Littlefield v U.S. Dept. of the Interior, ___ F. Supp. 3d ___, 2023 WL 1878470 (D. Mass., Feb. 10, 2023).

- **Holding**: The Secretary of the Interior properly applied the Interior Solicitor's Opinion M-37029 in deciding that the Mashpee Wampanoag Tribe was under federal jurisdiction in 1934 and thus qualified to have its fee lands taken into trust pursuant to 25 U.S.C.A. §§ 5108 & 5129.
- **Summary**: In 2007, the Secretary of the Interior recognized the Mashpee as "an Indian tribe within the meaning of Federal law." 72 Fed. Reg. 8007-01 (Feb. 22, 2007). Shortly after, the Tribe submitted a "fee-to-trust" application requesting that the Department acquire and take into trust two non-contiguous parcels totaling 321 acres in southeastern Massachusetts for purposes of establishing a reservation pursuant to the Indian Reorganization Act of 1934, which authorizes the Secretary of the Interior "to acquire land and hold it in trust 'for the purpose of providing land for Indians.'" *Carcieri v. Salazar*, 555 U.S. 379, 381–82 (2009) (quoting 25 U.SC. § 5108). The Secretary may only take land into trust for persons or tribes that meet at least one of the statute's definitions of "Indian." *Littlefield v. Mashpee Wampanoag Tribe* ("Littlefield II"), 951 F.3d 30, 34 (1st Cir. 2020). The IRA defines "Indian" in three different ways:

  > The term "Indian" as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood. 25 U.S.C. § 5129 (bracketed numbers added).

  After *Carcieri*, the Solicitor of the Department of the Interior published Opinion M-37029 (March 12, 2014), establishing a framework for interpreting the phrase "under Federal jurisdiction." U.S. Dept. of Interior M-37029 (March 12, 2014). The M-Opinion creates a two-part inquiry for determining whether a tribe was "under Federal jurisdiction" in 1934. The Secretary first must determine whether there was a "sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction." M-Opinion at 19. To make this finding, the Secretary asks "whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." The Secretary may consider "guardian-like action[s]" the government took on behalf of a tribe, including, but not limited to, negotiation of treaties, approval of contracts between the tribe and non-Indians, enforcement of federal commerce laws, the education of the tribe's children at BIA schools, and provision of federal health and social services to the tribe. M-Opinion at 19. If the Secretary concludes jurisdiction existed prior to 1934, the second step of her inquiry is to determine "whether the tribe's jurisdictional status remained intact in 1934." *Id*.

  In 2015, the Secretary issued a written decision granting the Tribe's application, finding that the Tribe qualified as "Indians" under the second IRA definition ("all persons

who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"). On judicial review, the district court determined that the Secretary's decision improperly construed the second definition of "Indian," *Littlefield v. U.S. Dept. of Interior* ("Littlefield I"), 199 F. Supp. 3d 391, 398-400 (D. Mass. 2016), and remanded the matter to the Secretary with the suggestion that the agency analyze the Tribe's eligibility under § 5129's first definition.

In 2018, the Secretary issued a second written decision denying the Tribe's application, concluding that the Tribe did not qualify under the IRA's first definition of "Indian" because it was not under federal jurisdiction in 1934. The Tribe sued the Secretary in the D.C. district court, which vacated the Secretary's decision, holding that it misapplied the M-Opinion by not viewing the probative evidence "in concert," and by misapplying the M-Opinion's standards to evidence concerning the education of Mashpee children at a federally-operated Indian School, the appearance of the Tribe on federal census rolls, and references to the Tribe in federal reports and surveys.

On remand, the Secretary issued a third decision in December 2021, concluding that the Tribe had been under federal jurisdiction in 1934 and thus qualified under the IRA's first definition of "Indian." The Secretary took into trust 321 acres of land located in southeastern Massachusetts. 23 persons residing in the vicinity brought an action under the Administrative Procedure Act, alleging that the Secretary's decision was arbitrary, capricious, and otherwise not in accordance with law.

The district court rejected the plaintiffs' challenges to the validity of the M-Opinion, finding that it withstood scrutiny under the C*arcieri* framework, which only interpreted the word "now" in the IRA to refer to the statute's enactment in 1934, and left open the question of *how* the Secretary was to determine whether a tribe was under federal jurisdiction in 1934. Applying *Chevron v. Natural Resources Defense* Council, 467 U.S. 837 (1984), the court found the M-Opinion's construction of "under federal jurisdiction" to be reasonable, and "use[d] the M-Opinion as the benchmark by which it evaluates the decision under review." 2023 WL 1878470 at *9.

The court concluded that the Secretary properly relied on evidence that the Government exercised "guardian-type actions" toward Mashpee children who attended an Indian School in Carlisle, Pennsylvania, between 1905 and 1918, finding irrelevant evidence cited by plaintiffs that such attendance was with the parents' voluntary consent.

The court also found that the Secretary acted rationally in relying upon government reports from the early 1800s including the Mashpee in the description of the Indian population under government jurisdiction, and in concluding that such reports played a role in government decisions to not forcibly remove the Tribe from their lands.

The court likewise found irrelevant the fact that prior court opinions had described the Indians in Massachusetts as "remnants of tribes" and had specifically concluded that the Mashpee did not qualify as a "tribe" under the definition used in *Montoya v. United States*, 180 U.S. 261, 266 (1901): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

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