

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE COMMONWEALTH OF
MASSACHUSETTS,

Plaintiff,

v.

THE WAMPANOAG TRIBE OF GAY
HEAD (AQUINNAH), THE WAMPANOAG
TRIBAL COUNCIL OF GAY HEAD, INC.,
and THE AQUINNAH WAMPANOAG
GAMING CORPORATION,

Defendants.

Case No: 1:13-cv-13286-FDS

(formerly Massachusetts Supreme
Judicial Court for Suffolk County
Civil Action No. SJ-2013-0479)

**COMMONWEALTH’S REPLY TO DEFENDANTS’ OPPOSITION TO
COMMONWEALTH’S MOTION FOR REMAND**

The Commonwealth files this reply (along with an assented-to motion for leave to do so) to respond to the Tribe’s argument that the Tribe is not legally bound by the terms of the 1983 Settlement Agreement that effectuated the transfer of publicly and privately held land to the Tribe. It is not clear what relevance this assertion has to the presence of a Federal question that would warrant this Court’s retention of the case—i.e. why this is nothing more than a defense the Tribe may assert in answer to the Commonwealth’s State law claims.¹ In any event, as is evident from the authoritative sources discussed herein, the Settlement Agreement and the obligations it entails are binding and enforceable against all parties to the Agreement, including the Tribe.

¹ It is unclear that the Tribe even wants the Court to analyze the substantial Federal question it advances. Though the Tribe opposes remand to a court that unquestionably has jurisdiction over it, at least with respect to the Settlement Agreement, see Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp., 443 Mass. 1, 16-17, 818 N.E.2d 1040, 1051 (2004), it also anticipates “challeng[ing] the court’s jurisdiction over [it], including but not limited to [its] sovereign immunity from suit.” Notice of Removal at 6, ¶ 24.

ARGUMENT

The Settlement Agreement is Enforceable against the Tribe.

In its Opposition, the Tribe asserts that (1) the Wampanoag Tribal Council of Gay Head, Inc. (“Tribal Council”) lacked the authority to enter into a binding Settlement Agreement on behalf of the Tribe; and (2) neither the parties to the Settlement Agreement nor Congress intended to make the Settlement Agreement binding and enforceable on the Tribe. By way of the Settlement Agreement, the Tribe was deeded over 400 acres of land subject to certain clear conditions. This exchange of value was ratified by both State and Federal legislative bodies. Now the Tribe argues that it cannot be bound by the agreed-on conditions, while—presumably—retaining possession of the land that was deeded in exchange for and in reliance on those conditions. This position is ahistorical and unsupportable.

A. The Tribe existed at the time of the Settlement Agreement and the Tribal Council possessed the authority to bind it.

The Tribe contends that, “[the Tribal Council] had no authority or capacity ... to limit the sovereignty of [or] contractually bind ... a tribe that did not exist.” Opp. at 7. This argument is wrong for several reasons.

First, the now-Federally acknowledged Tribe existed in 1983 when the parties executed the Settlement Agreement. When the Secretary of the Interior granted the Council’s petition for acknowledgment, it did not create the Tribe; it merely recognized the Tribe’s existence. See 52 Fed. Reg. 4193 (1987) (acknowledging the existence of the Council as an Indian tribe under Federal law). Indeed, among the regulatory criteria in effect in 1987 for Federal recognition of an Indian Tribe was that “[a] substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.” 25 C.F.R. § 83.7 (1978) (Decl. of Bryan F. Bertram in Support of the Commonwealth’s Mot. for Remand. (“Bertram Decl.”), Ex. B). In other words, the Tribe could not have been Federally recognized in 1987 had it not already been in existence in 1983. Thus,

the Department of the Interior’s formal acknowledgement of the Tribe established that the Tribe had existed since historical times, including only a few years earlier when, through the Council, it negotiated and executed the Settlement Agreement. See Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994) (explaining that, when the United States recognizes a tribe, it acknowledges the tribe’s “previously existing status” and its “retained sovereignty.”).²

Next, the Tribe challenges the authority of the Tribal Council to act on behalf of the Tribe prior to the Tribe’s Federal acknowledgement and accuses the Commonwealth of improperly conflating the Tribal Council and Tribe. See Opp. at 7. This argument is also unavailing. As a threshold matter, the Commonwealth defines and refers to the Council in the same manner as the Federal government has done repeatedly. The Department of the Interior specifically recognized the “Wampanoag Tribal Council of Gay Head, **Inc.**” as the Federally recognized Indian tribe. 52 Fed. Reg. 4193 (1987) (emphasis added) (Bertram Decl., Ex. A).³ Congress did the same in the Federal Settlement Act. See, e.g., 25 U.S.C. § 1771(7) (“[T]he Secretary has acknowledged the existence of the Wampanoag Tribal Council of Gay Head, **Inc.** as an Indian tribe and Congress hereby ratifies and confirms that existence as an Indian tribe . . .”) (emphasis added); § 1771f(2) (defining Wampanoag Tribal Council of Gay Head, Inc., as “the tribal entity recognized by the Secretary of the Interior” and consisting of 521 individual members and “such Indians of Gay Head ancestry as may be added from time to time”). The Commonwealth therefore properly avers in its Complaint that “[t]he Wampanoag Tribe of Gay Head (Aquinnah) includes the Defendant Wampanoag Tribal Council of Gay Head, Inc.,” Compl. ¶ 11, and in its filings has

² See also U.S. Congressional Research Service, R45031, Summary, Apr. 26, 2013, Jane M. Smith, available at <http://www.fas.org/sgp/crs/misc/R43051.pdf> (“The key to federal acknowledgment is continuous political existence of an Indian group from historical times to present. The federal acknowledgement process does not create tribes, and it does not give groups sovereignty.”).

³ See also 46 Fed. Reg. 50614 (Oct. 14, 1981) (public notice of petition for acknowledgment by “Wampanoag Tribal Council of Gay Head, Inc.”) (Bertram Decl., Ex. C); 51 Fed. Reg. 23604 (June 30, 1986) (public notice of Department of Interior’s proposal to decline Federal acknowledgement of “Wampanoag Tribal Council of Gay Head, Inc.”) (Bertram Decl., Ex. D).

referred to these entities in the same fashion as the Federal government. See 52 Fed. Reg. 4193; 25 U.S.C. § 1771(7). The Federal government has repeatedly stated that the Wampanoag Tribal Council of Gay Head, Inc. *is* the Tribe and the Commonwealth does nothing more than follow Federal pronouncement.

In any event, even if the Tribe correctly distinguishes between the Tribe and the Tribal Council—i.e. that Federal law did not acknowledge the two to be one and the same—that distinction is without consequence. The Tribal Council plainly intended and had authority to act on behalf of the Tribe. First, the language used in the Settlement Agreement reflects the parties’ intent to benefit and bind the Tribe, not just the corporate entity members of the Tribe created to act as its legal representative. See Settlement Agreement ¶¶ 8(d), 12 (stating that “the Settlement Lands are to be held in trust ... for the benefit of Gay Head Indians” and supporting Congressional action to “extinguish all claims of any kind by the alleged Gay Head Tribe.”). Likewise, Congress viewed the Tribal Council as the authorized representative of the Tribe, empowered to enter a binding Settlement Agreement on its behalf and drew no distinction between the Tribal Council and the Tribe. Congress affirmed the Secretary’s designation of the Council as the Tribe and defined the Council as the Tribe for the purpose of the Federal Settlement Act. 25 U.S.C. 1771(7) and (f)(2); see 52 Fed. Reg. 4193 (1987) (recognizing the existence of the Tribal Council as the Tribe).⁴

Moreover, the Secretary of the Interior’s Federal acknowledgement of the Tribe—including the findings of fact supporting that decision—demonstrates the Tribal Council’s authority to act on behalf of the Tribe. The Department of the Interior acknowledged receipt of the petition for Tribal acknowledgment to the “Wampanoag Tribal Council of Gay Head, Inc.”⁵

⁴ The Articles of Organization for the Wampanoag Tribal Council of Gay Head, Inc. underscore that this entity was an embodiment, extension, and/or legal representative of the Tribe. Those Articles list as its membership “all descendants of Gay Head Wampanoags”—in other words, all members of the Tribe. Bertram Decl., Ex. G (Articles of Organization).

⁵ Letter from Hazel E. Elbert, Acting Director, office of Indian Services to Gladys A. Widdiss, President, Wampanoag Tribal Council of Gay Head, Inc., July 28, 1983 (Bertram Decl., Ex. E.)

Federal Register notices concerning that petition all refer to the “Wampanoag Tribal Council of Gay Head, Inc.” 46 Fed. Reg. 50614; 51 Fed. Reg. 23604. To acknowledge the Tribe, the Department of the Interior examined evidence and found that the “Wampanoag Tribal Council of Gay Head” maintained political influence and authority over members of the Tribe and the Department subsequently recognized the “Wampanoag Tribal Council of Gay Head, Inc.” as that Indian tribe.⁶ Having advanced its petition for Federal acknowledgment through its Tribal Council, the Tribe may not now claim that the same Tribal Council lacked authority to act on behalf of the Tribe when negotiating with the Commonwealth during the very same time.

Courts have also concluded that the Tribal Council was authorized to act for the Tribe. In several related court actions, dissident tribal members challenged this authority to no avail. This litigation history is recounted at length in James v. Bellotti, 733 F.2d 989, 991 (1st Cir. 1984). Specifically, the District Court granted summary judgment against the members; on appeal, the First Circuit held that these plaintiff-members lacked standing to represent the Tribe. Id. at 991. In response, the plaintiffs filed another suit, this time in State court, seeking a declaration that the Tribal Council lacked authority to speak for the Tribe. Id. at 992. After removal, the District Court ruled that the plaintiffs “should not be permitted to challenge the authority of the [Council]” by replicating “their effort to intervene in the principal action.” Id. On appeal, the First Circuit agreed with the District Court’s conclusion that the plaintiffs were estopped from re-litigating their claim that the Tribal Council failed to adequately represent them. Id. at 994. Subsequently, the Massachusetts Appeals Court noted that the Tribal Council’s authority had been adjudicated in the Council’s original litigation. James v. Wampanoag Tribal Council of Gay Head, Inc., 23 Mass. App. Ct. 122, 124-25, 499 N.E.2d 1213, 1215 (1986). Thus, in the litigation leading to the Settlement, the District Court considered and rejected the argument that

⁶ Memo. from Deputy to the Asst. Secretary – Indian Affairs (Tribal Svcs.) to Asst. Secretary – Indian Affairs, Subject: Recommendation for Final Determination that the Wampanoag Tribal Council of Gay Head, Inc., exists as an Indian Tribe pursuant to 25 CFR 83, United States Dept. of the Interior, Jan. 27, 1987 (Bertram Decl., Ex. F); 52 Fed. Reg. 4193 (1987).

the Council lacked the authority to represent the Tribe. There is no reason for this Court to now reach a different result.

Finally, even if the Tribal Council lacked authority to bind the Tribe at the time the parties executed the Settlement Agreement, there can be no reasoned dispute that the Settlement Agreement bound the Wampanoag Tribal Council of Gay Head, Inc., a Massachusetts incorporated entity. The terms of that Settlement Agreement apply with equal force to the Tribe as a successor holder of the Settlement Lands. See 25 U.S.C. § 1771e(b) (“Subsequent holder bound to same terms and conditions”).

B. The Settlement Agreement became effective through ratification by Congress.

Next, the Tribe erroneously characterizes the Settlement Agreement as a framework which “set the groundwork” for the Tribe’s Federal recognition and its receipt of the Settlement Lands, rather than a free-standing agreement among parties to litigation. Def.’s Opp. at 1-2. The Settlement Agreement was the mechanism under which the Tribe was granted title to the Settlement Lands, not a precursor for later action. The validity of the Agreement does not depend on subsequent Federal recognition of the Tribe. See Settlement Agreement ¶ 13 (“All Federal, State, and Town laws shall apply to the Settlement Lands . . . regardless of any Federal recognition the alleged Gay Head Tribe may acquire[.]”); ¶ 14 (specifying that Gay Head Indians would not receive Federal recognition through legislation ratifying the Settlement Agreement, but could petition separately for it). Congressional ratification was the end, not the beginning, of the parties’ agreement to resolve the 1974 suit.

In entering into the Settlement Agreement, the parties intended to achieve finality and certainty regarding the Tribe’s claim to aboriginal title to certain lands in and around Martha’s Vineyard. See 25 U.S.C. § 1771(3) (“Congress shares with the [State] and the parties to the lawsuit a desire to remove all clouds on titles resulting from [the Tribe’s] land claim.”) The Settlement Agreement reflected a fair compromise, reached after nine years of litigation and extensive negotiations. For valuable consideration—namely title to 400 acres of land on

Martha's Vineyard—the Tribe knowingly and intelligently agreed to subject the Settlement Lands to State law. The parties reached this compromise in order to resolve the litigation, eliminate any remaining Tribal land claims, and clear title to the disputed lands. See 25 U.S.C. 1771(2)-(4). The parties sought ratification by Congress to secure additional funding for the purchase of the Settlement Lands and to extinguish the Tribe's aboriginal land claims. See 25 U.S.C. 1771a(d) (matching the State's contribution towards purchase of the Settlement Lands) and 1771b(b) (extinguishing any aboriginal title held by the Tribe). In seeking Congressional approval, the parties intended Congress to ratify, not revise, the carefully balanced Settlement Agreement struck between the State, the Town, and the Tribe.

Sharing the parties' desire to achieve finality regarding the Tribe's land claims and cognizant of the extensive negotiations that led to the Settlement Agreement, Congress obliged. The text and legislative history of the Act demonstrate that, in enacting the Federal Settlement Act, Congress did not intend to alter the bargain struck between the parties, but to ratify it.⁷ Congress named the Act to reflect this purpose: "Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Federal Settlement Act of 1987." Most importantly, Congress expressed its intent to ratify the jurisdictional compromise reached by the parties by declaring that that the Settlement Lands "shall be subject to" the Settlement Agreement. 25 U.S.C. 1771d(d). In sum, the parties to the Agreement and Congress intended the Settlement Act to be an enforceable agreement, binding on the State and the Tribe, and this Court should so interpret it.

CONCLUSION

For the foregoing reasons, and for all the reasons Stated in its Memorandum of Reasons in Support of its Motion for Remand, the Commonwealth of Massachusetts respectfully requests that the Court remand this case to the Massachusetts Supreme Judicial Court for Suffolk County.

⁷ It is undisputed that Congress possessed the authority to ratify the Settlement Agreement and alter the Tribe's jurisdiction accordingly. "The sovereignty that the Indian tribes retain is ... subject to complete defeasance [by Congress]." U. S. v. Wheeler, 435 U.S. 313, 323 (1978).

Respectfully submitted,

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By and through its attorney,

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