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January 25, 2008

Franklin Keel, Director
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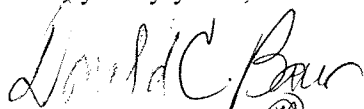

Re: Comments on the Proposed Trust Acquisition of the Mashpee Wampanoag Tribe of Massachusetts

Dear Director Keel:

Please find enclosed the comments of the Town of Mashpee regarding the proposed trust acquisition of land by the Mashpee Wampanoag Tribe of Massachusetts. The Town is providing these comments in response to the Bureau of Indian Affairs' notice and request for information, dated October 29, 2007.

Should you have any questions regarding these comments, please contact Donald Baur (contact information above) or Patrick Costello at (617) 439-0305, Louison, Costello, Condon, & Pfaff, LLP, 67 Batterymarch Street, Boston, Massachusetts 02110.

Very truly yours,


Donald C. Baur 


Patrick J. Costello 

cc: Town of Mashpee, Board of Selectmen

**COMMENTS OF
THE TOWN OF MASHPEE ON THE
TRUST LAND ACQUISITION REQUEST
OF THE MASHPEE WAMPANOAG TRIBE
OF MASSACHUSETTS**

Submitted to

**Bureau of Indian Affairs
Eastern Regional Office
545 Marriott Drive, Suite 700
Nashville, TN 37214**

January 25, 2008

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I. INTRODUCTION

The Town of Mashpee, Massachusetts (Town) submits these comments in response to the notice from the Bureau of Indian Affairs (BIA) requesting information about the application of the Mashpee Wampanoag Tribe of Massachusetts (Tribe) to have certain land acquired in trust pursuant to sections 5 and 7 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 465 and 467, and federal trust land acquisition regulations, 25 C.F.R. Part 151. The application involves land in Mashpee and Middleborough, Massachusetts. The land the Tribe seeks to have acquired within the Town consists of nine separate parcels, totaling approximately 141 acres (Mashpee lands). The proposed Middleborough request involves 539 acres of land.

The Town opposes the proposed transfer of land into trust for several reasons. First, the Tribe's request fails to clarify that a determination that the land qualifies for gaming as an initial reservation under 25 U.S.C. § 2719(b)(1)(B)(ii) of the Indian Gaming Regulatory Act (IGRA), as requested by the Tribe on page 2 of its request, only applies to the Middleborough land. Compliance with section 20 is required before land can be acquired in trust and used for gaming purposes. Although the Tribe states in its application that the Mashpee lands are "not suitable" for gaming purposes, the Tribe has not requested that the section 20 initial reservation determination be limited to Middleborough lands. Instead, the Tribe appears to request that land in both locations be acquired in trust for gaming purposes in accordance with section 20. The Town must oppose designation of the Mashpee lands as an initial reservation for purposes of IGRA.

Second, the Tribe's request proposes to transfer into trust nine parcels of land in Mashpee, five of which the Town either owns in fee or maintains reverter or other legal or

equitable rights. Contrary to the Tribe's assertions in its application, the Town has not yet agreed to transfer to the Tribe any of the Town's right, title, or interest in and to any of these parcels. The Town and Tribe have been engaged in lengthy negotiations regarding an intergovernmental agreement (IGA) which, inter alia, would address the transfer of title to these parcels; however, no such agreement has been reached. Without an IGA with the Tribe that protects the Town's and its citizens' interests in their real property and guarantees that land in Mashpee will not be used detrimentally for gaming purposes, the Town must oppose the proposed acquisition of the Mashpee lands. Cape Cod, as the Tribe notes in its application, has a fragile ecosystem, a unique and well-preserved history, and limited transportation infrastructure. Development of the scale that gaming usually entails will be extraordinarily detrimental to the environment and the character of the region. Under the Department's new off-reservation gaming policy issued on January 3, 2008, and because there is no guarantee that lands in Mashpee will not be available for gaming absent an agreement, the Town's opposition to the trust acquisition should lead the Department to reject the Tribe's request. Further, residential development undertaken in a fashion that does not conform to regional planning requirements will adversely affect the Town and surrounding region. For these reasons, without an IGA, the Town cannot support the acquisition and will not convey land it owns to the Tribe for purposes of this request.

Third, if BIA does not reject the request at the outset of the review, it must prepare an environmental impact statement (EIS) that covers the impacts of the proposed Mashpee and Middleborough acquisitions in a unified document. The requests must be considered together in a single EIS, as a result of the Tribe's unified trust acquisition request. In addition, the changes in the Town associated with the Tribe's proposed housing development, in combination with the

Tribe's proposed gaming development 30 miles away, will generate significant impacts. Although the greatest impacts are likely to be felt in Middleborough, residential development will significantly impact the Town. In addition, members of the Tribe residing in Mashpee will be commuting to Middleborough for the work opportunities that the casino will offer, thereby affecting traffic and congestion in the Town of Mashpee. Further, as long as all the lands involved in Mashpee and Middleborough are designated an initial reservation under 25 U.S.C. § 2719(b)(1)(B)(ii), the proposed uses are interchangeable, with gaming possible at either location. Thus, even if the Mashpee request is to be considered separately, an EIS is required.

To address these concerns, the Town has worked diligently, and continues to work, with the Tribe to develop an IGA that would allow the Town to support the Tribe's proposed trust acquisition. In consideration of these efforts, the Town requested a second extension to respond to BIA's request for comments. BIA has insisted, however, that the Town provide comments at this time, despite the long review process ahead. BIA's stance has, unfortunately, forced the Town to take an adversarial role at this early juncture. It is for that reason that the Town must file these comments opposing the trust land request.

The Town's comments are set forth in four sections. The first section provides background information on the Town, the Tribe's land claims lawsuit, and the efforts of the Town to reach an agreement with the Tribe. The second section sets forth the Town's specific objections to the Tribe's request. The third section provides preliminary comments on the required National Environmental Policy Act (NEPA) review. The fourth section provides the technical information sought by BIA's October 29, 2007 request.

II. DISCUSSION

A. Background

1. The Town of Mashpee

The Town of Mashpee is located on Cape Cod, a peninsula situated at the southeast corner of the Commonwealth of Massachusetts. The Cape is separated from mainland Massachusetts by the Cape Cod Canal, which the Army Corps of Engineers completed in 1914 to facilitate shipping through New England. The Town itself is located in the western part of the Cape, approximately 15 miles southeast from the Canal. Mashpee has a population of approximately 15,000 year-round residents and encompasses 29 square-miles within its territorial boundaries.

The Cape, shaped like a bent arm, is approximately 70 miles from the Canal to Provincetown's Race Point, the northeastern tip. Its width varies from 1 to 20 miles wide, and is completely surrounded by water, with Cape Cod Bay on the north, Buzzards Bay on the west, Vineyard and Nantucket Sounds on the south, and the Atlantic Ocean on the east. As a prime tourist destination with limited access and road infrastructure, travel on the Cape is very difficult, particularly in the summer months when tourism is at its peak and the Town's population doubles as seasonal residents move in.

The ecology of the entire Cape is fragile, and particularly so in Mashpee. Among the Town's natural attractions is the Lowell Holly Reservation, a 130-acre nature preserve on the shores of Wakeby and Mashpee Ponds, part of the largest freshwater pond complex on the Cape. It is the oldest private land trust in the country; the preserve contains 500 holly trees and harbors stands of Native American beech trees untouched for centuries, as well as some rare and

beautiful wildflowers. Eagles, osprey, and hawks are common. The Mashpee River Woodlands boasts eight miles of hiking trails along the Mashpee River, a protected waterway used for canoeing, bird watching and hiking. Recently, 2,200 acres in Mashpee have been proposed for inclusion in a new National Wildlife Refuge.

Because of the delicate ecology of Mashpee and the Cape, the Massachusetts state legislature created the Cape Cod Commission (CCC), the purpose of which is to protect the unique natural, coastal, historical, cultural, and other values threatened by uncoordinated or inappropriate uses of the region's land and other resources. The CCC is a regional planning and regulatory agency, responsible for preparing and implementing the Cape Cod Regional Policy Plan. The CCC, in conjunction with municipal boards and commissions, provides regulatory review processes and approvals for any development which has the potential to cause regional or local impacts. Within that regional development purview, the Town manages its affairs by an open Town Meeting form of government, wherein all of the Town's registered voters, including members of the Tribe, may vote on any matter requiring local legislative approval. The Town holds two Annual Town Meetings per year, in May and October and may also call additional Special Town Meetings, as needed. The chief executive body of the Town is an elected, five-member Board of Selectmen, which serves as the chief policy-making body within the Town government. Members of the Tribe have historically served, and one Member currently serves, on the Board of Selectmen. An appointed Town Manager is the chief administrative officer of the Town.

2. The Mashpee Wampanoag Tribe and the Land Claims

The relationship between the Tribe and the Town with respect to land and development has been controversial, primarily because of the Tribe's 1976 land claims suit asserting title to substantial portions of Town and privately-owned land located within Mashpee. In August of 1976, the Tribe sued in federal district court for recovery of approximately 1,600 acres of land located within the Town. The primary impetus for the suit was the Tribe's purported loss of political control over the Town with the influx of non-Indians into the area in the 1960s and the loss of free access to upland and shore areas, which had previously been accessible prior to development in the region.

The Tribe claimed that, beginning in 1842, the Commonwealth divided Mashpee ancestral lands that had been held in common by the Tribe and parceled them out to the Mashpee individually. In 1870, the Massachusetts state legislature adopted laws changing the Mashpee Indian District into a town and conveyed the remaining tribal lands to the town in its capacity as a body corporate and politic and a political subdivision of the Commonwealth. The Tribe claimed that by doing so, the Commonwealth violated the Indian Non-Intercourse Act, which requires federal approval of any transfer of tribal land to any other entity, including state and municipal governments.

The district court did not reach the merits of the Tribe's claims, however, because it dismissed the suit in 1977 on the ground that the Tribe did not meet the legal requirements of a federal Indian tribe. Only federal tribes can assert Non-Intercourse Act claims. A Non-Intercourse Act claim has four elements. The plaintiff must show that: 1) it is a "tribe" within the meaning of the Act; 2) the parcels of land were tribal land; 3) the United States never

consented to the alienation of the land; and 4) the trust relationship between the United States and the tribe was never terminated. *See Narragansett Tribe of Indians v. So. R.I. Land Develop.*, 418 F. Supp. 798 (D.R.I. 1976). After forty days of trial, the jury and the judge determined that the Mashpee did not constitute a “tribe” within the meaning of the Act at certain relevant times, and thus, the suit could not be maintained. *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978). The First Circuit Court of Appeals affirmed the district court’s decision in 1978. *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

Many of the residents of the Town have expressed concerns to Town officials regarding the Tribe’s proposed and potential future acquisitions of trust land and how the Tribe’s proposed development may affect the region. For that reason, the Town has worked diligently to negotiate an agreement that defines and limits the use of Tribal land and provides assurances regarding future development of such land.

3. History of the Town’s Negotiations with the Tribe to Develop IGA

The Tribe received the Department’s preliminary finding on Federal acknowledgment on March 31, 2006. Shortly thereafter, the Town requested an opportunity to meet with the Tribe. The Town and the Tribe commenced meetings and discussions among duly authorized representatives of the Board of Selectmen, Tribal Council, and legal counsel regarding post-recognition IGA issues in July 2006. Land claims and gaming in Mashpee were identified as the most pressing issues for the Town.

In September 2006, the Town prepared and shared with the Tribe a first draft Memorandum of Agreement, addressing the intergovernmental issues it anticipated upon final

recognition of the Tribe. Since that time, the Town and Tribe have met on at least six additional occasions to continue to pursue their negotiations on an IGA. Initially, the Tribe noted concerns about its legal authority to enter into such an agreement prior to final acknowledgment of the Tribe by the Department of the Interior. The Town, nonetheless, insisted on continuing the meetings. The Tribe received the Department's final finding on acknowledgment in February 2007. Despite nearly a year of persistent efforts to agree upon final terms of an IGA (nineteen months in total), the Town and Tribe have not yet resolved the issues of land claim releases and gaming activity in Mashpee.

The Town had hoped that it could withhold comment until such time as the parties had finalized their agreement, or resolved not to execute an IGA. The BIA, however, has insisted that the Town file comments before the parties could complete negotiations. For that reason, the Town must go on record objecting to the request.

B. Grounds for the Town's Objections to the Trust Land Acquisition Request

The Town objects to the proposed trust acquisition request because: 1) the application seeks a determination that the land involved in the request would be available for gaming purposes, which the Town opposes; and 2) the Town owns several of the parcels requested and, without an IGA, the Town will not convey the land to the Tribe, thereby preventing their acquisition in trust. Under the Department's new policy, the trust acquisition request should be denied.

1. The Tribe Has Requested a Determination that All Lands Involved Qualify for Gaming Purposes

The Tribe has requested that BIA acquire certain lands in trust on its behalf. In the Town of Mashpee, those lands include: (1) Old Indian Meeting House parcel (0.15 acres); (2) Town Cemetery (11.75 acres); (3) the Parsonage parcel (2.5 acres); (4) the Tribe's Museum (0.5 acres); (5) Tribal Council Offices (55 acres); (6) vacant land (10.81 acres); (7) vacant land (46.82 acres); (8) conservation land (burial ground) (0.361 acres); and (9) conservation land (8.9 acres). In the Town of Middleborough, the lands to be taken into trust include approximately 539 acres. Although the Tribe has stated that it does not intend to develop any of the Mashpee lands for gaming purposes,¹ it has nonetheless requested on page 2 of the trust land request a determination by the Secretary that all of the lands identified in the application constitute the initial reservation of a newly-recognized tribe on which gaming may be conducted.

The requested determination would help clear the path and provide a legal basis for the Tribe to engage in gaming activity in Mashpee. Section 20 prohibits gaming on lands acquired in trust after 1988 unless the lands are located within or adjacent to the boundaries of a reservation that existed on October 17, 1988 or, if the tribe did not have a reservation as of that

¹ The Tribe states in its application that it does not intend to use the Mashpee lands for gaming:

The lands in Mashpee are unsuited to gaming or other economic development, however, because of their location on Cape Cod, which has a fragile ecosystem, including sensitive wetlands, and limited highway access. In recognition of these facts and of the wishes of the Town, the tribe has committed to not building a casino in the Town of Mashpee.

Letter from the Mashpee Wampanoag Tribe to Regional Director Franklin Keel (Aug. 30, 2007). The purposes proposed for the Mashpee lands are as follows: (1) Old Indian Meeting House – purpose to remain the same; (2) cemetery land – purpose to remain the same; (3) a Parsonage – purpose to remain the same; (4) a Mashpee Tribal Museum – purpose to remain the same; (5) Tribal Council Offices – purpose to remain the same; (6) vacant land to be used for tribal housing; (7) vacant land to be used for tribal housing; (8) conservation land – purpose to remain the same; and (9) conservation land – purpose to remain the same.

date, the lands are within the tribe's last recognized reservation where the Indian tribe is presently located. 25 U.S.C. § 2719(a). Congress established three exceptions to the general prohibition on gaming on post-1988 lands, largely to accommodate newly-recognized tribes. Those exceptions cover land that is: 1) subject to the settlement of a land claim; 2) included in the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or 3) determined to be the "restored land" of an Indian tribe that is restored to Federal recognition. *Id.* § 2719(b)(1)(B)(i-iii). The Tribe is applying for permission to conduct gaming under the initial reservation exception. *See id.* § 2719(b)(1)(B)(ii).

As noted above, the Tribe has stated that it does not intend to offer gaming on the Mashpee lands. Nonetheless, this statement of intent does not guarantee that the Tribe would not, at some future date, convert use of the Mashpee lands to gaming. Without an enforceable agreement specifically defining permissible gaming activities and/or prohibiting gaming in perpetuity, the Town must assume the worst-case scenario, leaving it no choice but to oppose the Tribe's request. Based on the Town's opposition, the BIA should decline the Tribe's request.

Under new Departmental policy, the Town's opposition is ground for rejecting the Tribe's entire request. On January 3, 2008, the Department of the Interior issued guidance applicable to processing gaming-related trust acquisitions under the trust acquisition regulations. *See* Memorandum from Assistant Secretary Carl Artman to Regional Directors, BIA, George Skibine, Office of Indian Gaming (Jan. 3, 2008). The guidance focuses on two criteria in the trust land regulations that require the Secretary to give: 1) greater scrutiny to the tribe's justification of anticipated benefits from the proposed acquisition; and 2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on

regulatory jurisdiction, real property taxes, and special assessments. *See* Jan. 3 Memorandum (discussing 25 C.F.R. § 151.11(b)). With respect to the anticipated benefits of the proposed acquisition, the Department will look closely at whether the distance between the reservation and the proposed gaming site is commutable – that is, whether a tribal member living on the reservation could reasonably be expected to commute to the casino from the reservation. The Department will also accord greater weight to the concerns of local governments about the tax and jurisdictional impacts and whether the gaming facility is compatible with current zoning and land use requirements. The Department is to scrutinize the impacts of a gaming facility on traffic, day care centers, schools, churches, and residential developments. The guidance directs that all pending or new applications be screened initially in accordance with the new guidance and that if the initial review fails to address or does not adequately address the issues identified in the guidance, the application should be denied.

Under this guidance, the BIA should reject the Tribe's application until an enforceable agreement is in place that assures the Town that the land will not be used for gaming purposes. There is no doubt that gaming development is completely incompatible with the Town and the surrounding Cape. Such a result is required by the recent decision regarding the United Keetowah Band of Cherokee Indians of Oklahoma, where the Department denied the request of a landless tribe because of the objections of the state government and the lack of an agreement between the Tribe and the local government. *See* Letter from Asst. Secretary C.J. Artman, Department of the Interior to Chief G. Wickliffe, United Keetoowah Band of Cherokee Indians (Jan. 4, 2008).

Gaming is not currently permitted as a matter of law in Massachusetts, with the exception of bingo, beano, and other lottery events sponsored by charitable or social organizations and permitted on a case-by-case basis by local and state authorities. Given the statewide legal restrictions on mid- to large-scale gaming activities, the Town of Mashpee has not adopted any Zoning Bylaws, Regulations, or policies to govern this specific type of land use. Nor do its existing Bylaws, Regulations, and policies address the potential impacts of such uses on neighboring properties. Mashpee is a predominantly residential community, with a few concentrated areas of commercial and industrial use, principally located along state highways or “major” roads. There are no large hotels or resort/recreational facilities in Mashpee. There are few, if any, large, undeveloped tracts of land in the Town that would be suitable for any gaming or hotel/resort destination due to the environmental, access, and/or topographical conditions affecting these sites. Furthermore, the existing roadway infrastructure in the Town and the Upper Cape Cod region and, indeed, access to the Cape itself, are clearly inadequate for any such use.

As noted above, Mashpee, like Cape Cod generally, has a fragile ecosystem. In an effort to preserve what open natural lands survive, over the past several years the Town has prioritized its efforts to obtain whatever funds may be available to acquire land for conservation and open space purposes. Water supply in the Town is provided by the Mashpee Water District, a separate governmental entity, whose input on any major development project and the project’s impact on water supply capacity would be necessary. A major concern among Town residents and Town officials alike is the lack of public sewerage or wastewater disposal facilities serving properties in the Town. All wastewater generated in Mashpee is treated and disposed of by privately-owned and maintained treatment/disposal facilities. The proliferation of these in-ground disposal

systems and the high levels of nitrogen they generate have so adversely affected waterways and coastal bays within the Town that the Town has been compelled to adopt stringent denitrification standards and requirements in conjunction with new or upgraded wastewater disposal systems servicing Town properties. Discussion of wastewater/stormwater disposal alternatives is currently a major agenda item for many Town boards and agencies; however, long-term remedies for this problem are both costly and challenging from an engineering perspective. Any gaming enterprise in Mashpee would likely face substantial, if not insurmountable, environmental hurdles, given these infrastructure concerns.

In light of these conflicts, and the new Departmental guidance, the Tribe's application, as currently structured, cannot be granted. The BIA should decline the application now in its entirety.

2. The Town Will Not Transfer Lands to the Tribe without an IGA

The Tribe's application indicates that the Town will transfer its title to certain parcels of land – the Old Indian Meeting House parcel, the Town Cemetery, the Parsonage parcel – and will release the Town's reverter interest and deed restrictions in the Tribe's Museum and Tribal Council Offices parcels so that the land may be acquired in trust for the Tribe. This is an inaccurate and presumptive assertion by the Tribe. Without an IGA guaranteeing that this land will not be used for unapproved gaming purposes and that the Tribe will not pursue land claims against any land within the Town, the Town will not transfer the title to these parcels to the Tribe.

In a letter issued by the Mashpee Wampanoag Tribal Council President, dated September 28, 2006, which was incorporated as an Exhibit to the Tribe's Application and is

appended hereto as Exhibit 1, as well as in numerous other public statements by its representatives, the Tribe has assured the Town and its citizens that the Tribe “will file no land claims to land held in private hands in the Town of Mashpee or elsewhere on Cape Cod.” In addition to protecting the real estate interests of its residents and business owners, the Town has an obvious interest in protecting and securing the status of Town-owned real estate. To this end, and in conjunction with the ongoing IGA negotiations with the Tribe, the Town assembled an inventory of all Town-owned property and made this inventory available to the Tribe. In exchange for a binding IGA commitment by the Tribe not to pursue land claims against privately-owned and Town-owned property, the Town is prepared to pursue all steps necessary to convey the Mashpee lands identified in the Tribe’s Trust Application to the Tribe, subject to authorization by the Mashpee Town Meeting, as required by Massachusetts General Laws, Chapter 40, sections 15 and 15A. No progress will be made in this regard, however, without a final IGA in place.

Furthermore, with respect to the parcel identified as the “Town Cemetery,” other legal impediments may preclude this parcel from being placed into trust. This parcel was acquired by the Town in 1874 and, based on available information, has been utilized as a public/municipal cemetery since that time. Municipal cemeteries and burying places are governed by the provisions of General Laws, Chapter 114, sections 10 *et seq.* This statute places certain obligations upon towns to maintain the availability of and to preserve, in perpetuity, burial lots for the interment of persons dying within their territorial limits. Notably, Section 17 of Chapter 114 provides that “a town shall not alienate or appropriate to any other use than that of a burial ground, any tract of land which has been for more than one hundred years used as a burial place; and no portion of such burial ground shall be taken for public use without special authority from

the general court.” Thus, as a matter of Massachusetts law, the authority of the Town to convey this parcel to the Tribe is questionable without a Special Act of the Massachusetts legislature. The future responsibility and liability for providing burial lots at the subject parcel and assuring the availability of same for the general population of the Town, which is now the duty and responsibility of the Town, must also be addressed, presumably by an IGA, before this parcel could conceivably be transferred to the Tribe.

Consequently, the BIA will not be able to acquire the Mashpee lands in trust, and must decline the Tribe’s request.

C. The BIA Must Prepare an EIS Covering the Entire Proposal

A thorough EIS is required for the proposed acquisitions in both Mashpee and Middleborough. Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To ensure that this commitment is “infused into the ongoing programs and actions of the Federal Government, the act also establishes some important ‘action-forcing’ procedures.” 115 Cong. Rec. 40416 (remarks of Sen. Jackson). Section 102 directs, among other things, that agencies contemplating a major federal action assess the environmental impacts of a proposed action in an EIS, before committing to that action.

The purpose behind section 102’s EIS requirement is to ensure that the agency, in reaching its decision, carefully considers detailed information concerning significant environmental impacts and that such information is made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision. *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462

U.S. 87, 97 (1983); *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981). Assessing the environmental impacts of a proposed action enables an agency to engage in informed decision-making.

1. An EIS Is Required for the Proposed Action

Although the BIA has not announced that it is initiating NEPA review, an EIS is required. NEPA requires the preparation of an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). The purpose behind this requirement is to ensure that an agency, “in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Moreover, such information must be made available to the public for review. *Id.*

The Tribe’s proposed development requires an EIS. The Department has adopted the policy of preparing EISs for all gaming-related development.² Casino development, particularly where Class III gaming will be conducted, as the Tribe has proposed in this case, has substantial traffic, noise, water, pollution, crime, and quality of life impacts. BIA’s 2005 Checklist provides that “[p]roposals for large, and/or potentially controversial gaming establishments should require

² See, e.g., National Indian Gaming Commission Notice of Availability of a Draft Environmental Impact Statement and a Draft Conformity Determination for the Proposed Federated Indians of the Graton Rancheria Casino and Hotel Project, Sonoma, CA, 72 Fed. Reg. 10790-04 (Mar. 9, 2007); Bureau of Indian Affairs Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Hannahville Tribe of Potawatomi Indians’ Hotel and Casino Project, Romulus, MI, 72 Fed. Reg. 7068-02 (Feb. 14, 2007); Bureau of Indian Affairs Notice of Availability of Draft Environmental Impact Statement for the Proposed Transfer From Fee-to-Trust Land of Oneida Indian Nation of New York Land in Oneida and Madison Counties, NY, 71 Fed. Reg. 67896-01 (Nov. 24, 2006); Bureau of Indian Affairs Final Environmental Impact Statement for the Elk Valley Rancheria’s Proposed 203.5 Acre Martin Ranch Fee-to-Trust Transfer and Casino/Resort Project, Del Norte County, CA, 71 Fed. Reg. 59127-02 (Oct. 6, 2006).

the preparation of an EIS, especially if mitigation measures are required to reduce significant impacts.”

Because the Tribe has submitted a joint application to have lands in Mashpee and Middleborough acquired in trust and designated the initial reservation of the Tribe for gaming purposes, the EIS should address the development in both locations and treat such development as interchangeable. The application is a single proposed federal action and all of the land will share the same status. As such, any activity permissible at one site would be permissible at the other. One comprehensive EIS is particularly appropriate, given that the casino, regardless of its location, will provide employment and training opportunities for tribal members, many of whom will travel from one location to the other to take advantage of the services the Tribe will provide and the employment opportunities the casino development will offer. To capture the impacts associated with the proposed action, the BIA must evaluate all of the land in a single EIS.

2. The Town Must Be Included as a Cooperating Agency

In addition, the Town should be designated as a cooperating agency for purposes of NEPA compliance. Under the Council on Environmental Quality regulations, a “cooperating agency” can include any state or local agency that has “jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal.” 40 C.F.R. § 1508.5. Whereas federal agencies meeting those qualifications are required to participate as cooperating agencies upon request of the lead agency, *see id.* § 1501.6, state and local entities are strongly encouraged to do so through agreement with the lead agency. *Id.* Clearly, the Town qualifies in that it has “jurisdiction by land” and “special expertise” with respect to the environmental impacts the proposed project will generate. In fact, given that the Town owns or possesses an interest in

several of the parcels of land for which trust status is being sought, the Town should be included as a cooperating agency. Moreover, under NEPA, BIA owes a higher duty because the Tribe's proposal is at odds with local land use. *See Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1036 (D.C. Cir. 1973). Town participation will help BIA meet that duty.

Having the Town participate as a cooperating agency will substantially improve the environmental review process. NEPA guidance indicates that the "benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues," and that enhanced cooperating agency participation "foster[s] intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents." Memorandum for the Heads of Federal Agencies from James Connaughton, Council on Environmental Quality (January 30, 2002). Such goals are particularly important here, where a transfer of jurisdiction over substantial lands would occur between the Town and the Tribe, and where this transfer would have long-term impacts on the relationships of these neighboring governments. Fostering a strong and cooperative inter-governmental relationship by including the Town as a cooperating agency would be highly beneficial.

President Bush has, in fact, directed federal agencies to include local governments in the environmental process "in a manner that promotes cooperative conservation, with an emphasis

on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.” Executive Order 13352, Facilitation of Cooperative Conservation (Aug. 26, 2004). The Department of the Interior and its agencies are to carry out their programmatic duties in a manner that: 1) facilitates cooperative conservation; 2) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources; 3) properly accommodates local participation in Federal decision-making; and 4) provides that the programs, projects, and activities are consistent with protecting public health and safety. *Id.* To that end, it is critical that the Town be included as a cooperating agency in the environmental review process.

D. Response to BIA Questions

The Town has provided more extensive comments on the proposed acquisitions in order to bring to the BIA’s attention serious problems with the Tribe’s application. Most of those problems can be resolved only through the development of an IGA with the Tribe. The Town’s intent is to provide the BIA with this information before it invests time and resources into reviewing an application that cannot be granted. The BIA, however, has requested only a very limited amount of information. The following responds to the BIA’s request.

1) BIA requested information regarding the annual amount of property taxes currently leveled on the property. The current amount of property taxes is set forth in the table below.

Property	Property Tax	Property Tax
Parcel 1: Old Indian Meeting House	Exempt- Town owned	Exempt- Town owned
Parcel 2: Town Cemetery	Exempt- Town owned	Exempt- Town owned
Parcel 3: Parsonage	Exempt- Town owned	Exempt- Town owned
Parcel 4: Tribe's Museum	Exempt	Exempt
Parcel 5: Tribe's Council Offices	Exempt	Exempt
Parcel 6: Vacant Land	Exempt	Exempt
Parcel 7: Vacant Land	Exempt	Exempt
Parcel 8: Conservation Land (burial land)	Exempt	Exempt
Parcel 9: Conservation Land	Exempt	Exempt

2) BIA requested information regarding any special assessments, and amounts thereof, which are currently assessed against the property. Special assessments include water rates, charges, and betterments assessed by the Mashpee Water District and possible street/sidewalk betterments assessed by the Town of Mashpee.

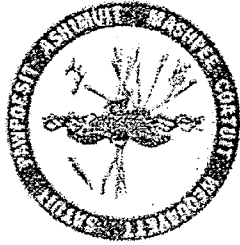
3) BIA has requested information regarding any governmental services which are currently provided to the property by the Town's jurisdiction. The Town currently provides services, including police, fire-protection, emergency medical services, public school for residential properties, maintenance of public ways serving all parcels, maintenance of Town-owned parcels.

4) BIA has requested information regarding how the land is currently zoned. The properties are zoned as follows:

Property	Zoning Designation
Parcel 1: Old Indian Meeting House	R-3, Residential
Parcel 2: Town Cemetery	R-3, Residential
Parcel 3: Parsonage	R-5, Residential
Parcel 4: Tribe's Museum	R-5, Residential, and Mashpee Center Overlay District
Parcel 5: Tribal Council Offices	R-3, Residential
Parcel 6: Vacant Land	R-5, Residential
Parcel 7: Vacant Land	R-5, Residential
Parcel 8: Conservation Land (burial land)	R-3, Residential
Parcel 9: Conservation Land	R-3, Residential

III. CONCLUSION

For the reasons discussed herein, the Town opposes the proposed trust acquisition. The Tribe has requested a determination that all of the lands involved in the proposed acquisition qualify for gaming purposes under section 20 of IGRA. Such development is antithetical the character of the region and would be highly detrimental to the fragile Cape environment. Without the support of the Town, the Tribe's request should be rejected. If BIA continues to process the Tribe's request, an EIS is required. That EIS must evaluate less harmful alternatives than trust land acquisition for the proposed uses. BIA must deny the Tribe's request.



Mashpee Wampanoag Tribal Council

483 Great Neck Road, South • P.O. Box 1048 • Mashpee, Massachusetts 02649
508-477-0208 • FAX 508-477-1218

September 28, 2006

Board of Selectmen
Town of Mashpee
Mashpee, Massachusetts

Ladies and Gentlemen:

As you know, on March 31, 2006, the United States Department of the Interior issued a proposed finding that the Mashpee Wampanoag Indian Tribe exists as an Indian tribe within the meaning of federal law. Comments on that proposed finding are due from interested parties by October 3, 2006. A final decision is due by March 31, 2007. Our Tribe has fought for this simple, but profound, affirmation of our people and community for over 30 years. I cannot understate how much recognition will mean to our people in terms of basic dignity. Because of the strength of the preliminary finding, we are optimistic of a positive finding.

Remembering the bitter conflict over land and sovereignty that was fought between the Town and the Tribe in the 1970s, after the preliminary decision had been issued, we have participated in a series of what we thought had been very constructive discussions with the committee of the Board of Selectmen and the Town manager in order to address the concerns of our fellow citizens and to talk about how the Tribe's recognition (which will potentially mean an influx of federal dollars) could benefit the Town.

Recently, those discussions have taken an unforeseen turn. We have been told that unless we sign a Memorandum of Agreement with severe restrictions on our rights and future, the Town would file an objection to recognition.

Given the solidity of the BIA's preliminary finding and the clarity to be found in decided law on the Tribe's right to seek recognition, the Tribe believes that such an action could only be viewed as mean spirited and punitive. It would mean a return to the old days of spending millions of taxpayer dollars in an effort to deny basic dignity to our people who have been good stewards of a place called Mashpee since time immemorial. We respectfully ask you to turn back from that destructive and wasteful course of action.

Let us make some things clear:

1. Federal Recognition is simply that: The United States recognizing that a Tribe meets 7 very specific criteria and that a government to government relationship exists after recognition.

2. All land and legal issues come after that. The Tribe and Town will enter into negotiations when the Tribe takes land into trust, by law.

We understand people being concerned despite our long held and expressed policies.

Accordingly, the Tribal Council met on September 28, 2006 and unanimously authorized me, as President of the Tribal Council, to inform the Board of Selectmen, as follows:

1. When recognized, the Mashpee will file no land claims to land held in private hands in the Town of Mashpee or elsewhere on Cape Cod.

2. When recognized, the Mashpee will not build a casino in the Town of Mashpee or elsewhere on Cape Cod.

Frankly, the Tribal Council has taken these actions out of both concern for our Town and because we see both as being in the Tribe's best interests.

As for land claims, we simply have no desire to disrupt the peace and sanctity of you, our neighbors, friends and family. Pursuing such claims would cost us all millions of dollars. We think that would be a waste of time, energy and resources. We wish to leave the past in the past. Our only goal is to strengthen the Mashpee as a self reliant community.

As for gaming, if we are able to be involved in a gaming venture after complying with lots of laws and regulations, we are going to be involved in the best casino gaming venture possible in order to maximize economic return to the Tribe. That being the case, building a casino in Mashpee is simply not a good idea as a business matter. You don't have to take our word on it, we have been told that by experts. You can be, too. The reason operating in Mashpee would not be optimal is because of the simple fact that a person has to cross a two lane bridge (renowned to all of us for back ups!) and then travel further by two lane highways. Again, we do not intend to build in Mashpee.

However, entering in to an agreement giving up any economic avenues prior to recognition could be extremely harmful to the Tribe and no benefit to the Town.

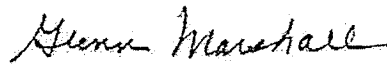
So, I know you are saying why won't the Tribe sign our memorandum given these intentions. The answer lies in law and history.

It is premature to enter into any official agreement that has little or no value. As stated above, we firmly believe that the Tribe will be recognized. When we are recognized, we eagerly look forward to working with all governments to develop agreements and development plans that serves all of us.

Over the course of U.S. history, trusting Native American Tribes have consistently hurt themselves by being pressured or threatened into one-sided agreements. We know that and you know that. The Mashpee Wampanoag Tribe is not going to do that. We have worked for over 30 years for equality and dignity and if we have to work longer and spend more because of the Town's actions, we will. History has also proven that peace at any price never works.

In conclusion, we ask you to respect and trust us. We have given our word. That is sacred in our culture. We will not take our fellow citizens' homes. We will work with you responsibly and collaboratively on all development issues that affect the Tribe and Town. Please reject the politics of prejudice. Join the 7 other Towns on Cape Cod that have endorsed our place in history. The decision is yours. Thank you for your consideration of these matters.

Very truly yours,


A handwritten signature in cursive script that reads "Glenn Marshall".

Glenn Marshall
President

From: Origin ID: JPNA (202)434-1656
Rebecca Brezenoff
PERKINS COIE
607 Fourteenth Street, NW

Washington, DC 20005

FedEx
Express

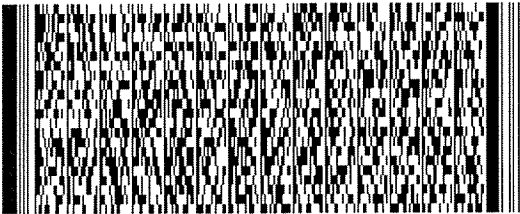


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