carlisle School and Haskell Institute, which were authorized to receive children from “Indians located in the United States.” *Id.*, §§ 1, 16.

people” were not permitted enrollment.¹³² Whereas a child whose “parents live on a reservation, Indian fashion” may attend, even if they were of a lesser degree of Indian blood.¹³³

Records show that Mashpee children were enrolled at the school every year between 1905 and 1918.¹³⁴ Specifically, a 1927 report prepared by the General Accounting Office identified numbers of Mashpee children in attendance at Carlisle School during those years.¹³⁵ Carlisle School records for the Mashpee students show compliance with the regulations regarding admission. Each enrollment application lists the student’s tribe, blood quantum, and verification of living in “Indian fashion.”¹³⁶

All of the forms, from the enrollment applications through records of departure from the school, contained a field for identifying the “Tribe” or “Nation” of the student.¹³⁷ In every case, the records relevant to our inquiry identify the student as a member of the Mashpee Nation, Wampanoag Tribe, Pokanoket or South Sea (names used in the seventeenth century records) and were certified by disinterested persons as “liv[ing] as an Indian.” In most cases, the “agency” line in the forms was filled in as “Mashpee, Massachusetts.”¹³⁸

Once enrolled, the Carlisle School exerted significant control over major aspects of the Mashpee students’ lives including their education, finances, physical health, and freedom of movement. The Superintendent and, at times the Commissioner of Indian Affairs, oversaw the use and disbursement of funds of belonging to the students. Several Mashpee students were given off-campus work assignments and received compensation for their services. Employers did not pay the students directly; rather, they remitted payment to the school which maintained the funds in student accounts.¹³⁹ The school then controlled and restricted access to the accounts.¹⁴⁰

The Commissioner of Indian Affairs also supervised health care for the students, treating them as wards of the federal government. For example, one Mashpee student suffered an infection and the Superintendent authorized amputation of the student’s toe, advising his mother of the event after the fact.¹⁴¹ Finally, the BIA circumscribed Mashpee students’ freedom to leave Carlisle School. Charles Peters had to seek permission from the Commissioner of Indian Affairs to leave the Carlisle School

¹³² *Id.*

¹³³ *Id.*

¹³⁴ No Mashpee children attended the Carlisle School after 1918 because the school closed that year.

¹³⁵ *In re: Carlisle Indian School, Carlisle, Pennsylvania*, GAO, Aug. 24, 1927 (The GAO Report identifies the following numbers of children for the corresponding years 1905 - 5 (p. 247); 1906 - 17 (p. 249); 1907 - 5 (p. 252); 1908 - 3 (p. 255); 1909 - 12 (p. 257); 1910 - 5 (p. 260); 1911 - 7 (p. 263); 1912 - 4 (p. 266); 1913 - 4 (p. 268); 1914 - 3 (p. 276); 1915 - 2 (p. 272); 1916 - 2 (p. 274); 1917 - 14 (p. 275); 1918 - 1 (p. 277)).

¹³⁶ Student Records for NARA RG75, Entry, 1327.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See, e.g.*, Letter from Ford Motor Company to Carlisle Superintendent (Apr. 6, 2017) (making a request to terminate the work program and make Z. Simon a regular employee paid directly by the company rather than having his funds paid to a student account).

¹⁴⁰ *See, e.g.*, Letter, Zephenia Simon to Superintendent Friedman (Nov. 8, 1913) (requesting funds from her account to pay her Mother’s mortgage); Check Authorization, (Jan. 14, 1914).

¹⁴¹ Letter of July 28, 1913, Exhibit R.

and move home to help his aging parents.¹⁴² Permission was granted only after the Carlisle School Superintendent investigated the circumstances.¹⁴³

Summary

The Remand Decision found that while relevant, enrollment of individual tribal members at the Carlisle School was insufficient to show jurisdiction over the Tribe as a whole.¹⁴⁴ As noted above, however under M-37029, BIA funded schools were at the time an integral part of the contemporaneous federal Indian policy aimed at breaking up tribal communities across the country, and the inclusion of the Mashpee and its members within this extraordinary and sweeping policy provides probative evidence of federal jurisdiction over the Tribe and its members.¹⁴⁵ So too are the provision of health and social services, and the control and management of tribal member funds.¹⁴⁶

Consistent with the federal policy of “civilization,” federal Indian agents exercised extraordinary control over the Mashpee students attending Carlisle School from 1905 through 1918. The students’ education, finances and health were all matters of interest overseen and controlled by the Federal Government as part of its efforts to assimilate Indian children, hastening the end of tribes and tribal communities.

M-37029 makes clear that in some instances, actions taken for, or on behalf of individual tribal members are probative of a tribe’s status as UFJ.¹⁴⁷ The actions discussed above constitute a clear assertion of federal authority over the Tribe and its members and, therefore, evidence the United States’ assertion of jurisdiction over the Tribe in the decades leading up to passage of the IRA. The Carlisle School records in this case are therefore probative of the Mashpee Tribe’s status as UFJ, and when viewed in concert with the other evidence, demonstrate that the Tribe was UFJ in 1934.

¹⁴² Letter from Charles Peters to Commissioner Sells (Dec. 1, 1913) (Peters, then 21 years old, requesting permission to return home to assist his parents).

¹⁴³ Letter from Superintendent Friedman to Commissioner Sells (Dec. 24, 1913) (supporting Peter’s request on the condition that his transportation costs for were paid from his student account).

¹⁴⁴ Remand Decision at 27. (“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.”)

¹⁴⁵ M-37029 at 19.

¹⁴⁶ M-37029 at 19 (one form of evidence demonstrating that a tribe was under federal jurisdiction in 1934 is “the provision of health or social services to a tribe”). *See also Confederated Tribes of the Grand Ronde Community of Or.*, 75 F. Supp.3d at 404 (confirming that evidence showing the federal government provided for the “medical needs” of Cowlitz Tribal members is evidence demonstrating that Cowlitz was under federal jurisdiction in 1934); *Confederated Tribes of the Grand Ronde Community of Or.*, 830 F.3d at 564 (upholding the Department’s determination that Cowlitz was under federal jurisdiction in 1934, based on the government’s course of dealings with Cowlitz that included government provision of services); *see also* Cowlitz ROD at 99 (citing the “authorization of money being held by the Department for health services” on behalf of Cowlitz Indians as evidence demonstrating the Cowlitz Tribe was under federal jurisdiction).

¹⁴⁷ M-37029 at 19.

3. Federal Reports and Surveys

The following reports and surveys provide probative evidence that the Federal Government was not only aware of its jurisdiction over the Tribe, but, pursuant to that authority, took affirmative actions to document the Tribe's living conditions, document their numbers and propose plans for improving the Tribe's status as part of the federal government's implementation of federal Indian policy. The reports and surveys document federal officials' continuing awareness of federal jurisdiction over and responsibility for the Tribe.

Schoolcraft Report

In 1832 Congress established the position of Commissioner of Indian Affairs and delegated to the Commissioner the authority to manage all Indian affairs.¹⁴⁸ Two years later Congress granted the President authority to "prescribe such rules and regulations as he may think fit, for carrying into effect the various provisions of [any act] relating to Indian affairs . . ."¹⁴⁹ At the same time Congress established the Department of Indian Affairs, predecessor to the BIA.¹⁵⁰ In 1847, Congress enacted a statute to reorganize the Department of Indian Affairs.¹⁵¹ The statute directed the newly formed department to "collect and digest such statistics and materials as may illustrate the history, the present condition" of Indian tribes as well as provide for the "future prospects of the Indian tribes of the United States."¹⁵²

Secretary of War, William L. Marcy selected Henry Schoolcraft, an experienced and well regarded agent¹⁵³ within the Office of Indian Affairs, to produce the report Congress ordered by the 1847 legislation.¹⁵⁴ Schoolcraft ultimately prepared a six-volume work in response to appointment.¹⁵⁵ In his first volume, published under the direction of the Commissioner of Indian Affairs, Schoolcraft summarized Mashpee history and then made policy recommendations as to the Tribe (as well as Martha's Vineyard and Herring Pond):

From the report made on this occasion there were found to be remnants of twelve tribes or local clans, living respectively at Chippequiddie, Christiantown, Gay Head, Fall River, Marshpee, Herring Pond, Hassanamisco, Punkapog, Natick, Dudley, Grafton, and Yarmouth. Their number was estimated at eight hundred and forty-seven, only

¹⁴⁸ Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564

¹⁴⁹ Act of June 30, 1834, ch. 162, § 17, 4 Stat. 735, 738

¹⁵⁰ *Id.*

¹⁵¹ Act of March 3, 1847, 29th Cong., 2d Sess., ch. 66, § 5.

¹⁵² *Id.*

¹⁵³ See F. Nichols, Index to Schoolcraft's "Indian Tribes of the United States, Bureau of American Ethnology, Bulletin 152, Smithsonian Institution (GPO 1954), Introduction.

¹⁵⁴ Letter, Secretary of War, William L. Marcy to Henry Schoolcraft (Mar. 18, 1847) (stating that "you are hereby specially appointed in the office of Indian Affairs to aid and assist in collecting and digesting a census and statistics of the various Indian tribe, and such materials as will tend to illustrate their history, present condition, and future prospects.")

¹⁵⁵ Henry R. Schoolcraft, *History of the Indian Tribes of the United States: Their Present Condition and Prospects, and a Sketch of Their Ancient Status* (1857).

about seven or eight of whom were of pure blood, the remainder being a mixture of Indian and African. A plan for their improvement was proposed.¹⁵⁶

Under the plan, all Indians in the State except those residing at “Marshpee,” Herring Pond, and Martha’s Vineyard would be merged into one community and an Indian commissioner would be appointed to supervise the tribes.¹⁵⁷ The volume also included Schoolcraft’s “Tables of the Indian Population of the United States” which listed the Mashpee as among the “Fragmentary Tribes still existing within the Boundaries of the old States.”¹⁵⁸

Schoolcraft’s reference to the Mashpee as a fragmentary tribe was consistent with other federal officials who at times deferred to the State’s exercise of authority.¹⁵⁹ However, the Schoolcraft report makes clear that federal officials also understood that Mashpee constituted a tribe and the United States had the prerogative to exercise federal Indian affairs jurisdiction over the Mashpee by issuing a “plan for their improvement.” Much like consideration of the Tribe under the federal removal policy, federal Indian agents ultimately opted not to implement the plan proposed by Schoolcraft. The Office of Indian Affairs did, however, develop and recommended concrete federal plans consistent with Congress’ directive to collect and digest materials concerning the Tribe’s future prospects. Thus, through the efforts to prepare and issue the Schoolcraft report, the Office of Indian Affairs regarded the Tribe as subject to federal jurisdiction, effectuating federal policy that took the Tribe into account and continued to enumerate the Mashpee among the Indian tribes of the United States. The Tribe’s appearance in the report therefore demonstrates continued federal jurisdiction over the Tribe.

1890 Annual Report of the Commissioner of Indian Affairs

As M-37029 explains “[a]s part of the exercise of this administrative jurisdiction, the Office [of Indian Affairs] produced annual reports, surveys, and census reports on many of the tribes and Indians under its jurisdiction.”¹⁶⁰ The annual reports of the Commissioner of Indian Affairs addressed the Federal Government’s policy and authority over Indian affairs, as well as actions taken pursuant to that authority; and the reports were submitted to Congress. In 1890, the Annual Report of the Commissioner of Indian Affairs noted that the Tribe continued to hold tribal relations and possession of specific tracts of land stating that “no Indians within the limits of the thirteen original States retained their original title of occupancy, and only in Massachusetts, New York, and North Carolina are they found holding a tribal relation and in possession of specific tracts.”¹⁶¹ Regarding the Mashpee, the annual report stated that “[t]he Marshpee Indians occupy a tract of land in Barnstable County, Mass., have a board of overseers appointed by the State, who by acts of 1789, 1808, and 1819, govern all their internal affairs and hold their lands in trust.”¹⁶²

¹⁵⁶ Henry R. Schoolcraft, *Historical and Statistical Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States*, 253 (1851).

¹⁵⁷ *Id.*

¹⁵⁸ *Historical and Statistical Information* (Jul. 22, 1850) (marked “approved” by L. Lea, Commissioner of Indian Affairs).

¹⁵⁹ *See infra*, Section C.2 (discussing federal officials’ reluctance to extend federal Indian affairs programs to the Tribe).

¹⁶⁰ M-37029 at 16.

¹⁶¹ ARCIA 1890 at xxvi.

¹⁶² *Id.* Interestingly, the report does not mention the State’s 1842 effort to allot the Tribe’s communal landholdings, remove the restrictions against alienation, and incorporate the former Indian district as the Town of Mashpee.

By including the Tribe in the 1890 annual report, the Commissioner explicitly acknowledged that the Tribe fell within its purview and noted the Tribe maintained “tribal relations” and maintained authority over its lands. Inclusion in the report constitutes probative evidence of the Federal Government’s exercise of jurisdiction over and responsibility for the Tribe.¹⁶³

Tantaquidgeon Report

In 1934, in exercise of its jurisdiction over New England tribes, the BIA commissioned Gladys Tantaquidgeon, a University of Pennsylvania student and Mohegan Indian, as a special investigator¹⁶⁴ to conduct a comprehensive survey of the New England tribes (Tantaquidgeon Report).¹⁶⁵ The report specifically addressed the Mashpee Indians and provided details on their “reservation,” population, subsistence practices, education facilities, health needs, arts and language, and governance.¹⁶⁶ The Tantaquidgeon Report was later included in a larger report for the Bureau of Indian Affairs.¹⁶⁷

The Tantaquidgeon Report was commissioned by the BIA, prepared by special investigator Tantaquidgeon, and was later relied on by the Office of Indian Affairs’ Director of Education as part of his effort to help secure federal funding to build a new school for Mashpee children.¹⁶⁸ This Tantaquidgeon Report provides probative evidence of the Federal Government’s authority over the Tribe, and its continuing efforts, pursuant to that authority, to document the Tribe’s community and their needs. The Tantaquidgeon Report informed federal officials, who subsequently relied on the Report.¹⁶⁹

Summary

The foregoing federal reports and surveys provide probative evidence of the United States exercise of federal jurisdiction over the Tribe. M-37029 requires the identification of “federal actions” which demonstrate federal jurisdiction. To determine whether a tribe was under federal jurisdiction, the Department must look to whether the United States took “an action or series of actions . . . that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.”¹⁷⁰

¹⁶³ See, e.g., *Village of Hobart v. Acting Midwest Reg’l Dir.*, 57 IBIA 4, 20, 24-25 (2013) (holding that “inclusion in the Indian population census and assignment of the Tribe to the jurisdiction of a BIA agency” was indicia of federal jurisdiction).

¹⁶⁴ See, e.g., Letter, W. Carson Ryan, Jr. Director of Research on Planning and Development, Office of Indian Affairs, to Howard A. Gray, Engineer-Examiner, Mass. Div. P.W.A., Federal Emergency Administration of Public Works (Apr. 24, 1935) (describing Tantaquidgeon as an expert on “surviving New England Indian groups” and as a “special investigator”).

¹⁶⁵ OFA Proposed Finding at 23.

¹⁶⁶ See Tantaquidgeon, Report on the Mashpee Tribe (Jan. 4, 1935).

¹⁶⁷ OFA Proposed Finding at 23.

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., *County of Amador v. U.S. Dep’t of Interior*, 136 F. Supp. 3d at 1200, 1208 (explaining that in the Record of Decision for the Ione Band of Miwok Indians of California (Ione Band), “efforts to document” the tribe’s members and listing them on the census included in the report was probative evidence that the Ione Band was under federal jurisdiction).

¹⁷⁰ M-37029 at 19.

The federally commissioned reports discussed above provided detailed information regarding the Tribe's status and set forth plans for exercising federal authority over the Tribe. The United States relied on these reports in making significant decisions regarding the Tribe. While inclusion in a singular federal report may not in and of itself establish that the Tribe was under federal jurisdiction, the reports here go beyond an isolated appearance or simple acknowledgment that the Tribe existed. Rather, these reports evidence the Federal Government's continuing responsibility for and authority over the Tribe and provided the basis for making decisions regarding the Tribe. The foregoing federal reports and surveys therefore constitute probative evidence of UFJ and when viewed in concert with the other forms of probative evidence demonstrate that the Tribe was UFJ prior to 1934.

4. Federal Censuses

Consistent efforts to document Mashpee tribal members in federal reports and census documents beginning with the Morse Report and continuing through the 1940s constitute probative evidence of federal jurisdiction over the Tribe.

Federal Reports and Census Records

As discussed above, the Morse Report provided early and detailed documentation of the Mashpee.¹⁷¹ Morse's account was subsequently relied on throughout the 1820s to respond to congressional requests for demographic information on tribes within the states and territories of the United States.¹⁷² The 1850 census included a "Statement Showing the Number of Indians Within the Territory of the United States at Different Periods, Number in Each Tribe, Present and Past Location, Etc."¹⁷³ The statement noted that information for the eastern tribes was obtained from Colonel McKenney's 1825 report to the Secretary of War on the "Several Tribes of Indian Within the U.S." which brought forward the census data from the Morse Report and its statistical table.¹⁷⁴

Between 1860 and 1930, the Federal Government consistently listed Mashpee tribal members as "Indian" in the general census.¹⁷⁵ In some census years, two types of population schedules were available for use: general population schedules and Indian population schedules. In 1910, the federal census enumerated 157 Mashpee Indians living in the Town of Mashpee as part of a separate Indian population schedule.¹⁷⁶

¹⁷¹ Morse Report at 68 (recording a population of 320 Mashpee tribal members living on the reservation).

¹⁷² See, e.g., Letter from Thomas McKenney, Director of the Office of Indian Affairs, to the Secretary of War (Dec. 23, 1824); Letter from Thomas McKenney, Director of the Office of Indian Affairs, to the Secretary of War (Jan. 10, 1825); Report from the Secretary of War: a Detailed Statement of the Several Tribes of Indians Within the U.S., and the Extent and Location of Certain Lands to which the Indian Title has been Extinguished (Jan. 3, 1829).

¹⁷³ Census of 1850, xciv, "Statement Showing the Number of Indians Within the Territory of the United States at Different Periods, Number in Each Tribe, Present and Past Location, Etc." (noting that information for the eastern tribes was obtained from the 1825 report of T. L. McKenney).

¹⁷⁴ *Id.*

¹⁷⁵ OFA Proposed Finding at 147-52.

¹⁷⁶ Population, Number of Indians Reported on Special Indian Schedule, Classified by Linguistic Stock and Tribe, 1910.

Carlisle School Censuses

In 1884, Congress enacted legislation requiring every Indian agent to submit a census of the Indians at his agency or upon the agency under their charge in an annual report.¹⁷⁷ The Commissioner of Indian Affairs' Annual Report to the Secretary compiled this data. Section 9 of the act explained that it applied to Indian agents in charge of BIA schools, such as the Carlisle School:

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

Although the records appear incomplete,¹⁷⁸ Mashpee students are listed on the 1911 census roll, (encompassing the 1910-1911 school year), entitled "Census of Pupils Enrolled at Carlisle Indian School," submitted to the Office of Indian Affairs by the Indian agent who served as Carlisle's superintendent,¹⁷⁹ and Mashpee students are again listed in the school's 1912 census roll dated June 6, 1912.¹⁸⁰ These census rolls were prepared in response to the 1884 legislation and informed the expenditure of federally appropriated funds to educate, clothe, and provide services to Mashpee students attending the Carlisle School.

Summary

In his *Carcieri* concurrence, Justice Breyer made clear that inclusion of tribes and their members on federal census rolls is probative evidence of whether a tribe was UFJ.¹⁸¹ In *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell (Grand Ronde)* the D.C. Circuit found that enumeration on a federal tribal list, when viewed in concert with the other evidence, demonstrated a course of dealings between the Federal Government and the Cowlitz tribe establishing federal jurisdiction.¹⁸² Indeed, courts have relied regularly on the enumeration of a tribe or its members on census rolls as

¹⁷⁷ Act of July 4, 1884, § 9, 23 Stat. 76, 98.

¹⁷⁸ There were likely far more Mashpee students enrolled at Carlisle School than are enumerated on the two census rolls, as evidenced by a 1927 General Accounting Office (GAO) Report, which lists as many as 17 Mashpee students attending in 1906.

¹⁷⁹ Census of Pupils Enrolled at Carlisle Indian School for the Fiscal Year, July 1, 1910, to June 30, 1911.

¹⁸⁰ Census Record (July 19, 1912).

¹⁸¹ *Carcieri*, 555 U.S. at 399 (2009) (Breyer, J., concurring) (finding that "enrollment (as of 1934) with the Indian Office" is evidence that a tribe was under federal jurisdiction in 1934).

¹⁸² *Confederated Tribes of the Grand Ronde Community of Or.*, 75 F.Supp.3d at 404 (finding that the inclusion of Cowlitz members on a 1912 Office of Indian Affairs statistical tabulation was evidence of federal jurisdiction). The D.C. Circuit agreed, upholding the Department's determination that Cowlitz was under federal jurisdiction in 1934 based on a course of dealings with Cowlitz that included, among other things, a 1934 instruction to the Taholah Agency to place Cowlitz Indians on the census roll for the Quinault Reservation. *Confederated Tribes of the Grand Ronde Community of Or.*, 830 F.3d at 566.

probative of UFJ.¹⁸³ The consistent efforts to enumerate the Tribe and its members in federal reports and census records therefore are probative of and demonstrate the Tribe's jurisdictional relationship with the Federal Government. When viewed in concert with other probative evidence, these records establish that the Tribe was UFJ.

Conclusion

M-37029 concludes that “[s]ome federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction,” but it goes on to say that “[i]n other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.”¹⁸⁴ As noted by the D.C. District Court, the Remand Decision viewed much of the evidence in isolation rather than in concert as required by M-37029.¹⁸⁵ Accordingly, after our reexamination of the Tribe's history and its interactions with the United States, I find grounds to depart from the Remand Decision here.

The course of federal dealing with the Mashpee Tribe from 1820 to 1934 included the Federal Government's consideration whether to apply the removal policy to the Mashpee, and its ultimate decision to allow the Mashpee to remain on their reservation and protect its land from non-Indian settlement; the enforcement of assimilationist policies on the Tribe by forcibly removing Mashpee children to the Carlisle School; inclusion of the Tribe in numerous federal reports and surveys; and the enumeration of the Tribe and its members in federal reports and census records. When viewed in concert the totality of the evidence indicates that the Tribe was under federal jurisdiction prior to 1934.

C. Federal Jurisdiction through 1934 and after

Having established that the Tribe was under federal jurisdiction prior to 1934, the next step is to determine whether the Tribe's jurisdictional status remained intact through 1934. The absence of probative evidence that Tribe's pre-1934 jurisdictional status was terminated by Congress or otherwise lost strongly suggests that such status was retained in 1934.¹⁸⁶

¹⁸³ See *No Casino in Plymouth v. Jewell*, 136 F.Supp.3d 1166, 1184 (E.D. Cal. 2015) (finding that “efforts to document members of the Band in the early 1900s” demonstrated that the Ione Band was under federal jurisdiction in 1934); *County of Amador v. U.S. Department of the Interior*, 136 F.Supp.3d 1193, 1200, 1208, 1209, 1210 (“BIA appointed Special Agent Kelsey in 1905-06 to investigate the conditions of dispossessed California tribal members, including in Amador County. His investigation included taking a census of the number of surviving Indian people...”, and “in 1915, BIA special agent John Terrell revisited many of the Indian communities in California, using Kelsey's census as a guide.”); *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4, 20, 24-25 (2013) (“In his annual report for 1934, submitted in April of that year, the Commissioner reported on the Indian population in the continental United States. He tabulated his population statistics by first by state, followed by jurisdiction, then by reservation, then by tribe. The Oneida Tribe is listed . . .”, and “The record contains various other indicia other indicia of the Federal government's jurisdiction over the Oneidas of Wisconsin – inclusion in the Indian population census . . .”).

¹⁸⁴ M-37029 at 19.

¹⁸⁵ See, *Mashpee*, ECF 75, Opinion at 23 (finding that the Secretary's conclusions about each piece of evidence evaluated in the 2018 Remand Decision show that the Secretary evaluated each piece of evidence in isolation rather than in concert).

¹⁸⁶ *Id.* at 20.

1. IRA Implementation for the Tribe

Following the IRA's passage, the Department set out to implement its provisions. Section 18 of the Act directed the Secretary to conduct elections for Indians residing on a reservation to vote to accept or reject application of the Act.¹⁸⁷ The Department was therefore faced with determining which Indians or Indian tribes resided on a reservation. And although the Federal Government acknowledged the Tribe's occupation and connection to the Town of Mashpee in a reservation like manner from the 1820 through the 1930s, it did not seek to implement IRA for the Tribe.¹⁸⁸

The decision not to hold a Section 18 election is not dispositive as to whether the Mashpee was UFJ through 1934. The Department's implementation of the IRA was not without error.¹⁸⁹ This was due to the fact-intensive nature of determining the existence of a tribal group or reservation, misinformation or insufficient information about particular groups, specific policy determinations, and time and resource constraints.¹⁹⁰ As Justice Breyer noted in his *Carciere* concurrence, federal officials made several errors in their effort to implement the IRA.¹⁹¹ Accordingly, certain tribes were later recognized as eligible to organize under the IRA, even though a Section 18 vote was not held at their reservation.¹⁹² Because the Department made mistakes in implementing the IRA, the failure to implement the IRA for the Tribe is not an indication that the Tribe's jurisdictional status was terminated.¹⁹³

¹⁸⁷ IRA, § 18, codified at 25 U.S.C. § 5125 (Section 18 provides that the IRA "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.") (The period for holding the elections was extended another year by the Act of June 15, 1935).

¹⁸⁸ See Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.* (1947) The BIA also chose not to conduct a Section 18 election at the Tribe's land in the Town of Mashpee.

¹⁸⁹ M-37029 at 23.

¹⁹⁰ See 2015 ROD at 84-90 (discussing the Department's implementation of the IRA); see also Memorandum to the Assistant Secretary – Indian Affairs re: Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, 7 (Oct. 1, 1980) ("It is very clear from the early administration of the Act that there was no established list of 'recognized tribes now under Federal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups."). The memorandum concluded that it is "irrelevant that the United States was ignorant in 1934 of the rights of the Stillaguamish and that no clear determination or redetermination of the status of the tribe was made at that time." *Id.* at 7.

¹⁹¹ *Carciere*, 555 U.S. at 397-98.

¹⁹² See, e.g., Memorandum from Assistant Solicitor Kenneth Meiklejohn (Jan. 10, 1940) (rejecting the assumption that the Yavapai Indians could not organize because a Section 18 vote had not been held on the tribe's reservation).

See also *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., at 265-66 (May 17, 1934) (debate between Senator Thomas and Senator Wheeler regarding whether the Catawbas should be subject to the IRA since they were "living on a reservation" and "descendants of Indians" but "[t]he Government has not found out they live yet, apparently"); Solicitor's Opinion, *Catawba Tribe – Recognition Under IRA* (Mar. 20, 1944), II Op. Sol. on Indian Affairs 1255 (U.S.D.I. 1979) (finding that the Catawba qualify for organization under the IRA, even though Commissioner Collier stated that "[t]he Federal Government has not considered these Indians as Federal wards").

¹⁹³ See, e.g., *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 565-66 (D.C. Cir. 2016) (errant statements by agency officials about a tribe's status are not dispositive as to a tribe's jurisdictional status in 1934).

2. Letters Disclaiming Jurisdiction

Following the IRA's passage, BIA officials wrote a number of letters that generally disclaim federal jurisdiction over the Tribe.¹⁹⁴ These letters are best characterized as reflections of evolving federal policy, practical constraints on implementing the IRA, and factual mistakes, rather than termination of the Tribe's jurisdictional relationship with the Federal Government. Federal officials, moreover, lack the authority to terminate tribal existence, whether through express action or by neglect.

For example, a letter from John Collier, responding to a Mashpee resident's request for assistance, illustrates the evolving federal policy implementing the IRA at that time. Collier denied the request, stating that:

In the absence . . . of any Federal policy at the present time with regard to other Indian groups or communities of Indian blood under the State – such as I understand the Mashpee community to be – I am unable to hold out any hope to you that the Federal Government can be of help at this particular time.¹⁹⁵

Collier further explained that:

[i]f at any time the Federal Government should undertake further provision for small Eastern groups under the States, and Mashpee should prove its people to have the requisite degree of Indian blood, you may be sure that the Wampanoag tribe will have careful consideration. Until such time these needs will have to be met . . . through local and State channels.¹⁹⁶

Collier's letter reflects the contemporaneous federal policy of deferring to state jurisdiction over New England tribes¹⁹⁷ at the time and did not rest on a legal analysis as to whether the BIA had legal

¹⁹⁴ See Letter from W. Carson Ryan, a BIA official, to James F. Peebles (Nov. 22, 1934) (stating that federal funds were not available for "Indian groups" like the "Mashpee Community" which were under state jurisdiction); Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Dec. 21, 1936) (responding to a request for federal aid by stating that the "Indians of the Mashpee Tribe are not under Federal jurisdiction or control"); Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Oct. 2, 1937) (reiterating Daiker's position that "the Indian Office can offer no assistance to Indians not members of a tribe under Federal jurisdiction," *i.e.* the Mashpee); Letter from John Herrick, Assistant to the Commissioner, to Charles L. Gifford (Oct. 28, 1937) (responding to a request for information on the Mashpee by stating that "the Federal Government does not exercise supervision over any of the eastern Indians," and therefore the Indian Office does not have information on the Mashpee).

¹⁹⁵ Letter from John Collier, Commissioner of Indian Affairs, to Mael L. Avant (undated). This letter was likely written in 1935, as it refers to a study conducted "last summer" by Gladys Tantaquidgeon. As described, *supra*, this study was performed in 1934.

¹⁹⁶ Letter from John Collier, Commissioner of Indian Affairs, to Mael L. Avant (undated).

¹⁹⁷ There are exceptions to this general trend, such as the Indians in New York. The federal government acknowledged that "[r]ightly or wrongly, from an early day, the State has exercised considerable jurisdiction over these Indians and has more or less satisfactorily performed the sovereign functions usually exercised by the Federal

authority over the Tribe. Collier's letter assumes that because the Tribe was located in an Eastern state where BIA had little tribal involvement it fell outside the coverage of federal Indian programs and monies. Collier's deference and false assumption appeared to stem from a combination of factors. Practical budgetary constraints on the federal coffers meant that while the IRA was intended to achieve several lofty objectives, its realization was not fully successful because "on a practical economic level the federal government was unable to respond fully to the economic condition of Indian people as described by the Meriam Report and as exacerbated by the Great Depression,"¹⁹⁸ deference to the original states, which had been regarded as sharing jurisdictional authority over Indians,¹⁹⁹ and the assumption that these Indian populations were already being provided for by state and local governments also played a part in how the IRA was enacted by federal officials.²⁰⁰ Of course, these assumptions were incorrect, but it was not until the 1970s, in the context of tribal land claims in the northeastern United States that the federal courts began to address this fundamental misunderstanding in the context of the 1790 Trade and Intercourse Act.²⁰¹

Other letters simply failed to acknowledge what should have been well-known to the Office of Indian Affairs. A 1937 letter written by John Herrick, an assistant to the Commissioner, states that the Indian Office did not possess any information concerning the Mashpee.²⁰² Yet in 1934, only three years prior, Gladys Tantaquidgeon had been commissioned by the Indian Office to compile a report on the New England tribes, which provided detailed information on the Mashpee Tribe and its way of life.²⁰³ Another example is the 1936 statement by F.H. Daiker, another assistant to the Commissioner, that the Mashpee Indians "have never been regarded as wards of the United States."²⁰⁴ This statement ignores the federal government's inclusion of the Mashpee in forming its removal policy, evidenced in the Morse Report, the attendance of Mashpee students at the Carlisle School, and the enumeration of the Tribe and its members in multiple censuses and federal reports.

Government in behalf of the Indians." Letter from Commissioner John Collier to Mr. Oliver LeFarge, President of the American Association of Indian Affairs at 1 (Feb. 19, 1938). Nevertheless, the federal government expressly recognized that the New York Indians are "wards of the [Federal] Government and as such, subject to whatever legislation the Congress under its paramount authority may enact," even though "[t]hus far, Congress has enacted very little legislation dealing specifically with the Indians in New York." *Id.*

¹⁹⁸ See Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (2012 ed.).

¹⁹⁹ See *id.* §§ 1.02[1], 15.06[1] (2012 ed.) (discussing how the Articles of the Confederation provided the federal government and state governments with a degree of shared authority over Indian Affairs that was "obscure and contradictory" in nature, and how this practice persisted following the Constitution and enactment of the Non-Intercourse Act). See also *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 944 (D. Mass. 1978) (noting that "a very large number" of Mashpee men were killed during the Revolutionary War, leaving some "70 widows . . . out of a population of a few hundred[,]"; a "situation [that] encouraged a considerable influx of unattached non-Indian males, mostly black"), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

²⁰⁰ See, e.g., Morse Report at 23–24 (stating that the New England tribes "are all provided for, both as to instruction and comfort, by the governments and religious associations, of the several states in which they reside."); Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Oct. 2, 1937) ("Your people are of the same status as other citizens of the Commonwealth of Massachusetts, and you must look to the local authorities for assistance.").

²⁰¹ 1 Stat. 137–38, codified at 25 U.S.C. 177. See, e.g., *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985).

²⁰² Letter from John Herrick, Assistant to the Commissioner, to Charles L. Gifford (Oct. 28, 1937).

²⁰³ Herrick's letter expressly refers to Professor Frank G. Speck, Tantaquidgeon's supervisor at the University of Pennsylvania.

²⁰⁴ Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Dec. 21, 1936).

Summary

Evidence demonstrating that the Federal Government excluded the Mashpee from the scope of its federal programs following passage of the IRA is not dispositive as to the question of whether the Tribe remained UFJ through 1934. As Justice Breyer recognized in his concurrence in *Carcieri*, as “a tribe may have been ‘under Federal jurisdiction’ in 1934 even though the Federal Government did not believe so at the time.”²⁰⁵ In fact, a tribe may be UFJ where federal officials mistakenly believed—even for long periods of time—that they were not.²⁰⁶ Given this, “[t]he Federal Government’s failure to take any actions towards, or on behalf of a tribe during the particular time period does not necessarily reflect a termination or loss of the tribe’s jurisdictional status”²⁰⁷ and “evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction.”²⁰⁸

Furthermore, the United States has plenary authority over tribes and their members, and only Congress can terminate such authority.²⁰⁹ Congress never adopted nor considered any termination legislation regarding the Tribe and the Tribe maintained a continuous tribal existence during the 1930s.²¹⁰ Despite federal officials disclaiming federal responsibility for the Tribe in the wake of the IRA, the greater weight of the probative evidence, when viewed in its entirety, demonstrates that the Tribe’s jurisdictional status remained intact through 1934.

D. Tribe-State Relationship

There exists a long and substantial history with respect to the entwined relationship among the Tribe, Massachusetts (the colonies and British Crown before that) and the federal government.²¹¹ By operation of the Indian Commerce Clause and the Supremacy Clause, however federal laws regulating relations with Indian tribes “supersede conflicting state laws.”²¹² This paramount federal authority over Indian affairs extends to all states, including the original thirteen.²¹³ Further, supremacy of

²⁰⁵ *Carcieri* at 397–98.

²⁰⁶ *Carcieri* at 398 (citing *Grand Traverse Band of Ottawa & Chippewa Indians*, 369 F.3d 960, 961, n.2 (6th Cir. 2004)).

²⁰⁷ M-37029 at 20; see also *United States v. John*, 437 U.S. 634, 653 (1978) (holding that “the fact that federal supervision over [...the Mississippi Choctaw] has not been continuous” does not “destroy the federal power [under the Indian Commerce Clause] to deal with them”).

²⁰⁸ M-37029 at 20.

²⁰⁹ *United States v. Nice*, 241 U.S. 591, 600 (1916) (stating that, in the application of the Dawes Act “plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter”).

²¹⁰ OFA Proposed Finding at 20. (finding that neither the Tribe nor its members were the subject of congressional legislation terminating the tribe or forbidding a federal relationship). As discussed in the Proposed Findings for Federal Acknowledgment for Mashpee, the Tribe maintained a continuous tribal existence during the 1930s. *Id.* at 19.

²¹¹ See Remand Decision at 16 (explaining that Massachusetts exercised considerable authority over the Mashpee Tribe and its members, treating them as a self-governing Indian community distinct from non-Indians”).

²¹² M-37029 at 14. See, e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764–65 (1985) (and cases cited therein); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (and cases cited therein).

²¹³ *Oneida Indian Nation v. County of Oneida*, 414 U.S. at 670. (holding that “[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original thirteen. It is true that the United States never held fee title to the Indian lands in the original States as it did to

federal law in Indian affairs persists, even if not continuously exercised.²¹⁴ The Department has previously rejected and federal courts have agreed²¹⁵ that federal authority over Indian affairs cannot be constrained or supplanted by state activity or policy²¹⁶ and federal jurisdiction is not surrendered through acquiescence.²¹⁷

Thus, while the United States often times acknowledged and allowed existing State relations with the Tribe,²¹⁸ the Federal Government at the same time retained and at times exercised paramount and preemptive jurisdiction over the Tribe and its members as evidenced by the discussion above regarding UFJ. In short, it is the consistently held position of the United States, confirmed by federal courts, that the mere existence of a state relationship cannot disqualify a tribe from federal jurisdiction or supervision. As a result, even if the Tribe had an active relationship with Massachusetts in 1934, this relationship does not preclude a finding that the Tribe was and remained under federal jurisdiction at that time.

IRA Authority Conclusion

The United States Court of Appeals for the District of Columbia Circuit addressed the degree of relationship between an Indian tribe and the United States government that is required to be considered “under federal jurisdiction” for purposes of the IRA. In *Grand Ronde*, the federal appeals court found that given “a large and complex record of Interior interactions with the Cowlitz for almost a century”

almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State. But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.” (internal citation omitted)).

²¹⁴ *U.S. v. John*, 437 U.S. 634 (1978). The *John* Court considered whether the United States could reassert authority to preempt state law with regard to the Mississippi Band of Choctaws, even after a long period during which federal authority was inactive. After removal of the Choctaw Nation from the state, those individual Choctaws remaining in the state became fully subject to state authority and jurisdiction for nearly one hundred years. *Id.* at 640-45. The state argued that federal authority had lapsed because of the intervening federal consent to state jurisdiction. *Id.* at 652. The Court rejected this proposition. It concluded that, even assuming state authority had gone unchallenged for that period of time, federal authority over the tribe had not been destroyed. *Id.* at 653.

²¹⁵ For example, the First Circuit Court of Appeals held that Maine’s assumption of duties to the Passamaquoddy tribes “did not cut off whatever federal duties existed” and, similarly, that “[v]oluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection.” *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F. 2d 370, 378 (1st Cir. 1975).

²¹⁶ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (stating that to find otherwise “would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the ‘supreme Law of the Land.’ Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.”).

²¹⁷ *Id.* at 2471-74 (2020) (explaining that federal acquiescence to Oklahoma’s persistent overstepping of its authority in Indian country could not serve to diminish the Creek reservation or federal jurisdiction); *see also* Oneida ROD at 34. (finding that “despite any deference to the State that had been occurring, the Oneida continued to be under federal jurisdiction of the federal government as demonstrated” and listing specific exercises of federal jurisdiction).

²¹⁸ As part of the 2018 remand process the parties briefed the question of whether the State’s actions could serve as a surrogate for federal jurisdiction. Remand Decision at 5, 16-20. I do not address that argument here, but rather find that the examples of State authority over the Tribe do not supplant the numerous examples demonstrating the exercise of federal jurisdiction.

the Secretary reasonably determined that the tribe in that case satisfied the two-part test, discussed above.²¹⁹ Significantly, the court opined that:

Whether the government acknowledged federal responsibilities toward a tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed. And as the Secretary explained, we can understand the existence of such responsibilities sometimes from one federal action that in and of itself will be sufficient, and at other times from a “variety of actions when viewed in concert.” Such contextual analysis takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian affairs and implementing the statute. It is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction.²²⁰

From the 1820s through 1934, federal officials took actions for or on behalf of the Tribe and its members that establish federal obligations, duties, responsibility for, and authority over the Tribe by the Federal Government. These actions, when viewed in concert, demonstrate that the Mashpee was UFJ in 1934. Based on the foregoing, acquisition of the Parcels in trust for the benefit of the Tribe is confirmed.

IV. THE PARCELS ARE AN INITIAL RESERVATION UNDER THE INDIAN GAMING REGULATORY ACT

The Department holds land in trust for the Tribe in the towns of Mashpee and Taunton, Massachusetts. As explained above, the acquisition of those lands as the Tribe’s reservation is confirmed based on the Tribe’s jurisdictional status in 1934. As part of the Tribe’s Application, it asserted that once acquired in trust the Parcels would qualify as its “initial reservation” pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721. I find that the Parcels – consisting of 170+/- acres in non-contiguous parcels in the Town of Mashpee (Mashpee Site) and 151+/- acres in contiguous parcels in the City of Taunton (Taunton Site) do qualify as the Tribe’s “initial reservation” pursuant to IGRA.

The question of whether the Parcels qualify as the Tribe’s initial reservation for gaming purposes is governed by IGRA and the Department’s implementing regulations at 25 C.F.R. Part 292 (Part 292). I am also guided by prior Indian lands determinations made by the Department. The relevant provisions of IGRA and Part 292, and applicable analysis in prior Indian lands determinations, are outlined below.

V. The Indian Gaming Regulatory Act

The IGRA was enacted “to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming.”²²¹ Section 20 of IGRA generally prohibits gaming

²¹⁹ *Cowlitz*, 830 F.3d at 566.

²²⁰ *Id.* at 565 (record citations omitted).

²²¹ *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002). *See also* 25 U.S.C. § 2702(1) (stating that one purpose of IGRA is “to provide a statutory basis for

activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. Such land is referred to as “newly acquired land.” There are several exceptions to this general prohibition, including when lands are taken into trust as part of the “initial reservation” of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process. 25 U.S.C. § 2719(b)(1)(B).

Lands taken into trust as a tribe’s initial reservation are excepted from IGRA’s general prohibition of gaming on newly acquired land. Congress provided this exception in order to place recently recognized tribes on equal footing with those recognized when IGRA was enacted in 1988.²²²

VI. The Department’s Part 292 Regulations

The Department’s regulations at 25 C.F.R. Part 292 implement Section 20 of IGRA. The initial reservation exception, 25 C.F.R. § 292.6, allows for gaming on newly acquired lands if the following conditions are met:

- (a) The tribe has been acknowledged (federally recognized) through the administrative process under Part 83 of this chapter.
- (b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.
- (c) The land has been proclaimed to be a reservation under 25 U.S.C. § 467 and is the first proclaimed reservation of the tribe following acknowledgment.
- (d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe’s governmental presence and tribal population, and within an area where the tribe has significant historical connections and one or more of the following modern connections to the land:
 - (1) The land is near where a significant number of tribal members reside; or
 - (2) The land is within a 25-mile radius of the tribe’s headquarters or other tribal government facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or
 - (3) The tribe can demonstrate other factors that establish the tribe’s current connection to the land.²²³

Because the Tribe had no proclaimed reservation on the effective date of Part 292, August 25, 2008, the Tribe must meet the requirements of section 292.6(d). Under paragraph (d), three criteria must be satisfied: (1) the land must be located in the state or states where the tribe is now located, as evidenced

the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”).

²²² *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003) (“Indeed, the exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.”).

²²³ 25 C.F.R. § 292.6.

by the tribe's governmental presence and tribal population; (2) the land must be within an area where the tribe has significant historical connections; and (3) the tribe must demonstrate one or more modern connections to the land. Part 292 defines "significant historical connection" to mean either "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty" or the tribe has "demonstrate[d] by historical documentation the existence of the tribe's villages, burial grounds, occupancy[,], or subsistence use in the vicinity of the land."²²⁴

VII. Prior Department Indian Lands Determinations on Significant Historical Connection

A. Guidiville Band of Pomo Indians Determination

In its September 1, 2011, letter to the Guidiville Band of Pomo Indians (Guidiville Band Indian lands determination), the Department considered whether the Guidiville Band established that a parcel of land located 100 miles south of the Band's Rancheria in Richmond, California, and across San Pablo Bay qualified as "restored land" pursuant to IGRA's restored land exception.²²⁵ In order for land to qualify as restored, among other things, a tribe must "demonstrate a significant historical connection to the land."²²⁶

Much of the Guidiville Band's historical documentation of a significant historical connection to the land relied on the common history of the Pomo-speaking Indians, a larger group of which the Guidiville Band was a subset or subgroup, who had various connections to land in the San Francisco Bay area. As this documentation was not specific to the Guidiville Band, the Department found it insufficient.²²⁷ Further, the documentation put forward by the Guidiville Band consisted of activities concentrated heavily on the north side of San Pablo Bay, while the parcel was located on the south side. The Department found that such documentation did not establish a significant historical connection to the parcel or land in its vicinity.²²⁸ Some of the documentation also tended only to prove a mere presence on or traverse through the land, and the Department stated that such evidence does not establish subsistence use or occupancy.²²⁹ Last, some of the Guidiville Band's documentation related to individuals' activities, which the Department found failed to establish that the Band itself established subsistence use or occupancy.²³⁰ The Department determined that the Guidiville Band had

²²⁴ *Id.* § 292.2.

²²⁵ Letter from Larry Echo Hawk, AS – IA, U.S. Dep't of Interior, to Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians (September 1, 2011) [hereinafter Guidiville Band Indian lands determination].

²²⁶ 25 C.F.R. § 292.12(b).

²²⁷ *See, e.g.*, Guidiville Band Indian lands determination at 13 ("The Band relies on the common history of Pomo-speaking Indians It is important to note that evidence of Pomo use and occupancy does not, without more, indicate use or occupancy by this particular band of Pomo, the Guidiville Band.").

²²⁸ *See, e.g., id.* at 14 ("[H]istorical evidence of a general connection to any land located in any of those counties is not the equivalent of documentation of the Band's own historical connection to Point Molate, or parcels in its vicinity.").

²²⁹ *Id.* at 15 ("[E]vidence of the Band's passing through a trade route to the Pacific coast or even the north shores of San Pablo Bay does not demonstrate the Band's subsistence use or occupancy within the vicinity of the [p]arcel."); *id.* at 17 ("[E]vidence of the presence of indigenous peoples and Pomos, generally, on ranchos in the Bay Area, by itself, does not demonstrate the Band's occupancy or subsistence use on or in the vicinity of the [p]arcel.").

²³⁰ *Id.* at 18 ("[E]vidence that individual tribal members were born at various locales in the Bay Area is not necessarily indicative of *tribal* occupation or subsistence use of a parcel located fifty miles away."); *id.* at 19 ("[R]elocation of some of

not “provided documentation sufficient to demonstrate that its ancestors, as opposed to other Pomo Indians or Indian peoples in the area, engaged in subsistence use or occupancy upon or in the vicinity of the [parcel].”²³¹ Without more, the Department explained, “such vague and speculative evidence [could not] support the arguments and claims advanced in the Band’s voluminous submissions.”²³²

In the Guidiville Indian lands determination, the Department further defined “subsistence use” and “occupancy.” It explained that “[s]ubsistence use and occupancy requires something more than a transient presence in an area.”²³³ It defined “subsistence” as “a means of subsisting as the *minimum* (as of food and shelter) necessary to support life” and listed “sowing, tending, harvesting, gathering[,] and hunting on lands and waters” as activities that tend to show a tribe used land for subsistence purposes.²³⁴ The Department explained that “occupancy” can be demonstrated by a tribe’s “consistent presence in a region supported by the existence of dwellings, villages[,] or burial grounds.”²³⁵ These definitions were important to the Department’s analysis of the significance of an aboriginal trade route.²³⁶ The Department found that the Guidiville Band’s evidence regarding its ancestors’ travels to various locations to trade and interact with other peoples only to return home did not qualify as subsistence use or occupancy.²³⁷

B. Scotts Valley Band of Pomo Indians Determination

In its May 25, 2012, letter to the Scotts Valley Band of Pomo Indians (Scotts Valley Band Indian lands determination), the Department considered whether the Scotts Valley Band had established that parcels near Richmond, California, that were approximately 78 miles south of the Band’s current tribal headquarters and located across San Pablo Bay qualified as restored land.²³⁸ Again, the analysis

the Band’s members to various locales throughout the Bay Area does not equate to the Band itself establishing subsistence use or occupancy in the region apart from its Rancheria in Ukiah.”)

²³¹ *Id.* at 19.

²³² *Id.*

²³³ *Id.* at 14. Use and occupancy does not, however, require exclusive use by the tribe. 73 Fed. Reg. 29,354, 29,360 (May 20, 2008) (stating in response to a comment that the significant historical connection requirement should call for historically exclusive use, the Department said such a requirement “would create too large a barrier to tribes in acquiring lands and [is] beyond the scope of the regulations and inconsistent with IGRA”); Letter from Tracie Stevens, Chairwoman of the Nat’l Indian Gaming Comm’n, U.S. Dep’t of the Interior, to Russell Atterbery, Chairman, Karuk Tribe of California 12 (April 9, 2012) (finding that the applicant tribe need not show historical exclusive use in the vicinity of the parcel at issue, and noting that “IGRA’s restored lands exception does not require the Karuk Tribe to demonstrate that it was the only tribe with historical connections to the area, or that the subject area was the only place where the Karuk Tribe has historical connections”).

²³⁴ Guidiville Band Indian lands determination at 14 (quoting WEBSTER’S NEW COLLEGIATE DICTIONARY 1153 (G. & C. Merriam Co. 1979)).

²³⁵ *Id.*

²³⁶ *Id.* at 14–15.

²³⁷ *Id.* at 14. The Department also found the Guidiville Band’s trade route evidence insufficient to establish a significant historical connection because the Band failed to prove that the traders were in fact the ancestors of the Guidiville Band, as opposed to Pomo-speaking Indians in general. *Id.* at 15.

²³⁸ Letter from Donald E. Laverdure, Acting Assistant Sec’y - Indian Affairs, U.S. Dep’t of Interior, to Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians (May 25, 2012) [hereinafter Scotts Valley Band Indian lands determination].

emphasized whether the Scotts Valley Band had established a “significant historical connection to the land.”

The Scotts Valley Band presented five categories of claimed historic subsistence use and occupancy, all of which fell short of establishing the Band’s significant historical connection to the parcels. First, the Band asserted that the Ca-la-na-po, a tribe the Scotts Valley Band claimed to succeed from, were taken to work on the parcels. The Department found that the historical documentation the Band put forward was insufficient because the Band had not established with the necessary degree of certainty that it referred to the Ca-la-na-po specifically.²³⁹ Second, the Band alleged that the Suisin Patwin, a second tribe the Band claimed to descend from, historically used and occupied land in the vicinity of the parcels. The Department found, however, that the Band had not established the Suisin Patwin Tribe was its tribal predecessor and, therefore, could not rely on its historical activities.²⁴⁰ Third, the Band claimed Ca-la-na-po historic use and occupancy north of the San Pablo Bay. The Department found that such activity was not in the vicinity of the parcels.²⁴¹ The Band’s fourth claimed historical connection relied on Suisin Patwin evidence, which the Department determined it could not use.²⁴² Last, the Band presented documentation related to individuals’ relocation to the San Francisco Bay area. The Department found that such evidence did not constitute the Scotts Valley Band’s relocation or a significant activity of the Band itself, that the Band had not established activity took place in the vicinity of the parcels, and that individual movement in the 1960s may not constitute a historic-era activity.²⁴³

The Department explicitly stated that tribes may rely on historical documentation related to activities of their tribal predecessors, stating that a “tribe’s history of use and occupancy inherently includes the use and occupancy of its tribal predecessors, even if those tribes had different political structures and were known under different names.”²⁴⁴ The Department acknowledged that, “[d]ue to the reality that tribal names and political structures change over time, an applicant tribe is not limited to the historical sources that bear its current name.”²⁴⁵ However, because Part 292 requires a tribe to establish a significant historical connection to newly acquired land based on evidence of “the tribe’s” historic use and occupancy, the applicant tribe must demonstrate that a particular historical reference is part of the applicant tribe’s history.²⁴⁶ The Department put forward two methods by which a tribe can establish the requisite nexus to a tribal predecessor: (1) through a line of political succession or (2) through significant genealogical descent.²⁴⁷ Once an appropriate nexus is established, a tribe may rely on the

²³⁹ *Id.* at 9–10.

²⁴⁰ *Id.* at 11–13.

²⁴¹ *Id.* 14–17.

²⁴² *Id.* at 17.

²⁴³ *Id.* at 18.

²⁴⁴ *Id.* at 7.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 7–8.

²⁴⁷ *Id.* at 8. In the Scotts Valley Band Indian lands determination, the Department found that the Band could not claim succession from the Suisin Patwin based on significant genealogical descent alone because of the Band’s “countervailing evidence of political succession” from the Ca-la-na-po. *Id.* at 11–12. The Department explained that, in situations where a tribe politically succeeds from a tribal predecessor, the tribe must provide more than evidence of significant genealogical descent to claim succession from a second tribal predecessor, stating “there [was] no evidence in the record to suggest that

historic use and occupancy of a predecessor tribe to establish a significant historical connection to newly acquired land.²⁴⁸

In the Scotts Valley Indian lands determination, the Department further defined “vicinity” for purposes of establishing that direct evidence of historic use and occupancy is within the vicinity of newly acquired land. It explained that Part 292’s inclusion of the word “vicinity” “permit[s] a finding of restored land on parcels where a tribe lacks any direct evidence of actual use or ownership of the parcel itself, but where the particular location and circumstances of available direct evidence on other lands cause a natural inference that the tribe historically used or occupied the subject parcel as well.”²⁴⁹ The Department explained that “whether a particular site with direct evidence of historic use or occupancy is within the vicinity of newly acquired land depends on the nature of the tribe’s historic use and occupancy, and whether those circumstances lead to the natural inference that the tribe also used or occupied the newly acquired land.”²⁵⁰ The Department stated that this analysis is fact-intensive and will vary based on the unique history and circumstances of any particular tribe.²⁵¹ As the Scotts Valley Band’s evidence indicated that the Band worked on ranchos located opposite a large body of water from the parcels in question, and the Band did not present evidence that its ancestors traversed the bay for subsistence use and occupancy purposes, the evidence of rancho work was not within the vicinity of the parcels.²⁵²

VIII. Initial Reservation Analysis

Following a detailed review of the documents contained in the record and application of the criteria found in Part 292, I find that the Mashpee and Taunton Sites qualify for the initial reservation exception to IGRA’s prohibition on gaming on newly acquired land.

Section 292.6(a): Federal Acknowledgment

When applying the criteria of the initial reservation exception, I must first determine whether a tribe was acknowledged through the administrative process prescribed in 25 C.F.R. Part 83.²⁵³ Part 83 establishes the procedures by which groups may seek federal acknowledgment as Indian tribes entitled to government-to-government relationships with the United States.²⁵⁴

the marriage of [an individual the Band claimed was Suisin Patwin] into the Ca-la-na-po Band created any political union between the Ca-la-na-po and the Suisin Patwin, or that the two tribes combined.” *Id.* at 11.

²⁴⁸ *Id.* at 8.

²⁴⁹ *Id.* at 15.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 15 n.59.

²⁵² *Id.* at 16–17.

²⁵³ 25 C.F.R. § 292.6(a). The Department published regulations amending the administrative process for federal acknowledgement, located at 25 C.F.R. Part 83. *See* Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (July 1, 2015). The Department issued its final acknowledgement decision for the Tribe in 2007 pursuant to the previous version of the regulations in place at that time.

²⁵⁴ *Id.* §§ 83.2

The Tribe achieved federal acknowledgment in 2007. The Department, through the Assistant Secretary, published a Proposed Finding regarding the Tribe's petition on April 6, 2006,²⁵⁵ and a Final Determination on February 17, 2007.²⁵⁶ The Assistant Secretary, based on a review by the Office of Federal Acknowledgment (OFA), concluded that the Tribe had satisfied all the required federal criteria for acknowledgment. On May 23, 2007, the Tribe's acknowledgment became effective.

The OFA, formerly called the Branch of Acknowledgment and Research, conducted an in-depth review of the Tribe's history utilizing historians, anthropologists, and genealogists and issued its conclusions. The findings contained in the OFA materials, accepted and relied on by the AS – IA, are entitled to deference.²⁵⁷ In reviewing the Department's determinations concerning federal recognition of tribes, courts commonly defer to the Department's expertise on tribal recognition and associated issues. As explained by the D.C. Circuit Court of Appeals in *James v. United States Department of Health and Human Services*:

The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition [T]he Department has been implementing its regulations for eight years and, as noted, it employs experts in the fields of history, anthropology[,] and genealogy [sic], to aid in determining tribal recognition.

This . . . weighs in favor of giving deference to the agency by providing it with the opportunity to apply its expertise.²⁵⁸

The Department's final determination acknowledging the Tribe satisfies Section 292.6(a).

Section 292.6(b): No Gaming Facility under the Restored Land Exception

Section 292.6(b) requires that a tribe has no gaming facility on newly acquired lands under the restored land exception.²⁵⁹ The Tribe satisfies section 292.6(b) because it has no gaming facility authorized under the restored land exception.

²⁵⁵ 71 Fed. Reg. 17,488 (Apr. 6, 2006). *See also* OFA Proposed Finding.

²⁵⁶ 72 Fed. Reg. 8,007 (Feb. 22, 2007); Office of Federal Acknowledgment, Summary Under the Criteria and Evidence for Final Determination for the Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc., (Feb. 15, 2007) [hereinafter OFA Final Determination].

²⁵⁷ *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000) (applying the highly deferential *Chevron* standard to the Department's final determination regarding acknowledgment).

²⁵⁸ *James v. U.S. Dep't of Health and Hum. Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

²⁵⁹ 25 C.F.R. § 292.6(b).

Section 292.6(c): First Proclaimed Reservation

Under Section 292.6(c), the particular land at issue must be proclaimed a reservation under section 7 of the IRA, and must be the first proclaimed reservation of the tribe following its federal acknowledgment.²⁶⁰ Section 7 provides:

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.²⁶¹

The Mashpee and Taunton Sites have been proclaimed reservation lands pursuant to Section 7.²⁶² The initial reservation exception of IGRA does not require that parcels are contiguous for both to constitute a tribe's initial reservation.²⁶³ Further, such acquisition of noncontiguous parcels is specifically contemplated in the implementing regulations for Section 5 of the IRA's.²⁶⁴ The Mashpee and Taunton Sites therefore comprise the Tribe's first proclaimed reservation, satisfying Section 292.6(c).

Section 292.6(d): Requirements for Tribes with No Proclaimed Reservation

Since the Tribe had no proclaimed reservation on the effective date of Part 292, August 25, 2008, the Tribe must satisfy the criteria under Section 292.6(d). In order to meet the requirements set forth under subparagraph (d), three criteria must be satisfied: (1) the land must be located in the state or states where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population; (2) the land must be within an area where the tribe has significant historical connections; and (3) the tribe must demonstrate one or more modern connections to the land.²⁶⁵ The Tribe has met all three of these requirements for the Mashpee and Taunton Sites.

Section 292.6(d): In-State Requirement

Section 292.6(d) requires that a tribe demonstrate its newly acquired land is located within the state or states where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population.²⁶⁶ The Taunton Site is located in Bristol County, Massachusetts, and the Mashpee Sites are located in Barnstable County, Massachusetts. The Tribe's headquarters is located in Mashpee,

²⁶⁰ *Id.* § 292.6(c).

²⁶¹ 25 U.S.C. § 5110.

²⁶² 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).

²⁶³ The Department found in the Nottawaseppi Indian lands opinion that noncontiguous parcels could qualify as a tribe's initial reservation for purposes of IGRA. Memorandum from Acting Assoc. Solicitor Div. of Indian Affairs, Office of the Solicitor, U.S. Dep't of the Interior, to Reg'l Dir. Midwest Reg'l Office, Bureau of Indian Affairs, U.S. Dep't of the Interior 3 (Dec. 13, 2000).

²⁶⁴ 25 C.F.R. § 151.11.

²⁶⁵ *Id.* § 292.6(d).

²⁶⁶ *Id.*

Massachusetts. Therefore, the Tribe's governmental presence is located in the same state as the parcels.

The Tribe has 2,633 members.²⁶⁷ Of these, 65% live within Massachusetts, 40% live in Mashpee where tribal headquarters are located, and over 60% live within 50 miles of the Taunton Site.²⁶⁸ Therefore, a large portion of the Tribe's population is located in the same state as the parcels. Accordingly, the Tribe satisfies the in-state requirement of Section 292.6(d).

Section 292.6(d): Significant Historical Connection

I rely on the Department's findings from the acknowledgment process in making our findings about whether the Mashpee and Taunton Sites are located within an area where the Tribe has significant historical connections. Section 292.6(d) requires that a tribe demonstrate its newly acquired land is "within an area where the tribe has significant historical connections."²⁶⁹ Part 292 defines "significant historical connection" to mean either: (1) "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty" or (2) the tribe has "demonstrate[d] by historical documentation the existence of the tribe's villages, burial grounds, occupancy[,] or subsistence use in the vicinity of the land."²⁷⁰

The first method for establishing a significant historical connection is to show that such land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty. Neither the Taunton nor Mashpee Sites are located within the Tribe's last reservation under a ratified or unratified treaty. Therefore, this provision is unavailable to the Tribe, and the Tribe may not establish a significant historical connection using the last reservation method.

I find, however, that the Tribe has established that the Mashpee and Taunton Sites are within an area where the Tribe has significant historical connections pursuant to the second method for finding a significant historical connection: the use or occupancy method.

a. The Wampanoag have a long history in southeastern Massachusetts

European contact

The Wampanoag, who were previously known as the Pokanoket, have a long history in southeastern Massachusetts reaching back before European contact in the early seventeenth century.²⁷¹ At the time

²⁶⁷ Consolidated and Restated Application of the Mashpee Wampanoag Tribe to Acquire 146 Acres+/- in Taunton, Massachusetts and 170 Acres+/- in Mashpee, Massachusetts for Gaming and Non-gaming Purposes Pursuant to 25 U.S.C. Section 465 & 25 C.F.R. Part 151 at 24-25 (June 5, 2012) [hereinafter Consolidated and Restated Application].

²⁶⁸ *Id.*

²⁶⁹ 25 C.F.R. § 292.6(d).

²⁷⁰ *Id.* § 292.2.

²⁷¹ Scholar Bert Salwen noted:

Pakanokick, as first published in 1616 by John Smith . . . , refers, narrowly, to the village of the chief sachem Massasoit, near Bristol. Rhode Island In this context, it is sometimes used interchangeably with Sowaams . . .

of contact, the Pokanoket people were organized into a coalition of loosely confederated chiefdoms, or “sachemdoms,” each with its own subordinate leader, a “sachem,” but recognizing a wider allegiance to the supreme or paramount sachem, the massasoit.²⁷² In the early seventeenth century, the massasoit was the great sachem Ousamequin, who was often referred to simply as Massasoit.²⁷³ The region around current-day Taunton was under the direct control of Massasoit.²⁷⁴ The Mashpee area had a number of its own sachems.²⁷⁵

At the time of European contact, the Pokanoket territory stretched widely. Salwen notes:

About 1620, the Pokanoket comprised a group of allied villages in eastern Rhode Island and in southeastern Massachusetts, south of Marshfield and Brocton ... includ[ing] all of Cape Cod, Martha’s Vineyard and Nantucket within the borders of this group.²⁷⁶

, though this term refers, more precisely, to Massasoit’s home district on the east side of Narragansett Bay.

However, by the last half of the seventeenth century, English writers had expanded the meaning of the name to include all the territory allied under the leadership of Massasoit and his successors.

Bert Salwen, *Indians of Southern New England and Long Island: Early Period*, in 15 HANDBOOK OF NORTH AMERICAN INDIANS 160, 175 (1978) [hereinafter Salwen 1978].

²⁷² OFA Proposed Finding at 32 (“During the 1620s, the Wampanoag of southeastern Massachusetts on Cape Cod along Nantucket Sound, called ‘South Sea Indians’ by the Pilgrims and Puritans, had a number of local leaders, or sachems, in charge of one or more villages joined in a loose alliance under one chief sachem.”). *See also* OFA Final Determination at 18 (“[A] hereditary sachem provided leadership among the Wampanoag from the 1620s to the 1660s.”).

²⁷³ *See* Susan G. Gibson, *Burr’s Hill: A 17th Century Wampanoag Burial Ground in Warren, Rhode Island* 9 (1980) (discussing “the Wampanoag sachem Ousamequin, known to the Pilgrims as Massasoit”) [hereinafter Gibson 1980]; *See also* Salwen 1978 at 171 (referring to “the chief sachem, Massasoit” and recognizing that he appeared to have had “considerable personal authority”); *see also* Warren F. Gookin, *Massasoit’s Domain: Is “Wampanoag” the Correct Designation?* 20 BULL. OF THE MASS. ARCHAEOLOGICAL SOC’Y (1), 13 (1958) (“...Massasoit was not only the great chief of his Sachemship, Pokanoket, but was also the head of an extensive confederacy.”) [hereinafter Gookin].

²⁷⁴ *See* Maurice Robbins, *Historical Approach to Titicut*, 11 BULL. OF THE MASS. ARCHAEOLOGICAL SOC’Y (3), 53–58 (1950) (detailing the series of land cessions made by Massasoit in the region, including the cession of Cohannet) [hereinafter Robbins 1950]; *see generally* Frank G. Speck *Territorial Subdivisions and Boundaries of the Wampanoag* INDIAN NOTES AND MONOGRAPHS NO. 44, 53 – 58 (1928) [hereinafter Speck].

²⁷⁵ *See* OFA Proposed Finding at 32 (noting that the praying town of Mashpee was established after the acquisition of 25-square miles of tribal land in Mashpee from two local Wampanoag sachems, Wequish and Tookenchosen).

²⁷⁶ Salwen at 171 and citing Gookin (1972); Salwen map; *see also* Eulalie Bonar, *The Burr’s Hill Collection: Research Report* at 7 (Feb. 14, 1995) (prepared for the National Museum of the American Indian) [hereinafter NMAI Report] Salwen also notes that Swanton (1952), following Speck (1928), assigns the Cape Cod subgroups a separate “Nauset” tribal identity, which he states “may in reality, reflect only the post colonization situation.” Salwen at 176. Salwen later notes that “[a]mong anthropologists, Frank G. Speck has made outstanding contributions to the study of southern New England Indians as they lived in the nineteenth and early twentieth centuries. However, Speck’s efforts to reconstruct precontact social structure and territorial boundaries were strongly influenced by his conviction that precontact political entities were quite rigidly organized “feudal tribes and his belief that Indian land ‘ownership’ as expressed in early colonial land deeds truly reflects the aboriginal pattern; both views are no longer universally accepted.” *Id.*

These lands include at least all of modern-day Bristol, Barnstable, and Plymouth Counties. The town of Taunton is in Bristol County, and the town of Mashpee is in Barnstable County.²⁷⁷

In the *Handbook of North American Indians*, which is cited extensively throughout the record, scholar Bert Salwen provided a description of early Pokanoket history.²⁷⁸ The Pokanoket had experienced decades of contact with Europeans prior to the arrival of the *Mayflower*.²⁷⁹ Prior to the Pilgrims' arrival, the Pokanoket's relationships with the Europeans were sometimes hostile and resulted in some Pokanoket people being enslaved.²⁸⁰ Also, the Pokanokets were struck by an epidemic between 1617 and 1619 that resulted in great losses of life.²⁸¹ The English from the *Mayflower* established Plymouth Colony on the decimated and abandoned Pokanoket village Pautuxet in 1620.²⁸² Massasoit was able to establish a long-standing alliance with Plymouth Colony following their arrival and entered into a treaty of peace in 1621.²⁸³

Between 1621 and 1670, Massasoit and one of his sons, Wamsutta (Alexander), sold or gave large tracts of land in what is now Bristol, Barnstable, and Plymouth counties to the Plymouth settlers.²⁸⁴ At the location of current-day Taunton, Massasoit conveyed lands in the Pokanoket village of Cohannet through a series of deeds.²⁸⁵ Numerous conveyances followed, and the English settlers rapidly began to occupy the region and displace Pokanoket people to other regions of Pokanoket territory.²⁸⁶

There were increasing instances of conflict between the Pokanoket and the settlers due to frequently-ignored land use agreements.²⁸⁷ It is likely that differing notions of land ownership contributed to the

²⁷⁷ Christine Grabowski wrote extensively on the history of the Mashpee Tribe, its relation to historic Pokanoket territory, and its historical connections to the Mashpee and Taunton Sites in three reports prepared on behalf of the Tribe. See Christine Grabowski, *The Mashpee Wampanoag Tribe's Historical Ties to Fall River, Massachusetts Area* (July 13, 2010) [hereinafter Grabowski 2010]; Christine Grabowski, *Indian Land Tenure in Middleborough, Massachusetts* (Jan. 25, 2008) [hereinafter Grabowski 2008]; Christine Grabowski, *Mashpee Wampanoag Tribal Identity in Ethno-historical Perspective* (Aug. 27, 2007) [hereinafter Grabowski 2007].

²⁷⁸ Salwen 1978 at 171–72.

²⁷⁹ See *id.*

²⁸⁰ *Id.* at 171 (“[C]rosscultural misunderstandings often resulted in conflict before the European explorers departed.”). The Wampanoag Tisquantum, or Squanto, who was instrumental in assisting the Pilgrims upon their arrival, was able to speak to them in English because he had been enslaved in England. Maurice Robbins, *The Rescue of Tisquantum along the Nemasket-Plimouth Path*, in *A SERIES OF PATHWAYS TO THE PAST* 1, 1-2 (1984) [hereinafter Robbins 1984].

²⁸¹ Salwen 1978 at 171.

²⁸² Robbins 1950 at 50.

²⁸³ *Id.* It has been suggested that Massasoit, whose population had been decimated by disease and whose territorial boundaries were under threat from the Narragansett Tribe that lived on the western shore of Narragansett Bay, established friendly relations with the Pilgrims as a politically astute defensive move. See *id.*; Robbins 1950 at 67 (discussing Massasoit's intentions in allying himself with the English).

²⁸⁴ See Robbins 1950 at 53–57. See generally Speck 53 – 55 for discussion of land conveyances by Massasoit and Wamsutta.

²⁸⁵ Robbins 1950 at 54–55

²⁸⁶ Robbins 1950 at 53–57; see also Laurie Weinstein, “*We’re Still Living on our Traditional Homeland*”: *The Wampanoag Legacy in New England*, in *STRATEGIES FOR SURVIVAL: THE WAMPANOAG IN NEW ENGLAND* 87(1997) [hereinafter Weinstein 1997]; The OFA Proposed Finding also notes how the arrival of English settlers and the resulting disease and war quickly reduced the Wampanoag settlements' populations. OFA Proposed Finding at 32.

²⁸⁷ Robbins 1950 at 52–53.

conflicts, as the Pokanoket likely thought they were only conveying rights to use the lands rather than conveying the entire property right in perpetuity.²⁸⁸

King Philip's War

Following Massasoit's death around 1660, his son Metacom, also known as King Philip, was increasingly angered by the usurpation of his people's rights. In 1675 and 1676, Metacom united tribes in New England in a war against the colonists, an effort that is referred to as King Philip's War.²⁸⁹ Metacom's efforts were unsuccessful and resulted in Metacom's death and large losses of life among the Pokanoket.²⁹⁰

After the war, most of the mainland Pokanoket were dispersed, while others were either sold into slavery in the West Indies or into local servitude.²⁹¹ The Mashpee praying town, which had already been organized in 1665, and other Pokanoket communities that had already converted to Christianity did not join Metacom against the English.²⁹²

It was during this time period that the Pokanoket began to coalesce into a number of settlements in old Pokanoket territory and came to be known more generally as the Wampanoag.²⁹³ These settlements were organized by the English and were designed to convert the Indians to Christianity.²⁹⁴

b. The Pokanoket nation/ Wampanoag coalition of confederated chiefdoms is the Mashpee Tribe's tribal predecessor

While a tribe must use history that is its own to establish a significant historical connection to newly acquired land, it may rely on the historical documentation of its tribal predecessors.²⁹⁵ There are two methods by which a tribe can establish the requisite nexus to a tribal predecessor: (1) through a line of political succession or (2) through significant genealogical descent.²⁹⁶ Once an appropriate nexus is established, a tribe may rely on the historic use and occupancy of a predecessor tribe to establish a significant historical connection to newly acquired land.²⁹⁷

The Tribe succeeds politically from the Pokanoket nation/Wampanoag coalition of confederated chiefdoms. The evidence is sufficient to establish that the Pokanoket/Wampanoag is the Tribe's tribal predecessor for purposes of establishing a significant historical connection. In the Guidiville Indian lands determination, the Department stated that the Guidiville Band's reliance "on the common history of Pomo-speaking Indians" rather than band-specific evidence was insufficient for establishing a

²⁸⁸ *Id.*

²⁸⁹ Salwen at 172.

²⁹⁰ *Id.*

²⁹¹ Weinstein at 87.

²⁹² OFA Proposed Finding at 92.

²⁹³ *See generally* Gookin (discussing the origins of the name Wampanoag).

²⁹⁴ OFA Proposed Finding at 32.

²⁹⁵ Scotts Valley Band Indian lands determination at 7.

²⁹⁶ *Id.* at 8.

²⁹⁷ *Id.*

significant historical connection to the Band's parcel.²⁹⁸ The Mashpee Tribe's relationship with the Pokanoket/Wampanoag is different and distinguishable from the Guidiville Band's relationship with the Pomo. The Pomo were a language or dialect group not tied together as a sovereign political entity, whereas the Pokanoket/Wampanoag were organized into a coalition of loosely confederated chiefdoms, or "sachemdoms," each with its own subordinate leader, a "sachem," but recognizing a wider allegiance to the supreme or paramount sachem, the massasoit.²⁹⁹ Further, Massasoit and his sons, Wamsutta (Alexander) and Metacom (Philip), provided unified leadership for the Wampanoag/Pokanoket during the important period in time when tribes were dealing with colonist encroachment on land.³⁰⁰ Because the Pokanoket/Wampanoag were a single sovereign political entity from which the Mashpee Tribe succeeded politically, the Mashpee Tribe's situation is different than that of the Guidiville Band's.

The Tribe also significantly descends genealogically from the Pokanoket/Wampanoag, unlike the Guidiville Band from the Pomo. Despite the fact that Mashpee became a praying town in 1665, creating the environment for formation of the historical Mashpee tribe defined by the 1861 Earle Report,³⁰¹ many displaced Pokanoket/Wampanoag continued to join the Mashpee community.³⁰² Following King Philip's War, the diminishment of Pokanoket/Wampanoag territory, and the dispersal and enslavement of most of the mainland Pokanoket/Wampanoag, Mashpee became a place of refuge for Pokanoket/Wampanoag people generally.³⁰³ Scholar Laurie Weinstein, noted with favor in the OFA findings, stated:

The Cape and island-dwelling Indians were left relatively unscathed since these areas were on the periphery of the battles The Cape, particularly the Mashpee area, became both a 'dumping ground' and a refuge area for the Wampanoag during and after King Phillip's War. Indians who had surrendered to the English were moved to Mashpee and [nearby] Sandwich.³⁰⁴

²⁹⁸ Guidiville Band Indian lands determination at 13.

²⁹⁹ OFA Proposed Finding at 32 ("During the 1620s, the Wampanoag of southeastern Massachusetts on Cape Cod along Nantucket Sound, called 'South Sea Indians' by the Pilgrims and Puritans, had a number of local leaders, or sachems, in charge of one or more villages joined in a loose alliance under one chief sachem."). *See also* OFA Final Determination at 18 ("[A] hereditary sachem provided leadership among the Wampanoag from the 1620s to the 1660s.").

³⁰⁰ *See generally* Robbins 1950 (discussing Massasoit's relations with the English and subsequent land cessions); Salwen at 171 (noting that Massasoit appeared to have "considerable personal authority, and in spite of occasional threats from individual sachems, the peace was maintained until his death.").

³⁰¹ OFA Final Determination at 28 (finding that almost all of the Mashpee Tribe's citizens descend genealogically from the historical tribe known as "the Wampanoag Indians residing at Mashpee, Barnstable County, Massachusetts, at the time of first sustained historical contact in the 1620s," as defined by the 1861 Earle Report).

³⁰² OFA Proposed Finding at 94 ("Diseases brought by the English colonists early in the 17th century and war killed many [Cape Cod] leaders and the inhabitants of their communities. As their numbers dwindled, the Wampanoags in southeastern Massachusetts on Cape Cod . . . lost land to the newcomers, although the area around the town of Mashpee remained a center of tribal activity.").

³⁰³ OFA Proposed Finding at 33 ("after King Phillip's War in the early 1670s, some other Wampanoag Indians and a few Narragansett and long Island Indians were also absorbed into the town."); *see also* Weinstein at 87 ("Most of the mainland Wampanoag were dispersed; others were either sold into slavery in the West Indies or into local servitude.").

³⁰⁴ Weinstein 1997 at 87.

The OFA materials discuss at length the continuation of Pokanoket/Wampanoag traditions and culture from contact into the twentieth century.³⁰⁵ Weinstein noted that “Mashpee’s significance as a cultural center for many of the Wampanoag grew throughout the centuries.”³⁰⁶ The influx of displaced Pokanoket/Wampanoag people to Mashpee provides a significant genealogical link to the wider Pokanoket nation/Wampanoag coalition of confederated chiefdoms.

There are, however, differing views regarding whether the Pokanoket/Wampanoag is a tribal predecessor of the Mashpee Tribe for purposes of establishing a significant historical connection. Researcher James P. Lynch prepared a report on behalf of the Pocasset Pokanoket Tribe³⁰⁷ in which he challenged the Mashpee Tribe’s nexus with the wider Pokanoket/Wampanoag.³⁰⁸

I will first address the Lynch report’s assertion that the ancestors of the Mashpee Tribe were not Wampanoag. In his report, Lynch claimed that “Wampanoag” was first used in an historical/political sense to identify those Pokanoket bands and tribes who allied themselves with Metacom against the English in King Philip’s War.³⁰⁹ As the Mashpee, already organized into a praying town, did not join Metacom, Lynch concluded that the Mashpee were not Wampanoag.³¹⁰ He provided minimal references to support his conclusion that the Wampanoag were limited to those Pokanoket bands that joined Metacom. One such reference is a vague statement written in 1676. Lynch in his report stated:

Increase Mather (1676) wrote the following,

. . . Especially that there have been jealousies concerning the Narragansetts and Womponoags Now it appears that Squaw-Sachem of Pocasset her men were conjoined with the Womponoags (that is Philips men) in this rebellion But when the time prefixed for the surrendry of the Womponoags and Squaw-Sachems Indians had lapsed, they pretended that they could not do as the had ingaged

We see on the basis of a contemporaneous observation (1676) that the application of Wampanoag had expanded beyond Pokanoket to include all Indians who joined King Philips [one name for Metacom] in his war.³¹¹

This historical statement does not provide conclusive evidence that the name Wampanoag was only applied to Indians who allied themselves with Metacom.

³⁰⁵ See OFA Proposed Finding for findings made pursuant to section 83.7(b) at 31 -92.

³⁰⁶ Weinstein 1997 at 87.

³⁰⁷ The Pocasset Pokanoket Tribe is a non-federally recognized entity.

³⁰⁸ Letter from Lesley S. Rich, to Kevin K. Washburn AS – IA, and Franklin Keel, Reg’l Dir., Eastern Region, *submitting* James Lynch, “The Mashpee Tribe of Cape Cod and the Aquinnah Tribe of Martha’s Vineyard, Massachusetts and their Historical Claims to Lands within Southeastern Massachusetts: An Ethnohistorical Evaluation of the Tribe’s Claims” (2013) [hereinafter Lynch Report].

³⁰⁹ Lynch Report at 39-41.

³¹⁰ *Id.* at 40-41.

³¹¹ *Id.* at 40.

As discussed throughout the record, and as Lynch acknowledged, the Pokanokets were the predecessor tribe of the Wampanoags.³¹² The name change appears to have occurred after King Phillip's War and coincides with declining use of the name Pokanoket.³¹³ The record does not show, however, that the Pokanoket and the Wampanoag became two different tribes that occupied two different territories or that the Wampanoag name was applied only to groups that fought with Metacom against the English. The record indicates that, after King Phillip's War, the Pokanoket began to coalesce into a number of settlements in old Pokanoket territory and came to be known more generally as the Wampanoag people.³¹⁴ The Wampanoag encompass more than those Pokanoket who fought for Metacom and that Wampanoag is a later-used name for the Pokanoket. Therefore, the Mashpee Tribe can rely on historical documentation referencing both the Pokanoket and the Wampanoag.

Next I address the Lynch report's argument that Mashpee was a distinct Christian community rather than a Pokanoket/Wampanoag community.³¹⁵ Mashpee's adoption of Christian characteristics at the urging of the English in no way diminishes its ability to rely on the historical documentation of its tribal predecessor, the Pokanoket/Wampanoag. Further, the adoption of Christianity by Mashpee does not lead to the conclusion that the Pokanoket/Wampanoag people of Mashpee no longer shared a cultural connection with the larger Pokanoket/Wampanoag culture. In fact, the OFA materials discuss at length the continuation of Pokanoket/Wampanoag traditions and culture from the seventeenth century into the twentieth century.³¹⁶ Mashpee's ability to maintain its relative independence enabled it to survive and thrive, while other Pokanoket/Wampanoag praying towns vanished. Because of its survival, Mashpee was able to maintain its Pokanoket/Wampanoag culture into the present.

c. The Taunton Site is located within an area where the Tribe has significant historical connections

Burial Grounds

Significant cultural and archeological evidence of the Mashpee Tribe's historical use and occupancy exists in the vicinity of the Taunton Site, establishing that the Taunton Site is located within an area

³¹² Lynch Report at 9 ("The Pokanoket tribe, as the historical facts will demonstrate, is the historic 'Wampanoag' tribe who demonstrable maintained and exclusive historic land occupation are in southeastern Massachusetts that they occupied, utilized, and over which asserted tribal political control prior to the time of first sustained contact with Europeans, which extended from the base of Cape Cod to Narragansett Bay." Citing Salwen map 1).

³¹³ *Id.* at 39 - 40.

³¹⁴ Gookin reports that, "The earliest mention of "the Wampanoag" that I have been able to find ..., is in Cotton Mathers' *Magnalia*, published in London in 1702." At 14. Gookin then speculates that, "... it seems likely that 'Wampanoag' could have been chosen by Philip as the name of the new pan-Indian nation which he hoped to form." *Id.*

³¹⁵ Lynch Report at 77 ("The initial Mashpee Christian population, as did many other Indians residing upon Cape Cod, shed their previous ideology and adopted that of the Christian colonists. They were groups of converts scattered, as noted earlier, amongst villages throughout the area, including the village of Mashpee and those surrounding it. They were not an historic tribe, merely family groups and individuals under the Reverend Bourne's tutelage who, having shed their traditional tribal relations, adopted a new ideology as a means of adapting to, or accommodating the socio-cultural changes occurring around them.").

³¹⁶ See e.g., OFA Proposed Finding at 28 (citing Weinstein for the importance of Mashpee and its "growing importance as a 'cultural center' for the Wampanoag from the colonial era to the 1980s); at 21 - 30 (citing numerous sources for the existence of the Mashpee Tribe on a substantially continuous basis since 1990).

where the Tribe has significant historical connections. Recent archeological work performed pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA)³¹⁷ conclusively links sites in the vicinity of the Taunton Site to the Tribe.

The National Park Service (NPS), in its designated role under NAGPRA, issued a Notice in 1995 in the Federal Register stating that a detailed inventory and assessment of human remains had been conducted of artifacts from the historic Wampanoag Titicut site in Bridgewater, located just 11 miles from the Taunton Site.³¹⁸ The Notice stated that the Titicut Site is believed to have been occupied for several thousand years prior to European contact and is located within the aboriginal territory of the Wampanoag at the time of European contact:

A detailed inventory and assessment of these human remains has been made by the Robert S. Peabody Museum of Archeology. Human remains of one individual, a ten to twelve year old female, were recovered in 1947 from the Titicut site. This site is believed to have been occupied for several thousand years prior to European Contact. The human remains were recovered with glass and shell beads, a felsite biface, an iron axe, awl, and knife handle, a large ceramic vessel, several antler spoons and hafts, and several whelk shells. The burial can be dated between 1600 and 1620, based on the European trade items recovered with the individual. This site is located within the aboriginal territory of the Wampanoag Tribe at the time of European contact.³¹⁹

The NPS concluded that the Wampanoag people in Mashpee should be the recipient of the remains:

Based on the available archeological and ethnohistorical evidence, as well as the geographical and oral tradition of the Wampanoag people, officials of the [Peabody Museum] have determined that pursuant to [NAGPRA], there is a relationship of shared group identity which can be reasonably traced between these human remains and associated funerary objects from the Titicut Site and the Wampanoag people. The nearest group of identifiable Wampanoag people are located in Mashpee, MA. The Federally recognized Gay Head Wampanoag concur that Mashpee is the closest community of Wampanoag people to be identified with the Titicut Site. However, the Mashpee Wampanoag are not recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.³²⁰

³¹⁷ 25 U.S.C. §§ 3001–3013. NAGPRA establishes rights of tribes and their lineal descendants to obtain repatriation of certain human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal agencies and museums owned or funded by the federal government. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 20.02[1][a] (2012).

³¹⁸ 60 Fed Reg. 8,733 (Feb. 15, 1995).

³¹⁹ *Id.*

³²⁰ *Id.*

Only federally recognized tribes were entitled to claims for repatriation, making the Mashpee Tribe ineligible for receipt of the items.³²¹ The Aquinnah Tribe was the only federally recognized tribe in Massachusetts. In a letter to the Department, the Aquinnah Tribe wrote: “[T]hese so called ‘culturally unidentifiable’ remains [should] be acknowledged for what they are, as culturally affiliated with the Mashpee Wampanoag Tribe.”³²²

According to the definition of “occupancy” the Department put forth in the Guidiville Band Indian lands determination,³²³ historical documentation of the burial ground at the Titicut site evidences the Mashpee Tribe’s historical occupation of the land. Further, relying on the Department’s definition of “vicinity” outlined in the Scotts Valley Band Indian lands determination,³²⁴ the direct evidence of historical use and occupancy at the Titicut site is within the vicinity of the Taunton Site. Unlike the Scotts Valley Band’s direct evidence, which dealt with Rancho work located on the opposite side of a body of water,³²⁵ the Mashpee Tribe’s evidence leads to the natural inference that the Mashpee Tribe also used and occupied the Taunton Site located only 11 miles away. Last, although the Mashpee Tribe could rely on historical documentation related to more general Wampanoag use and occupancy, it is helpful that the NPS and Aquinnah Tribe agreed the remains belonged specifically to the Mashpee Tribe. Therefore, the NPS finding provides conclusive archeological evidence of the Mashpee Tribe’s historic use and occupancy of land within the vicinity of the Taunton Site, indicating that the Taunton Site is located within an area where the Tribe has significant historical connections.

In addition to items found in Titicut, numerous cultural items have been found at Burr’s Hill, near Warren, Rhode Island, approximately 20 miles from the Taunton Site.³²⁶ Gibson notes that according to local tradition, Warren was the site of Sowams, the principal village of Massasoit.³²⁷ In a notice related to the repatriation of one cultural item, the NPS described Burr’s Hill and its connection to the Wampanoag:

³²¹ Subsequently, the Wampanoag Confederation was formed in 1996 by tribes in Massachusetts to specifically address repatriation issues of the non-federally recognized entities. It included the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts, the Assonet Band of the Wampanoag Nation (a non-federally recognized Indian group), and the Mashpee Wampanoag Indian Tribe. *See* Wampanoag Confederation Repatriation Project: Information Packet (September 16, 1997). Following formation of the confederation, NAGRPA notices identified the Wampanoag Confederation as the proper recipient for repatriated items. For example, a notice for cultural items retrieved in Bridgewater, near Taunton, read:

Oral tradition and historical documentation indicate that Bridgewater, MA, is within the aboriginal and historic homeland of the Wampanoag Nation. The present-day Indian tribe and groups that are most closely affiliated with the Wampanoag Nation are the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts, Assonet Band of the Wampanoag Nation (a non-federally recognized Indian group), and Mashpee Wampanoag Indian Tribe (a non-federally recognized Indian group).

71 Fed. Reg. 70,981, 70,981–82 (Dec. 7, 2006).

³²² Letter from Matthew J. Vanderhoop, Natural Res. Dir., Wampanoag Tribe of Gay Head (Aquinnah), to Timothy McKeown, U.S. Dep’t of Interior, Nat’l Park Serv. (Nov. 3, 1994).

³²³ Guidiville Band Indian lands determination at 14.

³²⁴ Scotts Valley Band Indian lands determination at 15.

³²⁵ *Id.* at 16–17.

³²⁶ *See* Gibson for discussion of numerous artifacts from Burr’s Hill.

³²⁷ *Id.* at 9.

Burr's Hill is believed to be located on the southern border of Sowams, a Wampanoag village. Sowams is identified in historic documents of the 17th and 18th centuries as a Wampanoag village, and was ceded to the English in 1653 by Massasoit and his eldest son Wamsutta (Alexander). Based on the presence of European trade goods and types of cultural items, these cultural items have been dated to A.D. 1600-1710.³²⁸

A 1995 report prepared by the Office of Repatriation within the National Museum of the American Indian, which is part of the Smithsonian Institution, discussed the appropriate recipients for the Burr's Hill cultural items.³²⁹ The report cited discussions with a representative of the Haffenreffer Museum of Anthropology who believed that the Mashpee Tribe was the likely claimant of the Burr's Hill materials.³³⁰ The Office of Repatriation's report recommended repatriation to the Mashpee Tribe for reasons of geographical proximity and the community's importance to the Wampanoag Nation as a cultural center.³³¹

In addition to the items at the Titicut and Burr's Hill sites, there are numerous other cultural items linked to the Mashpee tribe that have been recovered in the surrounding area of the Taunton Site. These items have been found in Fall River, located 20 miles from the Taunton Site, and in the town of Swansea, Bristol County, located 14 miles from the Taunton Site.³³² In these cases, the NPS found that there was a relationship of shared group identity that could be reasonably traced between the items and the Mashpee Tribe. Recovery of cultural items from Burr's Hill, Fall River, and Swansea add to the natural inference created by the Titicut site burial grounds that the Mashpee Tribe used and occupied the Taunton Site.

³²⁸ 65 Fed. Reg. 50,001 (Aug. 16, 2000) (listing a small, double-layered textile fragment as the cultural item to be repatriated in this notice). This notice stated that officials of the Robert S. Peabody Museum of Archaeology determined that there was a shared group identity between the item and the Wampanoag Repatriation Confederation, which includes the Mashpee Tribe. *Id.*

³²⁹ NMAI Report.

³³⁰ *Id.* at 9. Despite concluding that the Mashpee should receive the cultural items, the representative found that its status as not federally recognized made repatriation to the group problematic. *Id.*

³³¹ *Id.* at 10–11. The report concluded that the items should be repatriated to the wider Wampanoag Nation but that, if that organization did not believe it was the appropriate entity, the items should be repatriated to the specific Mashpee community. *Id.* at 10.

³³² For example, the NPA put out a notice in 2006 pertaining to two brass tubes found in Fall River, as well as a string of shell beads recovered at Bridgewater, Bristol County, and a perforated copper point recovered at Fairhaven, Bristol County. 71 Fed. Reg. 70,982 (Dec. 7, 2006). Officials of the Peabody Museum of Archaeology and Ethnology determined that the items had a cultural relationship with the Mashpee Tribe, as well as two other Wampanoag tribes. *Id.* Another example is a 2005 NPS notice related to the repatriation of 21 copper and two brass beads collected from Swansea, Bristol County, and a whale bone spoon and clay pipe fragment removed from the Slocum River site in Dartmouth, Bristol County. 70 Fed. Reg. 16,840, 16,841 (April 1, 2005). Officials of the Robert S. Peabody Museum of Archaeology determined that there was a cultural relationship between the objects and the Mashpee Tribe, as well as two other Wampanoag tribes. *Id.*

Villages and travel networks

Historical documentation of Pokanoket/Wampanoag communities interwoven by travel networks and located within the vicinity of the Taunton Site also establish that the Taunton Site is located within an area where the Tribe has significant historical connections.

Before the British purchased the land from Massasoit, and before incorporation as the town of Taunton in 1639 by the Plymouth Colony, Taunton was called by its native name: Cohannet.³³³ The Massachusetts Historical Commission issued a report discussing core historic Wampanoag areas and major settlements within the core areas located near Taunton and in the Taunton River drainage area.³³⁴ The report discussed the following settlements in the vicinity of Taunton: Titicut, located eight miles from the Taunton Site; Wapanucket, located on the northern shore of Lake Assawompsett and six miles from the Taunton Site; and Nemasket, located in Middleborough and 10 miles from the Taunton Site.³³⁵

The Massachusetts Historical Commission found that, at the time of contact, these Wampanoag settlements were established along major river drainages, such as the Taunton River, and were relied on permanently and seasonally for freshwater and marine resources, proximity to good agricultural land, and accessible water routes for transportation.³³⁶

According to the Department, “occupancy” can be demonstrated by a tribe’s dwellings and villages.³³⁷ These core Wampanoag areas served as communities and, therefore, demonstrate occupancy. The sites also contain evidence of subsistence use. Further, their scattered locations between six and 11 miles from the Taunton Site fall within the Department’s definition of “vicinity.”³³⁸ Last, I have already established that the Tribe may rely on historical documentation related to the Wampanoag. Therefore, the Wampanoag core areas located in the Taunton area serve as evidence of historical subsistence use and occupancy in the vicinity of the Taunton Site.

Overland and water routes played an important role in connecting areas of occupancy.³³⁹ The Massachusetts Historical Commission identified in its report six primary overland corridors of travel.³⁴⁰ The easternmost of the north-south trails ran south from Massachusetts Bay, near Boston, alongside Plymouth Bay and down to Cape Cod.³⁴¹ A major east-west trail ran from Patuxet

³³³ Robbins 1950 at 54 (citing a 1640 report on the establishment of the boundaries of Taunton, “alias Cohannet.”)

³³⁴ Massachusetts Historical Commission, *Historic & Archeological Resources of Southeast Massachusetts: A Framework for Preservation Decisions* (June 1982) [hereinafter *Massachusetts Historical Commission 1982*].

³³⁵ *Id.* at 34–36, 34 map 2.

³³⁶ *Id.* at 33. See also Kathleen Bragdon, “Inseparable from their Land”: Mashpee Wampanoag Tribe Historical and Modern Ties to Cohannet (Taunton) 21–28 (Sept. 14, 2012) (summarizing these sites and explaining their importance) [hereinafter *Bragdon 2012*].

³³⁷ Guidiville Band Indian lands determination at 14; see also 25 C.F.R. § 292.2 (explaining that a tribe can establish a significant historical connection by demonstrating the existence of the tribe’s villages in the vicinity of the parcel at issue).

³³⁸ See *Scotts Valley Band Indian lands determination* at 15.

³³⁹ See *Massachusetts Historical Commission map 2* (Exhibit 1e).

³⁴⁰ *Massachusetts Historical Commission 1982* at 36. See also *Bragdon 2012* at 30 fig.7 (identifying transportation routes in the 1600s that included an overland route connecting Mashpee to northern areas).

³⁴¹ *Massachusetts Historical Commission 1982* at 36.

(Plymouth), forded the Nemasket River in Middleborough and then the Taunton River, and continued west to the Narragansett Bay, near Burr's Hill and Sowams, reportedly Massasoit's village.³⁴² Another east-west trail ran closer to, going from Cape Cod west through Fall River to the Taunton River estuary.³⁴³

Water routes were also used. The Taunton River was one of the most heavily used.³⁴⁴ The Massachusetts Historical Commission found that, due to an extensive state coastline, water transportation probably played an important role at the time of contact.³⁴⁵ With respect to water routes near the town of Mashpee, the report stated:

The Buzzards Bay region was particularly well suited for water travel because of its well protected coastline. Cape Cod, the Elizabeth Islands[,] and Martha's Vineyard sheltered the Bay from off-shore storms and may have permitted water travel as far west as Narragansett Bay. In turn, the heavily convoluted coastline and associated river drainages permitted water access into the interior.³⁴⁶

Scholar Bert Salwen noted that trading networks, which utilized both overland and water routes, linked southern New England groups, of which Wampanoag was one, to one another and to different groups in adjacent regions, including Europeans.³⁴⁷

The Guidiville Band Indian lands determination found that the Guidiville Band's historical documentation related to a trade route did not qualify as evidence of subsistence use and occupancy. The Department determined that evidence of travels to various locations to trade and interact with other peoples, simply to return back home, did not qualify as subsistence use and occupancy. It stressed that evidence of subsistence use and occupancy requires something more than a tribe merely passing through a particular area. Here, archeological evidence and the existence of core Wampanoag areas establish historic subsistence use and occupancy within the vicinity of the Taunton Site. The Mashpee Tribe's evidence of major travel routes, when viewed in conjunction with direct evidence related to historical occupation at multiple sites, only furthers the natural inference that the Mashpee Tribe used and occupied the Taunton Site.

Conclusion: The Taunton Site is located within an area where the Tribe has significant historical connections.

³⁴² *Id.* at 37. Captain Myles Standish, the Pilgrims' military leader, took this path to attack the settlement of Nemasket. See generally Robbins 1984 (discussing events along the Nemasket Path from Plymouth to Middleborough involving Myles Standish and Tisquantum); Maurice Robbins, *The Path to Pokanoket. Winslow and Hopkins Visit the Great Chief*, in A SERIES OF PATHWAYS TO THE PAST 2, 1-2 (1984-1985) [hereinafter Robbins 1984 - 1985]; Gibson *supra* note 24.

³⁴³ Massachusetts Historical Commission 1982 at 37. A number of these trails and water routes have been adapted for use by major highways including, Routes 44, 123, and 138, and most of the sites used as river fords have been used as bridge sites. *Id.* at 40.

³⁴⁴ *Id.* at 38. The modern Wampanoag Commemorative Canoe Passage, established in 1977, runs from Plymouth through Taunton and along the Taunton River, near the Wampanucket site. Bragdon 2012 at 114-15.

³⁴⁵ Massachusetts Historical Commission at 38.

³⁴⁶ *Id.* at 38; see also *id.* at 35 (noting that natives of Nemasket were observed travelling to the Buzzard's Bay coast in the spring to harvest lobster).

³⁴⁷ Salwen at 166.

Based on the evidence discussed above, the Mashpee Tribe has established evidence of historical subsistence use and occupancy within the vicinity of the Taunton Site. Therefore, I find that the Taunton Site is located within an area where the Tribe has significant historical connections, and, thus, satisfies the historical connection requirement of Section 292.6(d).

d. The Mashpee Site is located within an area where the Tribe has significant historical connections.

The record is replete with conclusive evidence of the Tribe's historical use and occupancy of the Mashpee Site. For our analysis, I rely on specific factual findings OFA made in the Tribe's federal acknowledgment determination. Much of OFA's analysis dealt with the Mashpee Tribe's activities in the town of Mashpee, where the Mashpee Site is located.

Like other Wampanoag settlements, the area around Mashpee at the time of contact had a number of its own sachems who ruled by consensus and controlled several villages joined in a loose confederacy.³⁴⁸ In 1665, Puritan minister Richard Bourne established a praying town in Mashpee, and established the town on 25 square miles of tribal land he had acquired from two local Wampanoag sachems, Wequish and Tookenchosen.³⁴⁹ In 1685, the General Court of Plymouth Colony officially recognized these grants of land in perpetuity.³⁵⁰ Until the 1690s, the praying town was governed by a six-member council of Mashpee.³⁵¹

From 1665 to 1720, the Mashpee community was organized as a praying town.³⁵² In 1720, the town became a proprietorship in which Mashpee citizens elected local officers, held regular town meetings, maintained public records, and owned their land in common as proprietors.³⁵³

Section 83.7(b) of the federal acknowledgement regulations requires that a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present."³⁵⁴ The OFA Preliminary Finding concluded that "a predominant portion of the petitioner's members or claimed ancestors have maintained consistent interaction and significant social relationships throughout history."³⁵⁵ In reaching this conclusion, the OFA Proposed Finding discussed at length the Tribe's historic presence in the vicinity of Mashpee, stating "[t]he Mashpee

³⁴⁸ OFA Proposed Finding at 32 ("During the 1620s, the Wampanoag of southeastern Massachusetts on Cape Cod along Nantucket Sound, called 'South Sea Indians' by the Pilgrims and Puritans, had a number of local leaders, or sachems, in charge of one or more villages joined in a loose alliance under one chief sachem."). *See also* OFA Final Determination at 18 ("[A] hereditary sachem provided leadership among the Wampanoag from the 1620s to the 1660s.").

³⁴⁹ *Id.* OFA Proposed Finding at 32.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 33.

³⁵² *Id.* at 89. (noting that "from 1665 to 1720, the Mashpee inhabited a praying town that provided considerable political autonomy.").

³⁵³ *Id.* at 32.

³⁵⁴ 25 C.F.R. § 83.7(b).

³⁵⁵ OFA Proposed Finding at 31.

maintained a distinct Indian community in and around the town of Mashpee, Massachusetts, during the contact, colonial, and revolutionary periods.”³⁵⁶

The OFA materials conclude the Mashpee Tribe historically occupied the town of Mashpee, including the Mashpee Site.

Conclusion: The Mashpee Site is located within an area where the Tribe has significant historical connections.

Based on the evidence discussed above, the Mashpee Tribe has established evidence of historical subsistence use and occupancy of the Mashpee Site. Therefore, I find that the Mashpee Site is located within an area where the Tribe has significant historical connections and, thus, satisfies the historical connection requirement of Section 292.6(d).

Section 292.6(d): Modern Connections

Section 292.6(d) requires that a tribe demonstrate a modern connection to the newly acquired land. In order to establish a modern connection, the tribe must prove one or more of the following:

- (1) The land is near where a significant number of tribal members reside; or
- (2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or
- (3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.³⁵⁷

The Taunton Site meets the requirements of subsection (1) and the Mashpee Site meet the requirements of subsections (1) and (2). Therefore, both satisfy the modern connection requirement of Section 292.6(d).

Section 292.6(d)(1): The Mashpee and Taunton Sites are near where a significant number of tribal members reside

The Tribe has 2,633 members. Of these, 65% live within Massachusetts, 40% live in Mashpee where tribal headquarters are located, and over 60% live within 50 miles of the Taunton Site.³⁵⁸ Dispersion of membership is common among tribes without a designated land base and does not weigh against finding that the tribal population near the Mashpee and Taunton Sites is significant.³⁵⁹ The preamble

³⁵⁶ *Id.* at 32.

³⁵⁷ 25 C.F.R. § 292.6(d).

³⁵⁸ Consolidated and Restated Application at 24-25.

³⁵⁹ See Letter from Philip Hogen, Chairman of the Nat'l Indian Gaming Comm'n, U.S. Dep't of Interior, to John Barnett, Chairman of the Cowlitz Indian Tribe 15 (Nov. 23 2005) (applying pre-Part 292 standards and stating that, although “[t]he Tribe’s Clark County population figure does not amount to a large percentage of the Tribe’s total enrollment,” “in cases of high tribal dispersion, a relatively low percentage of tribal members who live in the subject county should not weigh against a tribe if, as in this case, the actual number of tribal members living in the county is not insignificant”).

to Part 292 acknowledged that modern tribal populations are subject to wide dispersion and specifically noted today's mobile work-related environment.³⁶⁰

Further, the 50-mile radius used to evaluate the tribal population in reference to the Taunton Site falls within the range of distances the Department intended to qualify as "near." In its proposed rule, the Department would have required a tribe to demonstrate a modern connection to land for purposes of the initial reservation exception by proving that "[a] majority of the tribe's members reside within 50 miles of the location of the land."³⁶¹ In response to concerns about this difficult-to-meet standard, the Department eliminated the 50-mile majority requirement and amended the language to require only that a significant number of tribal members reside near the land.³⁶² As the Department amended its 50-mile majority membership requirement to create a more lenient standard, it is clear that 50 miles qualifies as "near" for purposes of establishing that a significant number of tribal members reside near newly acquired land.

Further, the Department intended the modern connection requirement to provide a "mechanism to balance legitimate local concerns with the goals of promoting tribal economic development and tribal self-sufficiency."³⁶³ The surrounding community's interests are protected when it has notice of tribal presence in or near the community.³⁶⁴ A large portion of the Tribe's population residing within 50 miles of the Taunton Site puts residents of that community on notice of the tribe's governmental presence.

I conclude that a significant number of the Tribe's members reside near the Mashpee and Taunton Sites.

Section 292.6(d)(2): The Mashpee Site is within a 25-mile radius of the Tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust

The Tribe's headquarters is located in Mashpee, Massachusetts. It has been located there for at least 2 years before the Tribe's initial application in 2007. The Mashpee Site is located within a 25-mile radius of the Tribe's headquarters.

Initial Reservation Conclusion

Based on my review of documents in the record, I conclude the Mashpee and Taunton Sites qualify as the Tribe's "initial reservation" pursuant to IGRA. This decision relies on the extensive documents in

³⁶⁰ 73 Fed. Reg. 29,354, 29360 (May 20, 2008).

³⁶¹ 71 Fed. Reg. 58,769, 58,773 (Oct. 5, 2006). In its proposed rule, the Department also allowed a tribe to prove a modern connection to land by demonstrating that "the tribe's government headquarters are located within 25 miles of the location of the land." *Id.*

³⁶² 73 Fed. Reg. 29,354, 29,360 (May 20, 2008). The Department also added the option for tribes to establish a modern connection by proving other factors that demonstrate the tribe's current connection to the land. *Id.*

³⁶³ *Id.* at 29,365 (discussing the modern connection requirement in the context of the restored land exception).

³⁶⁴ *Id.* at 29,360.

the record, including the findings in OFA's Proposed Findings and Final Determinations, numerous historical sources, and modern archeological and academic sources.

IX. NO MAJOR FEDERAL ACTION

The Department's regulations at 25 C.F.R. Part 151 (Part 151) require compliance with National Environmental Policy Act (NEPA) and Departmental Manual 602 DM 2 when acquiring land in trust under Section 5 of the IRA. The issuance of a reservation proclamation is also considered a major federal action triggering review under NEPA.

My decision to confirm the Parcel's trust and reservation status however does not constitute a major federal action or acquisition of land under Part 151.³⁶⁵ The Parcels were accepted into trust and have remained in trust from the time BIA accepted title on November 10, 2015. The D.C. District Court maintained this *status quo* by issuing a mandatory stay directing that the Department take no steps to remove the lands from trust or rescind the reservation proclamation until fourteen days after the Department's decision on remand.³⁶⁶

Because the Parcels have remained in trust throughout the various legal challenges, and in fact must remain in trust as the Tribe's reservation under court order, this decision does not change the *status quo*. Thus, the decision does not require NEPA compliance under Part 151 or 602 DM 2, and also does not constitute a major federal action that could significantly affect the quality of the human environment. To the extent this decision could be considered a major federal action or new acquisition such that NEPA compliance would be required, the Department conducted NEPA review in the

³⁶⁵ The Department's regulations at 25 C.F.R. Part 151 (Part 151) require compliance with National Environmental Policy Act (NEPA) and Departmental Manual 602 DM 2 when acquiring land in trust under Section 5 of the IRA and issuance of a reservation proclamation is considered a major federal action requiring review under NEPA.

³⁶⁶ *Mashpee*, Memorandum Opinion and Order, ECF No. 77 at 9-10 (Jun. 5, 2020).

FEIS³⁶⁷ and Environmental Site Assessment³⁶⁸ that informed the 2015 ROD. Those analyses continue to constitute the Department's review of potential environmental effects from the trust acquisition and reservation proclamation. The 2015 ROD's discussion of environmental effects is incorporated herein as set out in the attached Appendix.

Sincerely,



Bryan Newland
Assistant Secretary – Indian Affairs

³⁶⁷ See 2015 ROD at 130-31. The BIA published a Notice of Intent (NOI) to prepare an EIS in the Federal Register on May 31, 2012, describing the proposed action of acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation, and announcing the intent to prepare an EIS (77 Fed. Reg. 32,123 (May 31, 2012)). The NOI commenced a public comment period, open through July 2, 2012, by providing an address and deadline for comments. It also announced two public scoping meetings to be held on June 20 and 21, 2012, at the Taunton High School and Mashpee High School auditoriums, respectively. The comments presented at the scoping meetings supplemented the 78 comment letters that were submitted to BIA during the public comment period. A Scoping Report, titled Mashpee Wampanoag Tribe, Fee-to-Trust Acquisition and Destination Resort Casino, Mashpee and Taunton, Massachusetts was made available by BIA in November 2012. The Scoping Report outlined the relevant issues of public concern to be addressed in the EIS. On November 15, 2013, BIA published a Notice of Availability (NOA) in the Federal Register that provided information on local public hearings and how to request or view copies of the Draft EIS (78 Fed. Reg. 68,859 (Nov. 15, 2013)). The EPA published a Notice of Filing in the Federal Register on November 22, 2013, that commenced the 45-day review and comment period lasting until January 6, 2014 (78 Fed. Reg. 70,041 (Nov. 22, 2013)). The BIA voluntarily extended the comment period an additional 11 days, through January 17, 2014, to allow additional review time. The BIA sent hard copies of the Draft EIS to the government offices of the City of Taunton, Town of Mashpee, and their local libraries for public access. The BIA also sent letters describing options for obtaining and commenting on the Draft EIS to Federal, tribal, state, and local agencies, as well as all interested parties who offered comments during scoping period. The BIA published notice of upcoming public hearings on the City of Taunton's and Town of Mashpee's municipal websites on November 15, 2013, and in two local newspapers, the Taunton Daily Gazette and Cape Cod Times, on November 16, 2013. The BIA held public hearings on December 2 and 3, 2013, at the Mashpee High School and Taunton High School auditoriums, respectively. The 20 statements presented at the hearings supplemented the 44 comment letters that were submitted to BIA during the public comment period. The BIA published an NOA for the Final EIS in the Federal Register on September 5, 2014 (79 Fed. Reg. 53,077 (Sept. 5, 2014)). The BIA also published the NOA in local and regional newspapers, including the Taunton Gazette on September 10, 2014, and the Cape Code Times on September 12, 2014. The 30-day waiting period ended on October 6, 2014.

³⁶⁸ See 2015 ROD at 131. To determine if there were any environmental contamination related concerns and/or liabilities affecting the Parcels, the Department completed Phase I ESAs in October 2014 and August 2015 to ensure there were no environmental contaminant concerns associated with the Parcels prior to acquisition.