No. 16-2484

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACORD; DEBORAH CANARY; VERONICA CASEY; PATRICIA COLBERT, VIVIAN COURCY; DONNA DEFARIA; KIM DORSEY; FRANCIS LAGACE; WILL COURCY; ANTONIO DEFARIA; KELLY DORSEY; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; ROBERT LINCOLN; CHRISTINA MCMAHON; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY; LOUISE SILVIA; FRANCIS CANARY, JR.; MICHELLE LEWRY; RICHARD LEWRY,

Plaintiffs – Appellees,

v.

MASHPEE WAMPANOAG INDIAN TRIBE,

Defendant – Appellant,

BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior; RYAN ZINKE, in his official capacity as Secretary – U.S. Department of the Interior; LAWRENCE ROBERTS, Acting Assistant Secretary, Indian Affairs, U.S. Department of the Interior; US DEPT OF THE INTERIOR; UNITED STATES,

Defendants.

On Appeal from a Judgment of the United States District Court for the District of Massachusetts, No. 1:16-cv-10184-WGY, Before the Honorable William G. Young

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APPELLATE BRIEF OF DEFENDANT-APPELLANT MASHPEE WAMPANOAG INDIAN TRIBE

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The U.S. District Court for the District of Massachusetts granted the motion for summary judgment of Plaintiffs-Appellees, certain residents of the City of Taunton, Massachusetts, on their declaratory judgment claim that the decision of the Secretary of the Department of the Interior (the "Department") lacked the authority to accept certain land into trust for the benefit of Defendant-Appellant Mashpee Wampanoag Indian Tribe under the Indian Reorganization Act (the "IRA") in the manner the Department had done.

The District Court's decision, including as clarified in a later order, is premised on the fundamental error of law that the at-issue language of the IRA is unambiguous and contradicts the interpretation under which the Department accepted the land into trust. Reversal is required.

CORPORATE DISCLOSURE STATEMENT

Appellant is a federally recognized Indian tribe and no corporate disclosure statement is required under Fed. R. App. Proc. 26.1.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Appellees' complaint brought against the Department and others under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq*. ("APA"). On July 28, 2016, the District Court ruled in favor of Appellees on their motion for summary judgment on their first cause of action

and entered judgment in favor of Appellees. Appellant was not a party at that time. In its Memorandum & Order regarding summary judgment, the District Court, consistent with a stipulation between the Department and Appellees, "determine[d] there [was] no just cause for delay, Fed. R. Civ. P. 54(b), and enter[ed] this declaratory judgment on the Plaintiffs' first cause of action." Addendum to Appellants' Brief ("ADD"), at 0162.

On August 24, 2016, the Department filed a motion for partial reconsideration or clarification of the District Court's Memorandum & Order regarding summary judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6), which tolled the time for any party to file a Notice of Appeal. Fed. R. App. P. 4(a)(4)(A). On October 12, 2016, the District Court ruled on the Department's pending motion, and explained that the Department if it so wished could, consistent with the District Court's rulings, analyze whether Appellant fell under the definition of "Indian."[1] ADD0167.

[1] This Court ordered on October 4, 2019 that in the parties' respective briefing on this appeal each was to "address the mootness and Rule 54(b) issues [previously briefed in response to this Court's August 20, 2019 Show Cause Order] more fully." Doc. No. 00117478647. Appellant incorporates by reference herein its prior submissions on these issues. Doc Nos. 00117484220 and 00117488868. In compliance with this Court's order for further briefing on these issues, Appellant further address the questions as to mootness and Rule 54(b) *infra*, Part IV.

On September 23, 2016, the District Court granted Appellant's motion to intervene in the proceeding. On December 8, 2016, Appellants filed a timely notice of appeal. Fed. R. App. Proc. 4(a)(1)(B) ("notice of appeal may be filed by any party within 60 days" if one of the parties is the United States, a United States agency, or a United States officer or employee sued in an official capacity). This Court has jurisdiction under 28 U.S.C. Section 1291.[2]

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The judgment below presents three questions for review:

First, whether the District Court erred in ruling that the language of the IRA upon which the Department relied to take certain land into trust for the benefit of Appellant was unambiguous;

Second, whether the Department's considered construction of the ambiguous statutory provision at 25 U.S.C. § 5129[3] to authorize the acquisition of trust land for Appellant is permissible; and

Third, whether this Court is the proper forum for resolving this dispute, including considering jurisdictional and mootness questions the Court has raised.

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[2] Following the November 8, 2016 election and the consequent change in administration, the Department voluntarily dismissed its appeal of the District Court's rulings at issue in this appeal.

[3] The at-issue language was previously located at 25 U.S.C. § 479.

BACKGROUND AND STATEMENT OF THE CASE

I. The Indian Reorganization Act.

During the entirety of the United States' history prior to enactment of the IRA in 1934, federal policy toward Indian tribes was dedicated to forced assimilation, wholesale removal, and even extinction. As non-Indian migration west accelerated, so too did the United States' efforts to open up Indian lands to non-Indian settlement. See Cohen's Handbook of Federal Indian Law, § 1.04, 71-72 (Nell Jessup Newton ed., 2012).

Congress enacted the IRA, also known as the Indian New Deal, in 1934 to repudiate the previous federal policy of breaking up tribal lands and to authorize a series of actions by the Department intended to rehabilitate tribes and foster tribal government and development, including authorizing the Department to acquire land in trust for Indians. Id. at § 1.05, at 81–83. It marked "a major shift in federal policy from one favoring diminishment of tribal lands to one protecting tribal lands and supporting tribal self-government and economic development." Id. at § 15.07[1][a], 1039, 1039 n. 4; see also Mescalero Apache Tribe v. Jones, 411 US 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the

initiative destroyed by a century of oppression and paternalism.'") (quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)).

The legislative history underlying the passage of the IRA evinces a keen awareness that the policies of the prior period had decimated tribal homelands and in some cases eliminated them altogether. As noted by Senator Wheeler, Chairman of the Senate Committee on Indian Affairs, one of the IRA's primary purposes was "to provide for the acquisition, through purchase, of land for Indians now landless who are anxious and fitted to make a living on such land." 78 Cong. Rec. 11,123 (June 12, 1934).

Accordingly, IRA Section 5, the "capstone" of the statute's land-related provisions, Cohen § 15.07[1][a] at 1040, delegates to the Secretary of the Interior the authority to acquire and hold in trust new land for "the Indian tribe or individual Indian" for which the land is acquired. 25 U.S.C. § 5108; 25 C.F.R. Part 151. Section 7 also provides the Secretary with the authority to proclaim new Indian reservations encompassing those trust lands. 25 U.S.C. § 5110.

The IRA defined the term "Indian" to include three distinct definitions of eligible Indians: "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction [in 1934], and [2] all persons who are descendants of such members who were, on June 1, 1934, residing

within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 5129.

II. Appellant's Loss of Land to the Colonial Government, Commonwealth of Massachusetts, and the United States.

Appellant has suffered through centuries of land loss, oppression, and near-extinction at the hands of colonial governments and the United States, and thus is emblematic of the tragic histories of Indian Tribes which Congress sought to remediate through the IRA. When Appellant first came into contact with non-Indians in the 1620's, it occupied all of southeastern Massachusetts and eastern Rhode Island, including the specific parcels at issue in this suit. ADD0065–66. By the time the United States adopted its Constitution a century and a half later, however, the colonial government through fraud, violence, and other means had reduced Appellant's territory to the roughly 17,000 acres that now comprise the Town of Mashpee, Massachusetts. ADD0065–67, ADD0116–18. From the 1820's through 1850, and various times thereafter, the United States described the Tribe's reduced territory as a reservation or Indian town. ADD0118–19.

Even beyond the explicit seizure of Tribal lands, the Commonwealth of Massachusetts facilitated the further depletion of Tribal lands. The Commonwealth purported to allot the majority of the Tribe's common lands to tribal members,

extend citizenship to tribal members, and make tribal allotments freely alienable by acts of the Commonwealth in 1842, 1869, and 1870. ADD0118–19.

Nonetheless, the Tribe maintained continuous ownership of certain parcels located in the Town of Mashpee, including the Old Indian Meeting House, the tribal cemetery, the parsonage, and the Baptist church and schoolhouse. ADD0110. These parcels, along with others, are the subject of this suit.

III. The Department's Issuance of the ROD Taking Land into Trust for the Benefit of Appellant.

In 2007, the United States acknowledged the Appellant's status as a continuously self-governing Indian tribe in accordance with federal regulations governing acknowledgment of Indian tribes. See 72 Fed. Reg. No. 35, Fe. 22, 2007. That same year, Appellant submitted its request that the United States place specified parcels of land into trust for the Tribe. ADD0007. The specified parcels in the Town of Mashpee total 170 acres, to be used as the Tribe's Government Center, tribal housing, and cultural resources (which were those continuously in tribal ownership). ADD0007–8. The specified parcels in the City of Taunton total 151 acres, to be developed as a desperately needed economic development project including Indian gaming facilities. ADD0007–8.

On September 18, 2015, the Department issued a 137-page Record of Decision ("ROD") concluding that Appellant satisfied the statutory and regulatory

requirements for having the at-issue land taken into trust for its benefit and "proclaiming them to be the Tribe's reservation." ADD0139–40. The ROD was the culmination of years of administrative deliberations under multiple federal statutes and regulations. Through the ROD, the Department announced that it would "acquire the [at-issue land] in trust and proclaim it to be the Tribe's reservation." ADD0140.[4] The Department's decision to take land into trust for Appellant represented a critical reversal of the centuries-long oppression of Appellant by the United States.

The Department decided to take the at-issue land into trust for Appellant because, among other things, it determined that Appellant satisfied the definition of "Indian" under the IRA. The IRA establishes three definitions of "Indian":

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] *all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation*, and [3] shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 5129 (emphasis supplied). The Department explained that Appellant satisfied the second definition, including because:

> [t]he Mashpee have a long recorded history at the Town of Mashpee (Town) which was originally set aside by the Colonial government for

[4] On November 10, 2015, the parcels were formally recorded as land held in trust by the United States for the Tribe and a formal reservation proclamation was signed on December 30, 2016. See 81 Fed Reg. 948, Jan. 8, 2016.

> the Mashpee Indians. The Tribe's ownership and sociopolitical control over this land has been repeatedly recognized by the Federal Government and the Commonwealth. Accordingly, the Town amounts to a 'reservation' for purposes for the IRA and the Tribe qualifies for the IRA's benefits under the second definition of "Indian."

ADD0082. The Department in great depth analyzed the meaning of the second definition, including the ambiguities in that definition, and Appellant's eligibility within that definition. ADD0082–123. Specifically with regard to the "such members" language in the second definition, the Department concluded that the phrase was ambiguous and interpreted it to incorporate the language from the first definition "members of any recognized Indian tribe," but not "now under federal jurisdiction [in 1934]." ADD0096. The Department examined Mashpee history in detail and concluded that the Tribe qualified as a tribe residing within the present boundaries (*i.e.*, the boundaries as they existed in 1934) of an Indian reservation. ADD0098–123. The Department did not address the Tribe's eligibility under the first definition of "Indian," which would have also required an analysis of whether Appellant was "now under federal jurisdiction [in 1934]." ADD0082–83 ("We have not determined whether the Mashpee could also qualify under the first definition of 'Indian,' as qualified by the Supreme Court's decision in *Carcieri v. Salazar*.").

IV. Proceedings Before the District Court

Appellees filed their amended complaint on May 2, 2016, asserting eight claims for relief, the first being a challenge to the Department's construction of the second definition of eligible tribes under the IRA. Joint Appendix ("JA") 015, ECF No. 12. Following a pre-trial conference, the parties agreed to, and the District Court ordered, a schedule to advance the matter for consideration on the merits. JA020, ECF No. 48. In particular, Appellees and the Department entered into a joint stipulation[5] limiting a hearing on the merits to the Plaintiffs-Appellees' first cause of action, which sought a declaratory judgment that the Department lacked authority to take land into trust for the Tribe under the second definition of "Indian" set forth in the Act. JA054.

On July 28, 2016 the District Court issued its opinion and order on the cross-motions for summary judgment. ADD0141. The District Court concluded that the second definition in Section 479—now recodified as Section 5129—unambiguously incorporated the entirety of the first definition, including the phrase "now under federal jurisdiction [in 1934]" the Department had not applied to Appellant in the ROD—such that deference to the Department's construction of

[5] The Tribe was not yet a party at the time of the stipulation.

the phrase "such members" was unwarranted. ADD0154–55. In so doing, the District Court began by criticizing this Court's law regarding a court's review of an agency's legal conclusions, including referring to that law as "muddled" and "flawed." ADD0149–51. In particular, the District Court explicitly rejected this Court's black letter law that an agency's legal conclusions "engender de novo review, but with some deference to the agency's reasonable interpretation of statutes and regulations that fall within the sphere of its authority." Id. (describing as "confusing" and muddled" Jianli Chen v. Holder, 703 F.3d 17, 21 (1st Cir. 2012) and Gourdet v. Holder, 587 F.3d 1, 5 (1st Cir. 2009) ("We review legal questions de novo, with appropriate deference to the agency's interpretation of the underlying statute in accordance with administrative law principles.") (internal quotation marks and citation omitted)). Indeed, the District Court concluded that this Court's "articulations of the standard of review of agency actions quoted above are flawed to the extent they suggest that 'some' deference is always due an agency's reasonable interpretations of its governing statute." ADD0151.

According to the District Court, the meaning of the second definition of "Indian" is "not a close call" and unambiguously through use of the word "such" sweeps in all the prefatory language contained in the first definition—including the requirement of "now under federal jurisdiction [in 1934]." ADD0154. In so

concluding, the District Court briefly addressed the rule against surplusage and concluded that its interpretation subsuming the first definition within the second definition did not render the second definition without meaning because it left open the "plausible" theoretical possibility that unenrolled individuals whose ancestors lived on reservations could fall within second definition. ADD0159–61.

The District Court remanded the matter "to the Secretary for further proceedings consistent with this opinion." ADD0162. Simultaneously, the District Court ruled: "In keeping with the parties' stipulation and to enable a prompt appeal of this declaration, the Court determines there is no just cause for delay, Fed. R. Civ. P. 54(b), and enters this declaratory judgment on the Plaintiffs' first cause of action." ADD0162. In post-judgment proceedings, the District Court allowed Appellant to intervene and further clarified its order by stating that the Department could, if it deemed appropriate, analyze the Appellant's eligibility consistent with the District Court's interpretation of "such members" to refer to the entirety of the first definition of "Indian." ADD0167. This appeal followed.[10]

[10] On remand from the District Court, On September 7, 2018, a new Secretary in a new Administration, Ryan Zinke, issued a new Record of Decision ("New ROD") concluding that (i) under Section 19 of the Act the Tribe does not satisfy the first definition of "Indian," but also (ii) declining to revisit or alter the conclusions of the Original ROD which is at-issue in the above-captioned proceeding. JA063, 090. The New ROD did not rely upon the second definition of Indian in any respect. JA090. Through the issuance of the New ROD, the district court's remand

SUMMARY OF THE ARGUMENT

When the District Court concluded that "such members" unambiguously referred to the entirety of the first definition of "Indian" it contravened the law of this Court that the word "such" is ambiguous, decisions of other federal courts describing the kaleidoscopic nature of the word "such," and the Department's careful interpretation of the at-issue phrase. In so doing, the District Court not only blazed an unjustified and novel interpretive path but also undercut the core intent of the IRA to provide Indian tribes like Appellant with the ability to regain at least some fraction of the lands stolen and defrauded from them over the centuries. If one tracks the law of this Court, and of other federal courts, together with fundamental principles of statutory construction there is only one conclusion: "such members" is ambiguous and the Department's interpretation that it refers solely to "members of any recognized Indian tribe" is correct. The District Court should be reversed.

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to the Secretary concluded. On September 27, 2018, the Tribe filed a Complaint in the U.S. District Court for the District of Columbia challenging the new Secretary's conclusion that the Tribe did not satisfy the first definition of "Indian" as contrary to the Administrative Procedure Act because the new Secretary's action was arbitrary, capricious, and contrary to law (the "D.C. Action"). See Mashpee Wampanoag Tribe v. Ryan Zinke, et al. (D.D.C. C.A. No. 1:18-cv-02242). Plaintiffs-Appellees are a party to the D.C. Action, as they moved to intervene without opposition. The D.C. Action, in which briefing has now been fully completed, does not relate to the second definition in any respect.

Even if one considers solely the at-issue statutory language, the District Court's conclusion that "such members" unambiguously refers to the entirety of the prefatory clause in the first definition is wrong. This Court has been clear that the word "such" has "latent ambiguity" as to whether it refers to the entirety of an antecedent clause. Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina, 36 F.3d 177, 185–86 (1st Cir. 1994). Other federal courts across the country are in accord: "such" is ambiguous and its ultimate meaning depends heavily on context and other indicia of meaning.

Multiple canons of construction require that "such members" be interpreted precisely as the Department did in the ROD. The presumption that ambiguous terms in a remedial statute like the IRA—aimed at repairing to some extent the disastrous harm visited upon Indian tribes like Appellant—are construed to advance the mission of such statutes requires such a reading. So, too, does the Indian canon of construction, which demands that ambiguous terms in statutes concerning Indians be interpreted generously to favor them. The rule against surplusage, as well, precludes the District Court's conclusion where subsuming the first definition into the second definition renders the second definition "insignificant" at best, since it degrades that definition into nothing but the theoretical.

Under Chevron, at step one of the analysis "such members" is ambiguous for all the same reasons it is ambiguous as a matter of ordinary statutory construction, particularly in light of various indicia of meaning that the District Court ignored. Under step two of Chevron, which the District Court never reached, the Department's construction of the ambiguous phrase "such members" is not only permissible but is the only reasonable construction, for all the reasons described above. As the Department's thorough analysis of the term "such members" reflects, its interpretation leveraged the Department's experience and expertise to arrive at the correct construction.

The issues in this appeal are ripe and this Court is the proper forum for resolution. Any argument that the ROD has been superseded is belied by the plain language of the Department's new record of decision, which explicitly does not supersede the original ROD regarding the second definition which was the impetus of the litigation below. Jurisdiction is proper as well; dismissing this appeal would hinder rather than aid judicial economy and would be manifestly unjust given the gravity of the issues at stake.

The District Court's entry of judgment against Appellant at summary judgment should be reversed, and judgment should enter for Appellant in light of

the Department's appropriate construction of the at-issue language in support of taking land into trust for Appellant.

STANDARD OF REVIEW

The District Court's determination that the phrase "such members" is unambiguous is a pure question of law. As a result, the judgment below is based solely on a statutory construction issue and is subject to this Court's *de novo* review. Omnipoint Holdings, Inc., v. City of Cranston, 586 F.34d 30, 45 (1st Cir. 2009).

ARGUMENT

I. The Phrase "Such Members" is Ambiguous and Must Be Interpreted to Refer Solely to "Members of Any Recognized Indian Tribe."

The District Court's confident conclusion that the phrase "such members" unambiguously refers to the entirety of the first definition of "Indian" contradicts the law of this Court, the consensus of other federal courts that the meaning of "such" is fluid and highly context-dependent, and the very dictionaries upon which the District Court relied. The District Court erred. Indeed, even before turning to the Chevron analysis fundamental principles of statutory construction demand that the ambiguity in the second definition be interpreted in precisely the fashion that the Department did in the ROD: "such members" refers solely to "members of any recognized Indian tribe."

a. The Phrase "Such Members" is Ambiguous on its Face.

i. This Court, and Other Circuit Courts, Have Recognized "Such" Is Ambiguous As to Whether it Incorporates the Entirety of a Prefatory Clause.

Consistent with the decisions of other circuit courts across the country, this Court explained in Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina ("Hogar") that "a statutory modifier like 'such'" has "latent ambiguity," particularly in determining whether "such" sweeps in the entirety of the antecedent clause. 36 F.3d 177, 185–86 (1st Cir. 1994). As the Ninth Circuit put it, "[n]o bright-line rule governs this area of the English language. 'Such' can refer exclusively to preceding nouns and adjectives. It can also refer to surrounding verbs, adverbial phrases, or other clauses. Context is typically determinative." United States v. Kristic, 558 F.3d 1010, 1013 (9th Cir. 2009).

In Hogar this Court ruled that the word "such" was ambiguous as to whether it incorporated the entirety of the sole antecedent phrase in the context of interpreting the Fair Housing Act ("FHA"). 36 F.3d at 185–86. The issue in Hogar was whether the defendant-appellee landlord fell under the "private individual owner" exemption from the FHA's anti-discrimination provisions. Id. Under that exemption, the FHA's anti-discrimination provisions do not apply to "*any single-family house sold or rented by an owner*" provided "[t]hat such private individual

owner does not own more than three *such* single-family houses at any one time." Id. at 179–80 (emphases supplied).[6] The defendant-appellee owned more than three single-family houses, but had not "sold or rented" more than three single family houses, so if "such" referred only to "single-family house" the exemption would apply, but if "such" referred to the entirety of the antecedent phrase the exemption would not apply. Id. The trial court had dismissed the lawsuit, because it concluded that "such" referred to the entirety of the antecedent clause and therefore found the FHA's anti-discrimination provision inapplicable. Id.

This Court held that the trial court was wrong that "such," an "*indeterminate* modifier," necessarily referred to the entirety of the antecedent clause. Id. at 185-86 (emphasis supplied). "The language of the statute is **not dispositive** on this issue" of whether "such single-family homes" refers to "the complete phrase—'single-family house *sold or rented by the owner*'—in the [] prefatory clause." Id. (emphasis in bold supplied). Particularly given that ambiguity on the face of the statute, this Court turned to the statute's goals to interpret the word "such": "*normally latent ambiguity in a statutory modifier like 'such' should be construed in furtherance of the statute's remedial goals*." Id. at 186 (emphases supplied).

[6] Notably, the sole antecedent clause "any single-family house sold or rented by an owner" is a single, uniform, mechanically undivided block phrase. It lacks any commas, semi-colons or other punctuation that could potentially subdivide the phrase from a grammatical perspective.

Notably, in that case an agency's interpretation of the statute was not at issue, such that ordinary principles of deference under Chevron did not apply.

In order to interpret the ambiguous meaning of the word "such" in the FHA in the absence of any agency interpretation, this Court employed "the presumption that ambiguous language in a remedial statute is entitled to a generous construction consistent with its reformative mission." Id; Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 428–29 (1st Cir.1985) (noting that this canon of construction represents an "especially reliable and legitimate" indicator of congressional intent). While recognizing it was "conceivable" that Congress had intended through the "indeterminate modifier" of the word "such" to refer to the entire prefatory clause, when this Court considered the remedial purpose of the FHA and other indicia of meaning it concluded the correct interpretation was to exclude the portion of the antecedent clause "sold or rented by an owner" in the definition of "such single family houses." Hogar, 36 F.3d at 185-186. Doing so extended, rather than limited, the anti-discrimination protections of the FHA. Id.

Consistent with this Court's ruling in Hogar, other circuit courts have recognized that the word "such" is ambiguous, particularly as to whether it refers to the entirety of a prefatory clause. N. Broward Hosp. Dist. v. Shalala, 172 F.3d 90, 95–99 (D.C. Cir. 1999) (deferring to government's interpretation of statutory

provision because the extent to which "such" incorporated prefatory language was ambiguous and "we cannot discern any clear congressional intent regarding the meaning of the provision" even with the assistance of legislative history); see also United States v. Ashurov, 726 F.3d 395, 398-400 (3d Cir. 2013) (construing "such" as ambiguous in light of rule of statutory construction against surplusage).

The Ninth Circuit has been particularly clear that in determining to which words in a prefatory clause "such" refers "[n]o bright-line rule governs this area of the English language." United States v. Kristic, 558 F.3d 1010, 1013 (9th Cir. 2009). In United States v. Kristic, for example, the Ninth Circuit reversed the dismissal of a criminal indictment because the trial court erroneously interpreted the ambiguous phrase "any such" to refer to the entirety of the antecedent clause in the at-issue statute. Id. at 1013–17.[7] There, a grand jury had indicted the appellee

[7] The District Court below relied upon a Ninth Circuit decision that preceded Krsitic, Univ. Med. Ctr. of S. Nevada v. Thompson, to claim that in the absence of specific language indicating that "such" referred back to a portion of the prefatory clause "such" unambiguously refers to entirety of the antecedent phrase. ADD0157–58 (citing 380 F.3d 1197, 1200–01 (9th Cir. 2004)). Thompson, however, did not announce any overarching rule for the interpretation of the word "such," but instead in *dicta* said solely that in the particular context of the Medicare statute the word "such" absent a modifier like "total" would have referred to the entire antecedent clause at issue. 380 F.3d at 1200–01. Further, to state the obvious, to the extent there is any conflict between Thompson and Kristic with regard to the interpretation of "such"—and Appellant submits there is not—Kristic controls where it is the more recent decision.

for obtaining an alien registration card by means of a false statement in violation of 18 U.S.C. Section 1546(a), but there was no allegation that appellee forged the alien registration card itself. Id. at 1012. Section 1564(a) provides:

> *Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant* visa, permit, border crossing card, alien registration receipt card, or other document ... or ... *possesses ...* ***any such*** visa, permit, border crossing card, alien registration receipt card, or other document ... *knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement ...* [shall be punished].

18 U.S.C. § 1546(a) (emphases supplied).

The Government there, like the Appellant here, argued that the phrase "any such" referred back only to a portion of the prefatory clause, "*immigrant or nonimmigrant* [document]." Id. at 1013 (emphasis supplied). Thus, under the Government's reading it was a crime under Section 1564(a) to obtain an "immigrant or nonimmigrant [document]" by means of a false statement, regardless of whether the document itself was genuine. Id. The appellee in Kristic, however, like Appellees here, argued that "any such" swept in the entire prefatory clause so that it was a crime under Section 1546(a) only where an individual used a "forge[d], alter[ed], or fals[ified]" document. Id.

The Ninth Circuit found that Section 1546(a) was ambiguous: "[t]he plain language of the statute compels neither the government's reading nor [appellee]'s

reading. The statute's text leaves us in perfect equipoise." Id. at 1013. Notably, in so doing, the Ninth Circuit looked to dictionary definitions of "such," as the District Court here did, but came to the opposite conclusion as to ambiguity. Id. Where the Second Edition of the Oxford American Dictionary defined "such" as "of the type previously mentioned" and Black's Law Dictionary defined it as "[t]hat or those; having just been mentioned," the Ninth Circuit concluded that the definitions were not dispositive on the question of whether "such" referred to the entirety of the prefatory clause. Id. Ultimately, the Ninth Circuit concluded that the Government was correct that "any such" referred only to any "immigrant or nonimmigrant [document]" and not the entirety of the prefatory clause: "[n]othing in the [legislative history] suggests that Congress intended to require, for the first time, an *already* forged or counterfeited document." Id. at 1016 (emphasis in original).[8]

[8] While the District Court relied upon Takeda Pharm., U.S.A., Inc. v. Burwell, to support its conclusion that "such" necessarily includes the entire prefatory clause, the U.S. District Court for the District of D.C. did not so hold in that matter. 78 F. Supp. 3d 65, 99 (D.D.C. 2015), aff'd in part, vacated in part, 691 F. App'x 634 (D.C. Cir. 2016). The court there said nothing as to whether "such" may refer to some portion of a prefatory clause, rather than to the entirety of a prefatory clause, but instead held solely that "such" must refer to *something*. Id. In that case, the court in interpreting a section of the Federal Food, Drug, and Cosmetic Act explained that "'such' nearly always operates as a reference back to something previously discussed." Id. For that reason, the court rejected the appellants' argument that the phrase "such drug" did not refer back to any prefatory language

ii. On its Face, "Such Members" is Ambiguous As to Whether it Refers to the Entirety of the Prefatory Clause.

The District Court's conclusion that "such members" in the second definition of Indian unambiguously incorporates the entirety of the prefatory clause, the first definition, was error, particularly where it failed to "exhaust the traditional tools of statutory construction." Castaneda v. Souza, 810 F.3d 15, 30 (1st Cir. 2015) (quoting Sierra Club v. EPA, 551 F.3d 1019, 1027 (D.C.Cir.2008)). The District Court's decision directly contradicts Hogar and the balance of the law regarding the ambiguity of the word "such" across the country. "Such" is ambiguous.

Just as this Court considered in Hogar whether "such single-family houses" was ambiguous with regard to whether it referred to the entirety of the prefatory clause "any single family house sold or rented by an owner" the question here is whether "such members" is ambiguous with regard to whether it refers to the entirety of the prefatory phrase "all persons of Indian descent who are members of any recognized Indian tribe . . . under Federal jurisdiction [in 1934]." 36 F.3d at 185–86. Given the "latent ambiguity" of the "indeterminate modifier 'such,'" the

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because adopting that construction would "ignore[] 'such' entirely, and essentially replaces it with 'the.'" Id.

answer is the same here as it was in Hogar: "*[t]he language of the statute is not dispositive on this issue*." Id (emphasis supplied).

There is no reason for this Court to revisit its reasoning in Hogar, particularly where, as described above, it is consistent with the body of jurisprudence on this issue in federal courts across the country. The District Court justified its conclusion that "such members" unambiguously refers to the entirety of the first definition by reference to two dictionaries, Webster's Collegiate Dictionary and the American Heritage Dictionary, but neither supports the District Court's conclusion. ADD0154–55. Neither said anything about whether "such" unambiguously refers to the entirety of a prefatory clause. Instead, both definitions to which the District Court cited made clear solely that "such" may refer to something previously stated. Id. (citing to Merriam Webster's Collegiate Dictionary 1247 (11th ed. 2003) (defining "such" as "of the character, quality, or extent previously indicated or implied"); American Heritage Dictionary 1729 (4th ed. 2000) (defining "such" as "[o]f a kind specified or implied" and "[o]f a degree or quality indicated"). Indeed, the definition of "such" from Merriam Webster's Collegiate Dictionary upon which the District Court relied was not even the first definition. Id. The first definition, which the District Court ignored, defined "such" as "of a kind of character to be indicated or suggested." Merriam Webster's

Collegiate Dictionary 1247 (11th ed. 2003). In other words, had the District Court merely compared the first two definitions of the dictionary to which it chose to cite it would immediately have recognized that "such" is inherently ambiguous, at a minimum because it may refer to something already indicated or to something "to be indicated." Indeed, as discussed *supra*, Part I.b.1., the Ninth Circuit in Kristic recognized the inherent ambiguity of "such" through analysis of dictionary definitions. 558 F.3d at 1013.[9, 10]

[9] As described, *supra* Part I.b.1., the cases upon which the District Court relied to support its conclusion that "such" is unambiguous are inapposite.

[10] Oddly, the District Court concluded its discussion of the dictionary definitions of "such" with a citation to Carcieri v. Salazar, 555 U.S. 379 (2009). ADD0155. This reliance on Carcieri is misplaced for two reasons. First, the Supreme Court construed the first definition, not the second definition, of eligible Indians and found the word "now," not the word "such," to be unambiguous. Id. at 394–95. The Court said exactly nothing about the interpretation of the second definition generally or the ambiguity of "such members" in particular. Id. Second, the Supreme Court did not hold (as the District Court indicated) that federal jurisdiction as of 1934 required formal, federal recognition at the time. In fact, every court to consider this issue has held to the contrary. Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, 830 F.3d 552 (D.C. Cir. 2016); Citizens for a Better Way v. U.S. Dep't of Interior, No. 12-3021, 2015 WL 56458925 (E.D. Cal. 2015); Cent N.Y. Fair Bus. Ass'n v. Jewell, No. 08-0660, 2015 WL 1400384 (N.D.N.Y. 2015).

II. "Such Members" in the Second Definition Must be Interpreted to Refer Solely to "Members of Any Recognized Indian Tribe" in the First Definition, as the Department Did in the ROD.

a. Statutory Canons Relating to Remedial Statutes and Statutes Impacting Indians Demand the Department's Interpretation of "Such Members."

Under bedrock canons of construction requiring interpretation of ambiguous statutes to inure to the benefit of marginalized groups—including both (i) to those whom remedial statutes are intended to help and (ii) Indians in particular—there is only one permissible construction of "such members." That ambiguous phrase should be interpreted to refer solely to "members of any recognized Indian tribe," as the Department did in the ROD, in service to the remedial purposes of the IRA and in favor of Indian tribes.

The IRA is a quintessential remedial statute, as it was intended to rectify the centuries of land theft, disenfranchisement, and oppression of Indian. See *supra*, Part I; see Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell, 830 F.3d 552, 565 (D.C. Cir. 2016) (the IRA is a remedial statute). The scope of the IRA's mission is impressive, to enable Indian tribes like Appellant which lived here for millennia before the arrival of Europeans to regain at least a portion of their pre-colonial existence including, fundamentally, acquisition of land on which

they can exercise their sovereignty. The mechanism to achieve this goal is the IRA's Section 5 authority which empowers the Secretary to acquire land in trust for the benefit of Indian tribes, just as the Department did here. As the Supreme Court summarized the remedial purpose of the IRA:

> The intent and purpose of the [Indian] Reorganization Act was '*to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism*.' H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934). See also S.Rep.No.1080, 73d Cong., 2d Sess., 1 (1934). As Senator Wheeler, on the floor, put it:
>
> 'This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it *seeks further to give the Indians the control of their own affairs and of their own property*; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians.' 78 Cong.Rec. 11125.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (emphases supplied).

As this Court articulated in Hogar, ambiguous provisions of remedial statutes like the IRA are "entitled to a generous construction consistent with its reformative mission." Hogar, 36 F.3d at 186; Cia. Petrolera Caribe, Inc., 754 F.2d at 428–29 (noting that this canon of construction represents an "especially reliable and legitimate" indicator of congressional intent). Indeed, it is a "canon of construction that remedial statutes should be liberally construed" to effectuate their purpose. Peyton v. Rowe, 391 U.S. 54, 65 (1968); see Doe v. Johns Hopkins Health Sys. Corp., 274 F. Supp. 3d 355, 363 (D. Md. 2017) ("[R]emedial statutes

are to be construed liberally in favor of claimants to suppress the evil and advance the remedy" provided the interpretation is not absurd).

Here, in order to give life to the IRA's reformative mission, namely rectifying the harm done to Indian Tribes including through depletion of their Tribal lands, the statute must be interpreted broadly, which here means interpreting "such members" to refer solely to "members of any recognized Indian tribe." Doing so advances the IRA's remedial purpose of enabling Indian tribes to obtain sovereign land. To do otherwise reduces the second definition to a mere hypothetical, as described *infra*, Part II.b., and impermissibly undercuts the remedial mission of the IRA.

Consonant with the presumption of interpreting remedial statutes to advance the missions of such statutes, the Indian canon of construction demands that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 545–46 (1st Cir. 1997) (citing to and relying upon the Indian canon of construction). As the Tenth Circuit aptly explained, "federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit. This canon of statutory construction is "rooted in the

unique trust relationship between the United States and the Indians." Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997).

Here, the Indian canon of construction demands that the ambiguous phrase "such members" be interpreted to benefit Appellant. Interpreting "such members" to exclude the "under federal jurisdiction" requirement of the first definition is "in favor of the Indians" and therefore is required. See Montana, 471 U.S. at 766; see Confederated Tribes of the Grande Ronde Cmty. of Or. v. Jewell, 830 F.3d 552, 561 (D.D.C. 2014) (suggesting that tribe met second definition regardless of whether they were "now under federal jurisdiction"). Helpfully, the canons of construction related to remedial statues and Indians buttress one another and confirm that the interpretation of "such members" is exactly the one the Department reached.

b. The Rule Against Surplusage Precludes the District Court's Construction of the Second Definition.

The District Court was so convinced that "such members" was unambiguous under its constrained reading of dictionary definitions that it compounded its error by rendering the rule against surplusage itself without meaning. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)

(internal quotations omitted). Thus, in TRW Inc. v. Andrews, under the rule against surplusage the Supreme Court rejected a proffered interpretation because "we doubt that the supporting scenario is likely to occur outside the realm of theory." Id. at 30; see Mass. Ass'n of Health Maintenance v. Ruthardt, 194 F.3d 176, 181 (1st Cir. 1999) (rejecting interpretation of statute although it did not render language entirely superfluous, because it made the at-issue language insignificant as a practical matter).

The District Court's interpretation of "such members" to merge the first definition of "Indian" into the second definition ignored that "cardinal principal" and rendered the second definition practically meaningless. TRW Inc., 534 U.S. at 31. According to the District Court, under its interpretation even though the second definition subsumes the first definition entirely it retains a patina of meaning based upon the "plausible" hypothetical that "not all descendants of members of tribes that were under federal jurisdiction in 1934 and whose members resided on Indian reservations are also members of a tribe." ADD0160. The District Court's assumption fails to consider the rule that Indian tribes define their own membership, including the ability to define membership as including after-born minors. Cohen, § 4.01[2][b].

In other words, the District Court reduced one of the three definitions of "Indian" to apply solely to an imagined population for which there was no evidence in the record at summary judgment. It is thus "doubt[ful] that the [District Court's] supporting scenario is likely to occur outside the realm of theory." TRW Inc., 534 U.S. at 31. At a bare minimum, the District Court's reading minimizes the second definition to startling "insignifican[ce]," thus violating the rule against surplusage. Id. The District Court's interpretation, for this reason as well, is error.

c. The Rule of The Last Antecedent Does Not Trump the Other Indicia of Meaning and Statutory Canons at Issue Here.

The Supreme Court has repeatedly explained that the grammatical rule of the "last antecedent," according to which a limiting word like "such" is read as modifying only the noun or phrase that it follows, "is not an absolute and can assuredly be overcome by other indicia of meaning." Paroline v. United States, 572 U.S. 434, 446–47 (2014) (internal quotations omitted); see also Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Indeed, the Supreme Court "has not applied [the rule of the last antecedent] in a mechanical way where it would require accepting 'unlikely premises.'" Id. (quoting United States v. Hayes, 555 U.S. 415, 425 (2009)). Thus, on repeated occasions the Supreme Court

has found that in light of other indicia of meaning it was inappropriate to apply the rule of the last antecedent. See e.g., United States, 555 U.S. at 425–26 (2009) (declining to apply the rule of the last antecedent because doing so would require the court adopt "unlikely premises" including an awkward statutory construction); Paroline, 572 U.S. at 446–47 (in light of unnatural implications, declining to apply the last antecedent rule to limit a proximate cause requirement for restitution to solely the final of five categories of harm related to the crime of possession of child pornography).

Here, given the analysis described above there is no justification for strictly imposing the rule of the last antecedent. To do so would contradict this Court's ruling in Hogar, undermine the rule against surplusage, and diminish the remedial purposes of the IRA.

III. A Complete Chevron Analysis Demands Deference to the Department's Interpretation of "Such Members."

Contrary to the clear direction of this Court and the Supreme Court, the District Court refused to consider anything other than the two words "such members" in isolation from other interpretive tools to assess the ambiguity of that brief phrase. A complete analysis under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., however, leads to the unavoidable conclusion that deference to the Department's construction of "such members" is required.

a. The Complete Chevron Analysis Includes Indicia of Meaning, and Not Exclusively the Plain Language.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). Under the Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. ("Chevron") analysis giving structure to that necessary deference, a court must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." Id. at 842. Ambiguity exists where a term "is susceptible to more than one permissible interpretation." Elien v. Ashcroft, 364 F.3d 392, 397 (1st Cir. 2004). Second, where there is ambiguity in the statute if the agency action at-issue "is based on a permissible construction of the statute" then the court defers to the agency. Chevron, 467 U.S. at 843.

The first question of whether a statute within an agency's jurisdiction is entitled to Chevron deference may begin with considering the at-issue statutory language. "But the task of statutory interpretation involves more than the application of syntactic and semantic rules to isolated sentences. Even plain meaning can give way to another interpretation if necessary to effectuate Congressional intent." Cablevision of Bos., Inc. v. Pub. Improvement Comm'n of

City of Bos., 184 F.3d 88, 101 (1st Cir. 1999). Indeed, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context." FDA v. Brown Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). For that reason, "[i]nstead of culling selected words from a statute's text and inspecting them in an antiseptic laboratory setting, a court engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language." O'Connell v. Shalala, 79 F.3d 170, 176 (1st Cir. 1996).

b. The Phrase "Such Members" is Ambiguous and the Department's Interpretation is Permissible.

As described *supra*, Part I, the term "such members" is ambiguous on its face. Under step two of Chevron, the Department's interpretation of "such members" to refer solely to "members of any recognized Indian tribe" is not merely "permissible;" it is the only statutory construction that passes muster. Indeed, as described *supra* Part II.a.–b., to construe "such members" in any other fashion would contravene the canon on interpreting remedial statutes to advance their purpose, the Indian canon of construction, and the rule against surplusage.

The Department brought considerable expertise over Indians affairs and, consistently with the clear remedial purposes of the IRA, construed the ambiguous

second definition to apply to descendants of members of a recognized tribe residing on a reservation as of 1934. See Teva Pharms. USA, Inc. v. FDA, 441 F. 3d 1, 5 (D.C. Cir. 2006) ("It is up to the agency to bring its experience and expertise to bear in light of competing interests at stake and make a reasonable policy choice); Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, 75 F. Supp.3d 387, 407 (D.D.C. 2014), *aff'd* 803 F.3d 552 (noting Secretary's expertise applicable in construing ambiguous statutory language). Under the bevy of law described *supra*, Part II, it is entirely reasonable, particularly in light of the Department's experience, to construe "such members" to refer solely to a portion of the prefatory clause in the first definition.

Finally, it must be said, that the Department's construction of the statute, calculated to achieve the remedial and liberal purposes of the IRA, is also precisely suited to provide long-awaited federal protection and active trusteeship to Appellant. For the past four hundred years, the Appellant has suffered and survived through continuous diminishment of its land base at the hands of the dominant society. ADD0104–13. Nonetheless, and against all historical pressures and uncommonly among eastern tribes, Appellant remained in occupation of its reservation up to and after enactment of the IRA in 1934. ADD0118–123. It is fitting, then, that Congress focused its remedial efforts in 1934, among others,

upon reservations and made Indians resident on a reservation eligible for the statute's benefits. And it is fitting that the canons of construction support the Department's determination that the Tribe qualifies under the IRA because of its residence on a reservation, without regard to other indicia of federal jurisdiction. Now, after four hundred years of land loss, the Department's construction of the IRA provides a mechanism for Tribe to reverse the historical trend and begin to rebuild its homeland. Surely, this is what Congress contemplated in 1934.

IV. This Court is the Proper Forum for the Issues in this Appeal.

Dismissal of this appeal on the basis of either mootness or this Court's jurisdiction[11] would both (i) exacerbate the judicial efficiency concerns that help to define the limits of this Court's jurisdiction and (ii) inequitably permit Appellees to leverage the Department's choice to voluntary dismiss its appeal to erect barriers to the resolution of Appellant's challenge to the District Court's decision. The history of the very remand order upon which Appellees have relied to contend that this appeal is both moot and outside this Court's jurisdiction demonstrates that exactly

[11] This Court ordered on October 4, 2019 that in the parties' respective briefing on this appeal each was to "address the mootness and Rule 54(b) issues [previously briefed in response to this Court's August 20, 2019 Show Cause Order] more fully." Doc. No. 00117498377. Appellant will not repeat the substance of its prior submissions on these issues but incorporates them by reference herein, including its recitation of the procedural history. See Doc Nos. 00117484220 and 00117488868.

the opposite is true: the remand has concluded such that the District Court's order is indisputably final and the September 7, 2018 Record of Decision ("New ROD") changed exactly nothing about the issues in this appeal. Appellees' insistence that the appeal is moot and that this Court lacks jurisdiction is particularly bizarre where their position—until the instant of this Court's inquiry regarding mootness and Rule 54(b)—was that this appeal should be litigated before this Court ***now***. Plaintiff-Appellees' Opposition to Intervenor-Defendant-Appellant's Further Stay Request (Oct. 9, 2018) (Doc. 0017349339) at 2, 5.[12] It is in the interests of both justice and judicial economy for this Court to decide this appeal now.

The boundaries of this Court's jurisdiction over "final decisions" under 28 U.S.C. Section 1291 are fluid and context dependent: "the requirement of finality is to be given a practical rather than a technical construction." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170–71 (1974). That "practical" analysis "requires some evaluation of the competing considerations underlying all questions of finality—the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Id. (internal quotations omitted). As the Tenth Circuit put it, "[t]he *practical* application of § 1291, however, must be viewed under the circumstances of each case." Bender v. Clark, 744 F.2d 1424,

1427 (10th Cir. 1984) (emphasis in original). Thus, "[t]he critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." Id. at 1427–28. With regard to remand orders, courts consider whether "(1) the district court conclusively resolve[d] a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1175 (9th Cir. 2011) (private party had right to immediate review of remand order). Because courts "apply a practical construction to the finality requirement, however, these are *considerations, rather than strict prerequisites*." Id (emphasis supplied)

In particular, a private party in certain circumstances may appeal a remand order in the absence of an appeal by the government depending on the "practical" considerations of whether an appeal is justified. See, e.g., Skagit County Pub. Hosp. Dist. No. 2 v. Shalala, 80 F.3d 379, 384 (9th Cir.1996) (holding that an agency remand that would not foreclose a later appeal was nevertheless "final and appealable" by a private party where government did not appeal); Pit River Tribe v. U.S. Forest Serv., 615 F.3d 1069, 1075–76 (9th Cir.2010) (there is no "hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order" in

the absence of a government appeal). Indeed, "any decision final from the agency's perspective also is final from the private litigant's, and that principle controls here." Rush Univ. Med. Ctr. v. Leavitt, 535 F.3d 735, 738 (7th Cir. 2008) (remand order appealable by private-party litigant in absence of government appeal).

In Cotton Petroleum Corp. v. U.S. Dep't of Interior, Bureau of Indian Affairs, for example, the Tenth Circuit ruled that a remand order was final and appealable by a private party in the absence of a government appeal under a balancing approach, largely because "the issues presented in this appeal are of such importance that any delay in review by this court would likely result in further disputes and litigation, confusion and danger of injustice." 870 F.2d 1515, 1522 (10th Cir. 1989). There, the trial court had ruled that the Secretary of the Interior correctly determined that appellant lacked any entitlement under a lease to operate a gas production unit on a parcel of restricted Indian allotment land and remanded for further proceedings. Id. at 1522. Although the remand order did not fall within the "collateral order" doctrine, justice required review by the Tenth Circuit. Id. The Tenth Circuit explained that under the "critical inquiry" of "whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review" it was appropriate to rule that the remand order was "final" and exercised appellate jurisdiction. Id.

While this Court has never directly confronted a case like this one—where the agency initially appealed but then voluntarily dismissed its appeal and the remand at-issue was complete—it has followed the Tenth Circuit's jurisprudence which directs that when evaluating whether a remand order is subject to appellate jurisdiction "[t]he critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." Mall Properties, Inc. v. Marsh, 841 F.2d 440, 442 (1st Cir. 1988) (quoting Bender v. Clark, 744 F.2d 1424, 1427 (10th Cir. 1984)). Applying that standard in Mall Properties, Inc. v. Marsh, this Court ruled that it lacked jurisdiction over the appeal of the non-government agency (the City of New Haven) from a remand order because (i) the City could participate in yet-to-be-completed remand proceedings; and (ii) "allowance of an immediate appeal would violate the efficiency concerns behind the policy against piecemeal appeals." Id. at 443.

Here, the balance described by the Tenth Circuit is strongly in favor of this Court exercising jurisdiction because given the importance of the issues in the appeal "any delay in review by this court would likely result in further disputes and litigation, confusion and danger of injustice." Cotton Petroleum Corp., 870 F.2d at 1522. The critical nature of the issues at stake here is beyond dispute: whether Appellant will be able to ensure that centuries of oppression and point-blank land

theft are, consistent with the mission of the IRA, remediated to at least some extent. Further, one can hardly conceive of a more troublesome brew of "further disputes and litigation, confusion and danger of injustice" than that which would result from this Court's dismissal of this appeal. Id.

If this Court were to "kick the can" to another forum, it would result in further delay, judicial inefficiency, and injustice. As this Court is aware from the parties' respective prior briefing on this issue, Appellant's pending D.C. District Court litigation challenging the New ROD relates exclusively to the first definition of Indian and has already proceeded to summary judgment. If the second definition issue in this appeal were shifted to that D.C. litigation it would result in dramatic delay and confusion in that forum. Indeed, summary judgment briefing on the New ROD and the IRA's first definition of "Indian" has already concluded and that briefing addresses neither the original ROD nor the District Court's decision on the second definition because those issues are not before the D.C. District Court. See Mashpee Wampanoag Tribe v. Zinke, et al., C.A. No. 1:18-cv-02242-RMC, Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (Aug. 16, 2019), (ECF Doc. 30-1); Order on Motion to Transfer, ECF Doc. 21, at 16 (Collyer, J.) ("Judge Young also focused on a

different agency decision: He considered the 2015 ROD and, of course, not the 2018 ROD that was issued on remand and is the subject of this lawsuit.").

The judicial inefficiency of shifting the issues in this appeal to another forum, like the D.C. District Court litigation, would be staggering. As a practical matter, if this Court were to rule it lacked jurisdiction, the Tribe would need to move to amend its Complaint in the D.C. District Court to add claims based upon the second definition, which in turn would, at a minimum, (i) necessitate motion practice regarding the Tribe's right to amend, (ii) create confusion about what, if any, impact the Massachusetts District Court's rulings have on the D.C. District Court litigation, (iii) require the Department to supplement the Administrative Record in that proceeding, and (iv) upon amendment of the complaint in the D.C. District Court, precipitate a new round of summary judgment briefing (already completed once in the Massachusetts District Court).

To state the obvious, and even apart from the efficiency concerns, that thicket of additional issues would delay an ultimate decision on whether the Tribe is entitled to have the at-issue land remain in trust for its benefit. To do so would be unjust, especially given that Appellees' position in this litigation has been that the time and place to litigate the second definition is here and now. Neither of the issues that underlay this Court's decision that it lacked jurisdiction in Mall

Properties, Inc. are present here. See 841 F.2d at 442–43 (1st Cir. 1988). There is no question about Appellant's ability to "participate in yet-to-be-completed remand proceedings," because the remand has concluded, and, as described above, allowing this appeal to proceed inures in favor of judicial efficiency concerns. Id. at 443.

As to this Court's inquiry regarding any mootness, as reflected in Appellant's prior briefing, that issue can be resolved simply. This appeal is not moot because a ruling by this Court can "issue a[] judicial remedy capable of affecting the parties rights." Diffenderfer v. Gomez-Colon, 587 F.3d 445, 451 (1st Cir. 2009). If this Court rules that Appellant qualified under the second definition of "Indian," Appellant will be entitled to have the at-issue land remain in trust for its benefit. Neither the New ROD not the pending D.C. District Court litigation change anything about that. Indeed, on its face the New ROD did not supersede the original ROD upon which the District Court made the rulings at issue here, because it was "strictly limited to the question of the Tribe's jurisdictional status in 1934, and does not otherwise revisit or alter the remainder of the Department's analysis of the second definition of 'Indian' in the 2015 [Record of Decision." JA090.

At bottom, Appellant is entitled to an answer to the question of whether it falls within the second definition of "Indian" and this Court is the proper forum to provide that answer.

CONCLUSION

This Court should reverse the District Court's conclusion that "such members" is unambiguous, defer to the Department's reasonable construction of the ambiguous statutory provisions administered by the Department, and uphold the ROD placing land into trust for Appellant.

Respectfully submitted,

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November 4, 2019

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 10,187 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019 I electronically filed the foregoing BRIEF OF DEFENDANT-APPELLANT MASHPEE WAMPANOAG INDIAN TRIBE, with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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ADDENDUM

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

September 2015

Agency: Bureau of Indian Affairs

Action: Record of Decision (ROD) for the acquisition in trust and issuance of a Reservation Proclamation for 170 acres+/- in the Town of Mashpee, Massachusetts, and 151 acres+/- in the City of Taunton, Massachusetts, by the Department of the Interior (Department) for the Mashpee Wampanoag Tribe (Tribe) for gaming and other purposes.

Summary: The Department federally acknowledged the Tribe through the Bureau of Indian Affairs (BIA) administrative acknowledgment process in 2007. The Tribe has no Federal reservation land. The Tribe submitted a fee-to-trust application to BIA in 2007 requesting that the Department acquire in trust 170 acres+/- in non-contiguous parcels in the Town of Mashpee, Massachusetts (Mashpee Site), and 151 acres+/- in contiguous parcels in the City of Taunton, Massachusetts (Taunton Site), and proclaim these lands to be the Tribe's reservation. The Mashpee Sites have been owned in fee or used by the Tribe or by entities controlled by the Tribe for many years. These lands are primarily used for tribal administration, preservation, and cultural purposes. The Tribe proposes no change in use to the Mashpee Sites. The Tribe proposes to use the Taunton Site for a 400,000 square foot (sq. ft.) casino/resort and ancillary facilities including
3,300-room hotels, a 23,423 square foot event center, restaurants, retail stores, a 25,000 square foot water park, and an approximately 4,490-space parking garage with valet parking, and surface parking for 1,170 vehicles.

The proposed trust acquisition and Reservation Proclamation were analyzed as Alternative A in the Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act under the direction and supervision of the BIA Eastern Regional Office. The BIA issued notice that a Draft EIS was available for public review and comment on November 1, 2013. After an extended comment period, two public hearings, and consideration and incorporation of comments received on the Draft EIS, the BIA issued notice of the availability of the Final EIS on September 5, 2014. The Draft and Final EIS considered a reasonable range of alternatives that would meet the purpose and need for acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation. They also analyzed the potential effects of those alternatives and feasible mitigation measures.

With this ROD, the Department announces its determination that:
1) it will acquire in trust the Mashpee and Taunton Sites, 2) it will proclaim these lands to be the Tribe's reservation, and 3) the Mashpee and Taunton Sites are eligible for gaming under the "initial reservation exception" of the Indian Gaming Regulatory Act.

The Department has considered potential effects to the environment, including those to local governments and other tribes, adopted all practicable means to avoid or minimize environmental harm, and determined that potentially significant effects will be adequately addressed by the mitigation measures as described in this ROD.

This decision is based on a thorough review and consideration of the Tribe's application materials and materials submitted therewith; the applicable statutory and regulatory authorities governing acquisition of the trust title to land, issuance of a Reservation Proclamation, and eligibility of land for gaming; the Draft EIS; the Final EIS; the administrative record; and comments received from the public, Federal, State, and local governmental agencies, and potentially affected Indian tribes.

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Attachments

1.0 INTRODUCTION

1.1 Summary

The Department of the Interior (Department) federally acknowledged the Mashpee Wampanoag Tribe (Tribe) through the Bureau of Indian Affairs (BIA) administrative acknowledgment process in 2007. The Tribe does not have a Federal reservation. The Tribe submitted a fee-to-trust application to BIA in 2007 requesting that the Department acquire in trust 170 acres+/- in non-contiguous parcels in the Town of Mashpee, Massachusetts (Mashpee Sites), and 151 acres+/- in contiguous parcels in the City of Taunton, Massachusetts (Taunton Site), and proclaim these lands to be the Tribe's reservation.

The Tribe, by entities controlled by or related to the Tribe, have owned or used the Mashpee Sites.[1] The Mashpee Sites include several parcels currently owned by the Tribe in fee, some by the Mashpee Wampanoag Indian Tribal Council, one by the Mashpee Old Indian Meeting House Authority, Inc., a non-profit organization owned by the Tribe, and one by Maushop, LLC, a domestic limited liability company owned by the Tribe.[2] These parcels include the Old Indian Meeting House, burial grounds and cemeteries, Parsonage, tribal Museum, tribal offices, conservation land, cultural and recreational land, and vacant land.[3] The Tribe is currently constructing tribal housing on Parcel 8. This project is ongoing and is not connected with the Tribe's application. A list of the parcels is included in **Table 1** of this ROD. Acquisition of the Mashpee Sites in trust will enable the Tribe to meet the needs of its members by providing land for self-determination and self-governance, cultural preservation, housing, and education.

The Taunton Site is located near Boston and Cape Cod, Massachusetts, and Providence, Rhode Island. It lies in and adjacent to the Liberty and Union Industrial Park, located to the north and east of the interchange of Massachusetts State Highway Routes 24 and 140. The majority of this site is currently developed as a commercial/industrial park. The City of Taunton has designated this site for economic development purposes. Upon acquisition in trust, the Tribe would use this land to meet its needs for economic development.

The Tribe has worked cooperatively with the Commonwealth of Massachusetts (Commonwealth) and with local governments. The Tribe negotiated a Tribal-State Gaming compact for the regulation of class III gaming pursuant to the Indian Gaming Regulatory Act (IGRA),

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[1] Memorandum to the Assistant Secretary – Indian Affairs from Acting Regional Director, Eastern Region (July 10, 2015) [hereinafter Regional Director's Decision], on file with the Office of Indian Gaming.

[2] 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 (June 5, 2012)[hereinafter Tribe's Restated 2012 Application] at 7, in Regional Director's Recommendation, Vol. I, on file with the Office of Indian Gaming..

[3] *See Final Environmental Impact Statement, Mashpee Wampanoag Tribe, Fee-to-Trust Acquisition and Casino Project Mashpee and Taunton, Massachusetts* [hereinafter Final EIS], Section 5.0 for a detailed description of the individual parcels, *available at* mwteis.com.

25 U.S.C. § 2710, with the Commonwealth. A "Notice of Tribal-State class III Gaming Compact taking effect" was published in the *Federal Register* on February 3, 2014 (79 Fed. Reg. 6,213 (Feb. 3, 2014)).[4] In addition, the Tribe entered into an Intergovernmental Agreement (IGA) with the City of Taunton, which sets forth terms for the operation of a gaming facility in Taunton and financial mitigation measures for impacts from the casino/resort (Final EIS, Appx. A-1). The Taunton City Council voted to approve the IGA on May 31, 2012, and it became effective July 10, 2012. The Tribe also entered into an IGA with the Town of Mashpee on April 22, 2008, in which the Town agreed to support the Tribe's application, cooperate on potential issues that could arise in the future, transfer certain lands to the Tribe, and remove restrictions placed on certain lands (Final EIS, Appx. A-2).

The Tribe considered different locations in the region for economic development before finalizing its application for the Taunton Site. 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 4 additional parcels in Taunton for a total of approximately 151 acres.

The BIA analyzed the Tribe's proposed development in an Environmental Impact Statement (EIS). The Draft EIS was made available by BIA for public review on November 1, 2013, and the Final EIS, on September 5, 2014. The EIS considered various alternatives to meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation while analyzing in detail their potential effects. See **Section 1.5** below for a detailed description of the EIS process.

With the issuance of this ROD, the Department has determined that Alternative A, consisting of the acquisition in trust of 151 acres+/- in Taunton and 170 acres+/- in Mashpee and construction in Taunton of an approximately 400,000 sq. ft. gaming-resort complex, water park, and 3 hotels will be implemented. See **Section 2.3.1** below for a detailed description of Alternative A. The Department has determined that the Preferred Alternative would best fit the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. The Department has also determined that under Section 20 of IGRA, the Sites are eligible for gaming as the Tribe's "initial reservation." See 25 U.S.C. § 2719(b)(1)(B). Upon acquisition in trust and issuance of a Reservation Proclamation under the Indian Reorganization Act (IRA), the Mashpee and Taunton Sites will qualify as the Tribe's "initial reservation" and be eligible for gaming.

The Department's determinations are based on a thorough review and consideration of the Tribe's application and materials submitted therewith; the applicable statutory and

[4] Available at http://bia.gov/WhoWeAre/AS-IA/OIG/index.htm.

regulatory authorities governing acquisition of the trust title to land, issuance of a Reservation Proclamation, and eligibility of land for gaming; the Draft EIS; the Final EIS; the administrative record; and comments received from the public, governmental agencies, and potentially affected Indian tribes.

1.2 Legal Descriptions

The legal descriptions for the Mashpee and Taunton Sites are located in **Attachment I** of this ROD. **Tables 1 and 2** below list the parcels of the Mashpee and Taunton Sites. Maps showing the location of the parcels are found in **Attachment II** of this ROD.

Table 1
Mashpee Parcels Proposed To Be Taken Into Trust

	Owner	Location	Current Use	Proposed	Acreage
1	Mashpee Wampanoag Tribe (MWT)	410 Meetinghouse Rd.	Old Indian Meeting House	No Change	0.15
2	The Mashpee Wampanoag Indian Tribal Council, Inc. (MWITC)	17 Mizzenmast	Burial Ground/ Cemetery	No Change	0.361
3	MWT	414 Meetinghouse Rd.	Cemetery	No Change	11.51
4	MWT	431 Main St.	Parsonage	No Change	2.0
5	MWT	414 Main St.	Tribe Museum	No Change	0.58
6	MWITC	483 Great Neck Rd.	Tribal Government Center	No Change	58.7
7	MWITC	41 Hollow Rd.	Vacant	Conservation	10.81
8	Mashpee Old Indian Meeting House Authority, Inc. (MOIMHA)	Meetinghouse Rd.	Vacant	Tribal Housing	46.82
9	MWITC	Es Res Great Neck Rd.	Cultural/ Recreational	No Change	8.9
10	MWITC	56 Uncle Percy's Rd.	Vacant	No Change	0.15
11	Maushop, LLC	213 Sampsons Mill Rd.	Agricultural/ Tribal Offices	No Change	30.138
				Site Total	**170.109**

Table 2
Taunton Parcels Proposed To Be Taken Into Trust

	Owner	Location	Current Use	Proposed	Acreage
1	One Stevens, LLC	50 O'Connell Way	Industrial/Office/ Warehouse	Casino/Resort	9.15
2	Two Stevens, LLC	60 O'Connell Way	Office/Warehouse/ Light mfr.	Casino/Resort	26.25

3	L&U, LLC	Lot 11 O'Connell Way	Vacant	Casino/Resort	14.02
4	OCTS Realty Trust	O'Connell Way	Vacant	Casino/Resort	7.89
5	OCTS Realty Trust	Stevens Street	Vacant	Casino/Resort	0.078
6	Jamins, LLC	73 Stevens Street	Office	Casino/Resort	1.50
7	71 Stevens Street, LLC	71 Stevens Street	Warehouse	Casino/Resort	6.88
8	D.G. & L.B. DaRosa	O'Connell Way	Vacant	Casino/Resort	2.11
9	D.G. & L.B. DaRosa	61R Stevens Street	Office	Casino/Resort	1.79
10	Taunton Devel. Corp.	O'Connell Way (Lot 9A)	Vacant	Casino/Resort	2.73
11	Taunton Devel. Corp.	O'Connell Way (Lot 9B)	Vacant	Casino/Resort	5.47
12	Taunton Devel. Corp.	O'Connell Way (Lot 13)	Vacant	Casino/Resort	22.5
13a	Taunton Devel. Corp.	Middleborough Avenue (Lot 14)	Vacant	Casino/Resort	45.0
13b	Taunton Devel. Corp.	5 Stevens Street	Vacant Residential	Casino/Resort	1.29
14	Taunton Devel. Corp.	O'Connell Way Roadway and gap parcel	Roadway	Casino/Resort	3.64
15	J.M. Allen	65 Stevens Street	Residential	Casino/Resort	0.35
16	K.& K. Williams	67 Stevens Street	Residential	Casino/Resort	0.68
17	D.G. DaRosa	61F Stevens Street	Residential	Casino/Resort	0.42
				Site Total	**151.748**

1.3 Purpose and Need for Acquiring the Sites in Trust and Proclaiming them to be the Tribe's Reservation

The purpose of acquiring the Sites in trust and proclaiming them to be the Tribe's reservation is to provide the Tribe with opportunities for long term, stable economic development and self-government. These opportunities will enable the Tribe to meet the needs of its members by providing land for self-determination and self-governance, cultural preservation, housing, education, and otherwise providing for its members. The Tribe is federally acknowledged but does not currently have the benefit of a federally protected reservation or trust lands. The Mashpee and Taunton Sites are located within lands to which the Tribe has a significant historical connection as discussed in **Section 7.0** below. Federal acquisition of the Sites and issuance of a Reservation Proclamation would allow the Tribe to rebuild its land base and pursue opportunities for economic development and self-government.

The Tribe needs economic development to create sufficient revenue to meet tribal needs. Many tribal members are unemployed and have incomes below the poverty level. Long term, stable economic development would provide employment opportunities for tribal members, ensured by the Tribe's tribal and Native American hiring and contracting policies. A 2002 health survey conducted by the Tribe with the Massachusetts Department of Public Health found that the percentage of members in poor health was two times higher than the general Massachusetts adult

population. The Tribe also faces serious needs among its members for housing. Revenue from economic development would fund construction of tribal housing and programs such as the Wampanoag Housing Program and the Low Income Home Energy Assistance Program.

Revenue from economic development will greatly enhance the Tribe's ability to preserve its history and community by funding the preservation and restoration of culturally significant sites, such as the Mashpee Old Indian Meeting House, the Parsonage, the Mashpee Wampanoag Indian Museum, the "ancient ways" (*i.e.*, historic trails and paths), the historic Indian burial ground, and historic family burial grounds scattered throughout the Town of Mashpee. Gaming revenues will also be used to enhance and extend the various educational, cultural, and employment programs and services the Tribe offers to Mashpee tribal children. Programs designed to teach cultural values, traditions, and skills, such as the Tribal Youth Council, Youth Cultural Activities, Mashpee Wampanoag Youth Survival Skills training, and the Youth Sobriety Powwow, will benefit from gaming revenues. The Language Reclamation Project, general education development (GED) tutoring, and educational scholarship services offered by the Tribe will also benefit from increased funding and allow for the preservation of tribal cultural traditions.

The Tribe considered various alternatives as potential methods for improving its economic self-sufficiency to meet tribal needs. See **Sections 2.1 – 2.3** of this ROD for a discussion of the process for development of reasonable alternatives for the proposed action of acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation. The Tribe has determined that a casino/resort is the only feasible financial venture that meets the Tribe's economic needs. Gaming is a revenue source with relatively high profit margins, which maximizes income to development risks and costs when compared with other types of enterprises. A casino/resort would allow the Tribe to take advantage of the gaming opportunities afforded to it under IGRA. It would minimize potential operational environmental impacts, particularly in comparison to manufacturing and industrial ventures. A casino/resort would allow the Tribe to create quality employment opportunities for its members and the surrounding community in a safe environment. No other project type, such as manufacturing, light industry, retail, or housing could be expected to generate revenues significant enough to be considered a viable alternative for the Tribe to gain adequate construction financing for the enterprise, achieve economic self-sufficiency, and address tribal housing, governmental, social, and cultural needs. The Tribe conducted a thorough analysis to determine the optimal size and class of a gaming facility in Taunton to maximize its financial benefit and reduce environmental impacts. The Tribe determined that it would need to offer class III (casino-style) gaming facility consisting of approximately 4,400 gaming positions in order to draw the number of visitors required to make the casino a success and generate the revenues required for maximizing tribal self-sufficiency.

1.4 Authorities

Section 5 of the IRA, 25 U.S.C. § 465, provides the Secretary of the Interior (Secretary) with general authority to acquire land in trust for Indian tribes in furtherance of the statute's broad goals of promoting Indian self-government and economic self-sufficiency. The regulations found at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5. Section 7 of the IRA, 25 U.S.C. § 467, authorizes the Secretary to proclaim lands to be an Indian reservation.

The IGRA was enacted to provide express statutory authority for the operation of 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. Section 20 of IGRA generally prohibits gaming 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. The regulations found at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20.

1.5 Procedural Background

The regulations at 25 C.F.R. Part 151 require compliance with the National Environmental Policy Act (NEPA). The BIA prepared the EIS as Lead Agency, while the Tribe and the Army Corps of Engineers (Corps) served as Cooperating Agencies in the process, as described under 40 C.F.R. § 1501.6.

1.5.1 Scoping

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 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.

1.5.2 Draft 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 U.S. Environmental Protection Agency (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, state, tribal, and local agencies, as well as all interested parties who offered comments during the 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, 2013, and December 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.

1.5.3 Final EIS

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 Daily Gazette* on September 10, 2014, and the *Cape Code Times*
on September 12, 2014. The 30-day waiting period ended on October 6, 2014. The comments and responses to each of the substantive comments received during this period that were not previously raised and responded to in the EIS process are included in **Attachment IV** of this ROD.

2.0 ANALYSIS OF ALTERNATIVES

2.1 Screening Process

In order to meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation, a range of possible alternatives were considered in the EIS. Alternatives, other than the No Action Alternative, were first screened to see if they met the purpose and need for action. Three alternatives in addition to the No Action Alternative were selected for detailed analysis based on three criteria: 1) ability to meet the purpose and need, 2) feasibility, and 3) ability to reduce environmental impacts. The Mashpee Site and the Taunton Site were evaluated separately because of their distinct locations and proposed development programs.

2.2 Alternatives Sites Considered but Rejected

Route 44 Middleborough Alternative

In 2007, the Tribe began negotiations with the Town of Middleborough, Massachusetts, to develop a casino on a 539-acre site. The Middleborough alternative included 4,000 slot machines and 200 gaming stations, a 1,000-room, 18-story hotel, a 5,000-seat event center, and a number of retail and restaurant options in a 598,000 square-foot main facility.
A total of 10,500 parking spaces were included in both surface lots and structured parking for patrons and employees. The proposal also included a gas station with up to 24 pumps and a 9,000 square-foot convenience store. In a later phase, an 18-hole golf course, club house, and

proshop would be developed in the northern part of the site. However, estimated wetlands impacts of the preferred alternative in Middleborough were substantially higher than those of any of the Alternatives now being considered in Taunton. The estimated trip generation of the Middleborough project was also much higher than that of any of the Alternatives currently being considered in Taunton. Moreover, infrastructure on and around the Middleborough site would have required substantial improvements. The Tribe determined that the site was not economically viable and therefore could not satisfy the purpose and need for acquiring the site in trust and proclaiming it to be the Tribe's reservation.

Fall River Executive Park Alternative

In July 2010, the Tribe amended its application to include an approximately 300-acre parcel in the City of Fall River, Massachusetts, in an area known as the Fall River Executive Park (FREP). The FREP site had undergone state environmental review under the Massachusetts Environmental Policy Act and had originally been conceived as an executive industrial park. The Tribe's preliminary plans for the development included a casino and entertainment complex, hotels, a variety of restaurants, an 18-hole golf course and club house, convention facilities, showroom, spa, retail, multi-screen movie theater, indoor water park, and parking. Plans for the site were abandoned, however, because of insurmountable legal obstacles to its development. The FREP site was located on land within the Southeastern Massachusetts Bioreserve (Chapter 266 of the Acts of 2002). A provision of that law specifically prohibited the development of a casino on the site. The Tribe determined that it would likely not be feasible to overcome this restriction and that without a change in the legal status of the land, an agreement with the Commonwealth on a Tribal-State Compact for the regulation of class III gaming was also not likely. Therefore, the site could not be developed as a casino and would not meet the Tribe's needs for economic development.

2.3 Reasonable Alternatives Considered in Detail

Selection of the Current Site in Taunton

With the help of community planners, local economic development agencies, and real estate and environmental consultants, the Tribe reviewed a number of sites in Bristol and Plymouth Counties, all within the Tribe's ancestral homelands and within Region C as defined by the Massachusetts Expanded Gaming Act (Chapter 194 of the Acts of 2011). Other key considerations included the size of the parcel, the availability of transportation infrastructure, and the perceived local support within the host municipality. The current site in the City of Taunton offers a number of important advantages. It is proximate to two regional highways, Routes 140 and 24, and is largely within an existing and already developed industrial park well served by public infrastructure. Much of the project site has already been developed and disturbed.

The Draft EIS and Final EIS evaluate the following reasonable alternatives and the mandatory No Action Alternative in detail.

2.3.1 Alternative A: Preferred Alternative

Alternative A includes the acquisition in trust of 170 acres+/- in the Town of Mashpee and 151 acres+/- in the City of Taunton and issuance of a Reservation Proclamation. Under Alternative A, the Tribe would subsequently develop the lands in Taunton into a casino/resort. Alternative A does not include foreseeable new development projects for the Mashpee Sites. Alternative A is considered to most suitably meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation, and, therefore, is the Preferred Alternative.

Under Preferred Alternative A, the gaming facility would be located south of the railroad tracks that bisect the Taunton project Site. The gaming facility would be approximately 400,000 sq. ft.. The gaming floor would be approximately 132,000 sq. ft. and feature an open design. It would include 3,000 slot machines, 150 multi-game tables, and 40 poker tables for 4,400 gaming positions. Other casino features would include a 5- or 6-venue food court with seating for approximately 135 patrons, a 400-seat buffet restaurant, an entertainment bar/lounge with 200 seats, and a 24-hour restaurant with seating for 120 patrons. Other support facilities required for the casino floor and restaurants would include an employee dining room with 325 seats. Two hotels, each 15 stories tall and having 300 rooms, would be constructed adjacent to the casino.

The parking structure proposed across from the casino would be connected by an elevated, 10,000 sq. ft. pedestrian bridge. The parking structure would contain space for approximately 3,900 vehicles. An underground garage beneath the casino would have spaces for approximately 590 cars on one level to be used exclusively for valet parking. There would be additional casino surface parking on-site for approximately 1,170 cars.

The Preferred Alternative would also include a water park and related facility development on the parcel that lies north of the rail line. This development would feature a 25,000 sq. ft. indoor/outdoor water park and a 300-room hotel. Surface parking has been analyzed on a preliminary basis to allow for 450 cars on this portion of the project site, based on the assumption that the hotel and water park are dual uses.

2.3.2 Alternative B: Reduced Intensity I

Alternative B includes the acquisition in trust of 170 acres+/- in the Town of Mashpee and 151 acres+/- in the City of Taunton and issuance of a Reservation Proclamation. Like Preferred Alternative A, Alternative B does not include foreseeable new development projects for the Mashpee Sites. Under Alternative B, the Tribe would still develop the Taunton Site, but the proposed development under Alternative B differs from Preferred Alternative A in that it removes the two casino hotels to reduce operations and footprint.

Under Alternative B, the casino facility in Taunton would be approximately 195,000 sq. ft. The Gaming Floor would be approximately 78,000 sq. ft. and feature an open design. It would include 1,850 slot machines and 60 multi-game tables. Other casino features would include

a 5- or 6-venue food court with seating area for 135 patrons, a 250-seat buffet restaurant (reduced compared to Preferred Alternative A), and an entertainment bar/lounge with 200 seats. The 24-hour restaurant included in Preferred Alternative A would be eliminated. Other support facilities required for the casino floor and restaurants would include an employee dining room with 225 seats, representing a reduction from Preferred Alternative A.

The parking structure proposed adjacent to the casino would be connected by an elevated pedestrian bridge of approximately 10,000 sq. ft. It would contain space for approximately 2,100 cars. An underground garage beneath the casino would accommodate approximately 590 cars on one level to be used exclusively for valet parking. There would be additional casino surface parking on site for approximately 1,170 cars.

Development north of the rail line would also be included under Alternative B, and would feature a 25,000 sq. ft. indoor/outdoor water park and a 300-room hotel. Surface parking has been analyzed on a preliminary basis to allow for 450 cars on that portion of the project site, based on the assumption that the hotel and water park are dual uses.

2.3.3 Alternative C: Reduced Intensity II

Alternative C includes the acquisition in trust of 170 acres+/- in the Town of Mashpee and 151 acres+/- in the City of Taunton and issuance of a Reservation Proclamation. Like Preferred Alternative A, Alternative C does not include foreseeable new development projects for the Mashpee Sites. Under Alternative C, the Tribe would still develop the Taunton Site. The proposed development under Alternative C differs from Alternative A in that it removes all development to the north of the railroad tracks that bisect the project site to reduce operations and footprint.

Under Alternative C, the casino facility in Taunton would be approximately 400,000 sq. ft. The Gaming Floor would be approximately 132,000 sq. ft. and feature an open design. It would include 3,000 slot machines, 150 multi-game tables, and 40 poker tables. Other casino features would include a 5- or 6- venue food court with seating area for approximately 135 patrons, a 400-seat buffet restaurant, a casino entertainment bar/lounge with 200 seats, and a 24-hour restaurant able to seat 120 patrons. Other support facilities required for the casino floor and restaurants would include an employee dining room with 325 seats. Two hotels of 15 stories and 300 rooms each would also be constructed adjacent to the casino.

The parking structure proposed adjacent to the casino would be connected by an elevated pedestrian bridge of approximately 10,000 sq. ft. The parking structure proposed would contain space for 3,900 cars. An underground garage beneath the casino would have spaces for approximately 590 cars on one level to be used exclusively for valet parking. There would be additional casino surface parking on-site for approximately 1,170 cars. The water park and all related development would not take place under Alternative C.

2.3.4 Alternative D: No Action

Under the No Action Alternative, no land would be acquired in trust for the Tribe. The Tribe would not establish an initial reservation nor develop a destination resort casino. The Tribe's development projects underway in the Town of Mashpee would continue and the Tribe would continue to own the remaining parcels in fee. Further, without a trust acquisition, it is assumed that the parcels within and adjacent to the Liberty and Union Industrial Park in Taunton would continue to develop to their capacity as currently zoned and permitted. Theoretical plans for this build-out were designed using information from the Taunton Development Corporation's original proposal for the Site, details of building permits held by current owners, and professional estimates on the ability to build out vacant lots. Under the No Action Alternative, the Taunton Site would contain in total approximately 663,400 sq. ft. of commercial-industrial-warehouse space, approximately 69,900 sq. ft. of office space, and approximately 3,600 sq. ft. of residential space.

3.0 ENVIRONMENTAL IMPACTS

A number of specific issues were raised during the EIS scoping process and public and agency comments on the Draft EIS. Each of the alternatives considered in the Final EIS was evaluated relative to these and other issues. The categories of the most substantive issues noted and addressed in the process include:

- Transportation
- Wetlands and Floodplains
- Stormwater
- Geology and Soils
- Rare Species and Wildlife Habitat
- Hazardous Materials
- Water Supply
- Wastewater
- Utilities
- Solid Waste
- Air Quality
- Greenhouse Gas Emissions
- Cultural Resources
- Noise
- Visual Impacts
- Socioeconomic Effects
- Environmental Justice
- Sustainability
- Construction Impacts
- Indirect and Growth Inducing Effects
- Cumulative Effects
- Unavoidable Adverse Effects

The evaluation of project-related impacts included consultations with entities that have jurisdiction or special expertise to ensure that the impact assessments for the Final EIS were accomplished using accepted industry standard practice, procedures and the most currently available data and models. Alternative courses of action and mitigation measures were developed in response to environmental concerns and issues. Sections 6.0 (Mashpee) and 8.0 (Taunton) of the Final EIS described the effects of Preferred Alternative A, Alternative B and Alternative C (Development Alternatives) as follows:

3.1 Potential Impacts in the Town of Mashpee

3.1.1 Environmental Impacts

No new development is being proposed as part of the fee-to-trust process for the Mashpee Sites under the Development Alternatives. These parcels would simply be maintained as historic tribal Sites, offices, housing, recreational lands, and other uses. The action of acquiring these Sites in trust will not, in itself, affect environmental conditions.

The Mashpee Sites also include several historic and cultural sites. The National Register of Historic Places includes the Old Indian Meeting House (Parcel 1), the cemetery (Parcel 3), and the Museum (Parcel 5). The Massachusetts State Register of Historic Places includes the Old Indian Meeting House (Parcel 1), the Burial Ground (Parcel 2), the cemetery (Parcel 3), and the Parsonage (Parcel 4). The Tribe has no plans to alter these Sites regardless of whether the parcels are acquired in trust by BIA or not. Parcel 6, which includes the Tribal Government Center, has been determined to be a tribal cultural property. Parcel 6 is used collectively by the tribal members for a wide range of tribal social and cultural activities including social gatherings, education of tribal members, and ceremonial activities. Anticipated environmental changes include the ongoing construction of low- and moderate-income tribal housing units on Parcel 8. Tribal housing and new governmental facilities planned for a portion of the Mashpee lands will continue regardless of the lands' trust status, and those actions have already undergone review under the National Environmental Policy Act and the Massachusetts Environmental Policy Act.[5] Impacts from ongoing developments on Parcel 8 will occur regardless of whether the parcels are acquired in trust.

Several of the Mashpee Sites include land designated as sensitive environment. The Tribe has no plans to develop these parcels, and, thus, their environmental conditions will be preserved. Part or all of Parcels 1, 3, 4, 5, 6, 7, 8, and 9 have been designated by the Massachusetts Natural Heritage and Endangered Species Program (NHESP) as Priority Habitat and Estimated Habitat. Parcels 4 (Parsonage) and 5 (Museum) contain small areas of wetlands and lie adjacent to wetlands and the Mashpee River, an anadromous fish run. The NHESP mapping indicates

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[5] *See* Environmental Assessment Report, Proposed Mashpee Wampanoag Housing (environmental review for eligibility to receive federal funding pursuant to the Native American Housing Assistance and Self Determination Act) (Nov. 2008); Certificate of the Secretary of Energy and Environmental Affairs on the Environmental Notification (Massachusetts Environmental Policy Act review for the Mashpee Wampanoag Tribe Housing Project) (Dec. 22, 2010), on file with the Office of Indian Gaming.

a potential vernal pool and Massachusetts Department of Environmental Protection (MassDEP) listed wetlands on Parcel 6 (Tribal Government Center) and a certified vernal pool, potential vernal pools, and MassDEP-listed wetlands near but not within Parcel 7 (vacant). The Tribe has agreed to maintain Parcel 7 as conservation land to protect habitat of the Eastern Box Turtle, a Species of Special Concern under the Massachusetts Endangered Species Act. Parcel 9 (cultural/recreational) includes two wetlands and a manmade stream, and Parcel 11 (agricultural/tribal offices) is bordered by the Santuit River and surrounding wetlands. Parcel 2 (Burial Ground) is subject to a preservation restriction held by the State Register of Historic Places and a conservation restriction held by the Commonwealth's Department of Conservation and Recreation, and will not be developed.

Preferred Alternative A is not expected to result in any significant adverse environmental impacts in the Town of Mashpee.

3.1.2 Socioeconomic Effects

Preferred Alternative A will have minor socioeconomic impacts on the Town of Mashpee. Because these parcels would become exempt from taxation upon acquisition into Federal trust, this action would deprive the Town of Mashpee of approximately $17,564 in property tax revenues per year based on assessed valuations and the fiscal year 2012 tax rates. This total represents a 0.03 percent decrease in annual property tax revenue for the Town of Mashpee. See **Section 8.6** of this ROD for additional discussion of tax impacts.

Upon acquisition in trust, criminal jurisdiction over crimes that occur on the Mashpee Sites will be governed by the Federal Government, the Tribe, and the Commonwealth, depending on the type of crime, the tribal status of the offender, and the tribal status of the victim. Civil (non-criminal) jurisdiction will also transfer from the state/town to the Tribe upon acquisition of the Sites in trust.

The ongoing tribal housing project (Parcel 8) will provide affordable housing for tribal members. The housing development will help to meet the unmet housing needs for members who already reside in the town of Mashpee where most real estate is prohibitively expensive for tribal members. By serving existing Mashpee residents with housing needs, the housing units are not expected to introduce new households to the Town of Mashpee.

Preferred Alternative A is not expected to result in any significant adverse impacts on law enforcement, criminal justice, fire protection, emergency medical services, or schools in the Town of Mashpee.

3.1.3 Environmental Justice

The acquisition in trust of the Mashpee Sites would facilitate tribal self-determination and would ensure that the lands were preserved for future generations of Mashpee Indians. Because the Tribe and local community, including the minority and low income community, were involved

in the decision making process, Preferred Alternative A would not result in any disproportionate adverse impacts on the Tribe or other minority or low-income community.

3.1.4 Indirect and Growth Inducing Effects

The NEPA requires that an EIS analyze both the indirect and growth-inducing effects of a proposed action (40 C.F.R. § 1502.16[b], 40 C.F.R. § 1508[b]). As defined in NEPA regulations, indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth, and related effects on natural systems.

Acquiring land in trust in the Town of Mashpee presents no potential for indirect off-site impacts, because it involves no alterations on any land off-site. Similarly, the taking of these lands into trust will not, in itself, induce growth in the surrounding region. The only foreseeable growth inducing effects may come from Tribe's participation in the local and regional economy. Under Preferred Alternative A, the Tribe would be relieved of property taxes on trust lands and, thus, be better able to provide additional affordable housing and other services to its underserved members. These reductions in economic burdens would allow tribal members to increase spending on necessities of life for themselves and their families, including food, clothing, health care, and other services and goods. The tribal government would be able to make similar investments related to citizen services and future construction. To the extent that the majority of these purchases are made locally, businesses and industries serving resident communities with these goods and services would experience increased demands. These demands would result in further investments in capital and labor and in some cases opportunities for expansion or opening of new businesses.

Preferred Alternative A is not expected to result in any significant adverse indirect and growth-inducing effects in the Town of Mashpee.

3.1.5 Cumulative Effects

Cumulative effects are defined as effects to the environment resulting from the incremental effect of a proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time (40 C.F.R. §1508.7). The purpose of the cumulative effects analysis is to ensure that Federal decisions consider the full range of consequences.

In consideration of potential cumulative effects that could result from acquiring the Mashpee Sites in trust, a geographic boundary was identified to include Mashpee and its closest surrounding towns, Barnstable, Bourne, Falmouth, and Sandwich, Massachusetts. These five Cape Cod towns were used as the study area for the evaluation of potential cumulative effects related to both environmental and socioeconomic conditions. Potential cumulative effects were generally considered in a timeframe of 10 years from the acquisition of the Sites in Mashpee.

Projects that may contribute to cumulative impacts were identified from public Massachusetts Environmental Policy Act (MEPA, M.G.L. c. 30, section 61 through 62H) filings. These filings identified proposed mixed-use developments and improvements to utilities and communications infrastructure in the five-town region with potential environmental impacts.

As discussed above, acquisition of the Mashpee Sites will not result in any significant environmental, socioeconomic, or environmental impacts in the Town of Mashpee, and thus, will not result in any cumulative effects relative to proposed projects underway in and around Mashpee.

3.2 Potential Impacts in the City of Taunton

3.2.1 Transportation

Vehicle trip rates were calculated in consultation with Massachusetts Department of Transportation (MassDOT) based on the number of gaming positions for the proposed class III destination resort casino/hotel, and based on square footage for the indoor water park. In the interest of a conservative analysis, no credit was taken for transportation demand management programs or public transportation use by employees or patrons. The analysis showed that the Development Alternatives would add significant vehicle trips to the local circulation network, resulting in decreased levels of service (LOS) for certain locations and facilities during the Weekday AM, Friday PM, and Saturday peak hours. The number of anticipated daily (Friday) trips is approximately 20,900 under the Preferred Alternative A, 11,500 under Alternative B, and 20,600 under Alternative C. The peak hour trips for Preferred Alternative A and Alternative C are very similar; for this reason, no separate traffic analysis was performed for Alternative C.

In consultation with MassDOT, the Tribe has committed to commensurate geometric and traffic signal improvement measures to mitigate identified traffic impacts. Under Preferred Alternative A or Alternative C, these measures include reconfiguration of flow on the Stevens Street Overpass bridge, the widening of Route 140 Northbound from 2 lanes to 3 lanes between Exits 11 and 12, and construction of a new slip ramp from Route 24 Southbound to Route 140 Northbound. Per conversations with MassDOT, the Tribe has agreed to a monitoring program at the conclusion of the full build-out of the casino; an enhanced Transportation Demand Management program; and identification of the Tribal-State Compact's Transportation Mitigation Fund as a means to address future, unanticipated transportation needs and surrounding community concerns.

Further description of traffic mitigation is provided in Section 8.1.3.4 of the Final EIS and **Section 6.1** of this ROD. Implementation of mitigation measures will ensure impacts to traffic will be less than significant. Alternative D/No Action Alternative would create no additional impacts, therefore, no mitigation measures were proposed.

3.2.2 Floodplain, Wetlands, and Other Waters of the United States

Direct Impacts: On-site activities associated with the Development Alternatives will not result in any direct impacts to waters of the United States, meaning that no immediate loss to the aquatic ecosystem is expected to occur from filling. Each alternative would involve approximately 25,500 sq. ft. of fill within the 100-year floodplain. Off-site traffic improvements under Preferred Alternative A or Alternative C would involve approximately 48,390 sq. ft. (1.1 acres) of permanent wetland impacts, 10,540 sq. ft. of temporary wetland impacts, and 1,075 linear feet (7,000 sq. ft.) of intermittent stream impacts.

Alternative B would involve no significant impacts to wetlands off-site. Approximately 25,500 sq. ft. of compensatory flood storage volume will be created on the Taunton Site to offset fill within the 100-year floodplain under the Development Alternatives. Wetland creation to mitigate off-site impacts will be developed at an approximately 2:1 ratio. Creation will take place on the Taunton Site in the same general watershed and reach of the affected wetlands.

Secondary Effects: Secondary Effects are impacts associated with discharge of dredged or fill material, outside footprint of fill. Preferred Alternative A or Alternative B would involve secondary effects impact area of approximately 42,600 sq. ft. of upland buffer to the Cotley River and approximately 194,500 sq. ft. of upland forest around a vernal pool. Alternative C would involve a secondary effects impact area of approximately 15,140 sq. ft. In compliance with Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands), and EPA Section 404(b)(1) review by the Corps, impacts to wetlands, floodplain, and other waters of the United States were avoided and minimized to the maximum extent practicable in project design.

A description of mitigation for floodplains, wetlands, and other waters is provided in Section 9.0 of the Final EIS and **Section 6.2** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, therefore, no mitigation measures were proposed.

3.2.3 Stormwater

The increase in impervious area related to development would increase stormwater runoff on-site under the Development Alternatives. Due to the reduced footprint of their proposed developments, Alternatives B and C would involve reduced impervious areas and thus reduced runoff volumes compared to Alternative A. Significant roadway improvements at the Route 24/Route 140 interchange would add stormwater impacts under Preferred Alternative A or Alternative C; no significant off-site stormwater impacts would occur under Alternative B.

Stormwater management during and after construction and the use of Best Management Practices (BMPs) approved by MassDEP should mitigate potential impacts to water quality by controlling stormwater runoff volume and discharge rates and by treating stormwater by removing pollutants prior to discharge to downstream surface waters. The proposed stormwater management systems will comply with the U.S. EPA National Pollution Discharge Elimination

System General Permit for Discharges from Construction Activities and MassDEP Stormwater Management Standards. Specifically, the Development Alternatives would involve the installation of deep-sump catch basins with hooded outlets, an extended detention basin with sediment forebay, subsurface recharge system, and bioretention areas. Design of off-site mitigation BMPs will meet MassDEP Stormwater Standards to the extent possible.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.3** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.4 Geology and Soils

Topography: Under the Development Alternatives, topographic features of the Taunton Site would be altered by earthwork from clearing and grading for development. Due to the relatively flat nature of the site and prior grading and earthwork, the general topographic features of the project site would be preserved. The Cotley River and its banks would not be impacted. Under Preferred Alternative A or Alternative C, off-site topography would be altered to include a constructed fill landform for the new ramp, associated steep fill slopes and a retaining wall at the Route 24/140 interchange. Roadway improvements located adjacent to steep slopes and embankments would be protected during construction utilizing stormwater best management practices. No further mitigation would be required.

Soils: Under Preferred Alternative A or Alternative B, development would impact approximately 6.1 acres of currently undeveloped Prime Soils and approximately 4.4 acres of currently undeveloped State Important Soils on the project site. Under Alternative C, development would impact approximately 3.4 acres of Prime Soils and approximately 0.8 acres of currently undeveloped State Important Soils on the project site. Soils would not be impacted by a change in agricultural use. The use of appropriate soil erosion and sediment control techniques would minimize the potential for erosion and sedimentation, and no additional mitigation would be required.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.4** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.5 Rare Species and Wildlife Habitat

Habitat: No work is planned in areas mapped as Core Habitats, Critical Natural Landscapes, or Living Waters Critical Supporting Watersheds under the Development Alternatives. Secondary impacts to upland forest communities and impacts to Critical Terrestrial Habitat associated with a vernal pool on the northern portion of the project site have been minimized to the extent practicable through design. Under Alternative C, impacts to Critical Terrestrial Habitat would be avoided. No mitigation would be necessary.

Listed Species: The project would have no adverse effects on state or federally listed threatened or endangered species under the Development Alternatives.

Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.6 Hazardous Materials

Encounter: The development proposed under the Development Alternatives involves risk of encountering soil contamination associated with a 1988 gasoline release at 61 Stevens Street, and potential impacts to soil along the property line of an auto salvage yard at 57 Stevens Street. Lead paint and asbestos containing materials may be encountered on the northern portion of the project site; this area would be avoided under Alternative C. Should any oil or hazardous material be found to be present during investigation or construction, it would be remediated in full compliance with all applicable requirements of the MassDEP and the Massachusetts Contingency Plan (MCP; 310 CMR 40.0000).

Release: Each Alternative involves risk of release of hazardous materials. The most likely possible incidents would involve the dripping of fuels, oil, and grease from construction equipment. To minimize risk, all hazardous materials necessary for the operation of the facilities shall be stored and handled according to Federal, State, and manufacturer's guidelines. Personnel shall follow written standard operating procedures (SOP) for filling and servicing construction equipment and vehicles.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.6** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.7 Water Supply

Total water demand associated with the proposed development is approximately 0.309 million gallons per day (MGD) under Preferred Alternative A, 0.163 MGD under Alternative B, or 0.245 MGD under Alternative C. With a total of 1.169 MGD of available supply capacity before the City of Taunton reaches the Water Management Act withdrawal limit and 3.27 MGD capacity available at the City's Water Treatment Plant, no mitigation of demand or new supply is necessary.

Hydrants, valves, and other appurtenances would be installed as part of the new water main construction. The proposed water system improvements include upgrading the Stevens Street water main from a 12-inch main to a 16-inch water main and replacing the 12-inch water main and 8-inch water main on Pine Hill Street with one 16-inch water main. A second point of connection at the emergency entrance on Middleboro Avenue/Hart Street would provide a

12-inch water main through the project site, which would be connected to the existing water main in O'Connell Way; this measure would not be needed under Alternative C.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.7** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.8 Wastewater

Total wastewater generation associated with the proposed development is approximately 0.225 MGD under Preferred Alternative A, 0.103 MGD under Alternative B, or 0.177 under Alternative C. This flow would be added to the Taunton Wastewater Treatment Facility (WWTF) and is within that facility's available capacity. Under Preferred Alternative A or Alternative B, two new dedicated sewer pumping stations would be constructed to serve the development; under Alternative C, the need for a new pumping station on the northern portion of the project site would be eliminated. Gravity sewers between the new sewer pumping station(s) and the WWTF have adequate capacity, and no further mitigation would be necessary.

Under each Development Alternative, the Tribe would contribute to the City of Taunton's infiltration and inflow (I/I) removal program at a ratio of 5:1 (i.e. 5 gallons of I/I removed for each gallon of wastewater added), resulting in removal of approximately 1.125 million gallons under Preferred Alternative A, 0.5 million gallons under Alternative B, or 0.88 gallons under Alternative C. This removal would reduce the frequency of combined sewer overflows (CSOs) and create an effective increase in WWTF capacity.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.8** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.9 Utilities

Electric: The anticipated electrical power requirement of the proposed development is approximately 22,400 megawatt-hours per year (MWh/year) under Preferred Alternative A, 15,600 MWh/year under Alternative B, or 20,600 MWh/year under Alternative C. Under each Alternative, a new substation would be constructed on the project site to fulfill demand.

Gas: The anticipated gas requirement for the proposed development is approximately 122,400 million British Thermal Units per year (MMBtu/year) under Preferred Alternative A, 58,300 MMBtu/year under Alternative B, or 90,200 MMBtu/year under Alternative C. Columbia Gas has made a preliminary determination that the gas mains in the vicinity of the project site are capable of supplying the estimated gas demand. A portion of the gas lines leading to the area in Route 140 would be upgraded to meet the project requirements. Under Preferred Alternative A

or Alterative B, gas service would be extended from Middleboro Avenue to provide for the water park.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.9** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.10 Solid Waste

Construction/Demolition: The demolition of current buildings on the project site would generate approximately 19,800 cubic yards of waste (of which 7,900 cubic yards would be recyclable), and construction would generate approximately 12,000 cubic yards of waste (approximately 60 percent recyclable) under Preferred Alternative A. Demolition waste would be reduced under Alternative B, which involves maintaining existing buildings at 50 O'Connell Way and 73 Stevens Street. Construction waste would be reduced under Alternative B or C, due to reduced scales of construction.

Operation: The operation of proposed facilities would generate approximately 2,090 tons per year (TPY) of solid waste under Preferred Alternative A, 1,280 TPY under Alternative B, or 1,730 TPY under Alternative C. The Tribe would contract with a private solid waste management company for solid waste and recycling collection and disposal services. A recycling program allowing casino patrons to dispose of all items without sorting would minimize non-recycled solid waste to the maximum extent practicable; no further mitigation would be necessary.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.10** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.11 Air Quality

Mobile Sources: Under Preferred Alternative A or Alternative C, traffic associated with the proposed development is expected to result in an increases of approximately 7.2 percent in volatile organic compounds (VOC) and 5.9 percent in nitrogen oxide (NOx) emissions by 2022 compared to No Action conditions. Alternative B would yield an increase of 4.1 percent in VOC and 4.1 percent in NOx emissions. Transportation mitigation measures, summarized in **Section 3.2.1** above and described in Sections 8.1.3.4 and 8.1.3.6 of the Final EIS, would result in air quality impact reductions. These mitigation measures would reduce VOCs by 1.8 percent and NOx emissions by 0.5 percent under Preferred Alternative A or Alternative C, or VOCs by 0.6 percent and NOx emissions by 0.2 percent under Alternative B.

Stationary Sources: Stationary sources, including sources such as boilers and emergency generators, would also cause unavoidable adverse effects to air quality. Equipment subject to the

Massachusetts Environmental Results Program (ERP) would meet emissions standards and other performance and maintenance requirements.

Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.12 Greenhouse Gas Emissions

Stationary: Annual greenhouse gas (GHG) emissions rates were calculated for a baseline case of development, in which facilities would be constructed in compliance with code ASHRAE 90.1 – 2007, and for mitigated versions of the same programs. The estimates were generated using VisualDOE for building energy modeling.[6] The GHG emissions are measured in carbon dioxide (CO2) equivalent based on their potential to contribute to climate change. Emissions related to activities that are stationary on the site include direct emissions from fuel combustion and indirect emissions associated with electricity and other energy imported from off-site power plants. Without mitigation, development under Preferred Alternative A would generate approximately 10,400 short TPY direct CO2 equivalent emissions and 16,500 short TPY indirect emissions. Alternative B would generate approximately 7,200 short TPY direct emissions and 9,100 short TPY indirect emissions. Alternative C would generate approximately 8,700 short TPY direct emissions and 15,600 short TPY indirect emissions.

Mitigation measures proposed under each Development Alternative include a heat recovery system, high efficiency building shell, and demand controlled ventilation. These and other measures, described in **Section 6.12** of this ROD, would reduce direct GHG emissions to 9,400 short TPY under Preferred Alternative A, 5,500 short TPY under Alternative B, or 8,000 short TPY under Alternative C. Mitigation measures would reduce indirect GHG emissions to approximately 12,600 short tons per year under Preferred Alternative A, 7,100 short TPY under Alternative B, or 12,000 short tons per year under Alternative C.

Transportation: Transportation GHG emissions are generated from vehicle exhaust, calculated based on the total area-wide CO2. Traffic associated with the proposed development would be expected to generate approximately 5,900 tons per year as CO2 under Preferred Alternative A, 5,500 tons per year under Alternative B, or 4,100 tons per year under Alternative C. These estimates account for the transportation mitigation measures summarized in **Section 3.2.1** above and described in Sections 8.1.3.4 and 8.1.3.6 of the Final EIS, which would result in GHG impact reductions.

Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.13 Cultural Resources

As of January 28, 2015, in consultation with the Massachusetts State Historic Preservation Officer, Tribal Historic Preservation Officer, and BIA's Eastern Regional Office Archaeologist,

a site protection plan (avoidance plan) was developed to avoid known archaeological sites within the Taunton Site, which includes the Preferred Alternative A. Additionally, because of a realignment of the Route 24/140 interchange, no cultural resources were identified in the area currently proposed for off-site transportation improvements. In support, a letter dated March 16, 2015, from the BIA, Eastern Regional Office Acting Regional Director to Massachusetts State Preservation Officer states that no known historic properties will be affected if the sites are avoided. Because Preferred Alternative A avoids known sites, the site protection plan will not need to be implemented. However, consultation with the State Historic Preservation Officer, the Advisory Council on Historic Preservation, Tribal Historic Preservation Officer, and the BIA's Eastern Regional Office Archaeologist is required if the construction activity will cause effect to archaeological sites.

As of September 2014, the project site was understood to contain four potentially significant archaeological sites (First Light 1-4) and one site (East Taunton Industrial Park 2, 19-BR-500) that had been recommended as eligible for listing on the National Register of Historic Places (NRHP) by the Massachusetts Historical Commission (MHC). The Tribe, in consultation with the MHC and BIA, undertook a site examination of First Light sites 2-4 sites to determine their eligibility for listing and boundaries. In April 2015, BIA received concurrence from the SHPO on BIA's determination that while the First Light 1 site is not eligible for nomination to the NRHP, the First Light 2, 3, and 4 sites (considered together as a single site) and the East Taunton Industrial Park 2 site are archaeological resources and NRHP eligible.

The BIA has recommended to the Tribe that the First Light 2-4 sites and the East Taunton Industrial Park 2 site should be avoided by the casino and resort construction activity, and a site avoidance plan has been developed. The BIA found that no known historic properties will be affected if the sites are avoided.

One area within proposed off-site roadway improvements at the Route 24/140 interchange may contain previously unidentified archaeological resources. A subsequent interchange realignment avoids potential unidentified archaeological resources. Preferred Alternative A is not expected to impact any off-site cultural resources. The current proposed design for the reconstruction of the Route 24/140 Interchange, as described in the Tribe's application for an Individual Section 404 Permit from the Corps, avoids two archaeological sites that were identified outside the proposed construction envelope. The Corps will continue to consult with the MHC under Section 106 during its review of the Section 404 application.

Improvements proposed under Preferred Alternative A or Alternative C could affect such resources off-site. No potential off-site impacts would occur under Alternative B. The Tribe, in consultation with the MHC and BIA, has undertaken an intensive (locational) archaeological survey of archaeologically sensitive areas of the off-site roadway improvements to determine if avoidance of all or some of the sites is necessary and possible.

If, following consultation, it is determined avoidance of previously unidentified archaeological resources within off-site roadway improvements is not possible, mitigation measures are likely to comprise the resolution determined through the Section 106 consultation process. Under Section

106, when a Federal agency funds a proposed action that would result in adverse effects to historic properties, the agency must work with consulting parties such as other Federal agencies, the SHPO, and Native American tribes to execute a memorandum of agreement (MOA) that described the resolution of adverse effects. If previously unidentified archaeological resources in the off-site roadway improvements area are determined eligible and adverse effects are not avoidable, under Preferred Alternative A or Alternative C the parties would define in an MOA the appropriate resolutions and implement the proposed measures.

Further description of mitigation is provided in Section 9.0 of the Final EIS and **Section 6.13** of this ROD. Implementation of mitigation measures will ensure impacts will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.14 Noise

Anticipated noise impacts associated with operation of the proposed development were predicted at the nearest noise-sensitive receptors surrounding the project site using CadnaA noise calculation software. Modeling results were compared to existing background levels as per the MassDEP Noise Policy, which limits increases to 10 decibels (dBA) over background. Using the MassDEP standard and CadnaA noise calculation software, the use of mechanical equipment used to heat, cool, and supply back-up power to the facility would not create significant additional noise in the surrounding neighborhood under the Development Alternatives. Therefore, no mitigation would be necessary.

Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.15 Visual

Based on comments received during Scoping, a view shed analysis was conducted to determine the extent to which major project elements would be visible within a two-mile radius. Renderings were also created to determine each Development Alternative's potential visual impacts on community character. Under Preferred Alternative A, visual impacts would not be significant. Under Alternative B due to elimination of casino/hotels and under Alternative C due to elimination of water park facilities, visual impacts would be less.

Under the Development Alternatives, the parking garage, water park, casino, and hotels would be partially visible from parts of their surroundings, but would largely be blocked by topography and trees. Shadows from new buildings would be limited to small areas of the Taunton Site, except for limited periods in the late afternoon. Significant shadows would be cast on and across Stevens Street during late afternoon hours around the Winter Solstice, when shadows are at their longest. Development under each Alternative would include outdoor lighting at levels meeting the goal of protecting public health and safety at night. Lighting in the entry courtyard and on the hotel roof terrace would be prevented from reaching neighboring properties or the night sky by screens created by building structures.

Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.16 Socioeconomic Effects

The Development Alternatives will have positive socioeconomic consequences for the Tribe and the City of Taunton.

Tax Revenues: Because these parcels would become exempt from taxation upon acquisition into Federal trust, this action would remove approximately $370,000 from the City of Taunton's annual tax revenues. As part of the Intergovernmental Agreement between the Tribe and the City of Taunton, entered into on July 10, 2012, the Tribe has agreed to provide the City with payments in lieu of property taxes based on the assessed valuation of the project site. **Section 8.6** of this ROD further discusses the IGA.

Impacts:

Preferred Alternative A

- *Employment*: Preferred Alternative A is projected to directly introduce approximately 3,500 permanent full- and part-time jobs. This addition would increase the number of jobs in the City of Taunton by 12.3 percent, and could substantially decrease the unemployment rate. Across Bristol and Plymouth Counties, the addition of 3,500 jobs would increase employment by 0.7 percent. The proposed development would generate an additional 1,540 permanent indirect (industries that provide goods and services to contractors) and induced jobs (generated by new economic demand from household spending salaries) within the 2-county area. Total direct, indirect, and induced employee compensation resulting in Bristol and Plymouth counties from the annual operation of the completed development is estimated at $147.57 million.

- *Construction*: Construction of the proposed development under Preferred Alternative A is expected to directly employ an average of 287 full-time equivalent jobs in Bristol and Plymouth Counties per year during the 8-year construction period, and would support an additional 712 person-years of indirect employment and 893 person-years of induced employment within the 2-county region. Total direct, indirect, and induced employee compensation resulting in the 2-county region from construction is estimated at $192.86 million.

- *Housing*: It is anticipated that some workers may move to Taunton or the broader labor-shed area to work at the proposed project. Vacant housing stock is available in the area to accommodate such relocations, and significant housing construction is not anticipated.

- *Visitation*: Development proposed under Preferred Alternative A is anticipated to introduce an estimated 5.3 million visitors per year to the project site and area. Visitors

are expected to contribute to an overall gradual strengthening of the regional economy through direct spending on-site and incidental purchases at off-site restaurants, hotels, motels, and retail establishments.

- *Spending*: The existing business community could experience alterations of local consumer spending behavior through which a portion of leisure spending would be shifted toward the casino amenities and away from established leisure and entertainment businesses. The negative consequences of this effect on particular businesses is expected to be offset by the continued support of economic activity, such as wages, purchases, and taxes, within the overall local economic sphere, and further offset by the increase in local and regional spending brought on by new employees to the casino and to positions vacated by new casino employees.

Alternative B: Reduced Intensity I

Like Preferred Alternative A, Alternative B would result in substantial economic benefits derived from new jobs and spending on the Site during project construction and operation. However, the reduced development program proposed under Alternative B would result in reduced economic benefits both during construction and ongoing operation of the project. Assuming that comparable construction techniques and materials would be utilized for Preferred Alternative A and Alternative B, total employment, employee compensation, and economic output associated with the construction of Alternative B would decrease roughly proportionately with decreases in the square feet of particular uses compared to Preferred Alternative A. For example, the casino included in Alternative B is roughly half the size of the casino proposed in Preferred Alternative A, therefore the economic benefits associated with construction of the Alternative B casino would be approximately half of those anticipated for Preferred Alternative A. Economic benefits associated with ongoing operation of the casino/resort would also be substantially reduced under Alternative B compared to Preferred Alternative A. Alternative B includes roughly 54 percent of the casino space, one third of the hotel rooms, 43 percent of the restaurant seats, and fewer employee dining room seats compared to Preferred Alternative A. Both non-payroll and payroll expenses associated with these uses would be less under Alternative B compared with Preferred Alternative A, and would support fewer direct, indirect and induced jobs, less employee compensation, and less economic output.

Alternative C: Reduced Intensity II

Like Preferred Alternative A, Alternative C would result in substantial economic benefits derived from new jobs and spending on the Site during project construction and operation. Because Alternative C does not include a water park and includes 300 fewer hotel rooms compared to Preferred Alternative A, this Alternative would result in reduced economic benefits, measured in terms of jobs, employee compensation, and economic output, both during construction and ongoing operation of the project.

Services:

- *Law Enforcement*: New employees and visitors at the casino/resort would create additional demand for police services under each Development Alternative. The Tribe would pay a one-time cost of approximately $2.982 million and annual costs of $2.5 million to fund the creation of a new police substation to accommodate the increased daily population in East Taunton, the purchase of new patrol cars, and the hiring of additional officers. See **Section 8.7** of this ROD for a further discussion.

- *Mental Health*: The development of a destination resort casino under the Development Alternatives may negatively affect people who suffer from problem or pathological gambling addition disorders. The Tribe would support problem gambling education, awareness, and treatment through a one-time contribution of $60,000 and annual contributions of $30,000 to a local center for the treatment of compulsive gambling. The Tribe also commits to providing training to front line staff in recognizing compulsive gamblers and to making information available and accessible for such individuals seeking assistance.

- *Criminal Justice*: Proposed development would not result in an adverse impact to the criminal justice system under the Development Alternatives. As described above, the Tribe's payment for the creation of a local center for the treatment of compulsive gambling would serve to lessen potential additional burden on the criminal justice system.

- *Fire Protection*: Proposed development under each Development Alternative would place additional burdens on the Taunton Fire Department due to the increase in visitors to the area and the additional households expected as a result of project-generated employment. The Tribe would compensate the City $2.86 million (in phases) during development and $1.5 million annually during operation for fire protection infrastructure improvements. See **Section 8.7** of this ROD for a further discussion.

- *Medical Services*: Under the Development Alternatives, the new visitors, residents, and employees in the area would create new demands on existing ambulance and hospital services, including in-patient and outpatient (emergency room) services. These visits would represent marginal increases compared to the 7,496 households served by Morton Hospital in fiscal year 2011 and the 52,794 emergency room cases handled by Morton Hospital annually. Overall, the development would not result in any significant adverse impacts to emergency medical services and hospitals.

- *Schools*: The development proposed under each Development Alternative would likely introduce new households to the area. While some of these households would increase demand for school seats in the Taunton Public School District, others would be broadly dispersed over approximately 317 schools in Bristol and Plymouth Counties and would not overburden any particular district. The Tribe would pay the City of Taunton

$370,000 annually for use as needed by the Taunton School District. See **Section 8.7** of this ROD for a further discussion.

3.2.17 Environmental Justice

Acquiring the Taunton Site in trust would create employment opportunities and generate revenues to support the Tribe, an Environmental Justice Community. Development proposed under Preferred Alternative A or Alternative C would generate traffic that could affect the Environmental Justice Community noted in Census Tract 6141.01 Block Group 3 in Taunton. This traffic would be reduced under Alternative B. Traffic mitigation measures described in **Section 6.1** of this ROD and in Sections 8.1.3.4 and 8.1.3.6 of the Final EIS, especially those within the Block Group at Mozzone Boulevard, Erika Drive, and High Street, would mitigate undue traffic burdens. Implementation of mitigation measures will ensure impacts to environmental justice will be less that significant. Alternative D/No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.18 Sustainability

Energy conservation and other sustainable design measures will be incorporated into the project under the Development Alternatives. New buildings will employ, where possible, energy and water efficient features for plumbing, mechanical, electrical, architectural, and structural systems and assemblies. Sustainable design elements relating to building energy management systems, lighting, recycling, conservation measures, regional building materials, and clean construction vehicles will be included, as practicable. Further description of traffic mitigation is provided in Section 8.1.3.4 of the Final EIS and **Section 6.1** of this ROD. Implementation of mitigation measures will ensure impacts to sustainability will be less that significant. Alternative D/ No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.19 Construction Impacts

The development of the proposed facilities under the Development Alternatives will involve environmental impacts specific to construction activities. Construction vehicles and employees under each alternative will generate traffic affecting roadways, air quality, and greenhouse gas emissions. Mitigation for these impacts will include designation of allowed routes coordinated with MassDOT and the City of Taunton, and provision of off-site parking and shuttles for construction workers. On the project site under each Development Alternative, heavy equipment and earth movement will pose risks to wetlands and topography. A Stormwater Pollution Prevention Plan (SWPPP) will be created and a buffer zone will be established to prevent impacts to wetlands. Construction under each alternative will also involve noise-generating equipment and activities. Noise impacts will be minimized through work hour limits, prevention of idling, and maintenance of muffler systems. Further description of traffic mitigation is provided in Section 8.1.3.4 of the Final EIS and **Section 6.1** of this ROD. Alternative D/ No Action Alternative would create no additional impacts, and no mitigation measures were proposed.

3.2.20 Indirect and Growth Inducing Effects

Development proposed under the Development Alternatives presents potential for indirect off-site impacts and induced growth in the surrounding region.

Employment: Wages earned by new employees would most likely be spent in the local economy. Businesses and industries serving resident communities with these goods and services would experience increased demands, resulting in further investments in capital and labor needed to meet these increased demands. Opportunities for the expansion of existing businesses and the opening of new businesses would exist. Compared to Preferred Alternative A, the level of employment and its effects on the local and regional economies under Alternative B and C would be reduced due to reduced scales of development and operations.

Operation: The operation of the proposed casino and related facilities would require the ongoing purchase of a wide range of goods and services, many of which would be purchased within the local and regional market areas. The demand the local and regional economies experience would represent opportunities for the expansion and creation of businesses, such as wholesalers, to serve the operational needs of the development. Compared to Preferred Alternative A, the effects of local and regional investment related to casino operations under Alterative B or C would be reduced due to reduced scales of development and operations.

Services: The induced growth created by the proposed development would create additional demand for community services, including police, fire, and emergency services, schools, and health and welfare-related services. This increased demand would be offset by spending and associated tax revenue to the County and the Commonwealth. In addition, new property tax revenues would be generated by any induced residential construction, and would be collected by County, municipal, school, and special district taxing authorities. Therefore, no significant impacts to community services are expected to result from induced growth. Compared to Preferred Alternative A, the effects of induced employment on local and regional community services under Alternative B
or C would be similar but reduced due to reduced scales of operations. As under Preferred Alternative A, these impacts would be offset by additional tax revenues.

Visitation: Visitors to the casino and related facilities would be expected to spend money in the local and regional economies on food, transportation, lodging, and entertainment. Development is expected to generate over 10,000 incoming automobile trips per day under Preferred Alternative A or Alternative C, or over 5,000 trips per day under Alternative B, representing substantial visitor and tourist spending potential.

3.2.21 Cumulative Effects

In consideration of potential cumulative effects that could result from Preferred Alternative A and development of the land in Taunton as proposed under the Development Alternatives, a geographic boundary was identified that included Bristol and Plymouth Counties for

socioeconomic analysis; roadways in Taunton, Raynham, Berkley, Bridgewater, Lakeville, and Middleborough as determined in consultation with MassDOT for transportation analysis; and the Assawompset Pond Complex in Lakeville, Middleborough, Rochester, and Freetown and Dever Wells in Taunton for water supply analysis. Potential cumulative effects were generally considered in a timeframe of 10 years from the present at the time of analysis (2012), with the exception of the transportation analysis which adopted a 20-year horizon. Projects that may contribute to cumulative impacts were identified from public Massachusetts Environmental Policy Act (MEPA, M.G.L. c. 30, section 61 through 62H, inclusive) filings. These filings identified proposed residential subdivisions, mixed-use commercial developments, and improvements to utilities and communications infrastructure in the 2-county region with potential environmental impacts. The study also included projected regional transportation projects identified in earlier analysis and other casino developments associated with the Massachusetts Expanded Gaming Legislation of 2011.

Traffic analysis focused on the effects of MassDOT's anticipated completion of a proposed series of improvements to the Route 24/Route 140 interchange area on traffic through the year 2032. These improvements, including a new collector-distributor road parallel to Route 24 Southbound, are expected to improve safety and capacity, producing a cumulative benefit. The anticipated removal of the Barstows Pond Dam is expected to result in erosion and sedimentation along the Cotley River in close proximity to the project site and convert open water to wetland and riverine habitat conducive to diadromous fish. Proposed improvements at the Taunton Municipal Airport are also expected to reduce wetland habitat. A description of mitigation for floodplains, wetlands, and other waters is provided in Section 9.0 of the Final EIS and **Section 6.2** of this ROD. Because impacts to Critical Terrestrial Habitat have been avoided or minimized to the extent possible under Preferred Alternative A and Alternatives B and C, cumulative effects would not be significant.

Other projects, like expansion of the Myles Standish Industrial Park, will add sources of wastewater to Taunton's WWTF. However, because these projects include substantial removal of I/I and upgrades to the WWTF are anticipated, no significant cumulative impacts are expected. Other development in the region, including casinos in other regions of the state, is expected to result in cumulative economic growth. While such development may result in an increase in cumulative demand on law enforcement, fire protection, and school systems, the Tribe has accounted for and minimized the effects of the Development Alternatives through mitigation payment agreements in the Intergovernmental Agreement between the Tribe and the City as discussed in **Sections 8.6 and 8.7** below. Additionally, anticipated projects in and around Census Tract 6141.01 Block Group 3 including the South Coast Rail development and intersection improvements are expected to produce cumulative benefits in terms of Environmental Justice.

Under the Development Alternatives, assuming that current and future projects in the region are designed and constructed according to MassDEP, MassDOT, and other environmental standards and permitting requirements, no significant cumulative impacts are expected with regard to wetlands, stormwater, hazardous materials, water supply, utilities, solid waste, air quality, greenhouse gas, cultural resources, noise, or visibility.

3.2.22 Unavoidable Adverse Effects

Even with the application of mitigation measures, some adverse effects caused by land development in the City of Taunton cannot be avoided. However, with mitigation efforts adverse effects are minimized to the greatest extent practicable in compliance with applicable laws, regulations, and policy, and will reduce adverse effects to less than significant.

Under the Development Alternatives, development of the Taunton Site would increase daily vehicle trips on local and regional roads, resulting in additional emissions of VOC, NOx, ground-level CO, and GHGs. Development under each Development Alternative would impact currently undeveloped Prime and Important Soils and create minor changes in topography. Additional demand for water and energy would represent unavoidable withdrawal of natural resources. Development proposed under Preferred Alternative A or Alternative B would involve unavoidable impacts to three potentially significant archaeological sites (First Light 2-4) and the East Taunton Industrial Park 2 Site (19-BR-500), which has been recommended as eligible for listing on the National Register by the project archaeologists. The scale of development proposed under each Alternative involves unavoidable effects in terms of visibility and shadows in the area.

Although direct impact to wetland have been avoided on the Taunton Site, off-site transportation improvements deemed necessary under Preferred Alternative A or Alternative C would involve wetland fill and stream crossing in the vicinity of the Route 24/Route 140 interchange. Each alternative is also likely to yield, to an extent, an unavoidable substitution effect, described in Section 8.16.3 of the Final EIS, wherein local spending would be diverted away from established leisure and entertainment businesses as local and regional residents chose instead to patron the destination resort casino.

4.0 ENVIRONMENTALLY PREFERRED ALTERNATIVE

As described in Sections 4.3.5 and 8.2.2.4 of the Final EIS, the Alternative D/No Action Alternative could result in significantly greater impacts to on-site land and wetland resources than the tribal Development Alternatives. Under Alternative D, it is assumed that the parcels within and adjacent to the Liberty Union Industrial Park in Taunton would continue to develop to their capacity as currently zoned and permitted. Alternative D could involve approximately 17,600 sq. ft. of total permanent alterations to waters of the U.S. This impact represents a significant increase from the total on-site impacts to wetlands and waters of the U.S. under Preferred Alternative A and Alternative B. Alternative D could result in some secondary effects to upland forest communities associated with the Cotley River. Alternative D could involve the build-out of the remaining parcels on the project site as commercial, industrial, warehouse, and office facilities. These buildings and additions could be developed concurrently or over several years by one or more developers and designs could vary from the layout projected. Development north of the railroad tracks on the project site would likely take place and could impact Critical Terrestrial Habitat associated with the vernal pool in Wetland Series 7. It can be assumed that these developers would comply with the Clean Water Act, the Massachusetts

Wetlands Protection Act and the Taunton Wetlands Protection Bylaw as necessary, and impacts would be minimized and mitigated to the maximum extent practicable.

Because the Alternative D does not provide a land base for tribal economic development, it does not meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. The Alternative D does not allow the Tribe to generate sustainable revenue and would limit the Tribe's opportunity to achieve self-sufficiency, self-determination, and develop a stronger tribal government. Additionally, Alternative D would likely result in substantially fewer economic benefits to the City of Taunton, Bristol and Plymouth Counties, and the Commonwealth of Massachusetts than the Development Alternatives.

Among the Development Alternatives, the Reduced Intensity II Alternative (Alternative C) would result in the fewest effects to the biological and physical environment. Alternative C would have the fewest effects due to its avoidance of any development on the northern portion of the project site in Taunton. However, Alternative C would generate less revenue, and therefore reduce the number of programs and service the tribal government could offer tribal members and neighboring communities. Alternative C is the Environmentally Preferred Alternative, but it does not fulfill the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation.

5.0 PREFERRED ALTERNATIVE

For the reasons discussed herein, the Department has determined that Alternative A is the Agency's Preferred Alternative because it meets the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. Acquiring the Mashpee and Taunton Sites in trust for the development of a casino-resort complex as described under Alternative A would provide the Tribe, which has no reservation or trust land, with the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for the tribal government. Under such conditions, the tribal government would be more stable and better prepared to establish, fund and maintain governmental programs that offer a wide range of health, education, and welfare services to tribal members, as well as provide the Tribe and its members with greater opportunities for economic growth and employment. Alternative A would also allow the Tribe to implement the highest and best use of the Taunton Site. Finally, while Alternative A would have slightly greater environmental impact than the environmentally preferred alternative as described above in **Section 4.0**, that alternative does not meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation, and the environmental impacts of Preferred Alternative A are adequately addressed by the mitigation measures adopted in this ROD.

Alternative B or C, while similar to Preferred Alternative A, would provide reduced economic opportunities for the Tribe than Alternative A due to the reduced scales of their development and programming. Because Alternative B would include a smaller casino facility compared to that of Alternative A and no casino hotels, and Alternative C would not include a water park or water park hotel, these alternatives would result in reduced economic benefits, measured in terms of jobs, employee compensation, and economic output, both during construction and ongoing

operation of the project. Visitation would be reduced under Alternative B or C, reducing both on-site and off-site spending and the Tribe's opportunity to provide for its members' need and achieve self-sufficiency.

Alternative A is the alternative that best meets the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation while preserving the key natural resources on and around the Taunton Site. Therefore, Alternative A is the Department's Preferred Alternative.

6.0 MITIGATION MEASURES

The Council on Environmental Quality's NEPA regulations require that mitigation measures be developed for all of a proposed project's effects on the environment where it is feasible to do so (40 CFR Sections 1502.14(f) and 1502.16(h); CEQ 40 Most Asked Questions, 19a). The NEPA regulations define mitigation as:

> …avoiding the impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; compensating for the impact by replacing or providing substitute resources or environments (40 CFR Section 1508.20).

These principles have been applied to guide design for the Development alternatives. Where potential effects on the environment were identified in early stages of project design and in EIS preparation, appropriate changes in the project description were made to avoid or minimize them. Other applications of mitigation have been incorporated into the design of the alternatives and have been mentioned throughout the EIS, including those compensatory mitigation measures to which the Tribe agreed in the Intergovernmental Agreement with the City of Taunton. The following section summarizes the measures to mitigate specific effects identified in the preparation of the EIS or to further reduce the impacts to less than significant levels.

All practicable means to avoid or minimize environmental harm from Preferred Alternative A have been identified and adopted. The following mitigation measures and related enforcement and monitoring programs have been adopted as a part of this decision. Where applicable, mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as this decision. Specific best management practices and mitigation measures adopted pursuant to this decision are set forth below and included within the Mitigation Monitoring and Enforcement Plan included as **Attachment III** to this ROD.

6.1 Transportation

Construction Impacts

The following measures will be implemented to mitigate traffic during construction, as described in Section 8.19.4 of the Final EIS, under the Development Alternatives:

A. The Tribe will work with the City of Taunton to develop a comprehensive Construction Traffic Management Plan (TMP), which will include the definition of designated routes for all associated construction truck traffic developed in close coordination with MassDOT and City staff prior to start of construction. A separate TMP will be developed specific to roadway improvements and the construction of the new water main and sewer extension, which will take place partly in public roadways.

B. Construction equipment, material deliveries and personnel vehicular travel to the project site in connection with construction activities will use only the designated service road from Route 140 onto Stevens Street rather than accessing Stevens Street from the Middleboro Avenue side.

C. Construction workers will have off-site parking and will be shuttled to/from the project site. They will be encouraged to carpool, and will be able to store tools and equipment on site.

D. Should a partial street closure be necessary in order to transport or off-load construction materials and/or to complete construction-related activities, the closure will be limited to off-peak periods.

Operational Impacts

The following measures will be implemented to mitigate traffic impacts during operation, under Preferred Alternative A and Alternative C:

E. Galleria Mall Drive South/County Street/Route 140 Southbound (SB) Ramps (Exit 11A) Improvements:

- County Street traffic will merge from two lanes to one lane before meeting with the Route 140 SB ramp traffic.
- Stevens Street Overpass centerline will shift to the west to allow for three travel lanes as it approaches the signal at the Overpass Connector/Route 140 Northbound (NB) Ramps/Stevens Street intersection.
- Stevens Street Overpass bridge will be restriped to consist of three travel lanes northbound and one travel lane southbound.
- This improvement will include updating all traffic signal equipment.

F. Overpass Connector/Route 140 NB Ramps/Stevens Street Intersection Improvements:

- Two lanes will be provided out to the Site driveway to prevent excessive on-site queuing.
- Right-turn out of the Site driveway will be signalized to prevent weaving between vehicles traveling through on Stevens Street and those making a left-turn onto the Route 140 NB ramp.
- Traffic from the project site onto Stevens Street will access the ramp via a double left turn onto the existing ramp.
- This intersection will be coordinated with the intersection of O'Connell Way/Stevens Street (Mitigation Measure H, below).
- This improvement will include updating all traffic signal equipment.

G. Route 140 NB between Exits 11 and 12:

- Route 140 NB will be widened from two lanes to three lanes between the existing ramp and the approach to the Route 24 NB on-ramp.
- Vehicles from Stevens Street will enter Route 140 NB in a separate lane.

H. O'Connell Way/Stevens Street Improvements:

- NB Stevens Street approach will have two left-turn lanes, a through lane, and a right-turn lane.
- SB approach will have a left-turn lane, a through lane, and a right-turn lane.
- Westbound (WB) approach will operate as left-turn lane and a shared through/right-turn lane.
- Eastbound (EB) Site drive approach will have two right-turn lanes, which will operate under signal control. Left-turns and through movements will not be allowed out of the main Site driveway.
- This intersection will be coordinated with the intersection of Overpass Connector/Route 140 NB Ramps/Stevens Street Intersection (Mitigation Measure F, above).
- This improvement will include updating all traffic signal equipment.

I. Secondary service road constructed north of parking garage to accommodate service vehicles generated by casino and Crossroads Center:

- Garage exits will be signed so as to prohibit right turns by casino patrons or employees on to that service road.
- Tribe will work with the City of Taunton and MassDOT to implement a heavy-vehicle exclusion on Stevens Street north of the service driveway.

J. Route 24 SB Ramp (Exit 12B)/County Street (Route 140) improvements:

- Construction of a new slip ramp in the northwest quadrant of the interchange to accommodate traffic from Route 24 SB to Route 140 NB. At its approach to Route 140, a single channelized right-turn lane will be provided.
- Route 140 SB approach will be widened to remove the bottleneck that occurs at the railroad tracks to and to allow two through lanes and a channelized right-turn lane at the intersection.
- Route 140 SB beneath Route 24 will be widened to accommodate two through lanes and a barrier-separated through lane, which accommodates the free right turn from the Route 24 SB off-ramp.
- Route 24 SB will be widened to accommodate three travel lanes from Hart Street Overpass to Route 140.
- Tribe will continue to work with MassDOT to develop a long-term interchange alternative which, when realized, will accommodate all projected traffic volumes including the potential revitalization of the Silver City Galleria Mall into the design year of 2032.
- This improvement will include updating all traffic signal equipment with consideration for Alternative 1D improvements in the future.

K. Route 24 NB (Exit 12A)/County Street (Route 140) Ramp Improvements:

- Route 140 SB approach will have two through lanes, an added lane from Route 24 SB ramp, and one exclusive left-turn lane.
- NB approach will have two through lanes and two channelized right-turn lanes.
- Route 140 NB right turn approach will be widened to allow two channelized right-turn lanes, capable of accommodating queues that will taper to one lane onto Route 24 NB.
- This improvement will include updating all traffic signal equipment.

L. Mozzone Boulevard/County Street (Route 140) Improvements:

- Signal phasing will be adjusted to add a short leading left-turn from Route 140 NB.
- NB lanes will be restriped to have a left-turn only lane and a through lane.
- This signal will be coordinated with the signals at Erika Drive, the Bristol Plymouth High School driveway and the Route 24/140 interchange.

M. Addition of traffic signal to Bristol-Plymouth High School Drive/County Street (Route 140) intersection

N. Updates to signal length and phasing splits at Erica Drive/County Street (Route 140) intersection

O. Hart's Four Corners [Hart Street/County Street (Route 140)] Improvements:

- Both County Street approaches will be widened to three lanes consisting of a left-turn lane, a through lane, and a shared through/right-turn.
- Both Hart Street approaches will be widened to include a left-turn lane, a through lane, and a right-turn lane

P. Adjustment of phasing splits at County Street (Route 140)/Gordon M. Owen Riverway Extension intersection

Q. Signal phasing changes at High Street/Winthrop Street intersection

R. Evaluation and signal timing and phasing updates at Winthrop Street (Route 44)/Highland Street intersection

S. Thirteen existing traffic signals to be outfitted with emergency vehicle priority equipment to allow rapid response from firehouse to project site

T. Bristol-Plymouth High School Drive/Hart Street/Poole Street Improvements:

- Realignment of High School driveway to align with Poole Street
- Americans with Disabilities Act (ADA) accommodations
- Addition of a flashing warning beacon on Hart Street

U. Stevens Street/Middleboro Avenue Improvements:

- Addition of a flashing warning beacon
- ADA accommodations
- Sidewalk widening at intersection approaches
- Installation of crosswalk markings
- Stevens Street to be signed for Heavy Vehicle Exclusion

V. Stevens Street/Pinehill Street Improvements:

- Radar speed control signs on Stevens Street in advance of Pinehill Street
- ADA accommodations at intersection
- Update of crosswalk markings
- Pinehill Street to be signed for Heavy Vehicle Exclusion

W. Addition of traffic signal control and pedestrian improvements at Middleboro Avenue/Pinehill Street/Caswell Street intersection

X. Addition of traffic signal control and pedestrian improvements at Middleboro Avenue/Old Colony Avenue/Liberty Street intersection

Y. Addition of school zone flashing warnings and appropriate signage and pavement markings at East Taunton Elementary Driveway/Stevens Street intersection

The following mitigation measures shall be implemented under Alternative B:

Z. O'Connell Way/Stevens Street/Revolutionary Road (Main Driveway) Improvements:

- The Stevens Street NB approach would be restriped to include a 250-foot left-turn lane, a through lane, and a right-turn lane.
- The WB Revolutionary Road approach would be striped as a left-turn lane and a shared through/right-turn lane.
- The EB O'Connell Way approach would be reconstructed with a channelized island to allow only right-turns out of the Site.
- The SB Stevens Street approach would be widened to accommodate a left-turn lane, a through lane, and a right-turn lane.
- The driveway signal would be coordinated with the signal at Overpass Connector/Route 140 NB Ramps/Stevens Street (Mitigation Measure AA, below).

AA. Overpass Connector/Route 140 NB Ramps/Stevens Street Improvements:

- The SB Stevens Street approach would be restriped as a single travel lane, which opens to three lanes at the intersection. The SB approach would have a through lane with 2 left-turn lanes that have storage lanes of 200 feet.
- The signal at this intersection would be retimed and coordinated with the signal at O'Connell Way/Stevens Street/Revolutionary Road (Mitigation Measure Z, above).

AB. Route 24/Route 140 Interchange SB Off-Ramp Improvements:

- Cycle lengths and splits would be reevaluated to reduce the queuing along the Route 24 SB off-ramp and the intersection. It is proposed that the cycle length be reduced during all peak hours to reduce the queues.
- It is also proposed that a full right-turn lane be added to the County Street southbound approach that extends to Industrial Drive.

AC. Construction of secondary site driveway to accommodate passenger vehicles wanting to exit the project site to travel northbound on Stevens Street and all trucks entering the Site.

6.2 Floodplain, Wetlands, and Other Waters of the United States

Construction Impacts

The following mitigation measures will be implemented to minimize construction impacts to wetlands during construction under the Development Alternatives:

A. The Tribe will implement a Stormwater Pollution Prevention Plan (SWPPP) to prevent impacts to the wetlands during the construction. The program will incorporate Best Management Practices (BMPs) specified in guidelines developed by EPA and will comply with the requirements of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges for Construction Activities.

B. The contractor will establish site trailers and staging areas to minimize impacts on natural resources.

C. The Construction Manager (CM) will establish an "environmental safety" zone establishing a 10-foot buffer zone around the wetland areas on the site.

D. Any refueling of construction vehicles and equipment will take place outside of the 10-foot wetlands buffer zone and will not be conducted in proximity to sedimentation basins or diversion swales.

E. No on-site disposal of solid waste, including building materials, will be allowed in the 10-foot buffer zone. Stumps will be removed from the site.

F. No materials will be disposed of into the wetlands or existing or proposed drainage systems. All subcontractors, including concrete suppliers, painters and plasterers, will be informed that the cleaning of equipment will be prohibited in areas where wash water will drain directly into wetlands or stormwater collection systems.

G. The contractor will establish a water resource, e.g., "cistern supply area," to supply a "water truck," or other means, to provide moisture for dust control and irrigation. Water will not be withdrawn from wetland areas.

Direct Impacts

The following mitigation measures shall be implemented to minimize direct impacts to wetlands under the Development Alternatives:

H. In compliance with Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands), and EPA Section 404(b)(1) review by the Corps, impacts to wetlands, floodplain, and other waters of the U.S. were avoided and minimized to the maximum extent practicable in project design.

I. Compensatory flood storage will be provided for all flood storage that would be lost within the 100 year floodplain so as not cause an increase, incremental or otherwise, in the horizontal extent and level of flood waters during peak flows. Approximately 20,900 sq.ft. of compensatory flood storage volume will be created on the project site to offset fill within the 100-year floodplain.

The following mitigation measure will be added to the above under Alternatives A and B:

J. Compensatory mitigation for unavoidable impacts to wetlands and other waters of the U.S. will be provided in accordance with the ratios contained in the "New England District Compensatory Mitigation Guidance" (Corps; July 20, 2010). Wetland creation to mitigate off-site impacts will be developed at an approximately 2:1 ratio. Creation will take place on the project site in the same general watershed and reach of the affected wetlands.

Secondary Effects

The following mitigation measure shall be implemented to minimize secondary effects under the Development Alternatives:

K. In compliance with Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands), and EPA Section 404(b)(1) review by the Corps, impacts to wetlands, floodplain, and other waters of the U.S. were avoided and minimized to the maximum extent practicable in project design.

6.3 Stormwater

On-site Impacts

The following mitigation measure will be implemented to handle stormwater runoff under the Development Alternatives, though Alternative C will not involve any work north of the railroad tracks on the project site:

A. Stormwater from the majority of the existing (and proposed) roadways will be collected in a closed conduit piping system fitted with 4-foot, deep-sump catch basins with hooded outlets.

B. Runoff from the roadway and parking areas, once routed through the initial pollutant attenuation stage of the collection system, will be conveyed to the existing extended detention basin located at the end of O'Connell Way.

C. For the areas currently flowing to the large combined existing extended detention basin, runoff from a portion of the roadway, parking/loading areas and building, once routed through the initial pollutant attenuation stage of the collection system, will be conveyed to the existing sediment forebay.

D. A level spreader sump will be provided down gradient of all stormwater management BMPs to reduce the channeled flow velocities and induce non-erosive sheet flow conditions prior to discharge to the receiving wetland.

E. Where feasible, roof drainage from the proposed building structures will be serviced by individual subsurface recharge systems. In areas where unsuitable soils and/or groundwater conditions prohibit the proper placement of subsurface recharge systems, above ground retention storage will be provided.

F. A multi-cell water quality swale will intercept runoff from parking areas.

G. Stormwater from much of the paved remote surface parking areas will discharge directly to bio-retention areas.

Off-site Impacts

The following mitigation measures shall be implemented under Preferred Alternative A and Alternative C:

H. Upgrade the existing stormwater management systems located at the Route 24/Route 140 intersection in comply with MassDEP Stormwater Standards. Design development of BMPs takes into consideration site constraints as well as compatibility with future stormwater needs related to MassDOT's long-range improvement plan (Alternative 1D).

6.4 Geology and Soils

Impacts of each Alternative to geology and soils on the project site will be minimized and less than significant. Off-site, under Preferred Alternative A and Alternative C, existing topography will be altered to include a constructed fill landform for the new ramp, associated steep fill slopes and a retaining wall. Roadway improvements located adjacent to steep slopes and embankments shall be protected during construction utilizing stormwater best management practices. Slopes will be permanently armored, and permanent stormwater closed drainage systems would be constructed to protect the steep slopes from future erosion. As a result of construction and permanent sediment and erosion control best management practices, impacts to the existing topography will be minimal and, therefore, less than significant. No further mitigation will be required.

6.5 Hazardous Materials

Risk of Encounter

The following mitigation measures will be implemented to minimize the risk of a hazardous materials encounter under the Development Alternatives:

A. Prior to construction, the Tribe will further investigate the potential to encounter oil and/or hazardous materials (OHM) on the project site. Should any OHM be found to be present on the project site, it will be remediated in full compliance with all applicable regulations.

B. In the event that contaminated soil and/or groundwater or other hazardous materials are encountered during construction-related earth-moving activities, all work shall be halted until a qualified individual can assess the extent of contamination. The release will be evaluated and responded to in a manner consistent with the requirements of the MassDEP and the Massachusetts Contingency Plan (MCP; 310 CMR 40.0000).

Risk of Release

The following mitigation measures will be implemented to minimize the risk of a hazardous materials release under the Development Alternatives:

C. All hazardous materials necessary for the operation of the facilities shall be stored and handled according to State, Federal, and manufacturer's guidelines. All flammable liquids shall be stored in a labeled secured container, encircled within a secondary containment enclosure.

D. Personnel shall follow written standard operating procedures (SOPs) for filling and servicing construction equipment and vehicles.

6.6 Water Supply

The following mitigation measures to meet the needs of the water system shall be implemented under the Development Alternatives:

A. The proposed water system improvements include upgrading the Stevens Street water main from a 12 inch main to a 16-inch water main and replacing the 12-inch water main and 8-inch water main on Pinehill Street with one 16-inch water main.

B. The second point of connection for the project site will be at the emergency entrance on Middleboro Avenue/Hart Street. This will then provide a 12-inch water main through the project site, which will be connected to the existing 12-inch water main in O'Connell Way. This measure will be unnecessary and eliminated under Alternative C.

C. Hydrants, valves and other appurtenances will be installed as part of the new water main construction.

6.7 Wastewater

The following mitigation measure to meet the needs of the wastewater treatment system shall be implemented under Preferred Alternative A:

A. The Tribe will contribute to the City's infiltration and inflow (I/I) removal program at a ratio of 5:1 (i.e. 5 gallons of I/I removed for each gallon of wastewater added) to remove 1.125 million gallons of peak I/I from the sewer collection system. This will reduce the frequency of combined sewer overflows (CSOs) and create an effective increase in WWTF capacity. The Tribe will also rehabilitate the existing Route 140 Pumping Station.

The following mitigation measure shall be implemented under Alternative B:

B. The Tribe will remove 0.5 million gallons of peak I/I from the sewer collection system. This will reduce the frequency of CSOs and create an effective increase in WWTF capacity. The Route 140 Pumping Station will be rehabilitated.

The following mitigation measure shall be implemented under Alternative C:

C. The Tribe will remove 0.88 million gallons of peak I/I from the sewer collection system. This will reduce the frequency of CSOs and create an effective increase in WWTF capacity. The Route 140 Pumping Station will be rehabilitated.

6.8 Utilities

Impacts to Electric Utility

The following mitigation measure to address electricity use shall be implemented under the Development Alternatives:

A. A new substation will be constructed on the project site to fulfill electrical demand.

Impacts to Gas Utility

The following mitigation measures to address gas use will be implemented under the Development Alternatives:

B. Columbia Gas has made a preliminary determination that the gas mains in the vicinity of the project site are capable of supplying the estimated gas demand. A portion of the gas lines leading to the area in Route 140 shall be upgraded to meet the project requirements.

C. Gas service will be extended from Middleboro Avenue to provide for the water park. This measure will be unnecessary and eliminated under Alternative C.

6.9 Solid Waste

The following measures will minimize solid waste to the extent practicable under the Development Alternatives:

Construction and Demolition

A. Approximately 40 percent of demolition waste can and will be recycled.

B. The Tribe will implement a Construction Waste Management Plan to ensure that a minimal amount of waste debris is disposed of in landfills and to pursue the goal of diverting at least 60 percent of construction-related waste from landfills.

C. Waste that cannot be recycled would be disposed of by a private company that accepts construction/demolition materials.

Operation

D. The Tribe shall contract with a private waste hauler for disposal of solid waste and recycled materials generated by the project and pay all fees associated therewith.

E. Refuse bins will be provided for patrons and employees in convenient locations in the casino, restaurants, and other facilities. Patrons will not be asked to separate recyclable items; trash and recycling will be collected in a single stream for back-end sorting. Employee office space will include separate receptacles for paper recycling. All waste will be sorted by employees and temporarily held on site in building space located away from pedestrian- or patron-accessible areas.

6.10 Air Quality

Construction Impacts

The following mitigation measures will be implemented to address air quality impacts during construction under the Development Alternatives:

A. Subcontractors will be required to adhere to all applicable regulations regarding control of dust and emissions. This will include maintenance of all motor vehicles, machinery, and equipment associated with construction activities and proper fitting of equipment with mufflers or other regulatory-required emissions control devices.

B. Dust generated from earthwork and other construction activities will be controlled by spraying with water. If necessary, other dust suppression methods will be implemented to ensure minimization of the off-site transport of dust. There also will be regular sweeping of the pavement of adjacent roadway surfaces during the construction period.

Regional Mesoscale Emissions

Mitigation of the Development Alternatives shall be addressed by the transportation mitigation measures described in **Section 6.1** above. These measures will reduce VOCs and NOx emissions during operation.

Stationary Sources

The following mitigation measures shall be implemented under the Development Alternatives:

C. Equipment subject to the Massachusetts Environmental Results Program (ERP) shall meet emissions standards and other performance and maintenance requirements.

D. Carbon monoxide monitors will be installed within loading docks and parking garages.

6.11 Greenhouse Gas Emissions

Direct and Indirect GHG Emissions

The following mitigation measures shall be implemented to address direct and indirect greenhouse gas emissions under the Development Alternatives:

A. A condenser heat recovery system will use a heat recovery exchanger to allow the reclamation of heat energy that is typically wasted and rejected via the chiller condenser.

B. High-efficiency water cooled chillers will use enhanced controls, enlarged and improved condenser sections, and high-efficiency compressors.

C. Air and water side economizers will allow the use of ambient air for cooling when outside temperatures are low enough.

D. Variable air volume systems, variable speed pumping, and variable speed cooling tower fans will reduce the energy use during periods when full motor capacity is not required.

E. Kitchen exhaust will be demand controlled to reduce unnecessary operation.

F. Improved air filtration will allow the system to meet indoor air quality requirements with less outdoor air makeup, reducing the energy needed to heat or cool the outdoor air makeup.

G. A high efficiency building shell generally includes greater insulation values in the building shell and glazing selection that combines functionality and high insulating

properties. The casino design will include a high efficiency shell to minimize the energy required to maintain desired interior conditions.

H. Green roofing will provide insulation.

I. Reflective roofing aids in reducing urban heat island effect in summer and so will be utilized on most roof surfaces except where green roofing is employed.

J. By shading building structures, exterior shading devices can reduce the cooling requirements for those structures.

K. Premium electric motors are more efficient than standard motors and will be specified for all significant uses such as HVAC equipment and elevators.

L. For ventilation systems where a large percentage of fresh air makeup must be used, a heat exchanger will use exhaust air to pre-warm incoming air on cold days, and pre-cool incoming air on hot days.

M. Ventilation systems will be demand controlled to reduce unnecessary operation.

N. Room occupancy sensors will be used in offices, conference rooms, bathrooms and storage areas to turn off or reduce lighting when the space is not occupied. Similarly, HVAC will be designed to minimize energy use when hotel rooms are unoccupied.

O. Building shells will maximize daylight penetration, reducing the need for indoor electric lighting during the daytime.

P. High-efficiency lighting and dimmer lighting will be installed to reduce electricity use.

Q. Low flow fixtures will provide an energy benefit by reducing the amount of water that needs to be treated and pumped to the Site.

R. Energy Star appliances will be utilized wherever they are available for the intended function.

S. Rainwater harvesting will provide an energy benefit by reducing the amount of water that needs to be treated and pumped to the Site for irrigation.

T. An energy management system will provide the operators with real-time data on system performance, allowing optimization of the system to reduce energy demand and cost.

U. To ensure proper implementation of energy-saving measures, enhanced commissioning will include additional oversight of the construction and startup phases.

V. Because refrigerants can be GHGs, an enhanced refrigerant management will ensure that the systems used have the minimum feasible global warming potential, and that leaks are prevented.

Transportation-Related GHG Emissions

Mitigation of the Development Alternatives shall be addressed by the transportation mitigation measures described in **Section 6.1** above. These measures will reduce GHG emissionsfrom transportation

6.12 Cultural Resources

On-Site Impacts

Alternative C would avoid impacts to archeological resources. The following mitigation measures shall be implemented to address potential impacts to cultural resources under Preferred Alternative A and Alternative B:

A. The BIA has recommended to the Tribe that the First Light 2-4 sites and the East Taunton Industrial Park 2 site should be avoided by the casino and resort construction activity, and PAL has developed a site avoidance plan. The BIA finding for the fee-to-trust undertaking is that no know historic properties will be affected if the sites are avoided. A site avoidance plan has been developed and Preferred Alternative A and new realignment of Route 24/140 interchange avoid known cultural resource sites.

B. In the event of discovery of human remains during ground disturbing activities, stop work and implement appropriate mitigation measures, including contacting the BIA's Eastern Regional Office Archaeologist, 545 Marriott Drive, Suite 700, Nashville, TN 37214, Phone: (615) 564-6840.

Off-Site Impacts

Alternative B would avoid off-site impacts to archeological resources because it does not propose a Route 140 ramp. Off-site traffic improvements under Preferred Alternative A and Alternative C may affect previously unidentified archaeological resources. The following mitigation measures will be implemented under those Alternatives:

C. Preferred Alternative A is not expected to impact any off-site cultural resources. The current proposed design for the reconstruction of the Route 24/140 Interchange, as described in the Tribe's application for an Individual Section 404 Permit from the Corps, avoids 2 archaeological sites that were identified outside the proposed construction envelope. The Corps will continue to consult with the Massachusetts Historical Commission under Section 106 during its review of the Section 404 application.

D. In the event of discovery of human remains during ground disturbing activities, stop work and implement appropriate mitigation measures.

6.13 Noise

Construction Impacts

The following mitigation measures will be implemented to address noise construction impacts under the Development Alternatives:

A. Construction equipment will be required to have installed and properly operating appropriate noise muffler systems.

B. All exterior construction activities will typically be limited to normal working hours. Off-hour work will be minimized, to the extent practicable, to avoid excess noise generating work at sensitive times.

C. Appropriate traffic management techniques to mitigate roadway traffic noise impacts will be implemented during the construction period.

D. Excessive idling of construction equipment engines will be prohibited.

E. All exhaust mufflers will be in good working order, and regular maintenance and lubrication of equipment will be required.

Operational Impacts

Operational noise impacts from mechanical equipment associated with the Development Alternatives will not be significant and will not require mitigation.

6.14 Visual Effects

Impacts of each Alternative relating to regional visibility, architectural aesthetics, shadow, and light shall be minimized to the extent practicable as described in **Section 3.2.15** of this ROD.

6.15 Socioeconomic Effects

The following mitigation measures shall be implemented to address the socioeconomic impacts under Preferred Alternative A:

A. The Tribe will pay a one-time cost of approximately $2.982 million and annual costs of $2.5 million to fund the creation of a new police substation to accommodate "the increased daily population in East Taunton, the purchase of new patrol cars, and the hiring of additional officers.

B. The Tribe will support problem gambling education, awareness, and treatment through a one-time contribution of $60,000 and annual contributions of $30,000 to a local center for the treatment of compulsive gambling. The Tribe will provide training to front line staff in recognizing compulsive gamblers and make information available and accessible for such individuals seeking assistance.

C. The Tribe would pay the City a one-time cost of $2.14 million for Phase 1 of development (as described in the IGA), a one-time cost of $720,000 for Phase 2, and annual costs of $1.5 million for fire protection infrastructure improvements.

D. The Tribe would pay the City of Taunton $370,000 annually as increased local contribution to the Taunton School District. The Taunton School District could use these additional funds as needed based on any new burdens that result from an increased student population.

E. The Tribe would provide the City of Taunton with payments in lieu of property taxes (PILOTs) based on the assessed valuation of the project site.

Under Alternatives B and C, payments from the Tribe to the City of Taunton shall be equivalent to those described under Preferred Alternative A

6.16 Environmental Justice

Negative impacts to an Environmental Justice Community will be limited to increases in traffic in the vicinity of Census Tract 6141.01 Block Group 3 under the Development Alternatives. Transportation improvements described above in **Section 6.1** will mitigate this undue burden under each Alternative.

6.17 Sustainability

Energy conservation and other sustainable design measures will be incorporated into the project under the Development Alternatives. New buildings will employ, where possible, energy and water efficient features for plumbing, mechanical, electrical, architectural, and structural systems and assemblies. Sustainable design elements relating to building energy management systems, lighting, recycling, conservation measures, regional building materials, and clean construction vehicles will be included, as practicable.

The Tribe has conducted an assessment of credits attainable for the proposed development in Taunton under the Development Alternatives according to the Leadership in Energy and Environmental Design (LEED) building rating system developed by the U.S. Green Building Council. The LEED rating system is designed to assess a building project's siting, design, and operation and to provide a rating or score that is useful for comparing projects in terms of their overall sustainability. Based on the current status of design, as described in Section 8.18 of the Final EIS, the facility could potentially qualify for LEED Silver Certification. As the design of

the project progresses, the Tribe will continue to review the design against the LEED criteria and will strive to construct and operate the facility in an environmentally friendly manner.

6.18 Construction

Where applicable, the sections above have described mitigation measures to be implemented during construction stages.

The following are some general requirements related to construction vehicle fueling and storage under the Development Alternatives:

- Any refueling of construction vehicles and equipment will take place outside of a 10-foot wetlands buffer zone and will not be conducted in proximity to sedimentation basins or diversion swales.
- No on-site disposal of solid waste, including building materials, will be allowed in the 10-foot buffer zone. Stumps will be removed from the site.
- No materials will be disposed of into the wetlands or existing or proposed drainage systems. All subcontractors, including concrete suppliers, painters and plasterers, will be informed that the cleaning of equipment will be prohibited in areas where wash water will drain directly into wetlands or stormwater collection systems.
- The contractor will establish a water resource, e.g., "cistern supply area," to supply a "water truck," or other means, to provide moisture for dust control and irrigation. Water will not be withdrawn from wetland areas.

Generally, under each Alternative, the construction work hours on-site will be from 7:30 AM to 4:30 PM, Monday through Friday. For off-site work zones including existing roadway improvements and utility work, the work hours will be limited to Monday through Friday from 7:00 AM to 3:30 PM. No trucks will be allowed to idle more than five minutes. There may be occasions when work will occur outside these hours; however, appropriate authorizations will be obtained prior to such deviations.

7.0 ELIGIBILTY FOR GAMING PURSUANT TO THE INDIAN GAMING REGULATORY ACT

7.1 Introduction

The Tribe has requested the Department acquire land into trust in the towns of Mashpee and Taunton, Massachusetts. The Tribe asserts that the land will qualify as its "initial reservation" pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721. This finding concludes that, based on the available information, the Mashpee and Taunton Sites will qualify as the Tribe's "initial reservation" pursuant to IGRA if they are acquired in trust and proclaimed a reservation pursuant to Sections 5 and 7 of the Indian Reorganization Act (IRA), 25 U.S.C. §§ 465, 467.

7.2 Legal Framework

The question of whether the Mashpee and Taunton Sites 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. We are also guided by prior Indian lands determinations made by the Department. The relevant provisions of IGRA, Part 292 and prior Indian lands determinations are outlined below.

1. 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."[7] Section 20 of IGRA generally prohibits gaming 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.[8]

2. 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.

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[7] *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*, 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 the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

[8] *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.").

(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.

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 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."[9]

3. Prior Departmental Indian Lands Determinations

Although the following Departmental Indian Lands Determinations considered the "restored lands" exception under IGRA and not the initial reservation exception, they address whether a tribe has a "significant historical connection" to the lands at issue, and, thus, are briefly summarized below.

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.[10]

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[9] *Id.* § 292.2.

[10] Letter from Larry Echo Hawk, Assistant Sec'y – Indian Affairs, U.S. Dep't of Interior, to Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians (September 1, 2011) [hereinafter Guidiville Band Indian lands determination], *available at* http://www.bia.gov/cs/groups/public/documents/text/idc015051.pdf

In order for land to qualify as restored, among other things, a tribe must "demonstrate a significant historical connection to the land."[11]

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.[12] 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.[13] 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.[14] 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.[15] The Department determined that the Guidiville Band had 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]."[16] Without more, the Department explained, "such vague and speculative evidence [could not] support the arguments and claims advanced in the Band's voluminous submissions."[17]

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."[18] It defined "subsistence" as "a means of subsisting as the

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[11] 25 C.F.R. § 292.12(b).

[12] *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.").

[13] *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.").

[14] *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.").

[15] *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 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.")

[16] *Id.* at 19.

[17] *Id.*

[18] *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

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.[19] 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."[20] These definitions were important to the Department's analysis of the significance of an aboriginal trade route.[21] 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.[22]

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.[23] Again, the analysis 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.[24] Second, the

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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"), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fKaruk4912.pdf&tabid=120&mid=957.

[19] Guidiville Band Indian lands determination at 14 (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 1153 (G. & C. Merriam Co. 1979)).

[20] *Id.*

[21] *Id.* at 14–15.

[22] *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.

[23] 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], *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-018517.pdf.

[24] *Id.* at 9–10.

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.[25] 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.[26] The Band's fourth claimed historical connection relied on Suisin Patwin evidence, which the Department determined it could not use.[27] 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.[28]

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."[29] 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."[30] 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.[31] 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.[32] 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.[33]

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[25] *Id.* at 11–13.

[26] *Id.* 14–17.

[27] *Id.* at 17.

[28] *Id.* at 18.

[29] *Id.* at 7.

[30] *Id.*

[31] *Id.* at 7–8.

[32] *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 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.

[33] *Id.* at 8.

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."[34] 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."[35] The Department stated that this analysis is fact-intensive and will vary based on the unique history and circumstances of any particular tribe.[36] 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.[37]

7.3 Initial Reservation Analysis

Following a detailed review of the documents contained in the record and application of the criteria found in Part 292, we find that the Mashpee and Taunton Sites qualify for the initial reservation exception to IGRA's prohibition on gaming on newly acquired land.[38]

7.3.1 Section 292.6(a): Federal Acknowledgment

When applying the criteria of the initial reservation exception, we first determine whether a tribe was acknowledged through the administrative process prescribed in 25 C.F.R. Part 83.[39] 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.[40]

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[34] *Id.* at 15.

[35] *Id.*

[36] *Id.* at 15 n.59.

[37] *Id.* at 16–17.

[38] The question of whether lands presently qualify for the initial reservation exception under IGRA is a separate and distinct legal inquiry from the question of whether lands constituted a tribe's historical reservation in 1934 for purposes of the IRA. Thus, although the Tribe had a "reservation" for purposes of the second definition of § 479 of the IRA, it does not have a "reservation" pursuant to IGRA. Accordingly, the Mashpee and Taunton Sites are eligible for the initial reservation exception pursuant to IGRA. *See* **Section 8.6** of this ROD for further discussion.

[39] 25 C.F.R. § 292.6(a). The Department recently published amended federal acknowledgment regulations on June 29, 2105, that amended the administrative process of 25 C.F.R. Part 83. 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. The amended regulations can be viewed at: http://bia.gov/WhoWeAre/AS-IA/ORM/83revise/index.htm.

[40] *Id.* §§ 83.1–83.13.

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,[41] and a Final Determination on February 17, 2007.[42] The Assistant Secretary – Indian Affairs, based on a review by the Office of Federal Acknowledgment (OFA), concluded that the Tribe had satisfied all the required Federal criteria for acknowledgement. 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 Assistant Secretary – Indian Affairs, are entitled to deference.[43] 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.[44]

We 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.

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

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[41] 71 Fed. Reg. 17,488 (April 6, 2006). *See also* Office of Federal Acknowledgment, Summary under the Criteria for the Proposed Finding on the Mashpee Wampanoag Indian Tribal Council, Inc. (March 31, 2006) [hereinafter OFA Proposed Finding], *available at* http://www.bia.gov/cs/groups/xofa/documents/text/idc-001343.pdf .

[42] 72 Fed. Reg. 8,007 (Feb. 22, 2007); Office of Federal Acknowledgement, Summary Under the Criteria and Evidence for Final Determination for the Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc., (Feb. 15, 2007) [hereinafter OFA Final Determination], *available at* http://www.bia.gov/cs/groups/xofa/documents/text/idc-001338.pdf.

[43] *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).

[44] *James v. United States Department of Health and Human Services*, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

7.3.2 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.[45] The Tribe satisfies section 292.6(b) because it has no trust land and no gaming operation and, therefore, no gaming facility authorized under the restored land exception.

7.3.3 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.[46] 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.[47]

The Tribe has applied to have the Mashpee and Taunton Sites proclaimed reservation lands pursuant to Section 7. The initial reservation exception of IGRA does not require that parcels are contiguous for both to constitute a tribe's initial reservation.[48] Further, such acquisition of noncontiguous parcels is specifically contemplated in the implementing regulations for Section 5 of the IRA's.[49] Upon acquisition, the Mashpee and Taunton Sites will be the Tribe's first proclaimed reservation, satisfying Section 292.6(c).

7.3.4 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, we must apply 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

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[45] 25 C.F.R. § 292.6(b).

[46] *Id.* § 292.6(c).

[47] 25 U.S.C. § 467.

[48] 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 Associate Solicitor of the Division of Indian Affairs, U.S. Dep't of Interior, to Reg'l Dir. of the Midwest Reg'l Office, Bureau of Indian Affairs, U.S. Department of Interior 3 (Dec. 13, 2000), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f33_nottawaseppihuronpotawatomibnd.pdf&tabid=120&mid=957.

[49] 25 C.F.R. § 151.11.

(3) the tribe must demonstrate one or more modern connections to the land.[50] The Tribe has met all three of these requirements for the Mashpee and Taunton Sites.

1. 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.[51] 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, Massachusetts. Therefore, the Tribe's governmental presence is located in the same state as the parcels.

The Tribe has 2,647 members.[52] Of these, 65 percent live within Massachusetts, 40 percent live in Mashpee where tribal headquarters are located, and over 60 percent live within 50 miles of the Taunton parcel.[53] 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).

2. Section 292.6(d): Significant Historical Connection

Section 292.6(d) requires that a tribe demonstrate its newly acquired land is "within an area where the tribe has significant historical connections."[54] 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."[55]

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.

We 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.

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[50] *Id.* § 292.6(d).

[51] *Id.*

[52] Regional Director's Recommendation at 7.

[53] *Id.*

[54] 25 C.F.R. § 292.6(d).

[55] *Id.* § 292.2.

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 17th century.[56] At the time 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.[57] In the early 17th century, the massasoit was the great sachem Ousamequin, who was often referred to simply as Massasoit.[58] The region around current-day Taunton was under the direct control of Massasoit.[59] The Mashpee area had a number of its own sachems.[60]

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 …

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[56] 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 . . . , 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].

[57] The 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.").

[58] *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] .

[59] *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 AN MONOGRAPHS NO. 44, 53 – 58 (1928) [hereinafter Speck] for discussion of lands deeded by Massasoit and his son and locations of residences of Massasoit and his two sons.

[60] *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).

> includ[ing] all of Cape Cod, Martha's Vineyard and Nantucket within the borders of this group.[61]

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.[62] In the *Handbook of North American Indians,* which is cited extensively throughout the record, scholar Bert Salwen provided a description of early Pokanoket history.[63] The Pokanoket had experienced decades of contact with Europeans prior to the arrival of the *Mayflower*.[64] Prior to the Pilgrims' arrival, the Pokanoket's relationships with the Europeans were sometimes hostile and resulted in some Pokanoket people being enslaved.[65] Also, the Pokanokets were struck by an epidemic between 1617 and 1619 that resulted in great losses of life.[66] The English from the *Mayflower* established Plymouth Colony on the decimated and abandoned Pokanoket village Pautuxet in 1620.[67] Massasoit was able to establish a long-standing alliance with Plymouth Colony following their arrival and entered into a treaty of peace in 1621.[68]

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[61] 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 unites 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.*

[62] 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].

[63] Salwen 1978 at 171–72.

[64] *See id.*

[65] *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].

[66] Salwen 1978 at 171.

[67] Robbins 1950 at 50.

[68] *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).

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.[69] At the location of current-day Taunton, Massasoit conveyed lands in the Pokanoket village of Cohannet through a series of deeds.[70] Numerous conveyances followed, and the English settlers rapidly began to occupy the region and displace Pokanoket people to other regions of Pokanoket territory.[71]

There were increasing instances of conflict between the Pokanoket and the settlers due to frequently-ignored land use agreements.[72] It is likely that differing notions of land ownership contributed to the conflicts, as the Pokanoket likely thought they were only conveying rights to use the lands rather than conveying the entire property right in perpetuity.[73]

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.[74] Metacom's efforts were unsuccessful and resulted in Metacom's death and large losses of life among the Pokanoket.[75]

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.[76] 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.[77]

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.[78] These

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

[70] Robbins 1950 at 54-55

[71] 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] at 87; the OFA findings also note how the arrival of English settlers and the resulting disease and war quickly reduced the Wampanoag settlements' populations. OFA Proposed Finding at 32.

[72] Robbins 1950 at 52–53.

[73] *Id.* at 52–53.

[74] Salwen at 172.

[75] *Id.*

[76] Weinstein at 87.

[77] The OFA Proposed Finding at 92.

[78] *See generally* Gookin (discussing the origins of the name Wampanoag).

settlements were organized by the English and were designed to convert the Indians to Christianity.[79]

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.[80] 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.[81] 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.[82]

The Tribe succeeds politically from the Pokanoket nation/Wampanoag coalition of confederated chiefdoms sufficient to establish the requisite nexus to qualify the Pokanoket/Wampanoag as 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 significant historical connection to the Band's parcel.[83] 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.[84] 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.[85] Because the Pokanoket/Wampanoag were a single sovereign political entity from which the Mashpee Tribe is able to succeed politically, the Mashpee Tribe's situation is different than that of the Guidiville Band's.

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[79] OFA Proposed Finding at 32.

[80] Scotts Valley Band Indian lands determination at 7.

[81] *Id.* at 8.

[82] *Id.* at 8.

[83] Guidiville Band Indian lands determination at 13.

[84] The 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.").

[85] *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.").

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,[86] many displaced Pokanoket/Wampanoag continued to join the Mashpee community.[87] 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.[88] 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 Philip's War. Indians who had surrendered to the English were moved to Mashpee and [nearby] Sandwich.[89]

The OFA materials discuss at length the continuation of Pokanoket/Wampanoag traditions and culture from contact into the 20th century.[90] Weinstein noted that "Mashpee's significance as a cultural center for many of the Wampanoag grew throughout the centuries."[91] 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.

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[86] The 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).

[87] The 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.").

[88] The OFA Proposed Finding at 33 ("after King Philip'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.").

[89] Weinstein 1997 at 87.

[90] *See* OFA Proposed Finding for findings made pursuant to section 83.7(b) at 31-92.

[91] Weinstein 1997 at 87.

Researcher James P. Lynch prepared a report on behalf of the Pocasset Pokanoket Tribe[92] in which he challenged the Mashpee Tribe's nexus with the wider Pokanoket/Wampanoag.[93]

We 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.[94] As the Mashpee, already organized into a praying town, did not join Metacom, Lynch concluded that the Mashpee were not Wampanoag.[95] 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 Wompanoags (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 Philip [one name for Metacom] in his war.[96]

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

As discussed throughout the record, and as Lynch acknowledged, the Pokanokets were the predecessor tribe of the Wampanoags.[97] The name change appears to have occurred after

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[92] The Pocasset Pokanoket Tribe is a non-federally recognized tribe.

[93] Letter from Lesley S. Rich, to Kevin K. Washburn Assistant Secretary – Indian Affairs, and Franklin Keel, Regional Director, 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" (2012) [hereinafter Lynch Report]. .

[94] Lynch Report at 39-41.

[95] *Id.* at 40-41.

[96] *Id.* at 40.

[97] 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).

King Philip's War and coincides with declining use of the name Pokanoket.[98] 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 Philip'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.[99] Therefore, we conclude that 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 we will address the Lynch report's argument that Mashpee was a distinct Christian community rather than a Pokanoket/Wampanoag community.[100] 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 17th century into the 20th century.[101] 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 parcel 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 parcel, establishing that the Taunton parcel is located within an area where the Tribe has significant historical connections. Recent

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[98] *Id.* at 39 - 40.

[99] 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.*

[100] 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.").

[101] *See e.g.,* The 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 continuation of continuous existence of Mashpee on a substantially continuous basis since 1990).

archeological work performed pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA)[102] conclusively links sites in the vicinity of the Taunton parcel 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 parcel.[103] 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.[104]

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.[105]

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[102] 25 U.S.C. §§ 3001–3013. NAGPRA establishes rights of tribes and their lineal descendents 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).

[103] 60 Fed Reg. 8,733 (Feb. 15, 1995).

[104] *Id.*

[105] *Id.*

Only federally recognized tribes were entitled to claims for repatriation, making the Mashpee Tribe ineligible for receipt of the items.[106] 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."[107]

According to the definition of "occupancy," the Department put forth in the Guidiville Band Indian lands determination,[108] 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,[109] the direct evidence of historical use and occupancy at the Titicut site is within the vicinity of the Taunton parcel. Unlike the Scotts Valley Band's direct evidence, which dealt with Rancho work located on the opposite side of a body of water,[110] the Mashpee Tribe's evidence leads to the natural inference that the Mashpee Tribe also used and occupied the Taunton parcel 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 parcel, indicating that the Taunton parcel 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, and approximately 20 miles from the Taunton parcel.[111] Gibson

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[106] Subsequently, the Wampanoag Confederation was formed in 1996 by tribes in Massachusetts to specifically address repatriation issues of the non-federally recognized tribes. 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).

[107] 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) .

[108] Guidiville Band Indian lands determination at 14.

[109] Scotts Valley Band Indian lands determination at 15.

[110] *Id.* at 16–17.

[111] *See* Gibson for discussion of numerous artifacts from Burr's Hill.

notes that according to local tradition, Warren was the site of Sowams, the principal village of Massasoit.[112] In a notice related to the repatriation of one cultural item, the NPS described Burr's Hill and its connection to the Wampanoag:

> 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.[113]

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.[114] 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.[115] 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.[116]

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 parcel. These items have been found in Fall River, located 20 miles from the Taunton parcel, and in the town of Swansea, Bristol County, located 14 miles from the Taunton parcel.[117] In these cases, NPS found that there was a relationship of shared group identity that could be

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[112] *Id.* at 9;

[113] 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.*

[114] The NMAI Report.

[115] *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.*

[116] *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.

[117] For example, the NPS 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 2 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.*

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 parcel.

Villages and travel networks

Historical documentation of Pokanoket/Wampanoag communities interwoven by travel networks and located within the vicinity of the Taunton parcel also establish that the Taunton parcel 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.[118] 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.[119] The report discussed the following settlements in the vicinity of Taunton: Titicut, located 8 miles from the Taunton parcel; Wapanucket, located on the northern shore of Lake Assawompsett and 6 miles from the Taunton parcel; and Nemasket, located in Middleborough and 10 miles from the Taunton parcel.[120]

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.[121]

According to the Department, "occupancy" can be demonstrated by a tribe's dwellings and villages.[122] 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 parcel fall within the Department's definition of "vicinity."[123] Last, we 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 parcel.

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[118] Robbins 1950 at 54 (citing a 1640 report on the establishment of the boundaries of Taunton, "alias Cohannet.")

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

[120] *Id.* at 34–36, 34 map 2.

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

[122] Guidiville Band Indian lands determination at 14.

[123] Scotts Valley Band Indian lands determination at 15.

Overland and water routes played an important role in connecting areas of occupancy.[124] The Massachusetts Historical Commission identified in its report six primary overland corridors of travel.[125] The easternmost of the north-south trails ran south from Massachusetts Bay, near Boston, alongside Plymouth Bay and down to Cape Cod.[126] A major east-west trail ran from Patuxet (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.[127] Another east-west trail ran closer to the Buzzard's Bay Coast, going from Cape Cod west through Fall River to the Taunton River estuary.[128]

Water routes were also used. The Taunton River was one of the most heavily used.[129] The Massachusetts Historical Commission found that, due to an extensive state coastline, water transportation probably played an important role at the time of contact.[130] 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.[131]

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.[132]

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[124] See Massachusetts Historical Commission map 2 (Exhibit 1e).

[125] 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).

[126] Massachusetts Historical Commission 1982 at 36.

[127] *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.

[128] 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.

[129] *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.

[130] Massachusetts Historical Commission at 38.

[131] *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).

[132] Salwen at 166.

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 parcel. 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 parcel.

> *Conclusion: The Taunton parcel 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 within the vicinity of the Taunton parcel. Therefore, we find that the Taunton parcel 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 parcel 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 parcel. For our analysis, we will 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 parcel 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.[133] 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.[134] In 1685, the General Court of Plymouth Colony officially recognized these grants of land in perpetuity.[135] Until the 1690s, the praying town was governed by a six-member council of Mashpee.[136]

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[133] The 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.").

[134] *Id.* OFA Proposed Finding at 32.

[135] *Id.*

[136] *Id.* at 33.

From 1665 to 1720, the Mashpee community was organized as a praying town.[137] 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.[138]

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."[139] 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."[140] 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 maintained a distinct Indian community in and around the town of Mashpee, Massachusetts, during the contact, colonial, and revolutionary periods."[141]

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

Conclusion: The Mashpee parcel 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 parcel. Therefore, we find that the Mashpee parcel is located within an area where the Tribe has significant historical connections and, thus, satisfies the historical connection requirement of Section 292.6(d).

3. 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

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

[138] *Id.*at 32.

[139] 25 C.F.R. § 83.7(b).

[140] The OFA Proposed Finding at 31.

[141] *Id.* at 32.

(3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.[142]

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

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

The Tribe has 2,647 members. Of these, 65 percent live within Massachusetts, 40 percent live in Mashpee where tribal headquarters are located, and over 60 percent live within 50 miles of the Taunton parcel.[143] 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.[144] The preamble to Part 292 acknowledged that modern tribal populations are subject to wide dispersion and specifically noted today's mobile work-related environment.[145]

Further, the 50-mile radius used to evaluate the tribal population in reference to the Taunton parcel 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."[146] 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.[147] 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

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[142] 25 C.F.R. § 292.6(d).

[143] Regional Director's Recommendation at 7.

[144] *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."), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f09_cowlitztribe.pdf&tabid=120&mid=957.

[145] 73 Fed. Reg. 29,354, 29360 (May 20, 2008).

[146] 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.*

[147] 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.*

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."[148] The surrounding community's interests are protected when it has notice of tribal presence in or near the community.[149] 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.

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

b. Section 292.6(d)(2): The Mashpee parcel 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 parcel is located within a 25-mile radius of the Tribe's headquarters.

Initial Reservation Conclusion

Based on our review of documents in the record, we conclude the Mashpee and Taunton Sites will qualify as the Tribe's "initial reservation" pursuant to IGRA upon acquisition in trust and when proclaimed to be the Tribe's reservation pursuant to the IRA. We rely on the extensive documents in the record, including the findings in OFA's Proposed Findings and Final Determinations, numerous historical sources, and modern archeological and academic sources.

8.0 TRUST ACQUISITION DETERMINATION PURSUANT TO 25 C.F.R. PART 151

The Secretary's general authority for acquiring land in trust is found in Section 5 of IRA 25 U.S.C. § 465. The regulations found at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5.

8.1 25 C.F.R. § 151.3 – Land acquisition policy

Section 151.13 (a) sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe:

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

[149] *Id.* at 29,360.

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
(2) When the tribe already owns an interest in the land; or
(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

The Tribe's application satisfies Sections 151.13 (a)(2) because it owns an interest in the Mashpee and Taunton Sites. The lands located in Mashpee have been owned or used by the Tribe or by entities controlled by or related to the Tribe for many years. The Mashpee Sites include several parcels currently owned by the Tribe in fee, some by the Tribal Council, one by a non-profit organization owned by the Tribe, and one by a domestic limited liability company owned by the Tribe. A detailed list of the parcels is included in **Table 1 in Section 1.2** of this ROD. With regard to Taunton, the Tribe has option agreements with various owners for each of the Taunton parcels, and plans to exercise these options prior to the Departments' acquisition of the parcels in trust.[150]

The Tribe's application satisfies Section 151.13 (a)(3) because the acquisition of the Mashpee Sites and the Taunton Site would facilitate tribal self-determination and Indian housing, and expand the Tribe's economic opportunities. Preferred Alternative A will enable the Tribe to facilitate tribal self-determination by using revenue for educational, cultural, and employment programs for tribal youth, including the Language Reclamation Project, GED tutoring, and educational scholarships, as well as the Tribal Youth Council, youth cultural activities, Mashpee Wampanoag youth survival skills training, and the Youth Sobriety Pow Wow. By supporting these programs, the Tribe can provide its youth with valuable opportunities to learn about their cultural values, traditions, and instill skills to participate and lead healthy lives in their community and the larger society. Revenue from Preferred Alternative A is also needed so that the Tribe may adequately preserve its community and cultural history. The revenue will be used to fund the restoration and preservation of cultural sites in the Town of Mashpee, such as the Tribe's museum and historic burial grounds.

Revenue from Preferred Alternative A will allow the Tribe to address healthcare and housing needs. Many tribal members have ongoing health issues. A 2002 health survey, conducted by the Tribe with the Massachusetts Department of Public Health, found that the percentage of Wampanoag in poor health was two times higher than the general Massachusetts adult population.[151] The same survey also found that the percentage of Wampanoags in poor emotional health was one-and-a-half times higher than the Massachusetts adult population. Adult tribal members were less likely to have ready access to dental care, and more likely to be obese and to have diabetes and high blood pressure as compared to the general Massachusetts adult population. Revenue from Preferred Alternative A will support tribal health programs for members. The Tribe also has substantial housing needs. Revenue from Preferred Alternative A will support tribal programs such as the Wampanoag Housing Program and the Low Income

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[150] Tribe's Restated 2012 Application, Tab 14

[151] Tribe's Restated 2012 Application at 12.

Home Energy Assistance Program.[152] Revenue from economic development will also enable construction of senior living facilities and housing.

The Acting Regional Director determined, and we concur, that the acquisition of the Mashpee and Taunton Sites is necessary to facilitate tribal self-determination, economic development, and Indian housing.

8.2 25 C.F.R. § 151.11 - Off-reservation acquisitions

The Tribe's application is considered under the off-reservation criteria of Section 151.11 because the Tribe is landless and has no reservation. Section 151.11(a) requires the consideration of the criteria listed in sections 151.10 (a) through (c) and (e) through (h) as discussed below.

8.3 25 C.F.R. § 151.10(a) - The existence of statutory authority for the acquisition and any limitations contained in such authority

Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations on such authority. We conclude that the Department has this authority.

The IRA provides the Department with discretionary authority to acquire land in trust for "Indians." In turn, the IRA has three definitions of "Indian" at 25 U.S.C. § 479. Section 479 provides in pertinent part:

> 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 [3] shall further include all other persons of one-half or more Indian blood.

Our determination addresses the second definition of "Indian" set forth at 25 U.S.C. § 479.[153] The Mashpee have a long recorded history at the Town of Mashpee (Town), which was originally set aside by the Colonial government for the Mashpee Indians. The Tribe's ownership and sociopolitical control over this land has been repeatedly recognized by the Federal Government and the Commonwealth. Accordingly, the Town amounts to a "reservation" for purposes of the IRA and the Tribe qualifies for the IRA's benefits under the second definition of "Indian." We have not determined whether the Mashpee could also qualify under the first definition of "Indian," as qualified by the Supreme Court's decision in *Carcieri v.*

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[152] *Id.* at 13.

[153] The comment letters submitted by state and local jurisdictions pursuant to 25 C.F.R. § 151.10(e) concern the Department's authority under the first definition of "Indian" in § 479 of the IRA as interpreted by *Carcieri*, and are not relevant because the Department is utilizing its authority under the second definition of "Indian."

Salazar.[154] For the reasons set forth below, it is not necessary to make that legal determination today.

I. THE DEPARTMENT'S AUTHORITY TO ACQUIRE LAND IN TRUST UNDER THE SECOND DEFINITION

The second definition of "Indian" includes "all persons who were descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." This definition contains several ambiguous terms that, in part, are not defined by the statute. Whether the Tribe falls within the scope of the second definition of "Indian" requires a review of IRA's statutory language and its legislative history, as well as consideration of the Department's implementation of the Act. This analysis is further guided by the applicable Indian canons of construction, as well as the backdrop of basic principles of Indian law, which, as I have articulated previously,[155] define the federal government's unique and evolving relationship with Indian tribes.

a. Statutory Ambiguities

As a preliminary matter, when an agency interprets the meaning of a statutory provision, it must first determine whether "Congress has directly spoken to the precise question at issue."[156] If the language of the statute is clear, the agency must give effect to "the unambiguously expressed intent of Congress."[157] Where the unambiguous meaning of the statute cannot be gleaned from the text itself or the associated legislative history, however, the agency must base its interpretation on a "reasonable construction" of the statute.[158] When an agency charged with administering a statute interprets an ambiguity in the statute or fills a gap where Congress has been silent, the agency's interpretation should be either controlling or accorded deference unless it is unreasonable or contrary to the statute.[159]

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[154] 555 U.S. 379 (2009).

[155] M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act at 12-16 (Mar. 12, 2014).

[156] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

[157] *Id.* at 843.

[158] *Id.* at 840.

[159] The Secretary receives deference to interpret statutes that are consigned to her administration. *See Chevron*, 467 U.S. at 84245; *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). *See also Skidmore v. Swift*, 323 U.S. 134, 139 (1944) (agencies merit deference based on the "specialized experience and broader investigations and information" available to them). Furthermore, the Department is afforded *Chevron* deference in interpreting the IRA. *See Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 U.S. Dist. LEXIS 38719 at *17–*18 (N.D.N.Y. Mar. 26, 2015) (finding that the language of the first definition of Indian "does not point to a single unambiguous meaning"); *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 2014 U.S. Dist. LEXIS 172111 at *35 (finding the IRA's legislative history unhelpful, "except that it confirms that the phrase 'under federal jurisdiction' [in the first definition of Indian] is indeed ambiguous and that *Chevron* deference is required").

An examination of the second definition reveals that there are several words or phrases in the text that lack a plain meaning. First, from the face of the statute, the second definition could suggest that it contemplates individual Indians, rather than a tribal entity, given the reference to "persons."

Second, the term "such members" is ambiguous. The word "such" indicates that all or a portion of the preceding phrase is to be incorporated, but it is ambiguous whether it applies to the entire phrase "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," or to the portion most directly describing the members, *i.e.* "members of any recognized Indian tribe."

Third, the second definition requires residency "within the present boundaries of any Indian reservation," yet the IRA does not define "Indian reservation." The IRA also does not identify whether "present" in the term "present boundaries" refers to the time at which the Secretary considers a fee-to-trust application, or June 1, 1934.

Fourth, it is ambiguous whether the 1934 residency requirement attaches to the "descendants" or the "members." If the 1934 residency requirement attaches to the "descendants," the second definition is a closed class, *i.e.* its application is limited to those who were themselves living on a reservation in 1934. If the 1934 residency requirement applies to the ancestral "members," however, then the class is open to all present and future descendants, regardless of whether those descendants were alive and living on a reservation in 1934. Because Mashpee qualifies regardless of whether this is a closed or open class, we need not opine on this ambiguity today.

Because the meaning of these terms is not plain, in order to construe them we look to other aids of statutory construction, such as legislative history and the implementation of the statute.

b. Legislative History

Congress's deliberations in enacting IRA shed some light on the intended meaning of the second definition, but are not determinative of these interpretive questions. At best, the relevant legislative history is inconclusive.

Although Congress considered various versions of IRA, its express goals from the onset were to support the restoration of tribal homelands, tribal self-determination, and economic development.[160] Congress in part sought to undo deleterious effects of the prior policy of breaking up tribal landholdings through individual allotments and broadly redressing the

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[160] *See, e.g.*, H.R. 7902, 73d Cong., 2d Sess., Title III §1 (as introduced, Feb. 12, 1934). *See also Morton v. Mancari*, 417 U.S. 535, 542 (1974) (Congress enacted the IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically).

negative impacts of prior federal policy.[161] Congress further desired to secure tribal homelands for Indian groups who lacked reservation land.[162]

In developing the legislation, Congress considered several different ways to define and describe a "reservation"[163] or "residing upon any Indian reservation."[164] Congress also proposed limiting the right to organize to "[a]ny Indian tribe residing on a reservation on which at least 40 per centum of the original land is still restricted or in tribal status."[165] Additionally, the original bill included a provision specifying that the phrase "a member of an Indian tribe" must include "any descendant of a member permanently residing within an existing Indian reservation."[166] Commissioner John Collier explained that the purpose of the provision was "to include individuals excluded [from] any final roll of an Indian tribe but nevertheless belonging in every social sense to the Indian group."[167]

Congress eliminated this provision, as well as the definitions for both "reservation" and "residing upon any Indian reservation" from the final version of the bill. Congress did not specify why it deleted the definitions of "reservation" and "residing upon any Indian reservation," perhaps because they were eliminated as part of the larger removal of a title authorizing the creation of

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[161] *See* IRA, Pub. L. No. 73-383, 48 Stat. 984, § 1(1934) (terminating the allotment policy by stating that "hereafter no land of any Indian reservation…shall be allotted in severalty to any Indian"); *see also* Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 16 (Feb. 22, 1934) (*The Purpose and Operation of the Wheeler-Howard Indian Rights Bill*, a memorandum of explanation submitted by Commissioner Collier) (Commissioner Collier highlighted that the "disastrous" economic condition of the Indians was "directly and inevitable the result of existing law—principally, but not exclusively, the allotment law and its amendments").

[162] *See* 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 241 (May 17, 1934) (discussing the procurement of new Indian reservations for wandering bands of Indians).

[163] *See, e.g.*, H.R. 7902, 73d Cong., 2d Sess., Title I §13(l) (as introduced, Feb. 12, 1934) (defining the term "reservation" as "all the territory within the outer boundaries of any Indian reservation, whether or not such property is subject to restrictions on alienation and whether or not such land is under Indian ownership").

[164] *See, e.g.*, H.R. 7902, 73d Cong., 2d Sess., Title I §13(c) (as introduced, Feb. 12, 1934) (defining the term "residing upon any Indian reservation" for purposes of identifying who may be issued a corporate charter under IRA as "the maintaining of a permanent abode at the time of the issuance of a charter and for a continuous period of at least one year prior to February 1, 1934, and subsequent to September 1, 1932, but this definition may be modified by the Secretary of the Interior with respect to Indians who may reside on lands acquired subsequently to February 1, 1934").

[165] H.R. 7902, 73rd Cong. § 17 (as reported with amendments, May 28, 1934).

[166] H.R. 7902, 73d Cong., 2d Sess., Title III §19 (as introduced, Feb. 12, 1934). This provision was separate from and in addition to the reservation-based language in the definition of "Indian" that was retained in the final version of the bill.

[167] Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 27 (Feb. 22, 1934) (*The Purpose and Operation of the Wheeler-Howard Indian Rights Bill*, a memorandum of explanation submitted by Commissioner Collier). The Department originally drafted the proposed legislation that was subsequently enacted as IRA.

chartered Indian communities.[168] Additionally, the Solicitor's Office supported the Senate version of the bill that deleted the provision limiting tribal incorporation to "those reservations upon which at least 40 percent of the original land or the subsurface mineral rights are still in restricted or tribal status," because the Senate version was "more liberal and flexible."[169]

On a general note, Commissioner Collier emphasized that the bill was designed to be flexible in order to serve as a universal solution to the unique problems across Indian country. Commissioner Collier explained that the bill:

> pursues a middle road between blanket legislation everywhere equally applicable and specific statutes dealing with the problems of particular tribes. It sets up, in effect, an administrative machinery for dealing with the various problems of different Indian reservations, and lays down certain definite directions of policy and restrictions upon administrative discretion in dealing with these problems.[170]

Accordingly, Congress appears to have chosen not to impose a strict definition of "reservation" but rather left that determination to the Department's expertise to accommodate the particular circumstances of each tribe and reservation.

Regarding the definition of "Indian," the legislative history includes discussion that sheds limited light on the second category. For example, early in the legislative process, the House slightly modified the language, replacing an "or" between the first and second definition with an "and," in order to "clarify the intent of the section that residence upon a reservation is deemed an essential qualification … only with respect to persons who are not members of any recognized Indian tribe and not possessed of one fourth degree of Indian blood."[171] Additionally, during the Senate hearings, Senator Thomas of Oklahoma expressed his concern that an individual could satisfy the second definition if they showed that "they were a descendant of Pocahontas, although they might be only five-hundredths Indian blood."[172] Commissioner Collier responded

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[168] *See* Cong. Rec (House) at 12051 (June 15, 1934) (explaining that many features of the original bill invoked considerable controversy and that the substitute bill eliminated those controversial features, including the creation of chartered Indian communities). While the original bill provided for the creation of chartered Indian communities, and exhaustively listed the terms of those charters, the final legislation provided for both tribal organization via constitutions and tribal corporations via charters, and largely eliminated the specific terms to be imposed on these constitutions and charters.

[169] *Analysis of Differences Between House Bill and Senate Bill*, at 9–10, Box 11, Records Concerning the Wheeler-Howard Act, 1933–37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4) (undated) (National Archives Records).

[170] Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 21–22 (Feb. 22, 1934) (*The Purpose and Operation of the Wheeler-Howard Indian Rights Bill*, a memorandum of explanation submitted by Commissioner Collier).

[171] Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 196 (Apr. 9, 1934).

[172] 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 264 (May 17, 1934).

that would only be the case "[i]f they are actually residing within the present boundaries of an Indian reservation at the present time."[173]

Additionally, there was discussion regarding the blood requirement and whether that requirement attached to the other categories of Indians.[174] Congress, however, ultimately concluded that blood quantum served as a third and independent definition of "Indian."[175] Commissioner Collier further addressed concerns that the first definition, covering any "recognized Indian tribe," would be overly inclusive by suggesting the addition of the language "now under federal jurisdiction" after that phrase. He stated that by doing so, it would "limit the act to the Indians now under federal jurisdiction, except that other Indians of more than one-half Indian blood would get help."[176]

c. Implementation of IRA

Following IRA's passage, the Department, acting primarily through the guidance of the Office of the Solicitor, set out to implement its provisions. The threshold issue was determining which individuals or groups qualified as Indians or Indian tribes for purposes of the Act. This issue frequently arose via the Department's duty to hold Section 18 elections,[177] as well as Departmental evaluations of requests by Indian groups to formally organize under Section 16.[178] Section 18 required the Department to hold elections on reservations to determine whether IRA would apply to that reservation. The IRA initially required an election within a year of the Act's passage, but Congress later extended that deadline to June 18, 1936.[179] Accordingly, the Department had to determine, relatively quickly, the location of reservations in order to allow Indian residents to vote on whether to opt out of IRA. Similarly, the Department had to make numerous determinations as to whether certain groups were eligible to formally organize under Section 16 of IRA.

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[173] *Id.*

[174] *Id.* at 265-66. Chairman Wheeler initially misunderstood the interplay between the three parts of the definition of "Indian," seeming to believe that the blood quantum limitation applied to all three parts. *Id.* Senator O'Mahoney attempted to correct the Chairman by pointing out that the blood limitation did not appear in the first definition and Commissioner Collier clarified that the blood quantum requirement was an independent category of "Indian." *Id.* at 266.

[175] *Id.*

[176] *Id.*

[177] 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." IRA Section 18, codified at 25 U.S.C. § 478.

[178] Section 16 provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize," including the adoption of a constitution and bylaws, and such organization becomes effective when ratified by a majority vote of the adult members of the tribe or of the adult Indians residing on a reservation. IRA Section 16, codified at 25 U.S.C. § 476.

[179] 25 U.S.C. § 478; Act of June 15, 1935, 49 Stat. 378.

Through resolving inquiries related to these two provisions of the IRA, the Department opined several times on the definition of "Indian." Despite this general guidance, much ambiguity remained in the actual application to individual Indian groups, and the Department's implementation efforts demonstrate that Departmental officials were often uncertain and, in some cases, mistaken as to whether the IRA applied to a certain Indian group or reservation.

i. *Departmental Guidance on the Definition of "Indian" and Qualifying "Reservations"*

The Department, through both the Indian Affairs Office and the Solicitor's Office, issued several general guidance documents on the meaning of "Indian" in Section 19. The historical record demonstrates that Commissioner Collier was not always consistent, or clear, in his understanding of the application of the second definition of "Indian."

For example, in 1936, Commissioner Collier issued a circular to assist superintendents in conducting record keeping of Indian enrollment under IRA.[180] The Circular focuses primarily on the third definition concerning half-bloods, but offers some limited explanation of the first two definitions of "Indian" in the IRA. Specifically, Collier noted that "[t]here will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of the tribe, except for where a final roll has been made, and hence included under Class 1."[181] Nevertheless, Collier advised that "a record will have to be kept of Classes 2 and 3,"[182] suggesting that Class 2 (i.e. the second definition of "Indian") was sufficiently independent from, and not co-dependent on, the other definitions of Indian in IRA.

Collier's explanation focused on the second definition's inclusion of individuals who were not listed on the membership rolls of tribes covered by the first definition, however in separate guidance, he also noted that "[w]herever practicable, the Interior Department will treat the Indians of a single reservation as a single tribe," suggesting that the second definition was applicable to reservations containing both a single or multiple tribes.[183]

While not expressly opining on the term "Indian" or "Indian tribe," in 1935 the Acting Solicitor reiterated the Department's general position that the IRA permitted the following groups to organize as a tribe:

(a) A band or tribe of Indians which has only a partial interest in the lands of a single reservation;
(b) A band or tribe which has rights coextensive with a single reservation;

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[180] Circular No. 3134, Enrollment under the Indian Reorganization Act (Mar. 7, 1936).

[181] *Id.*

[182] *Id.*

[183] Circular 86949, Analysis and Explanation of the Wheeler-Howard Indian Act at 8 (undated).

(c) A group of Indians residing on a single reservation, who may be recognized as a "tribe" for purposes of the Wheeler-Howard Act regardless of former affiliations;
(d) A tribe whose members are scattered over two or more reservations in which they have property rights as members of such tribes.[184]

This guidance highlights the intrinsic link between reservation residency and tribal status under IRA.

ii. *Specific Applications of the IRA for Purposes of Section 18 Elections and Formal Organization under Section 16*

Greater explanation of IRA's application to "Indians" and the meaning of "reservation" occurred in case specific settings, such as determining whether to hold a Section 18 election at a reservation. Other case-specific determinations concerned whether the subject group resided on a reservation and qualified as an "Indian" tribe under the second definition, thereby allowing it to immediately organize under Section 16.[185] On occasions where a group failed to satisfy either the first or second definition of "Indian," recommendations were made that reservation land be acquired for that group so that it could subsequently organize.[186]

One such example involves the status of California "rancherias" and the question of whether they qualified as reservations for purposes of holding Section 18 elections. On January 16, 1935, a local Indian Agent provided a tabulation of all the Section 18 elections already held and also listed Indian communities in California and Nevada that had not yet held a Section 18 vote.[187] The latter list contained over 70 "tribes" or "reservations" and the local Indian agent indicated that he was waiting for direction from the Indian Office as to "whether rancherias, colonies, homesites, etc., are required to hold a referendum" or, in other words, whether these communities qualified as a "reservation" for purposes of Section 18.[188] The Indian agent noted his opinion as to whether some of these communities were true reservations, stating,

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[184] Assistant Solicitor Memorandum to the Commissioner of Indian Affairs re the Organization of the Minnesota Chippewas (Aug. 27, 1935).

[185] *See, e.g.*, Solicitor's Opinion, Status of Nahma and Beaver Indians, May 1, 1937, reprinted in II Op. on Indian Affairs 747 (U.S.D.I. 1979) (Finding that there was "no possibility of approaching organization for these Indians through their present land status as there are not existing reservations for these Indians" and accordingly, they "did not enjoy a status…as Indians on a reservation entitling them to be organized under the [IRA]").

[186] *See, e.g.*, Assistant Solicitor Felix Cohen, Memorandum for the Commissioner of Indian Affairs at 1(Apr. 3, 1935) (finding that the Siouan Indians of North Carolina were not a "recognized Indian tribe now under federal jurisdiction" nor were they presently "residents of an Indian reservation"). The opinion determined, however, that if the Secretary established a reservation for these Indians, they could then organize since under Section 19, "the 'Indians residing on one reservation' may be recognized as a 'tribe' for the purposes of the Wheeler-Howard Act regardless of their previous status." *Id.*

[187] Memo from Roy Nash, Field Representative, to Commissioner of Indian Affairs re Indian Reorganization Act, Results of Special Elections (Jan. 16, 1935).

[188] *Id.* at 4–8.

for example, that he had been told that Fort Bidwell was "not technically a reservation."[189] He also stated that Fort Independence and Summit Lake were the only "bona-fide reservations" left to vote, but did not explain the criteria he relied on to reach this conclusion.[190] Consequently, he suggested that the other remaining rancherias or homesites in California be "blanketed in under the law" without a Section 18 vote since they were not, in his opinion, "reservations."[191]

Five months later, the Sacramento Indian Agency submitted a revised tabulation of elections results for the rancherias under its jurisdiction.[192] The tabulation demonstrates that elections were held at all the rancherias previously questioned in the January 16 correspondence, including Fort Bidwell, except for where there were no Indians living at a rancheria or other unique circumstances existed. This final tabulation indicates that the Indian Affairs Office found that rancherias and homesites qualified as "reservations" for purposes of Section 18 elections.

Another example concerned the Shinnecock and Poosepatuck Indians in New York and whether they were occupants of "reservations" for purposes of holding a Section 18 vote. In January of 1936, two Indian agents inspected the Shinnecock and Poosepatuck Indian reservations and issued a report on "whether, *as a matter of policy*, the residents of these reservations should be encouraged to come under the [IRA]."[193] The report determined that both these groups had reservations that were created and primarily regulated under State law and that "could be considered 'Reservations' within the meaning of Section 19 of the Reorganization Act."[194] The agents recommended, however, that "the Office adopt a *policy* of excluding these Indians from the [IRA]" because the agents found their physical appearance and cultural practices insufficiently "Indian."[195] Moreover, the agents believed these groups would not meaningfully benefit from IRA given their adequate land holdings and ongoing receipt of social services by the State.[196] Nonetheless, the agents further advised that "[t]he United States Government should not recede from its possession of technical superiority over the State of New York in the matter of guardianship and should be prepared at any time to step into the picture," in the event the state failed to adequately protect the reservation landholdings.[197]

In rebuke of this recommendation, a subsequent Departmental legal memo argued that the term "reservation" is "broad and general, and has been so interpreted in the administration of the

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[189] *Id.* at 4.

[190] *Id.* at 8.

[191] *Id.*

[192] Sacramento Indian Agency, Revised Tabulation of Election Results (June 25, 1935).

[193] Field Representative Harper, Report on the Shinnecock and Poosepatuck Indian Reservations, In Relation to the Reorganization Act at 1 (Jan. 1936) (emphasis added).

[194] *Id.* at 1, 2–3, 7.

[195] *Id.* at 10 (emphasis added).

[196] *Id.* at 10–12.

[197] *Id.* at 11.

[IRA]."[198] The opinion further determined that IRA was not intended to be limited to "reservations established and recognized under Federal jurisdiction" but that it applied to all reservations, including "State reservations."[199]

The opinion went on to discuss that while the State of New York had long exercised jurisdiction over Indians within its borders, the United States never surrendered its "right to assume jurisdiction at any time in any way which it sees fit."[200] The opinion found that the United States, through Congress, had exercised its right to assume jurisdiction by enacting IRA and this Act imposed "a duty on the Secretary to hold Section 18 elections at all Indian reservations."[201] Accordingly, the opinion found that the Secretary was legally obligated to hold Section 18 elections at the Shinnecock and Poosepatuck reservations,[202] in contrast to the Indian agents' position that as a matter of policy, such elections should not be held.

Ultimately, the Commissioner of Indian Affairs, John Collier, decided that "the considerations of policy all weigh in the direction" of excluding the Shinnecock and Poosepatuck from the Act.[203] Interestingly, Solicitor Nathan Margold appended the Commissioner's memo with a handwritten note expressing his view that "the occupants of these reservations are not Indians and therefore are not within the application of the [Act] *even though that act applies to Indians living on reservations that are not federal reservations*."[204]

Although this correspondence focused primarily on Departmental officials' views of the "Indian character" of the subject groups, more importantly for our purposes, it illustrates a fundamental disagreement between the Commissioner and the Solicitor as to the meaning of "reservation" and whether IRA applied to non-Federal reservations. While Commissioner Collier's policy decisions may have limited IRA's implementation in some instances, Solicitor Margold's conclusion regarding the scope of the Secretary's legal authority under IRA is more relevant and persuasive to the legal analysis here.

The historical record also demonstrates that in the years following the enactment of IRA and its early implementation, there were errors and particular policy changes that affected the

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[198] Memorandum to Daiker from Attorney Meiklejohn, Indian Organization at 1 (May 14, 1936).

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* at 3.

[203] Memorandum from Commissioner John Collier (May 18, 1936).

[204] *Id.* (handwritten note dated May 19, 1936) (emphasis added). The Solicitor's position appears to contradict that taken by the Commissioner in a separate correspondence on the Shinnecock and Poosepatuck, issued at the same time. *See* Letter from Commissioner John Collier to Special Agent William Harrison (May 18, 1936). In this letter, the Commissioner directed that no Section 18 election should be held at the Shinnecock and Poosepatuck reservations, focusing again on the groups' "lack of traditional or cultural traits of Indians" and further relying on his opinion that their "so-called reservations are not Federal territory but state reservations which have never been under Federal supervision."

Department's determination of tribal eligibility, as also recognized by Justice Breyer in his concurring opinion in *Carcieri*.[205] One example is the Catawba Indian Tribe of South Carolina (Catawba Tribe). The Department did not initially consider the Catawba Tribe as "Federal wards" and therefore did not treat it as subject to IRA.[206] In 1944, however, the Solicitor's Office evaluated the issue and found that at least in the mid-1800s, the Federal Government had acted to recognize the tribe and "although such recognition is of ancient date, the tribal organization has been continuously maintained."[207] The Solicitor's Office also relied on the fact that the Federal Government had recently entered into an agreement with the State concerning the fulfillment of governmental responsibilities towards the Catawba Tribe.[208] Accordingly, the Solicitor's Office determined that the Catawba Tribe did in fact constitute a tribe recognized by the Federal Government and, therefore, it was entitled to organize under IRA.[209]

Similarly, the Federal Government initially did not allow the Yavapai Indians to formally organize under IRA because a Section 18 vote had not been held at their reservation.[210] In 1940, the Solicitor's Office advised that the Section 18 vote was not necessary for a group to utilize IRA's provisions, including organization, since the vote was only for the purpose of opting out of the Act and "[t]he Department has in the past approved the organization of groups that did not vote on the acceptance of [the IRA."[211] The Indian Office subsequently inquired as to whether the Yavapai Camp, comprised of trust land transferred to the Department by the Veterans Administration, did in fact constitute a reservation under IRA,[212] to which the

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[206] *See* 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 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, March 20, 1944, reprinted in 11 Op. on Indian Affairs 1255 (U.S.D.I. 1979).

[207] Solicitor's Opinion, Catawba Tribe – Recognition Under IRA, March 20, 1944, reprinted in II Op. on Indian Affairs 1255 (U.S.D.I. 1979).

[208] *See id.*; *see also* Solicitor's Opinion, The Memorandum of Understanding Between the State of South Carolina, the Catawba Indian Tribe, the United States Department of the Interior, and the Farm Security Administration of the United States Department of Agriculture, January 13, 1942, reprinted in I Op. Sol. on Indian Affairs 1080 (U.S.D.I. 1979)

[209] *Id.* Although the Catawba do not appear on Table A of the Haas Report, which lists the Section 18 elections held, it does appear on Table B, which lists Indian tribes having constitutions approved under the IRA (as well as statutes specific to Oklahoma and Alaska). *See* Theodore Haas, Ten Years of Tribal Government Under I.R.A. (1947).

[210] *See* Memorandum from Assistant Solicitor Kenneth Meiklejohn (Jan. 10, 1940).

[211] *Id.*

[212] *See* Memorandum from D'Arcy McNickle, Indian Organization, to Land Division (Jan. 19, 1940).

Solicitor's Office responded in the affirmative.[213] Consequently, the Indian Office began efforts to assist the Yavapai Indians in organization.[214]

The historical record regarding IRA implementation demonstrates a number of points. First, there existed quite a bit of uncertainty regarding whether certain groups qualified as "Indians" or as on "reservations" for purposes of the Act. Second, the implementation of the IRA varied, substantially depending on the unique history of each region, such as the unusual land designations in California or the state government involvement with New York tribes, as well as on limitations imposed by policy decisions and the dearth of Federal resources. Third, these uncertainties sometimes led to errors that were later rectified and changes in policy.

iii. *Regulatory Definitions of "Individual Indian" and "Reservation" in the Department's Land-into-Trust Regulations*

Although not dispositive of our analysis here for reasons explained below, the Department has defined "individual Indian" and "reservation" in its land-into-trust regulations. In 1980, in promulgating final fee-to-trust regulations, the Department defined "reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that . . . where there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary."[215] There is no explanation in either the proposed rule or the final rule for this language.[216] Its usage in the rule as originally promulgated suggests that the Department sought to facilitate on-reservation acquisitions for the tribes who had jurisdiction over a particular reservation and for individuals at the time of the application.[217] Although the definition of "reservation" has remained the same through the current fee-to-trust regulations, the fee-to-trust regulations now impose additional requirements for off-reservation acquisitions.[218] In any event, the definition of "reservation" in the Department's fee-to-trust regulation governs reservation status at the time a trust acquisition is made by the Department, not as of when IRA was enacted.[219]

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[213] *See* Memorandum from Assistant Solicitor Kenneth Meiklejohn to Indian Organization (Feb. 28, 1940).

[214] *See* Letter from Assistant Commissioner Fred Daiker to Field Agent Kenneth Mormon (Apr. 26, 1940).

[215] 45 Fed. Reg. 62034 (1980); *see also* 25 C.F.R. § 151.2(f).

[216] The core jurisdictional requirement of the definition did not change from the proposed rule. *Compare* 43 Fed. Reg. 32311 (1978) with 45 Fed. Reg. 62034 (1980).

[217] *See* 25 C.F.R. 120a.3 (noting that land may be acquired for a tribe in trust status where, inter alia, "the property is located within the exterior boundaries of the tribe's reservation, or adjacent thereto", and authorizing on-reservation trust acquisitions for individuals); 120a.8 ("[a]n individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction consents in writing to the acquisition. . . .")

[218] *See* 25 C.F.R. 151.11.

[219] 45 Fed. Reg. 62034 (Sept. 18, 1980) (summarizing the regulations as "set[ting] forth the policies and procedures which are to be followed in [trust] acquisitions").

The Department's fee-to-trust regulations have included the same definition of the term "individual Indian" since they were promulgated in 1980. The second definition of "individual Indian" provides "Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation."[220] The preamble to the proposed rule that led that up to the 1980 regulations explains the basis for the definition of "individual Indian" as the definition BIA is using for Indian preference purposes.[221]

d. *Chevron* Deference and the Meaning of the Second Definition

The text of the IRA does not establish the plain meaning of the second definition, thus Congress has left a gap for the Department to fill. [222] Although the surrounding legislative history and the subsequent implementation provide some insight on filling that gap, neither offers a clear understanding of the meaning of the phrase "and all persons who were descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." In fact, Congress, in amending the initially introduced bills designed to reorganize Indian Affairs, removed definitional sections, opting for a flexible statute that could provide a flexible and universal tool to address tribes and tribal issues nationally.[223] Since Congress has delegated to the Department the authority to interpret and implement IRA,[224] the Department's reasonable interpretation is entitled to deference.

The Department's interpretation is necessarily guided by the Indian canons of construction which require that the Department interpret ambiguous statutes liberally in favor of the Indians.[225] Other applicable canons of construction include the plain meaning rule,[226] the rule against surplusage,[227] and the rule of avoiding absurd results.[228] The Department's interpretation is also informed by the policies and objectives underlying the IRA. As noted above, Congress enacted IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be

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[220] 25 C.F.R. § 151.2(c).

[221] 43 Fed. Reg. 32311 (1978).

[222] *See Chevron*, 467 U.S. 837, 843–44.

[223] *See supra* Section I.b.

[224] *See Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 2014 U.S. Dist. LEXIS 172111 at *35.

[225] *See Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D.S.D. 2006) ("The canons of construction applicable in Indian law are based on the unique trust relationship between the United States and Indian Tribes [and] a court must "construe federal statutes liberally in favor of the tribe and interpret ambiguous provisions to the tribe's benefit.") (citing *Hagen v, Utah*, 510 U.S. 399 (1994)).

[226] *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").

[227] *See* TRW v. Andrews, 534 U.S. 19, 31 (2001).

[228] *See Halbig v. Burwell*, 758 F.3d 390, 402 (D.C. Cir. 2014) ("Our obligation to avoid adopting statutory constructions with absurd results is well-established.").

able to assume a greater degree of self-government, both politically and economically.[229] The "sweeping" legislation was intended to rebuild tribal land bases and empower tribal self-government and the exercise of tribal sovereignty.[230] With these guideposts in mind, we offer the following interpretations.

i. *Applicability of the Second Definition to Tribal Acquisitions*

Section 5 of the IRA authorizes trust acquisitions for "Indians," as defined in Section 19. Each category set forth in the overall definition of "Indian" utilizes language referring to individuals, such as "members," "descendants," and "other persons." Yet it is clear that Congress intended Section 5 of the IRA to apply to both tribes and individuals, if they met the definition of Indian.[231] To interpret otherwise would lead to the absurd result that the IRA—a statute designed to further tribal sovereignty and the land base of tribes—would permit individual Indians to acquire land in trust but not tribes.[232] Furthermore, the broader interpretation comports with the post-IRA implementation efforts that allowed groups to formally organize under the IRA if they satisfied either the first or second definition[233] and the consistent Departmental practice of allowing trust land acquisitions for both tribes and individuals.[234]

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[229] *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

[230] *See id.*; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (finding that while the IRA's land acquisition provision was to address the failure of the assimilation and allotment policy, the IRA also had a broader purpose to "rehabilitate the Indian's economic life," and "give the Indians the control of their affairs and of their own property").

[231] *See* 78 Cong. Rec. (Sen.) at 11,462 (June 12, 1934) (in response to concerns that Section 5 would only cover land acquisitions made for a tribe, Senator Wheeler stated that Section 5 "is not for Indian tribes, but for *both* tribes and individual Indians") (emphasis added). Additionally, earlier versions of the bill refer only to title being taken in trust "for the Indian tribe for which the land is acquired." *See* H.R. Rep. No 73-1804 on H.R. 7902 at 3 (May 28, 1934) (reporting on a revised version of House bill). It was not until the end of the legislative process that this section was modified to include "Indian tribe *or individual Indians* for which the land is acquired." *See* S. 3645 in the House of Representatives at 4 (June 13, 1924).

[232] The first definition of "Indian" similarly uses language referring to an individual, so construing the second definition in such a limited fashion would implicate the first definition as well, precluding tribes from acquiring trust lands under either definition. It is well-established that statutory constructions which would result in absurd results should be avoided. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453-55 (1989); *see also New York State Dept of Social Services v. Dublino*, 413 U.S. 405, 419-20 (1973) (Courts cannot interpret federal statutes to negate their own stated purposes).

[233] *See, e.g.*, Assistant Solicitor Memorandum to the Commissioner of Indian Affairs re the Organization of the Minnesota Chippewas (Aug. 27, 1935) (detailing the manners by which an Indian group with rights to a reservation could organize); Felix Cohen April 3, 1935 Memorandum (determining that the Siouan Indians of North Carolina could not organize under Section 16 of the IRA because they did not satisfy the first or second definition of "Indian").

[234] *See* 25 C.F.R. § 151.1 (stating that the following regulations promulgated pursuant to 25 U.S.C. § 465 "set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians *and tribes*") (emphasis added); *see* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][b] (2012 ed.) (discussing Interior's process of converting fee land into trust "by accepting legal title to the land in the name of the United States in trust for *a tribe* or individual Indian") (emphasis added).

Accordingly, the Department finds that the reasonable interpretation of the second definition is that it applies to both individual Indians and tribes.[235]

ii. *Such Members*

Congress expressly sought to extend IRA's benefits to different classes of Indians. The first Class is "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." The second Class is "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." And the third Class is "all other persons of one-half or more Indian blood."[236]

In light of Congress's broad intent to restore and provide new homelands for Indians and the clear rule that statutory ambiguities are to be construed for the benefit of Indians, it would make little sense to interpret the second definition in such a way that would limit its applicability. Therefore, regarding the meaning of the referent of "such members" contained in the second definition, we believe it was intended to incorporate only the phrase "members of any recognized Indian tribe" and not "under federal jurisdiction" in 1934.[237] To interpret it otherwise would be to completely subsume the second definition into the first, resulting in surplusage. The Supreme Court has stated that a cardinal principle of statutory construction is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[238] Fully incorporating the first definition into the second would render the requirement of reservation residency meaningless, since all individuals would qualify under the first definition regardless of their residency. It would eliminate the significance of the term "reservation," which is a different concept than "under federal jurisdiction." Additionally, the term "and all" is conjunctive and indicates that Congress intended that the second definition be independent of the first.[239] Accordingly, the most reasonable way to interpret the relationship of the second definition to the first, as well as the overall structure of

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[235] This conclusion is further reinforced by the definition of "tribe" which includes "the Indians residing on one reservation." *See* 25 U.S.C. § 479.

[236] Section 19 further provides that "[f]or the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians." 25 U.S.C. § 479.

[237] The M-Opinion concerning the first definition of "Indian" already determined that there is no temporal limitation on the term "recognized" and therefore, recognition in 1934 is not required. *See* M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act at 23–24 (Mar. 12, 2014). The Department has interpreted "recognized" in 25 U.S.C. § 479 to mean federally recognized in the present day. *See* 25 C.F.R. § 81.1(w); *see also Sandy Lake Band v. Salazar*, 714 F.3d 1098, 1102 (affirming the district court order upholding the Department's interpretation of the phrase "recognized Indian tribe"). A tribe, such as Mashpee, that has received formal recognition through the Departmental acknowledgement process at 25 C.F.R. Part 83 satisfies this part of the statute. *See* M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act at 24-25 (Mar. 12, 2014).

[238] *See TRW v. Andrews*, 534 U.S. 19, 31 (2001) (internal citation omitted).

[239] *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989).

the three definitions, is to construe them as three partially overlapping sets that are defined by different limitations.[240]

Furthermore, it would have been redundant for Congress to incorporate the phrase "under federal jurisdiction" where it was well established at the time of IRA that Indian residents of a reservation were automatically subject to Federal authority.[241] Congress is assumed to know the state of the law at the time it enacts legislation.[242] The plain language of the statute is clear that 1934 applies to and limits the application of the second definition.[243] Therefore, in the same way that the Supreme Court has interpreted the statutory language as imposing a temporal limitation in the first definition to members of tribes under Federal jurisdiction *in 1934*,[244] the statute similarly established the temporal scope of the second category as reservation residents *as of June 1, 1934*. Congress intentionally preserved the jurisdictional framework existing at the time of the IRA by limiting the first category of Indians to those under federal jurisdiction in 1934 and by limiting the second category to reservation residents in 1934.

Commissioner Collier's statement that inserting the qualifier "now under Federal jurisdiction" in the first definition of Indian would "limit the act to the Indians now under federal jurisdiction, except that other Indians of more than one-half Indian blood would get help" could be interpreted, in isolation, as support for the "now under Federal jurisdiction" qualifier attaching also to the second definition. Yet the more reasonable interpretation, particularly in light of the general understanding regarding Federal authority over reservations, is that Commissioner Collier considered both the first and second definitions to be limited to those for whom a Federal relationship existed in 1934, either through membership in a "recognized Indian tribe" or by residence on a reservation.

Accordingly, the second definition should be interpreted to incorporate "members of any recognized tribe" but not the phrase "now under Federal jurisdiction" which modifies only the first definition of "Indian." This interpretation is reasonable since it does not explicitly or

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[240] These limitations are membership in a tribe now under federal jurisdiction for the first definition, descendancy and residence on a reservation for the second definition, and blood quantum for the third definition.

[241] *See, e.g.*, *United States v. Sandoval*, 231 U.S. 28, 45–46 (1913) ("Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State."). Furthermore, the IRA definition of "tribe" includes "Indians residing on one reservation," reinforcing the statute's intended coverage of all Indian reservations. *See* 25 U.S.C. § 479.

[242] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

[243] *See Carcieri v. Salazar*, 555 U.S. at 393.

[244] The Department's longstanding position prior to the *Carcieri* decision was that the phrase "now under federal jurisdiction" in the first definition meant at the time a trust acquisition was being made by the Department. *See* M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act at 3 n.15 (Mar. 12, 2014).

implicitly limit the plain language of the first definition, which has already been determined to be ambiguous.[245]

iii. *Within the Present Boundaries of Any Indian Reservation*

The second definition of "Indian" provides for "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." Concerning the phrase "within the present boundaries of any Indian reservation," I conclude that the Department must make a case-by-case determination as to whether a particular settlement was set aside for Indians and therefore qualifies as an "Indian reservation" under the IRA. The distinct issue of the meaning of the term "present" also is a fact-based inquiry into whether the persons in question were within the "present boundaries" as of June 1, 1934.

a. *"Indian reservation"*

As noted previously, the IRA does not define "Indian reservation," which is logical given the amorphous nature of this concept throughout much of United States' history. Historically, there have been varying articulations of what constituted an Indian reservation, a concept that has evolved alongside the dynamic federal policy concerning tribes, relocation, and self-determination.[246] Today, there are numerous different definitions of "reservation," for example in our fee-to-trust regulations and in our regulations interpreting the Indian Gaming Regulatory Act.[247]

Several Supreme Court decisions illustrate the non-uniformity by which a reservation came into existence historically. For example, in 1896, the Supreme Court considered whether certain lands set aside by treaty for the Chippewa Indians as a "place of encampment" for fishing purposes constituted an Indian reservation.[248] The Court determined that:

> whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to

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[245] *See* M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act at 17 (Mar. 12, 2014); *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 2014 U.S. Dist. LEXIS 172111 at *35 (finding that "the phrase 'under federal jurisdiction' is indeed ambiguous and that *Chevron* deference is required"); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 U.S. Dist. LEXIS 38719 at *17–*18 (N.D.N.Y. Mar. 26, 2015) (finding that the language of the first definition "does not point to a single unambiguous meaning").

[246] *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][a], [b] (2012 ed.).

[247] *See, e.g.*, 25 C.F.R. § 151.2(f) (defining "Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction," as well as former reservations); 25 C.F.R. § 292.2 (offering several different definitions of "reservation," including "[l]and acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation").

[248] *Spalding v. Chandler*, 160 U.S. 394 (1896).

> the making of the treaty and acquiesced in by the United States government, or whether the election was made by the government and acquiesced in by the Indians, is immaterial.[249]

The Court further provided that "[i]f the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by the boundaries in the treaty itself."[250]

In 1902, the Supreme Court again considered the question of reservation creation in the context of unceded Indian lands.[251] The Court determined that "in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes."[252]

Outside of the judicial setting, contemporaneous dictionaries offer limited insight into the general concept of a "reservation." For example, the 1933 edition of Black's Law Dictionary defines a reservation to include "a tract of land such as parks, military posts, Indian lands."[253] Additionally, the 1934 Webster's dictionary uses the following definition: "A tract of the public land reserved for some special use, as for schools, for forests, for the use of Indians."[254]

The 1942 Handbook on Federal Indian Law, written by Assistant Solicitor Felix Cohen, one of the primary drafters of the bill that later became IRA, addresses the various origins of Indian reservations, particularly via treaty, statute, or executive order.[255] The Handbook provides that there have been three general methods by which treaty reservations were established: 1) the recognition of aboriginal title; 2) the exchange of lands; and 3) the purchase of lands.[256] The Handbook notes that reservations established between a tribe and a former sovereign entity, such as the British Crown, can serve as the basis for an ongoing relationship between a tribe and the United States and continued reservation of the subject land.[257] The Handbook also discusses alternate ways for reservations to be established, such as through legislation and executive

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[249] *Id.* at 403-404.

[250] *Id.* at 404.

[251] *Minnesota v. Hitchcock*, 185 U.S. 373 (1902).

[252] *Id.* at 390.

[253] Black's Law Dictionary 1542 (3d ed. 1933).

[254] Webster's New International Dictionary of the English Language 2118 (2d ed. 1934). *See also* 3 Bouvier's Law Dictionary and Concise Encyclopedia 2918-19 (8th ed. 1914) (defining reservation to include areas "such as Indian reservations and those for military posts, and for the conservation of natural resources").

[255] Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, Ch. 15 §§ 5, 6, 7 (1942 ed.).

[256] *Id.* at 294, Ch. 15 § 5(a).

[257] *Id. See also Strother v. Lucas*, 37 U.S. 410, 436 (1838) ("the law of nations, according to which the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect").

orders.[258] It notes that the most common type of reservation-creating legislation "*reserves* a portion of the public domain from entry or sale and dedicates the reserved area to Indian use," with the result that the "designated area is 'set aside' or 'reserved' for a given tribe, band, or group of Indians."[259] The Handbook further states that "there is no magic" in the word "reservation" and that "land purchased for Indian use and occupancy" constitutes a "reservation" whether or not the underlying statute uses that term.[260] Similarly, the Handbook describes the most common kind of reservation-creating executive order as one "which presumes to set apart a designated area for the use, or use and occupancy, or as a reservation for a particular tribe or tribes of Indians."[261]

In 1945, the Solicitor opined on the varying nature of the term "Indian reservations," finding that neither the courts nor the Department had ever created a generally applicable definition.[262] The Solicitor found that past inquiries focused on the specific factual circumstances at hand, usually for the purpose of determining "Indian country" for criminal jurisdiction or "Indian title" for compensating loss thereof, rather than whether the underlying tract constituted a "reservation" or not.[263] The Solicitor cited at length to *Minnesota v. Hitchcock*, a 1901 Supreme Court decision that found that "[t]he mere calling of the tract a reservation instead of unceded Indian lands did not change the title," rather "[i]t was simply a convenient way of designating the tract."[264] He also quoted the *Hitchcock* decision for the proposition that "in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract," rather "[i]t is enough that from what has been done there results a certain defined tract appropriated to certain purposes."[265] Recognizing the varying treatment of the term in the existing legal authorities, the Solicitor did not attempt to create a single definition of "Indian reservation."

As an additional note, we do not think the definition of "reservation" in our fee-to-trust regulations is dispositive of our analysis today.[266] It was drafted long after the enactment of IRA

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[258] Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 296–302, CH. 15 §§6, 7 (1942 ed.).

[259] *Id.* at 296, Ch. 15 § 6(1) (emphasis in original).

[260] *Id.* at 297, Ch. 15 § 6(2) (citing *United States v. McGowan*, 302 U.S. 535 (1938)).

[261] *Id.* at 300, Ch. 15 § 7; *see also id.* at 302, Ch. 15 § 7 (noting the similar form of various reservation-creating executive orders because"[i]n each it is decreed that certain designated lands be set apart in a designated manner for a named purpose").

[262] *Judicial and Departmental Construction of the Words "Indian Reservations,"* Solicitor Warner W. Gardner, II Sol. Op. 1378 (Dec. 29, 1945).

[263] *Id.* at 1378.

[264] *Id.* (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1901)).

[265] *Id.*

[266] As noted previously, the Department's fee-to-trust regulations define Indian reservation as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction," as well as "that area of land constituting the former reservation of the tribe as defined by the Secretary" in the State of Oklahoma or where there has been a judicial determination as to diminishment or disestablishment. *See* 25 C.F.R. § 151.2(f).

and, even more importantly, it is intended to govern reservation status as of the time of an acquisition, not eligibility of an Indian tribe for trust land acquisition under the second definition of "Indian." Nothing in the regulation or the preambles to any of the versions of the fee-to-trust regulations suggest that it was intended to address the eligibility of tribes for trust acquisitions under the IRA. Indeed, as explained above, the term "reservation" is used to determine how an acquisition will be processed, or, in the case of individual Indians, even permitted. Likewise, we do not think the reference to a "federally recognized Indian reservation" in the definition of "individual Indian" is dispositive of our analysis.[267] Not only is it used in the context of acquisitions for individual Indians, but it was enacted long after the enactment of IRA without any explanation. In other words, the definition was drafted for a different purpose, at a different time. In any event, as explained below, the Federal Government treated the Mashpee lands as a reservation.

We therefore turn back to the definition of "reservation" at the time of IRA was enacted. While there was no single definition of "reservation" at the time IRA was enacted, there was a generally accepted understanding that the terms "reservation" and "Indian reservation" referenced lands set aside for Indian use and occupation.[268] Land may be set aside through a variety of ways, so long as that set aside carries legal effect. A case-by-case evaluation is therefore necessary to determine whether any specific tract of land qualifies. Given the remedial purpose of IRA, the Department's early practices in implementing IRA, and the Indian canons of construction, we believe there is a wide range of relevant evidence that could demonstrate that land was set aside for Indian purposes, *i.e.* that it was a reservation for IRA purposes, in 1934. This includes colonial, state, and Federal records pertaining to a protected Indian settlement, such as, and not limited to, treaties and executive orders concerning the land, Commissioner of Indian Affairs reports discussing the status of the settlement and its Indian inhabitants, Federal enforcement of the Trade and Intercourse Acts for activities on the reservation, and any other records of an agency presence on the reservation or consideration of the reservation in the formation of Federal policy. Additionally, academic reports and other historical sources may

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[267] The Department's fee-to-trust regulatory definition of individual Indian includes "[a]ny person who is a descendant of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation." *See* 25 C.F.R. § 151.2(c)(2).

[268] Even in modern times, the notion of an informal reservation continues to exist. *See, Oklahoma Tax Commissioner v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (finding that the subject property qualified as a reservation, even though it lacked that formal denomination, because it was "validly set apart for the use of the Indians as such, under the superintendence of the Government") (citing *U.S. v. John*, 437 U.S. 634 (1978)); *see also* 25 C.F.R. § 81.1(q) (the regulations, revised in 1981, governing Secretarial elections for tribal re-organization define a "reservation" as "any area established by treaty, Congressional Act, Executive Order, or *otherwise for the use or occupancy of Indians*") (emphasis added). It should also be noted that following the passage of the IRA, Congress enacted a statute in 1942 defining "Indian Country" for purposes of the Indian Major Crimes Act. *See* 11 U.S.C. § 1151. This statute contains a provision for "Indian reservations." The analysis conducted in this Memorandum pertains only to the scope of "Indian reservations" for the broad purposes of the IRA and does not apply to the more narrow definition used later by Congress in the context of federal criminal law and enforcement. *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][c][i] (2012 ed.) (suggesting that the articulation of the term "reservation" in Section 1151 was intended to exclude Indian reservations already subject to state authority).

evince an Indian reservation by highlighting tribal political and social control over a certain tract of land. Similar to the approach set forth by the Department for determining "under federal jurisdiction" in the first definition of "Indian," it is important to examine the entire history of the reservation area, not just its status as a snapshot in 1934.[269] Accordingly, relevant sources need not be contemporaneous with 1934. Earlier or later documentation may reflect the existence of an Indian reservation.

Furthermore, evidence that a government entity other than the Federal Government claimed or exerted authority over the subject land or claimed or exercised superintendence over the resident Indians does not, in and of itself, undermine its reservation status. Even though Solicitor Margold and Commissioner Collier did not appear to agree on this point while implementing IRA, we are persuaded that the Solicitor's position is more reasonable given the broad understanding of "reservation" at this time and Congress' decision not to include a specific, and limiting, definition of "reservation" in IRA. Furthermore, Solicitor Margold's determination concerned the scope of the Department's legal authority under IRA, whereas Commissioner Collier appeared to have taken his position on the basis of policy. Moreover, it should be noted that where a reservation was illegally treated as subject to state law or superintendence, as a matter of law "[o]nce the United States was organized and the Constitution adopted…tribal rights to Indian lands became the exclusive province of the federal law."[270]

b. "Present boundaries"

After determining that an "Indian reservation" did in fact exist, the "present boundaries" prong necessitates an evaluation of the legal authorities setting aside the reservation. To the extent that the underlying legal authorities precisely delineated the boundaries of the reservation, the Department should rely upon those boundaries. If the legal boundaries are unclear, however, the Department may look to other indicia, including actual occupation and use of the reservation land by the tribe. The entire analysis should be guided by the Indian canon of construction requiring that ambiguities be resolved in favor of the Indians and by the well-established rule that reservation boundaries may enclose tracts of land that are not themselves held in fee or trust by the tribe or its members.[271] Moreover, in light of the legislative history and Congress' intent

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[269] *See* M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act at 18-20 (Mar. 12, 2014).

[270] *Oneida Indian Nation of N.Y. v. Oneida Cnty*, 414 U.S. 661, 667 (1974); *see also Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 U.S. Dist. LEXIS 38719 at *22 (N.D.N.Y. Mar. 26, 2015) (finding that the "exclusive federal jurisdiction over tribal rights of occupancy applies even where the United Sates never held fee title to the Indian lands—as in the original colonies—and the fee title to Indian lands is accordingly in the state") (internal quotations omitted).

[271] *See Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) (dismissing the argument that lands patented in fee to non-Indians are no longer part of the reservation because it would create "an impractical pattern of checkerboard jurisdiction"); 18 U.S.C. § 1151 (defining "Indian country," for purposes of criminal jurisdiction, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation").

to establish temporal limitations, the term "present" is reasonably understood to mean the boundaries as of June 1, 1934.[272]

iv. *Descendants Versus Members Residing on the Reservation*

As a preliminary matter, it is not necessary to reach an independent determination on whether the 1934 residency requirement attaches to the "descendants" or the "members" referenced in the statute. Although the Department has opined on this statutory construction issue in the limited context of the Indian preference statute,[273] that statute is solely applicable to individuals, not tribes, and offers limited guidance for our purposes. The same Indian preference interpretation was used as the basis for the second definition of "individual Indian" in the Department's land-into-trust regulations, but again our focus is on a land acquisition for a tribe.[274] Nonetheless, as detailed *infra*, the Tribe has demonstrated that its ancestral members were residing on the Mashpee reservation in 1934 and, further, that several living members were themselves residents of the Town in 1934. As discussed *infra* Section III(a), by law and fact, these members were descendants from previous members. Given the historical record on IRA implementation and the Department's emphasis on reservation residency as one manner of attaining the Act's benefits, the Tribe's members, themselves descendants of members, would have met these residency requirements in 1934 and they continue to meet them today. Accordingly, the Tribe satisfies either possible construction.

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[272] *See, e.g.*, 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 264 (May 17, 1934) (Commissioner Collier's explanation that descendants qualify under the second definition only "[i]f they are actually residing within the present boundaries of an Indian reservation at the present time").

[273] *See* Memorandum from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs, *Application of Definition of Indian in 25 U.S.C. § 479 to Descendants of Members Born after June 1, 1934* (Mar. 24, 1976) (interpreting the second definition as a closed class for purposes of individual applications for Indian preference hiring under 25 U.S.C. § 472); *Garvais v. Dep't of the Interior*, 2004 MSPB LEXIS 3395 (July 8, 2004) (Merit Systems Protection Board decision relying favorably on the 1976 Associate Solicitor opinion concerning the scope of Indian preference).

[274] 45 Fed. Reg. 62034 (1980).

v. *Full Interpretation of the Second Definition*

In light of our evaluation of the statutory language, we find that in order to determine whether the Tribe is eligible to receive land in trust pursuant to the second definition, we must find that the Tribe is composed of descendants of members of a recognized Indian tribe who maintained residence within the boundaries of an Indian reservation as of June 1, 1934. The existence of a "reservation" will involve a fact-specific inquiry into whether land was set aside for the use or occupancy of the Mashpee Indians.[275]

II. BACKGROUND OF THE MASHPEE WAMPANOAG TRIBE

a. History of the Mashpee Tribe at the Town of Mashpee

The Tribe has an extensive history at the Town of Mashpee, pre-dating European contact and enduring through modern times. The legal form of this relationship has evolved over time, arising in aboriginal presence, then set aside through land deeds, and later via state law. Federal officials, State entities, and other parties have recognized and documented the tribal presence at the Town. While these sources do not always refer to the Town as a "reservation," they employ language such as "Indian settlement," "Indian district," or "Indian town."

i. *The Colonial Period*

The Mashpee Tribe is a subcomponent of the broader Wampanoag Indians, also referred to as the Pokanoket, who have a long history in southeastern Massachusetts dating before European contact in the early 17th century. At the time 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.[276] The Pokanoket territory extended from Cape Cod in the east to the eastern shore of Narragansett Bay in the west, and from the islands of Martha's Vineyard and Nantucket in the south to the towns of Marshfield and Brockton in the north.[277] These lands

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[275] I further note that an applicant tribe who qualifies for land-in-trust based on reservation residency is not limited by 25 U.S.C. § 465, governing the acquisition of trust land, to on-reservation trust acquisitions only.

[276] Office of Federal Acknowledgment, Summary under the Criteria for the Proposed Finding on the Mashpee Wampanoag Indian Tribal Council, Inc. at 18, 32 (Mar. 31, 2006) [hereinafter Department's Proposed Finding]. The Department's Proposed Finding sets forth in great detail the historical record concerning the Tribe and forms the basis of the Department's Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc.

[277] *See* Bert Salwen, *Indians of Southern New England and Long Island: Early Period*, *in* 15 HANDBOOK OF NORTH AMERICAN INDIANS 160, 171 (1978) [hereinafter Salwen 1978]; Dr. Kathleen J. Bragdon, et al, "Inseparable from their Land": Mashpee Wampanoag Tribe Historical and Modern Ties to Cohannut (Taunton) at vii (Sept. 14, 2012) [hereinafter Bragdon Report].

include 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.[278]

The Mashpee Tribe had early contact with British colonizers beginning in the 17th century. There is a long and substantial history with respect to the entwined relationship among the Tribe, the British Crown and the colonies before formation of the United States. The original colonies were generally left with day to day management of Indian relations, while the British Crown reserved ultimate authority.[279] Early English colonists followed the general principle that land could only be obtained from Indians with their consent.[280] Indeed, the Massachusetts Bay Colony required colonists to acquire lands claims by the Indians by purchase and the Massachusetts General Court declared only it could grant the right to purchase land in the colony.[281] In 1665, two local Wampanoag sachems donated land to the Mashpee Indians, at the behest of Puritan minister, Richard Bourne, to establish a praying town in what is now the Town of Mashpee.[282] Another sachem confirmed this land grant, and granted additional lands, by deed in 1666.[283] Pursuant to these deeds, the land was held in common by the Mashpee Indians and could not be alienated to outsiders without the consent of all other tribal members.[284] The 1666 deed also expressly provided for "all the Privileges & Immunities belonging to the Indians with all Meadows, Necks, Creeks, Timber wood, hunting, fishing, fowling or whatever Privileges belong unto these lands … ."[285] Significantly, the colonial court confirmed the Mashpee's 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,

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[278] Christine Grabowski wrote extensively on the history of the Mashpee Tribe, its relation to historic Pokanoket territory, and its historical connections to the Taunton and Mashpee parcels in three reports prepared on behalf of the Tribe: "Mashpee Wampanoag Tribal Identity in Ethno-historical Perspective," Grabowski (2007); "Indian Land Tenure in Middleborough, Massachusetts (2008); and "The Mashpee Wampanoag Tribe's Historical Ties to Fall River, Massachusetts, Area (2010).

[279] *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1] (2012 ed.).

[280] *See* Francis Paul Prucha, The Great White Father: The United States Government and the American Indians 15 (Univ. Neb. Press 1984); D'Arcy McNickle, Native American Tribalism 29-30, 33 (Oxford Univ. Press 1973).

[281] Alden T. Vaughn, New England Frontier: Puritans and Indians 1620-1675, at 114 (Univ. Okla. Press 1995).

[282] *See* Dec. 11, 1665 Mashpee Grant, confirmed by the General Court of Plymouth Colony in 1689, located in *Indian Deeds: Land Transactions in Plymouth Colony 1620–1691*, Jeremey Dupertuis Bangs, New England Historical Genealogical Society (using the name "South Sea Indians") [hereinafter 1665 Deed]; *see also* Department's Proposed Finding at 13. These praying towns were established for the purpose of converting the Indian inhabitants to Christianity. Department's Proposed Finding at 13.

[283] Sept. 20, 1666 Deed, 33 Massachusetts Archives Collection (1629–1799), p.149 [hereinafter 1666 Deed]; *see also* Department's Proposed Finding at 13.

[284] *See* 1665 Deed at 349 (securing tracts of land for the "South Sea Indians & their children for ever, so as never to be given, sold, or alienated from them without all their consents"); 1666 Deed at 149 (deeding lands to "the South Sea Indians and their children forever for a possession for them and their children forever not to be sold or given or alienated from them or any part of these lands")

[285] 1666 Deed.

whatsoever, by the Courts[sic] allowance, without the consent of all the said Indians."[286] The praying town, consisting of 25 square miles, was governed by a 6-person council of Mashpee Indians that exercised a high degree of political power and independence with the assistance of Bourne. [287]

In 1675 and 1676, escalating tensions in the region led the New England tribes to wage war against the colonial settlers, an effort referred to as King Philip's War.[288] The war lasted a short time but resulted in large losses of life among the Pokanoket, the seizure of remaining Pokanoket territory, and the displacement of Pokanoket people.[289] The Town of Mashpee and the control of its government remained in the hands of Mashpee Indian inhabitants, as they did not participate in the war against the colonists.[290] Following King Philip's War, and the attendant diminishment of Pokanoket/Wampanoag territory and dispersal and enslavement of most of the mainland Pokanoket/Wampanoag, Mashpee became a place of refuge for Pokanoket/Wampanoag people generally.[291]

The Mashpee's praying town remained intact until the 1720s, when the colonial government implemented a proprietary system of governance and ownership. Under the proprietary system, Mashpee men and women "elected local officers, held regular town meetings, maintained the public records, and owned their land in common as proprietors."[292] In 1746, the General Court of Massachusetts diminished Mashpee control by assigning three non-Mashpee individuals to serve as overseers to the Town.[293] The Mashpee Indians, however, disfavored the overseers and repeatedly raised their complaints to the colonial legislature. In 1763, at the behest of the Mashpee Indians, the colonial government converted the Town of Mashpee into a self-governing "Indian district," the only one of its kind in Massachusetts.[294] The Indian district was governed by 5 overseers, 3 of whom were Mashpee members, and remained in place until 1788, the year Massachusetts became a Commonwealth.[295] Throughout this period, the colonies were struggling for Independence from the British Crown and part of that struggle involved increasing tensions

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[286] 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").

[287] Department's Proposed Finding at 32, 94–95.

[288] Salwen 1978 at 172.

[289] Bragdon Report at vii–viii.

[290] Department's Proposed Finding at 94 (describing how the Mashpee Indians pledged and maintained neutrality throughout King Philip's war).

[291] *Id.* at 33; Bragdon Report at viii.

[292] Department's Proposed Finding at 95–96.

[293] *Id.* at 96.

[294] *Id.* at 96.

[295] *Id.* at 34, 96.

and a desire to centralize Indian affairs. The Continental Congress attempted to address these issues,[296] but in the subsequent Articles of Confederation, the States continued to debate their authority and oversight over Indian affairs within their boundaries.[297]

ii. *The Early Period Following the Formation of the United States*

In 1788, the year after the U.S. Constitution was adopted (which removed references to state powers over Indian affairs), the Commonwealth terminated Mashpee control and the overseer system by installing three non-Indian guardians.[298] In response to strong Mashpee resistance to this system, the Commonwealth removed the guardians and converted the settlement back to a self-governing Indian district in 1834.[299] Thus, despite adoption of the Constitution, the Commonwealth chose to continue regulating Mashpee affairs by determining the governance system and legal status of the Town. And under the Indian district system, the Mashpee was again able to exercise political and regulatory control over the Town.

Near this time, the Federal Government considered the Mashpee "reservation" in developing its policy on removal. In 1822, the Reverend Jedidiah Morse assisted President James Monroe in making a recommendation to Congress on establishing a national policy concerning the forcible removal of Indian tribes from their aboriginal territories (Morse Report).[300] Reverend Morse, a reputable geographer, was commissioned by the Secretary of War, John C. Calhoun, 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."[301] In the introduction to his report, Reverend Morse voiced his commitment to fulfilling the mission's underlying objective: "lay[ing] before the Government, as full and correct a view of the numbers and actual situation of the *whole* Indian population within their jurisdiction, as [his] information and materials would admit."[302]

As part of his report, Reverend Morse set forth a statistical table enumerating "the names and numbers of all the tribes within the jurisdiction of the United States."[303] The Mashpee Tribe

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[296] *See* 2 J. Continental Cong. 175, 183 (1775).

[297] *See* U.S. Articles of Confederation art. ix (1777); *see also* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW §§ 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).

[298] Department's Proposed Finding at 97.

[299] *Id.* at 98.

[300] A REPORT TO THE SECRETARY OF WAR ON INDIAN AFFAIRS (New Haven 1822) [hereinafter Morse Report].

[301] *Id.* at 1.

[302] *Id.* at 22 (emphasis in original).

[303] *Id.* at 23.

is listed and the Town of Mashpee is listed as the Tribe's "place of residence."[304] Reverend Morse also included narratives for each state describing the status of tribes residing therein. In discussing the Mashpee Tribe, Reverend Morse determined that there were 320 members living on the "reservation." He ultimately concluded that the Federal Government would be ill advised to remove the Mashpee and other Massachusetts tribes from their current territory as the tribes' whaling and manufacturing skills were of public utility there. He also reasoned that the tribes felt strongly attached to the location.[305] This report and statistical table were relied upon by President Monroe and Congress in the formation of the removal policy and the decision not to impose relocation on the Tribe.[306] They also appear to have been relied upon by the Office of Indian Affairs throughout the 1820s in response to congressional requests for demographic information on tribes within the States and territories.[307]

In 1842, the Commonwealth of Massachusetts ordered the allotment of most of the Tribe's common lands in severalty to Mashpee members.[308] An area amounting to 10,171 acres were reported to have been allotted to individual Mashpee members.[309] The Commonwealth retained the restrictions on alienation prohibiting land transfers to non-Mashpee members and also preserved approximately 3,150 acres of commonly held land.[310] In 1869, the Commonwealth terminated these long-standing restrictions on land alienation and, in 1870, incorporated the Town of Mashpee.[311] The Town boundaries were defined by the boundaries of the prior Indian district.[312] Even though the Town no longer maintained its official designation as a self-governing Indian district, as it had under the prior forms of government, historical evidence demonstrates that the Mashpee continued to dominate the Town's population, as well as control

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[304] *Id.* at 46.

[305] *Id.* at 70.

[306] *See* Plan for Removing the Several Indian Tribes West of the Mississippi River, 18th Cong., 2d. Sess., at 541-45 (Jan. 27, 1825). Congress also relied on Morse's data concerning the Mashpee in its development of Indian trade policy. *See* History of Congress, 17th Cong., 1st Sess., at 1794– 95 (May 1822).

[307] *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).

[308] *See* An Act Concerning the District of Marshpee, Mass. Acts. Ch. 72 (1849); *see also* Department's Proposed Finding at 99. As explained *infra* Section II.c, the Commonwealth's allotment of the Tribe's common lands was in violation of the Non-Intercourse Act.

[309] Department's Proposed Finding at 99.

[310] *Id.* A more contemporaneous report places the estimated number of preserved common lands at 5,000 acres. *See* HISTORY OF BARNSTABLE COUNTY, MASSACHUSETTS, ed. Simeon L. Deyo at 710 (1890).

[311] *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* Department's Proposed Finding at 100.

[312] 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.")

the Town's government and culture up until the 1970s.[313] This occupation and control persisted even though individual tracts of Mashpee land gradually fell into the ownership of absentee landlords or seasonal residents.[314] Certain politically and religiously important tracts of land, specifically the Old Indian Meeting House, the tribal cemetery, the parsonage, and the Baptist church/school house lot, continued to be held in common by the Mashpee community via deeds issued to the Town government.[315] The communal fishing rights were also transferred to the Town pursuant to the 1870 Act.[316]

In 1885, Congress tasked the Department of the Interior with compiling comprehensive information on the status of Indian education across the country. In response to this request, the Department commissioned ethnologist Alice Fletcher to conduct the necessary research. The final report, published in 1888, includes in the background chapters a section on the history and current status of the Mashpee.[317] The report referenced the existence of the "Mashpee Plantation" and explained the history of its creation stemming from the 1660s deeds and confirmation by the General Court in Plymouth, and evolving through the various forms of governance and Indian versus non-Indian oversight.[318]

In 1890, the Commissioner of Indian Affairs issued his annual report on the status of tribes and federal Indian policy, which included a discussion of the Mashpee. The report found 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."[319] Regarding the Mashpee, the 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."[320] The report failed to mention the Commonwealth's more

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[313] *Id.* at 100-07 (describing how Mashpee members formed the majority of year-round residents and monopolized the town's elected and appointed positions until changing demography in the 1970s led to a shift in the population majority favoring non-Mashpee residents).

[314] Department's Proposed Finding at 47-48.

[315] Registered Deed, located in the Barnstable County Registry of Deeds, Book 121, pp. 139–141 (Nov. 17, 1874); *see also* An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 2 (1870) (All common lands, common funds, and all fishing and other rights held by the district of Marshpee, are hereby transferred to the town of Mashpee."). The deed does not cover the Baptist church/school house property and the support for its continued status as common lands held by the Town originates from the Tribe's title work, which has not been independently verified by the Department. *See* Mashpee Wampanoag Tribe Memorandum on *Carcieri v. Salazar* Supplement 2 at 4–5 (submitted to the Department on Nov. 29, 2012).

[316] An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 2 (1870).

[317] 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, at 59–60 (1888).

[318] *Id.*

[319] ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at xxvi (1890).

[320] *Id.*

recent efforts to allot the communal landholdings, remove the restrictions against alienation, and incorporate the former Indian district.

iii. *The 20th Century*

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.[321] Even though many individual allotments within the Town gradually left Mashpee member ownership,[322] the Tribe maintained ownership over fundamental community parcels vis- à-vis its control of the Town government.[323] Additionally, some individual allotments were deeded back to the Town for common use, such as the Public Hall and the Samual G. Davis School, or were continuously owned by tribal allottees who permitted tribal uses of the land, such as fishing at the herring run site.[324] Some allotted lands had deeds that reserved access to usufructary rights, such as the right to gather seaweed and marsh hay, to tribal members.[325] The Tribe also "continued to regulate access to and use of common resources by regulating fishing and hunting, harvesting trees, and maintaining streams, rivers, and harbors."[326]

Indeed, many outside entities highlighted the continued "Indian" character of the Town.[327] For example, a 1915 travel essay published in *Cape Code Magazine* identified Mashpee as an "Indian settlement."[328] In the 1920s, anthropologist Frank Speck completed a study of the Tribe and referred to the Town as "the last stronghold of the Cape Cod tribes" and a "native

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[321] *See, e.g.*, Department's Proposed Finding at 100-101 (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).

[322] Not every allotment passed from Mashpee hands. While a complete chain of title search for all allotments has not been conducted, the Tribe has identified at least three parcels that have been continuously held by Mashpee members. *See* Mashpee Wampanoag Tribe Memorandum on *Carcieri v. Salazar* Supplement 2 at 7-8 (submitted to the Department on Nov. 29, 2012).

[323] Namely, the Old Indian Meeting House, the tribal cemetery, the parsonage, and the Baptist church/school house.

[324] This is according to the title work conducted by the Tribe and has not been independently verified by the Department. *See* Mashpee Wampanoag Tribe Memorandum on *Carcieri v. Salazar* Supplement 2 at 5-7 (submitted to the Department on Nov. 29, 2012); *see also* Lopez Affidavit ¶ 17 (discussing the public hall); *id.* ¶¶ 15-16 (discussing the herring run site). Reliance on title work done by the applicant is appropriate and consistent with Departmental prior practice.

[325] *See* Frederick D. Nichols , Title Report re Condemnation Proceedings U.S. District Court No. 7359, Civil, 229 acres, South Mashpee, Mass., at 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, as explained *supra*, tribal members.

[326] *Id.* at 101.

[327] *Id.* at 21-22.

[328] *See* Department's Proposed Finding at 22 (citing *Cape Cod Magazine* 1915.12.00).

settlement."[329] Dr. Speck found that in 1920, Mashpee Indians comprised 230 out of the Town's total population of 252.[330]

The BIA also referenced the Mashpee reservation in keeping records concerning Mashpee children at BIA schools. Between 1904 and 1916, Mashpee children were enrolled at the Carlisle Indian Industrial School, a BIA-run residential school in Carlisle, Pennsylvania.[331] Many of the Federal school records for these students listed their home "agency" or "reservation" as "Mashpee."[332]

By the 1930s, there were about 300 Mashpee members, almost all of whom lived in the Town.[333] The southern part of the Town, however, had become less concentrated with Mashpee residents as an increasing number of non-Indian seasonal inhabitants resided along the beach front, although these seasonal inhabitants lacked the right to vote or send their children to the local school.[334] The year-round population consisted almost entirely of Mashpee members and their spouses and the 1930 Federal Census recorded that, out of the 361 individuals living in the Town, 265 identified as Indian.[335]

Mashpee member Chief Vernon "Silent Drum" Lopez lived in the Town in 1934 and recounts that it "stayed almost completely Indian territory until after World War II" because it was largely isolated from white outsiders.[336] Chief Lopez also describes how there was no cash economy during this time; rather, members lived off the land by growing gardens on their allotments, engaging in group hunting expeditions, or fishing in the Mashpee River.[337] The Tribe held meetings in the public hall, as well as powwows on an allotment referred to as Douglas field.[338] During this time period, tribal members generally disregarded the notion of private property when it came to subsistence activities and tribal gatherings.[339]

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[329] *See id.*

[330] *Id.* at 45.

[331] *See* Carlisle School Records for Alfred De Grasse, Daisy Mingo, Charles Peters, Lizette Pocknett, Eva Simons, Lillian Simons, Zepheniah Simons, and George Thompson (collected from NARA RG75, Entry 1327).

[332] *See, e.g.*, Carlise School Records for Alfred De Grasse ("agency"), Daisy Mingo ("agency"), Charles Peter ("agency" and "reservation"), Eva Simons ("agency" and "reservation"), Lillian Simons ("agency" and "reservation") (collected from NARA RG75, Entry 1327).

[333] *Id.* at 15.

[334] Department's Proposed Finding at 48–49.

[335] *Id.* at 49-50, 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.

[336] Affidavit of Chief Vernon "Silent Drum" Lopez ¶¶ 2, 3, 5 (executed on Nov. 28, 2012), Exhibit 3 of Mashpee Wampanoag Tribe Memo on *Carcieri v. Salazar*: Supplement 2 (Nov. 29, 2012).

[337] *Id.* ¶¶ 4, 6-16.

[338] *Id.* ¶ 17.

[339] *Id.* ¶ 18.

Chief Lopez's account of the Town in 1934 comports with the contemporaneous study conducted by Gladys Tantaquidgeon, a University of Pennsylvania student and Mohegan Indian, who was commissioned by BIA to conduct a comprehensive survey of the New England tribes (Tantaquidgeon Report).[340] The Tantaquidgeon Report specifically addressed the Mashpee Indians and provided details on their "reservation,"[341] subsistence practices, education facilities, health needs, arts and language, and governance.[342] The Tantaquidgeon Report explained that the Town "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." [343] 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.[344] As the OFA Proposed Finding notes, the Mashpee "continued their dominance of the town government through the 1930's and1940's, with mostly members or a few of their spouses holding all the elected and appointed positions that managed the social, legal, and economic spheres of the town."[345] Moreover, there was a "close social connection between the town government and the Mashpee 'tribal' council."[346]

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.[347] By the 1970s, the Tribe no longer exerted political control over the Town and there was no longer external recognition of the Town as an Indian

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[340] Although Tantaquidgeon's report was never officially published by the BIA, there are several versions of the draft manuscript. For citation purposes, these manuscripts will be referred to as the Dec. 6, 1934 Tantaquidgeon Manuscript or the Jan. 4, 1935 Tantaquidgeon Manuscript.

[341] Shortly after the Tantaquidgeon report was compiled, a news article was published describing state efforts to create a reservation near Fall River for "the Wampanoag Tribes." *See* "Old CCC Camp is Proposed as Reservation for Indians" newspaper unidentified (June 14, 1939). Although the article first references the Wampanoag Tribes broadly, it never expressly refers to the Mashpee and likely concerned only the state-recognized Pocasset Wampanoag band. The article refers to the tribe's formerly held "Wattupa Reservation" and efforts to create a new reservation near Fall River, and the Pocassets are currently based in Fall River and claim historical ties to the "Wattupa reservation." *See* The History of the Pocassets, http://www.pocassetwampanoagofstandingwolfinc.com/the-history-of-the-pocassets/ (last accessed Aug. 23, 2015).

[342] Dec. 6, 1934 Tantaquidgeon Manuscript at 10–17; *see generally* Jan. 4, 1935 Tantaquidgeon Manuscript (providing a detailed narrative of the Mashpee Tribe's history, language, government, social regulations, economic life, education, and so forth).

[343] *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")

[344] *See* Department's 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.

[345] *Id.* at 54.

[346] *Id.*

[347] Department's Proposed Finding at 105.

settlement or reservation. The Tribe has continued to maintain a strong presence, however, existing as an incorporated council from 1974 until 2007 when it was formally recognized by the Federal Government.[348] In 2008, the Town government conveyed to the Tribe the land parcels that had been traditionally held in common for tribal purposes, specifically the Old Indian Meeting House, the tribal cemetery, and the parsonage.[349]

b. The Non-Intercourse Act and Its Application to the Town of Mashpee

An important backdrop to the history of the Tribe and its occupation of the Town is the legal framework of the Non-Intercourse Act. This act codified aspects of the common law rule that the United States, as the sovereign successor to the British Crown, assumed the rights and obligations of the Crown regarding existing property ownership, including the exclusive right to alienate Indian title.[350] The act broadly provides that:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.[351]

As evidenced by the statutory language and accompanying case law,[352] the Non-Intercourse Act enumerates the Federal authority and duty to oversee land transactions between Indians and non-Indians. The authority and duty exist regardless of where the violation occurred in the United States and whether the federal government has chosen to implement them in a given circumstance.[353]

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[348] *See* Department's Proposed Finding at 65–66, 108; Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).

[349] *See* Town of Mashpee Resolution, Special Town Meeting (Apr. 7, 2008) (resolution authorizing conveyance of tribally significant properties).

[350] *See Johnson v. M'Intosh*, 21 U.S. 543, 572–74 (1823) (describing the doctrine of discovery and the native right of occupancy); *Mitchell v. United States*, 34 U.S. 711, 748–49 (1835) ("[A]ccording to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws.").

[351] Act of June 30, 1834, § 14, 4 Stat, 729, now codified at 25 U.S.C. § 177.

[352] *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *United States v. Sandoval*, 231 U.S. 28, 45-46 91913); *see also United States v. Kagama,* 118 U.S. 375, 384-385 (1886).

[353] *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 ("The 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. It is true that the United States never held fee title to the Indian lands in the original States as it did to 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.") (citation omitted); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1975).

As described *supra*, the Mashpee tribe has a longstanding relationship with the land now known as the Town of Mashpee. By 1665, this relationship was recognized and protected by the colonial government.[354] In line with Federal policy, the deeds to the lands contained alienation restrictions, similar to restrictions set forth in the Non-Intercourse Act, that prevented individual Mashpee Indians from selling land to outsiders without the consent of all other tribal members.[355] In 1685, the colonial court confirmed the Mashpee's deeds and guaranteed 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."[356] The communal, Indian character of these lands persisted for centuries, notwithstanding colonial- and state-imposed shifts in the Mashpee governing structure.[357] In 1842, the Commonwealth allotted the majority of Mashpee lands, leaving intact the prohibition against conveyance to non-members, but later terminated these restrictions in 1869 just before it incorporated the Town of Mashpee in 1870.[358] Arguably, the Commonwealth lacked the authority to allot the lands without federal consent and to subsequently incorporate the Town.[359] Despite allotment, however, the Town remained under Mashpee cultural and political control from 1870, including in 1934, until the influx of year-round non-Mashpee residents in the late 1960s.[360]

The record demonstrates that the Federal Government was aware of the arguably unauthorized state allotment action, yet chose not to assert its authority pursuant to the Non-Intercourse Act, which was typical of Federal policy regarding Northeastern tribes at this time.[361] Then in 1977,

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[354] *See* Dec. 11, 1665 Mashpee Grant, confirmed by the General Court of Plymouth Colony in 1689, located in *Indian Deeds: Land Transactions in Plymouth Colony 1620–1691*, Jeremey Dupertuis Bangs, New England Historical Genealogical Society [hereinafter 1665 Deed]; 1666 Deed.

[355] *See* 1665 Deed at 349 (securing tracts of land for the "South Sea Indians & their children for ever, soe as never to be given, sold, or alienated from them without all theire consents"); 1966 Deed at 149 (deeding lands to "the South Sea Indians and their children forever for a possession for them and their children forever not to be sold or given or alienated from them or any part of these lands").

[356] 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").

[357] *See supra* Section II.a.

[358] *See* An Act Concerning the District of Marshpee, Mass. Acts 1842, ch. 72; An Act to Incorporate the Town of Mashpee, Mass. Acts 1870, ch. 293.

[359] *See supra* note 353.

[360] *See* Department's Proposed Finding at 107–08.

[361] *See* Letter from Rev. Watson Hammond to President Grover Cleveland (Dec. 1886) (describing the state's actions to allot Mashpee land); Letter from Theodore Tyndale to President Grover Cleveland (Dec. 25, 1886) (describing the state's actions to allot Mashpee lands); *see also* Letter from Commissioner of Indians Affairs to Theodore Tyndale (Feb. 17, 1887) (acknowledging receipt of Theodore Tyndale and Reverend Hammond's letters). This was not the first time the federal government chose not to intervene in Indian land transactions in the Northeast. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 205 (explaining that although the federal government was originally protective of the New York Indians and their land rights, "[t]he Federal Government's policy soon veered away from the protection of New York and other east coast reservations," and it subsequently made no effort to intervene with New York State's attempts to obtain Indian land cessions).

the Mashpee requested that the Federal Government institute land-claim litigation on its behalf but the Department declined.[362] The Mashpee proceeded to bring a suit against the Town of Mashpee, without Federal involvement, which resulted in a Federal jury determination that the Mashpee did not constitute an Indian tribe for purposes of the Non-Intercourse Act and accordingly the suit was dismissed due to lack of standing.[363] Despite the jury finding,[364] the district court noted that the Town retained its Indian character through the 1940s.[365] Moreover, the court's determination did not preclude the Department from acknowledging the Mashpee Tribe in 2007, as the Department employed different standards and a broader evidentiary record in its acknowledgement proceeding.[366] Furthermore, the district court case did not make any determinations regarding the Mashpee's title to the land. Accordingly, the issue of whether the Mashpee have viable land claims under the Non-Intercourse Act remains an open question.

III. THE TRIBE'S ELIGIBILITY FOR TRUST LAND

In order for the Mashpee Tribe to be eligible to receive land into trust under the IRA pursuant to the second definition, we must determine that: (1) the Tribe is composed of descendants of members of a recognized Indian tribe; and (2) the Tribe's members resided within the boundaries of an Indian reservation as of June 1, 1934.[367]

Our evaluation of the factual circumstances surrounding the Town's origins as land set aside for the Mashpee Indians, and the Tribe's continued control and occupation of the Town leads to the conclusion that the Mashpee Tribe qualifies under the second definition of "Indian."

a. The Mashpee are Descendants of Members of a Recognized Indian Tribe

There is no question that the Mashpee are composed of descendants of members of a recognized Indian tribe. The Tribe received formal Federal recognition through the acknowledgement process at 25 C.F.R. Part 83 in 2007.[368] As part of this process, the Tribe had to demonstrate its genealogical relationships stemming back to 1934 and earlier. One piece of evidence considered was an 1859 report created by John Milton Earle setting forth a complete list of the Tribe's membership at that time and indicating that the vast majority of members lived in the Town.[369] The BIA relied on the Earle report in making its acknowledgment determination, and ultimately concluded that 90 percent of the Tribe's current members are descendants from individuals listed

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[362] *See* Department's Proposed Finding at 6.

[363] *Mashpee Tribe v. Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

[364] The jury finding was based on jury instructions setting forth a standard of "tribe" that was contested by the Mashpee and, as admitted by the court, that created "a difficult factual question for the jury" given the courts usual reliance on federal recognition of tribal existence. *See id.* at 581-52.

[365] *See* 447 F. Supp. at 946 ("Up through the 1930's and early 1940's, however, the area remained substantially as it had been from the 1870's on.").

[366] *See* Department's Proposed Finding at 7.

in the Earle report.[370] Additionally, the Tribe submits that 35 of its current members were alive and residing in the Town in 1934 and by law and fact, these members were descendants from previous members.[371] Accordingly, the Tribe satisfies this portion of the second definition.

b. The Tribe's Members Resided Within the Boundaries of the Mashpee Indian Reservation

The historical record demonstrates that a reservation was set aside for the Mashpee Indians via colonial land deeds that were under the protection of the colonial court and government. The record further shows that the reservation continued to exist in 1934 and at that time, Mashpee members were residing within its boundaries.

i. *The Existence of the Mashpee Indian Reservation*

1. *Creation of the reservation in the 1660s*

The historical development of the Town, including its unique status as an Indian district, its continued occupation and sociopolitical control by Mashpee members, and its acknowledgement by outside parties as an "Indian town" all support the existence of a Mashpee Indian reservation in 1934 for IRA purposes. The original territory was specifically set aside for the Mashpee Indians to hold and regulate in common as a praying town, and included usufructory rights such as hunting and fishing.[372] The governing sovereign at the time, the British Crown, recognized and protected the communal land deeds and the concomitant rights of the Mashpee Indians.[373] The colonial court 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,

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[367] As explained *supra*, due to the particular circumstances of the Mashpee, I do not need to determine whether living Mashpee members must have resided on the reservation in 1934 or whether ancestral residence in 1934 is legally sufficient.

[368] *See* Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).

[369] Department's Proposed Finding at 49, 132-33.

[370] *Id.* at 158.

[371] *See* Letter from Chairman Cedric Cromwell re February 3, 2015, submission by Tribe on eligibility of the Indian Reorganization Act ("IRA") (Mar. 18, 2015); Department's Proposed Finding at 132–56 (providing genealogical data demonstrating tribal membership through descendancy).

[372] *See* 1665 Deed at 349 (securing tracts of land for the "South Sea Indians & their children for ever, so as never to be given, sold, or alienated from them without all their consents"); 1666 Deed at 149 (deeding lands to "the South Sea Indians and their children forever for a possession for them and their children forever not to be sold or given or alienated from them or any part of these lands"); *see id.* (providing for "all the Privileges & Immunities belonging to the Indians with all Meadows, Necks, Creeks, Timber wood, hunting, *fishing*, fowling or whatever Privileges belong unto these lands").

[373] *See* 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").

whatsoever, by the Courts[sic] allowance, without the consent of all the said Indians."[374] Although the term "reservation" was not employed in these early land grants and colonial court confirmation, no "magic words" are required for the creation of a reservation. Furthermore, even though this set-aside was not established through traditional mechanisms, such as treaties, legislation, or executive order, the Supreme Court has stated that "in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract." [375] Rather, "it is enough that from what has been done there results a certain defined tract appropriated to certain purposes."[376] The communal land deeds and subsequent recognition and protection by the colonial government constitute the initial set aside appropriating the Mashpee tracts for the use of and occupation by the Mashpee Indians.

For the next several hundred years, the Town continued to be used and occupied by the Tribe. In addition to tribal regulatory control, there existed non-tribal superintendence that was tied to the evolving legal status of the land and governance structure, beginning as a praying town, and shifting through a proprietary system, overseer system, Indian district, guardianship system, then returning again to an Indian district.[377] Despite the changing nature of the town, several factors persisted that demonstrate the continuing reservation status of the land. First, the Tribe held the land in common with restraints against alienation to non-tribal members. This status protected the lands from non-Indian intrusion and allowed the tribal government to effectively manage its natural resources. This tribal occupation and regulation alone would have qualified as a "town, settlement or territory belonging to any nation or tribe of Indians," for purposes of the original Trade and Intercourse Act. [378]

Second, the Tribe's political and cultural control over the Town contributed to the widespread external recognition of the Town's reservation-like character. The 1885 Alice Fletcher report on Indian education, commissioned by the Department of the Interior, recognized the existence of the "Mashpee Plantation" and its extensive history of Indian oversight, often coupled with competing non-Indian oversight.[379] The 1890 Annual Report of the Commissioner of Indian Affairs similarly recognized the Tribe's settlement, finding that while "no Indians within the limits of the thirteen original States retained their original title of occupancy," *i.e.* Indian title, the Mashpee continue to maintain a tribal relation and have their land held in trust.[380]

Lastly, the Tribe and its land were subject to oversight and control by several other governmental entities, including the federal government. As with any typical Indian reservation, however,

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[374] *Id.*

[375] *Minnesota v. Hitchcock*, 185 U.S. at 390.

[376] *Id.*

[377] *See supra* Section II.a(i), (ii).

[378] Act of July 22, 1790, 1 Stat. 137 § 5.

[379] 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, at 59–60 (1888).

[380] ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at xxvi (1890).

there were varying degrees of outside superintendence and control that fluctuated in reflection of changing British Colonial, Commonwealth, and Federal policies. Yet a clear pattern of supervision existed that influenced both the overarching structure of governance at Mashpee and the everyday affairs of the Town. For example, in 1746, the colonial court diminished Mashpee control by assigning three non-Mashpee overseers to the Town;[381] in 1763, at the behest of the Mashpee Indians, the colonial legislature converted the Town of Mashpee into a unique self-governing "Indian district."[382] Even in this self-governing status, however, the Tribe was subject to the oversight of two elected non-member overseers.[383]

Following the Revolutionary War and the adoption of the U.S. Constitution, the newly formed Commonwealth terminated Mashpee control and the overseer system by installing three non-Indian guardians.[384] In response to strong Mashpee resistance to this system – resistance that was sparked in part by the state guardian attempts to regulate intimate and everyday aspects of Mashpee life, such as sexual behavior and liquor sales – the Commonwealth removed the guardians and converted the settlement back to a self-governing Indian district in 1834.[385]

Shortly before the Commonwealth converted it to an Indian district, the Town was also subject to federal oversight as part of the Federal Government's larger agenda to remove Indians from their aboriginal territories. As detailed *supra*, the Federal Government sent its agent, Reverend Jedidiah Morse, to visit the Town, among other Indian territories.[386] Reverend Morse described the Tribe's "reservation" and recommended against the Tribe's removal due to its particular utility in that region and due to its members' strong attachments to their home.[387] The Federal Government agreed and ultimately declined to remove the Tribe from its native reservation.[388]

2. *Continuation of the Reservation following allotment and into 1934*

In 1849, the Commonwealth imposed its policy of allotment and, in 1869 and 1870, respectively, enacted legislation to lift the restrictions on alienation and incorporate the Town of Mashpee. As a threshold matter, an Indian reservation does not lose its reservation status simply because individual tracts of land fall out of Indian ownership.[389] Rather, "only Congress can divest a

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[381] Department's Proposed Finding at 96.

[382] *Id.*

[383] The two non-member overseers were in addition to three elected Mashpee overseers. *See id.*

[384] *Id.* at 97.

[385] *Id.* at 98.

[386] *See supra* Section II.a(ii).

[387] Morse Report at 70.

[388] *See* Plan for Removing the Several Indian Tribes West of the Mississippi River, 18th Cong., 2d. Sess., at 541–45 (Jan. 27, 1825).

[389] *Solem v. Bartlett*, 465 U.S. 463 (1984).

reservation of its land and diminish its boundaries," and it must do so explicitly.[390] In the case of the Mashpee, it is evident that the 1849, 1869, and 1870 Acts did not change the status of the Reservation and it continued to exist as such in 1934. First, the Commonwealth authorized the allotment of tribal landholdings to individuals without Congressional approval.[391]

Second, on a more practical note, while title to many individual allotments eventually passed into non-Indian hands, the Tribe, through the Town, still owned and controlled important communal parcels of land, namely the Old Indian Meeting House, the cemetery, the parsonage, and the Baptist church/school house.[392] Furthermore, some individual allotments were deeded back to the Town for common use, others were continuously owned by tribal allottees who permitted tribal uses of the land, and yet other allotted lands had deeds that reserved access to usufructary rights, such as the right to gather seaweed and marsh hay, to tribal members.[393] Mashpee members continued to dominate the Town's year-round population and, on a fundamental level, the Tribe maintained its cultural and political control over the Town.[394] Therefore, the Indian character of the Reservation persevered up until and through the time in question, June 1, 1934.

Indeed, the Town was widely recognized as a Mashpee Indian settlement in the 1930s. Several academics studied the Town precisely because of its Indian nature. The BIA-commissioned Tantaquidgeon Report provided details on the Mashpee "reservation," subsistence practices, education facilities, health needs, arts and language, and governance.[395] It explained that the Town "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." In 1938, Harvard sociologist Carle Zimmerman reported that certain Mashpee families dominated the town politics and effectuated a "tribal" government.[396] And although slightly preceding the time period in question, BIA itself denominated the Town as a "reservation" or "agency" in its Carlisle school records for

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[390] *Id.* at 470; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish must be "clear and plain").

[391] *See supra* Section II.b.

[392] *See supra* Section II.a(iii).

[393] *See id.*; *see also* Lopez Affidavit ¶ 17 (discussing the public hall and Douglas field sites), ¶¶ 15–16 (discussing the herring run site); Frederick D. Nichols , Title Report re Condemnation Proceedings U.S. District Court No. 7359, Civil, 229 acres, South Mashpee, Mass., at 1–2 (Aug. 10, 1949).

[394] *See supra* Section II.a(iii); Department's Proposed Finding at 44, 49, 152; *see also generally* Affidavit of Chief Vernon "Silent Drum" Lopez.

[395] Dec. 6, 1934 Tantaquidgeon Manuscript at 10–17; *see generally* Jan. 4, 1935 Tantaquidgeon Manuscript (providing a detailed narrative of the Mashpee Tribe's history, language, government, social regulations, economic life, education, and so forth).

[396] *See* Department's 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.

Mashpee students.[397] Additional sources from the early 1900s similarly referred to the Town as an "Indian" or "native" "settlement."[398]

Although many of these sources refer to the Mashpee Reservation as something other than a reservation, per se, and in fact, its legal status was that of an incorporated town, the Supreme Court has found the particular label of an Indian settlement to be "immaterial."[399] Moreover, the Town "constitute[s] definable territory occupied exclusively by [the Mashpee] (as distinguished from lands wandered over by many tribes)."[400] This fact would have been sufficient to protect the Town under Indian title, had it not been formally designated a Town by the Commonwealth.

3. *Federal treatment of the Reservation*

Although the Federal Government had, at various times, acknowledged the Mashpee reservation, it did not seek to implement IRA at the Town. In fact, there exists a collection of letters, written by BIA officials in the 1930s, that generally disclaimed Federal jurisdiction over the Tribe because it was allegedly governed by state authority.[401] As a preliminary matter, these letters do not consider or address the existence of the Mashpee Reservation for purposes of qualifying for the IRA's benefits under the second definition. Rather, the Federal officials assumed that because the Tribe and its Town were located in the Eastern States, they could not fall within the coverage of Federal Indian programs and monies.[402]

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[397] *See, e.g.*, Carlise School Records for Alfred De Grasse ("agency"), Daisy Mingo ("agency"), Charles Peter ("agency" and "reservation"), Eva Simons ("agency" and "reservation"), Lillian Simons ("agency" and "reservation") (collected from NARA RG75, Entry 1327).

[398] *See* Department's Proposed Finding at 22 (citing a 1915 *Cape Cod Magazine* article and the 1928 academic study conducted by anthropologist Frank Speck).

[399] *United States v. McGowan*, 302 U.S. at 538–39.

[400] *See United States v. Santa Fe P. R. Co.*, 314 U.S. at 345..

[401] *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).

[402] Letter from John Collier, Commissioner of Indian Affairs, to Maoel L. Avant (undated) (finding that the federal government could not offer assistance to the Mashpee unless the federal government decided to "undertake further provision for small Eastern groups under the States" but "until such time these needs will have to be met … through local and State channels"). 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.

This situation may be analogized to the situation recognize by Justice Breyer in his concurrence in *Carcieri* where "a tribe may have been 'under Federal jurisdiction' in 1934 [for purposes of the first definition of "Indian"] even though the Federal Government did not believe so at the time."[403] As detailed *supra*, the Federal Government's application of IRA, particularly through its immediate implementation of Section 18 votes at Indian reservations and efforts to assist groups in formally organizing under Section 16, was not fully comprehensive or without error. This reality 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.[404] Accordingly, certain tribes were later recognized as eligible to organize under the IRA even though a Section 18 vote had not been held at their reservations and even if the Department had not originally considered the tribe as a "Federal ward."[405]

Moreover, these letters are best understood as reflections of evolving and changing Federal policy, rather than the legal realities, of that period. They highlight the historical Federal policy of acquiescence to state jurisdiction over the New England tribes.[406] This acquiescence appeared to stem from a combination of budgetary constraints on the Federal coffers,[407]

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[403] *See* 555 U.S. at 397–98; *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 (Oct. 1, 1980). While the Stillaguamish memorandum addressed the tribe's qualification under the first definition of "Indian," it is illustrative of the point that the federal government may not have overlooked or misunderstood the status of a tribe or a reservation at the time the IRA was passed. 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.

[404] *See supra* Section I.c; *see also* Stillaguamish Memorandum at 7 ("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.").

[405] *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 Catwaba qualify for organization under the IRA, even though Commissioner Collier stated that "[t]he Federal Government has not considered these Indians as Federal wards").

[406] 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 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.*

[407] *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (2012 ed.) (noting that while the IRA was intended to achieve several lofty objectives, its realization was not fully successful because "on a practical economic

traditional deference to the colonial states deriving from their shared jurisdictional authority over Indians in the early development of the United States,[408] and the assumption that these Indian populations were already being adequately provided for by the State and local governments.[409] Accordingly, evidence demonstrating that the Federal Government excluded the Mashpee from the scope of its Federal programs in the 1930s is not dispositive as to the question of whether the Town qualified as a reservation for purposes of IRA. This comports with our reasonable interpretation that Congress intended the definition of "Indian" to cover three distinct but partially overlapping classes of Indians, and therefore the qualifier "now under federal jurisdiction" contained in the first definition does not apply to the second definition.[410] It further comports with our reasonable interpretation that evidence of State exertions of authority over a reservation are not dispositive as to whether that land qualified as a "reservation" under IRA, particularly given Solicitor Margold's express opinion that IRA applied to Indians living on non-Federal reservations.[411] Moreover, this evidence is outweighed by the larger universe of documents demonstrating the existence of the reservation for the Mashpee and its treatment as such by external parties, including the federal government, from the 1660s up through the 1930s.

ii. *The Boundaries of the Historic Mashpee Indian Reservation*

For purposes of the second definition, the "present boundaries" of the historic Mashpee Indian reservation in 1934 are coterminous with the boundaries of the Town as incorporated in 1870.[412] While the land deeds of 1665 and 1666 formed the boundaries of the original Mashpee communally-held settlement, over time title to certain tracts of land fell out of Mashpee ownership.[413] The legal status of the entire community also evolved at several points following the initial issuance of these deeds. Because the statutory text requires residence within the "present boundaries" of the reservation,[414] the reservation boundaries for purposes of our inquiry are set at the time of the last change in legal status prior to 1934, *i.e.* when the Indian district was

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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").

[408] *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW §§ 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).

[409] *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.").

[410] *See supra* Section I.d(ii).

[411] *See supra* Section I.d(iii)(a).

[412] *See* Attachment II of this ROD, 1930 Mashpee Heads of Households Map (submitted by the Tribe, modified version of Massachusetts State Planning Board map of the roads and waterways for the Town of Mashpee).

[413] *See* Department's Proposed Finding at 33–34 (discussing land sales to outsiders).

[414] *See* 25 U.S.C. § 479.

incorporated into the Town in 1870.[415] As explained *supra*, these exterior boundaries were not affected by the loss of title to individual tracts pursuant to the Commonwealth's allotment efforts, particularly since important communal lands remained in the Tribe's hands and there remains an open legal question as to whether the Commonwealth had the authority to divest the Tribe of its land.

iii. *Mashpee Members Lived on the Reservation in 1934*

As we stated previously, we need not decide whether the 1934 residency requirement attaches to "descendants" or "members." The Tribe has identified 35 "living tribal members who were resident on the reservation" as of June 1, 1934.[416] This includes the Mashpee traditional Chief Vernon "Silent Drum" Lopez, who has provided an affidavit detailing his experience living on the reservation in 1934.[417] As noted *supra*, these members were also descendants of members since membership was determined genealogically.[418] Accordingly, we find that the Tribe's members maintained residence within the boundaries of an Indian reservation as of June 1, 1934, and this aspect of the definition has been satisfied.

IV. CONCLUSION

The IRA applies to "Indians," including "descendants of [members of any recognized Indian tribe] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." The applicability of this definition is, in large part, a fact-specific inquiry into whether land was set aside for Indian use and occupation. The Town of Mashpee was specifically established as a protected tract of land for Mashpee Indians. The Tribe has a long recorded history at its Town and the Tribe's ownership and control over this land, while varying in form and degree over hundreds of years, existed in 1934. Given the extensive historical evidence concerning the Town of Mashpee, the sweeping remedial purpose of IRA, and the clear directive to interpret statutory ambiguities in favor of the Indians, we find that the Tribe had
a historic reservation for purposes of the second definition as the term was understood when the IRA was enacted.[419] The Tribe, as discussed above, has provided sufficient evidence that its members resided on such reservation on June 1, 1934. Accordingly, the Department has authority to acquire land in trust on behalf of the Tribe pursuant to the IRA.

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[415] 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.")

[416] Letter from Chairman Cedric Cromwell re February 3, 2015, submission by Tribe on eligibility of the Indian Reorganization Act ("IRA") (Mar. 18, 2015).

[417] Affidavit of Chief Vernon "Silent Drum" Lopez (executed on Nov. 28, 2012), Exhibit 3 of Mashpee Wampanoag Tribe Memo on *Carcieri v. Salazar*: Supplement 2 (Nov. 29, 2012).

[418] *See supra* Section III.a.

[419] This opinion only addresses whether the Mashpee had a reservation in 1934 for purposes of IRA, and not for any other statutory purposes. I note, however, that the concept of a "reservation" as understood in the 1934 for purposes of applying IRA is not identical to the modern concept of a "reservation."

8.4 25 C.F.R. § 151.10(b) - The need of the individual Indian or tribe for additional land

Section 151.10(b) requires consideration of the need of the tribe for additional land. The Tribe has a need for land to establish the Tribe's initial reservation and provide the Tribe with opportunities for self-government, self-determination, and long-term, stable economic development. The Tribe was federally recognized in 2007, but does not currently have the benefit of a federally protected reservation or trust lands. The Tribe needs land to establish a homeland, develop economic development opportunities, and facilitate self-determination.

Currently, the Mashpee Sites are primarily used for tribal administration, preservation, and cultural purposes. Acquisition of these Sites in trust will protect them from the imposition of state and local zoning and taxation, and will allow the Tribe to govern itself and exercise its sovereignty.

Sections 3.2 and 5.0 of the Final EIS discuss in detail the needs of the Tribe. The median annual household income of reporting tribal members was $29,601.11 as of August 31, 2012. This represents less than half of the median household income in the Town of Mashpee, as well the median household income of $64,509 in Massachusetts and $51,914 nationally. In 2012, 50 percent of tribal members lived in poverty. In that same year, tribal members had an unemployment rate of nearly 50 percent ,compared to 8.1 percent nationally,[420] and there are few job opportunities within the Town of Mashpee where 40 percent of tribal members reside.

The Tribe also has a need for land to address tribal members' substantial housing needs. In recent years, the demand for real estate on Cape Cod, and the Town of Mashpee in particular, has increased substantially, creating a scarcity of affordable housing. In the Town of Mashpee, new home construction is aimed at high-income levels, and most tribal members cannot afford the marketing value.[421] Although a number of tribal members reside on ancestral home lots along historic Main Street, recent zoning laws prevent members from further subdividing these lots to create multi-family housing to serve relatives. Additionally, the average tribal household size is 2.73 persons greater than the average household size in either the Town of Mashpee or Barnstable County. The Tribe's 2011 Indian Housing Plan shows the following needs for the 661 families identified as comprising the tribal population: 524 (79 percent) are identified as low income; 431 (65 percent) include an elderly family member; 37 (almost 6 percent) live in substandard housing with inadequate plumbing or cooking facilities.[422] There is also an unmet rental-housing need for 100 families (15 percent of the population). Revenue from economic development will support tribal programs such as the Wampanoag Housing Program and the Low Income Home Energy Assistance Program. Acquisition of the Mashpee Sites will also allow the Tribe to construct a senior living facility and housing.

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[420] Tribe's Restated 2012 Application at 12, *citing* Bureau of Labor Statistics as of April 2012.

[421] Tribe's Restated 2012 Application at 13.

[422] *Id.*

As discussed in **Section 1.3** above, the Tribe needs land for economic development. Acquisition of the Taunton Site will provide economic development opportunities and funding to for the Tribe to rebuild its land base, strengthen its tribal community, and achieve self-determination. The Tribe seeks to preserve tribal lands, its history, and its community for future generations, as well as increase tribal services and programs. The establishment of a land base and the proposed uses on the Mashpee and Taunton Sites would support the Tribe's endeavors as they seek to self-govern and meet significant tribal needs.

The Acting Regional Director determined, and we concur, that the Tribe has adequately supported its need for additional land to facilitate economic development, Indian housing, and self-determination.

8.5 25 C.F.R. § 151.10(c) – The purposes for which the land will be used

Section 151.10(c) requires consideration of the purposes for which the land will be used. The Tribe proposes no change in use to the Mashpee Sites. The previously approved on-going construction of housing on Parcel 8 will continue. The Tribe proposes to develop a destination facility that would be approximately 400,000 sq. ft. at the Taunton Site. The gaming floor would be approximately 132,000 sq. ft. and feature an open design. It would hold 3,000 slot machines, 150 multi-game tables, and 40 poker tables for 4,400 gaming positions. Other casino features would include a 5- to 6-venue food court with seating for approximately 135 patrons, a 400-seat buffet restaurant, an entertainment bar/lounge with 200 seats, and a 24-hour restaurant with seating for 120 patrons. Other support facilities required for the casino floor and restaurants would include an employee dining room with 325 seats. Two hotels, each 15 stories tall and having 300 rooms, would be constructed adjacent to the casino.

The parking structure proposed across from the casino would be connected by an elevated, 10,000 square-foot pedestrian bridge, and would contain space for approximately 3,900 cars. An underground garage beneath the casino would have spaces for approximately 590 cars on one level to be used exclusively for valet parking. There would be additional casino surface parking on-site for approximately 1,170 cars.

The project would also include a water park and related facility development on the parcel that lies north of the rail line. This development would feature a 25,000 sq. ft. indoor/outdoor water park and a 300-room hotel. Surface parking has been analyzed on a preliminary basis to allow for 450 cars on this portion of the project site, based on the assumption that the hotel and water park are dual uses.

The Acting Regional Director determined, and we concur, that the Tribe has adequately described the intended purpose of the land to be acquired.

8.6 25 C.F.R. § 151.10(e) - If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls. On May 30 and June 1, 2012, BIA sent notices of the proposed acquisition to state and local governments having regulatory jurisdiction over the Sites and requested comments on the potential impacts to regulatory jurisdiction, real property taxes, and special assessments. Notices were sent to the following:[423]

- Chair, Barnstable County Commissioners
- Barnstable County Administrator
- Chairwoman, Bristol County Commissioners
- Chairman, Town Selectmen, Town of Mashpee
- Manager, Town of Mashpee
- Assessing Director, Town of Mashpee
- President, City Council, Town of Mashpee
- Mayor, City of Taunton
- Office of the Governor, Commonwealth of Massachusetts

Responses were received from the following:

- Mayor, City of Taunton
- Assessing Director, Town of Mashpee
- Manager, Town of Mashpee
- Chairman, Town Selectmen, Town of Mashpee
- Chief Legal Counsel, Office of the Governor's Legal Counsel[424]

We analyze the tax impacts below, and note that Section 8.16 of the Final EIS fully evaluated the impact to the State and its political subdivisions from the removal of the land from the tax rolls.

Mashpee Sites

Five parcels in the Town of Mashpee were on the tax rolls in Fiscal Year (FY) 2012. In accordance with Commonwealth law, the Town has historically exempted some of the Mashpee Sites because they provided educational, cultural, religious, housing, and other civic, charitable, and/or benevolent programs and opportunities (Mass. G. L. C.59, Section 5.). The Town levied

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[423] Regional Director's Recommendation, Vol. III, Ex. 2, Items 1-8.

[424] On June 27, 2012, the Office of the Governor's requested an extension of time to respond to BIA's request for comments. The Office of the Governor's Legal Counsel submitted comments to BIA by letter dated September 4, 2012. *See* Letter to Donald Laverdure, Acting Assistant Secretary – Indian Affairs, and Franklin Keel, Regional Director, Eastern Region, from Mark A. Reilly, Chief Legal Counsel (Sept. 4, 2012) in Regional Director's Recommendation, Vol. III, Ex. 2, Item 3.

taxes on the remaining parcels which totaled $17,563.89 for fiscal year 2012.[425] This represents 0.03 percent of the total property tax revenue for the Town of Mashpee for that year.[426]

Table 3
Tax Payments in Mashpee for Fiscal Year 2012

Number	Parcel ID Number	Location	Total Taxes Paid
1	61-58A-0-R	410 Meetinghouse Road	Exempt
2	125-238-0-E	17 Mizzenmast	Exempt
3	68-13A-0-E	414 Meetinghouse Road	Exempt
4	27-42-0-R	431 Main Street	$1,384.79
5	35-30-0-R	414 Main Street	Exempt
6	95-7-0-R	483 Great Neck Road	Exempt
7	45-73-A-R	41 Hollow Road	$637.72
8	45-75-0-R	Meetinghouse Road	$6,918.42
9	99-38-0-R	Es Res Great Neck Road	Exempt
10	117-173-0-R	56 Uncle Percy's Road	$122.95
11	63-10-0-R	213 Sampsons Mill Road	$8,500.01
Total			$17,563.89
Total Property Taxes for the Town of Mashpee			$54,080,834
Percent of Total Property Taxed for the Town of Mashpee			0.03 percent

Under the IGA with the Town of Mashpee on April 28, 2008, the Town agreed to transfer parcels located within the Town for the purpose of having them conveyed to the United States in trust for the Tribe.

Taunton Site

Six Taunton Sites are exempt from taxation. The property taxes for the remaining Sites for FY 2012 were $268,190.15.[427] This represented 0.51 percent of the total property tax revenue for the City of Taunton.[428]

Table 4

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[425] FY 2012 real estate tax bills for the Mashpee Sites, on file with the Office of Indian Gaming. The Town of Mashpee responded to the Regional Director's request of June 1, 2012, with estimated taxes for FY 2012. *See* letters from Jason R. Streebel, Assessing Director, Town of Mashpee (received June 25, 2012); Joyce Mason, Manager, Town of Mashpee (received June 21, 2012); Michael R. Richardson, Chairman, Town Selectmen of Mashpee (received June 21, 2012) in Regional Director's Recommendation Vol. III, Ex. 2, Items 1-6.

[426] Final EIS, Section 6.3.

[427] FY 2012 real estate tax bills for the Taunton Sites, on file with the Office of Indian Gaming.

[428] Final EIS, Section 7.16.

Tax Payments in City Of Taunton for Fiscal Year 2012

Parcel ID Number	Location	Total Taxes Paid
North of Railroad Tracks		
94-156-0	Middleborough Avenue (Lot 14)	Exempt
95-36-0	5 Stevens Street	Exempt
108-27-0	O'Connell Way (Lot 13)	Exempt
108-26-0	O'Connell Way (Lot 9B)	Exempt
118-49-0	O'Connell Way (Lot 9A)	Exempt
NA	O'Connell Way roadway and gap	Exempt
South of Railroad Tracks		
118-50-0	50 O'Connell Way	$152,791.08
118-45-0	60 O'Connell Way	$35,947.43
109-302-0	O'Connell Way (Lot 11)	$8,388.19
119-1-0	73 Stevens Street	$14,506.02
118-51-0	O'Connell Way	$486.11
118-52-0	Stevens Street	$46.96
119-67-0	O'Connell Way	$6,010.02
109-299-0	61R Stevens Street	$13,650.40
119-66-0	71 Stevens Street	$25,642.11
119-30-0	65 Stevens Street	$2,679.29
119-2-0	67 Stevens Street	$2,862.40
109-17-0	61 Stevens Street	$5,180.14
Total		$268,190.15
Total Property Taxes for the City of Taunton		$72,783,646
Percent of Total Property Taxed for the City of Taunton		0.51 percent

On July 10, 2012, the City of Taunton and the Tribe entered into an IGA that set forth the terms for the Tribe's development of the Preferred Development in Taunton.[429] The IGA includes provisions requiring the Tribe to allocate approximately $33 million in up-front mitigation payments and approximately $13 million annually to Taunton based on slot revenues, payment in lieu of taxes, and allocations to public institutions, including police and schools.[430] Among the stipulations agreed to by the Tribe in the IGA are the following:

> *Up-front Payment*: The Tribe agreed to make a non-refundable payment to the City of Taunton in the amount of $1.5 million within 30 days of the Tribal-State Compact for the regulation of class III gaming being approved by the State Legislature. This payment occurred on August 22, 2012.

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[429] Final EIS, Volume II, Exhibit 3, Appendix A-2.

[430] Final EIS, Section 2.2.3.

Continuing Payments: The Tribe will pay the City of Taunton 2.05 percent of the casino's net revenues generated from slot machines and other electronic games. In no event can this amount be less than $8 million per year.

Payment in Lieu of Taxes (PILOTs): The Tribe will pay the City of Taunton an annual amount equal to the property tax that would be payable on the Sites, based upon an assessed value of the Site determined as of the date the Taunton Site are taken into trust or May 17, 2012, whichever value is greater, plus a 3 percent per year increase on the previous year's payment. Although this increase will be capped after year ten, the PILOT will continue indefinitely.

Infrastructure Costs: The Tribe is obligated to pay for all up-front infrastructure costs necessary to improve and upgrade the City's police, fire, water, sewer, administrative, and other facilities. The Tribe is also required to pay for the City's ongoing costs resulting from the City's hiring of additional police, fire, administrative, and other personnel, as related to the planned development.

Because the tax revenues generated by the Taunton Site represent a small proportion of total property tax revenues for the City, and the Tribe has committed to impact payments as described above, the loss of property taxes from the acquisition of the Site in trust will be offset or substantially mitigated by the impact payments and the increased economic activity from the gaming enterprise. In a letter dated September 10, 2012, the Mayor expressed support for the proposed project and stated that the proposed project will stimulate strong local and regional economic growth and provide many needed jobs.[431]

In addition to the fiscal benefits that local governments are provided under the two IGAs with The Town of Mashpee and the City of Taunton, the annual operation of the project would also have tax revenues associated with it. Although the Tribe itself is tax-exempt, the operation of the casino facility would generate tax revenues in the form of personal income taxes, corporate and business taxes from contractors and suppliers, and sales taxes on materials purchased directly by contractors and suppliers.

The Acting Regional Director found, and we concur, that removal of the Mashpee Sites and Taunton Site from the tax rolls would not have an adverse impact on the Town of Mashpee or the City of Taunton.

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[431] Letter to Donald Laverdure, Acting Assistant Secretary – Indian Affairs, and Franklin Keel, Regional Director, Eastern Region, from Thomas C, Hoye, Jr., Mayor, City of Taunton (Sept. 10, 2012).

8.7 25 C.F.R. § 151.10(f) - Jurisdictional problems and potential conflicts of land use which may arise

Trust lands are not subject to the regulatory requirements of the Commonwealth and local jurisdictions. Federal laws will, however, continue to apply on the Sites. In Taunton, Preferred Alternative A requires roadway and sewer improvements that are proposed to be constructed on land outside of the proposed trust acquisition. Any such work on non-trust lands would be fully subject to local laws and laws of the Commonwealth and regulatory permitting programs.

Mashpee Sites

No jurisdictional problems associated with the Mashpee Sites are anticipated. These Sites are zoned residential. No new development is proposed, and these Sites would be maintained as historic tribal sites, offices, housing, recreational lands, and other uses. The previously-approved on-going construction of housing on Parcel 8 will continue. In the IGA between the Tribe and the Town of Mashpee, the Town agreed to support the Tribe's application and any necessary approvals, and acknowledged that the Town may lose revenue and regulatory control over the Mashpee Sites.[432] The Town and Tribe agreed to cooperate and work together through any potential traffic issues that could arise as a result of the proposed improvements related to the trust acquisition even though no foreseeable traffic impacts or land use impacts are anticipated.

No potential conflicts of land use associated with the Mashpee Sites are anticipated. The Mashpee Sites also include several historic and cultural sites. The National Register of Historic Places includes the Old Indian Meeting House (Parcel 1), the Cemetery (Parcel 3), and the Museum (Parcel 5). The Massachusetts State Register of Historic Places includes the Old Indian Meeting House (Parcel 1), the Burial Ground (Parcel 2), the Cemetery (Parcel 3), and the Parsonage (Parcel 4). The Tribe has no plans to alter these sites regardless of whether the parcels are acquired in trust by BIA or not. Parcel 6, which includes the Tribal Government Center, has been designated as tribal cultural property. Parcel 6 is used collectively by the tribal members for a wide range of tribal social and cultural activities including social gatherings, education of tribal members, and ceremonial activities. Anticipated environmental changes include the ongoing construction of low- and moderate-income tribal housing units on Parcel 8. This action was already reviewed pursuant to the National Environmental Policy Act and the Massachusetts Environmental Policy Act.[433]

Several of the Mashpee Sites include land designated as sensitive environment. Part or all of Parcels 1, 3, 4, 5, 6, 7, 8, and 9 have been designated by the Massachusetts Natural Heritage and Endangered Species Program (NHESP) as Priority Habitat and Estimated Habitat. Parcels 4

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[432] *See* Final EIS, Appx. A-1.

[433] *See* Environmental Assessment Report, Proposed Mashpee Wampanoag Housing (environmental review for eligibility to receive federal funding pursuant to the Native American Housing Assistance and Self Determination Act) (Nov. 2008); Certificate of the Secretary of Energy and Environmental Affairs on the Environmental Notification (Massachusetts Environmental Policy Act review for the Mashpee Wampanoag Tribe Housing Project) (Dec. 22, 2010), on file with the Office of Indian Gaming.

(Parsonage) and 5 (Museum) contain small areas of wetlands and lie adjacent to wetlands and the Mashpee River, an anadromous fish run. NHESP mapping indicates a potential vernal pool and MassDEP-listed wetlands on Parcel 6 (Tribal Government Center) and a certified vernal pool, potential vernal pools, and MassDEP-listed wetlands near, but not within, Parcel 7 (vacant). The Tribe has agreed to maintain Parcel 7 as conservation land to protect the habitat of the Eastern Box Turtle, a Species of Special Concern under the Massachusetts Endangered Species Act. Parcel 9 (cultural/recreational) includes two wetlands and a manmade stream, and Parcel 11 (agricultural/tribal offices) is bordered by the Santuit River and surrounding wetlands. Parcel 2 (Burial Ground) is subject to a preservation restriction held by the State Register of Historic Places and a conservation restriction held by the Commonwealth's Department of Conservation and Recreation, and will not be developed.

In the IGA between the Tribe and the Town of Mashpee, the Town agreed to support the Tribe's application and any necessary approvals, and acknowledged that the Town may lose revenue and regulatory control over the Mashpee Sites. The Town and Tribe agreed to cooperate and work together through any potential traffic issues that could arise as a result of the proposed improvements related to the trust acquisition. However, because no change in land-use is proposed, no foreseeable traffic impacts or land use impacts are anticipated. As such, no jurisdictional problems or land-use conflicts are anticipated with respect to the Tribe's use of the Mashpee Sites.

In his letter dated September 4, 2012, the Chief Legal Counsel, Office of the Governor's Legal Counsel (Chief Legal Counsel's letter), stated that the Office of the Governor supports the Tribe's application. The Chief Legal Counsel's letter refers to the two IGAs and the Tribal-State Compact for the regulation of class III gaming as addressing most of the concerns expressed by the Commonwealth in 2008. The Chief Legal Counsel's letter further states that the Commonwealth is confident that the Tribe will work with the Commonwealth, as well as the affected communities surrounding the Mashpee and Taunton Sites, to mitigate any remaining concerns. The remaining concerns include the future adoption of laws and an agreement by the Tribe to be governed by the Governor's use of emergency authority on tribal lands. The letter suggests that the Commonwealth may also address the effects of the change of zoning status by including tribal lands in its affordable housing policy and requirements.

Taunton Site

No jurisdictional or land-use problems associated with the Taunton Site are anticipated. The Taunton Site lies in and adjacent to the Liberty and Union Industrial Park (LUIP), located near the junction of two major roadways. The LUIP is a commercial/industrial development park created in 2003 and operated by the private, non-profit entity Taunton Development Corporation for the purpose of generating economic development opportunities in the City of Taunton. The Sites are currently zoned as industrial. The City of Taunton has designated this Site for economic development purposes. Existing development on the Site consists of five light industrial/warehouse/office buildings and three residences totaling approximately 250,400 sq. ft. and associated parking. Other areas of the Site have been graded, but not yet built upon. The Site is well-developed with a central access roadway (O'Connell Way), utilities, and stormwater

retention ponds already in place. An active freight rail line runs east-west through the Site. Approximately 50 acres of the Site are located north of the railroad, consisting of mature forest and former agricultural fields. The area north of the rail line includes Barstows Pond, a small man-made impoundment of the Cotley River. The remainder of the Site, south of the railroad, consists largely of existing commercial development. Much of the undeveloped area is wetland.

As discussed above in **Section 8.6**, the IGA between the Tribe and the City of Taunton provides the City with substantial mitigation for any potential impacts. In exchange for the provision of municipal services, including police, fire, water, sewer, and other services, the Tribe has agreed to pay one-time impact costs and annual costs as summarized in **Table 5** below. The Tribe has also agreed to be responsible for all costs of improvements to transportation infrastructure, including road construction, bridges, road maintenance, and traffic signals necessitated by Preferred Alternative A. These improvements will benefit the Tribe and the City. Further, the Tribe has agreed to pay annual costs related to impacts to schools. The Tribe has agreed to work cooperatively to evaluate and determine the appropriate staffing levels, training, amounts, and types of equipment and necessary facilities to provide additional services. The Tribe has also agreed to pay all costs related to these additional services as defined within the IGA.

Table 5
Summary of Mitigation Costs – City of Taunton[434]

Category	One-Time Construction Phase 1 Cost (estimate)	One-Time Construction Phase 2 Cost (estimate)	Annual Costs (estimate)
Fire	$2,140,000	$720,000	$1,500,000
Police	$2,982,000	$0	$2,500,000
Administrative	$132,000	$0	$400,000
Schools	$0	$0	$370,000
Sewer	$7,500,000	$0	$20,000.00
Water	$2,000,000	$0	$20,000
Total	**$14,754,000**	**$720,000**	**$4,790,000**

The Acting Regional Director determined, and we concur, that jurisdictional problems and potential land use conflicts have been addressed, and that any concerns that may arise in the future will be addressed cooperatively by the Tribe, the Town of Mashpee, the City of Taunton, and the Commonwealth.[435]

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[435] Several nearby jurisdictions raised concerns about impacts from increased traffic and the safety of nearby high school, middle school, and elementary school students, as well at water availability at the Taunton Site. *See e.g.*, letter from Dean V. Cronin, Chairman, Thomas J. Pires, Member, and Patrick W. Menges, Clerk, Dightmon Board of Selectmen, to Franklin Keel, Reg'l Dir., Eastern Reg., (Jan. 6, 2013); letter from Stephen J. Mckinnon, Chairman, Town of Middleborough Board of Selectmen (Jan. 14, 2014); letter from Richard Brown, Town Administrator,

8.8 25 C.F.R. § 151.10(g) - If the land to be acquired is in fee status, whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

The Eastern Regional Office of BIA is located in Nashville, Tennessee, and currently provides technical advice and limited direct field services on trust resources program management matters to the eastern United States. The Regional Office's trust resources management programs include real estate services, forestry, archeology, environmental management services, and natural resources management.

While the distance of the properties from the Regional Office limits BIA's capacity to make regular on-site visits, the current and proposed uses of the Mashpee Sites, along with the active management activities of the Tribe, would not require a regular Federal oversight presence. The planned tribal presence on the Taunton Site and the highly regulated nature of Indian gaming operations generally, and specifically under the 2014 Tribal-State Compact for the regulation of class III gaming between the Tribe and the Commonwealth, would minimize the need for regular onsite inspections by BIA staff. In addition, the Tribe has entered into IGAs with the Mashpee and Taunton governments to provide for, among other things, law enforcement, police and fire protection, sewer and water improvements, and building and fire code enforcement.[436]

Acquiring the Mashpee and Taunton Sites in trust should not impose any significant additional responsibilities or burdens on the level of services currently being provided to the Tribe by BIA. Accordingly, the Acting Regional Director found, and we concur, that BIA is equipped to discharge any additional responsibilities resulting from the acquisition of the land in trust and the development of the proposed gaming facility.

8.9 25 C.F.R. § 151.10(h) - The extent of information to allow the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations

This ROD documents the Department's compliance with NEPA through the preparation of an EIS. 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

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Town of Freetown, to Cedric Cromwell, Chairman Tribal Council, Mashpee Wampanoag (Dec. 23, 2013); letter from Rita A. Garbitt, Town Administrator, Town of Lakeville, to Franklin Keel, Regional Director, Eastern Reg., (Jan. 16, 2014); and letter from Jonathan F. Mitchell, Mayor, City of New Bedford (Jan. 17, 2014). These concerns were specifically addressed in Sections 8.0 and 10.00 of the Final EIS and through the mitigation measures identified in the Final EIS and **Section 6.0** of this ROD.

[436] Intergovernmental Agreement, Final EIS, Appx. A-2, Ex. D.

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 of 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. The comments and responses to each of the substantive comments received during this period that were not previously raised and responded to in the EIS process are included in **Attachment IV** of this ROD.

The Department must complete an Environmental Site Assessment (ESA) pursuant to the Departmental Manual at 602 DM 2 to determine if there are any environmental contamination-related concerns and/or liabilities affecting the land being considered for acquisition. The Department completed Phase I ESAs in October 2014 and August 2015 to ensure there are no environmental contaminant concerns associated with the Sites.

8.10 25 C.F.R. § 151.11(b) - The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation

Presently, the Tribe presently does not have a Federal Indian reservation, although the Mashpee Sites are currently used by the Tribe and tribal entities and the Taunton Site is located within the historical range of the Mashpee Wampanoag people.[437] Mashpee is on the "upper", or western, portion of Cape Cod. Taunton is located approximately 54 miles northwest of Mashpee in Bristol County, Massachusetts. As discussed in detail above in **Section 7.0** of this ROD, the Mashpee and Taunton Sites will be designated as the Tribe's initial reservation because the Tribe has significant historical and modern connections to the areas in which the Sites are located.

8.11 25 C.F.R. § 151.11(c) - Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use

The Tribe has prepared a business plan that addresses the Taunton project's anticipated economic benefits.[438] In general, the project is expected to generate $400 million in the first year.[439] Revenues generated by the project will go toward the current and immediate needs of the Tribe. Priorities for the investment of funds include the construction of affordable housing for tribal members.

The proposed facility is also expected to strengthen the overall regional economy through construction, direct spending at the casino, and off-site spending by visitors and employees. Based on preliminary estimates, the total cost for developing the proposed project is estimated at $573.1 million in 2012 dollars. This cost includes construction costs, but excludes financing, value of land, and marketing. For the economic benefits analysis, the cost of fixtures, furniture, and equipment (FFE) ($120.6 million) is excluded, as it is assumed that FFE are imported from outside Massachusetts, and not constructed on the project site. Therefore, the construction costs used as the basis for this analysis are $452.5 million, of which $433.1 million are assumed to occur in the two-county region.[440]

As a result of the direct expenditures, direct employment from construction of the proposed project (including both on-site construction jobs and jobs resulting from construction soft costs such as architecture and engineering) is estimated at 2,400 person-years of employment in Massachusetts, or an average of 300 full-time equivalent jobs per year during the eight year construction period. In Bristol and Plymouth Counties, construction of the project would

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[437] The Tribe does not presently have a reservation as that term is defined in the Department's trust land acquisition regulations at 25 C.F.R. § 151.2.

[438] Regional Director's Recommendation, Vol. I, Tab 21. Because the Mashpee Sites are not being acquired for business purposes, no plan is required for those Sites.

[439] *See* summary of the Pro Forma Income Statement in Regional Director's Recommendation, Vol. I, Tab 21.1.

[440] Final EIS, Section 8.16.4.3; Regional Director's Recommendation, Vol. I, Ex. 21.

generate 2,297 person-years of employment, or an average of 287 full-time equivalent jobs per year during the eight-year construction period.

Based on our analysis of the information provided in the Tribe's application, the assumptions and estimates of economic benefit to the Tribe, particularly from the gaming operation, appear to be reasonable and obtainable. Further, the project will contribute revenues to the local economy throughout the development and operation phases of the project.

8.12 25 C.F.R. § 151.11(d). Contact with state and local governments pursuant to sections 151.10(e) and (f).

As discussed above in **Section 8.6**, on May 30 and June 1, 2012, BIA sent notices of the proposed acquisition to state and local governments having regulatory jurisdiction over the Sites, and requested comments on the potential impacts to regulatory jurisdiction, real property taxes, and special assessments. See discussion under **Sections 8.6 and 8.7** of this ROD.

9.0 ISSUANCE OF A RESERVATION PROCLAMATION

The Secretary's authority for issuing reservation proclamations is found in Section 7 of IRA, 25 U.S.C. § 467. Section 7 authorizes the Department to proclaim new Indian reservations on lands acquired pursuant to the acquisition authority conferred by the IRA, or to add such lands to existing reservations.[441] A reservation proclamation makes clear that land acquired in trust is a tribe's reservation, and clarifies jurisdictional status of the land. The Department evaluates requests for reservation proclamations pursuant to its internal reservation proclamation guidelines. These guidelines request and evaluate information similar to that which is required for a request to acquire land in trust, including a tribal resolution, legal description, and maps. Issuance of a reservation proclamation is considered a major Federal action requiring review pursuant to the National Environmental Policy Act.

As discussed in **Section 7.0** above, a reservation proclamation is required by IGRA to meet its "initial reservation" exception for gaming eligibility. With the issuance of this ROD, and upon meeting the requirements of the Department's proclamation guidelines, the Department announces its determination that the Mashpee and Taunton Sites are to be proclaimed the Tribe's reservation.

10.0 DECISION TO IMPLEMENT THE PREFERRED ALTERNATIVE

The Department has determined that it will implement the Preferred Alternative A. This decision was made based upon the environmental impacts identified in the EIS, a consideration

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[441] The Secretary's reservation proclamation authority only extends to lands acquired under the IRA, such as by Section 5, and, therefore, a Section 7 reservation proclamation does not affect the earlier determination that the Mashpee had a historical reservation in 1934 for purposes of applying the IRA.

of economic and technical factors, as well as the BIA's policy goals and objectives for the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. Of the alternatives evaluated in the EIS, Alternative A would best meet the purposes and needs of the BIA, consistent with its statutory mission and responsibilities, to promote the long-term economic vitality and self-sufficiency, self-determination, and self-governance of the Tribe. The tribal government facilities and casino-resort complex described under Alternative A would provide the Mashpee Wampanoag Tribe, which has no trust land or reservation, with a reservation land base and the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for its tribal government. This would enable the tribal government to establish, fund, and maintain governmental programs that offer health, education, and welfare services to tribal members, as well as provide the Tribe and local communities with greater opportunities for employment and economic growth.

The Department is aware that completion of the project as detailed in Alternative A will require approval or other actions from federal, state, and local agencies. Federally-recognized tribes possess both the right and the authority to regulate activities on their reservation and trust lands independently from state and local controls. Projects that are undertaken by the Tribe on tribal lands will not be subject to the regulatory requirements of state and local jurisdictions. Federal laws, however, will continue to apply on the site. This means, for example, that the local zoning laws of Mashpee and Taunton would not apply to the trust lands, nor would state laws such as the Massachusetts Wetlands Protection Act (MGL Ch.131 § 40). In Taunton, however, the proposed casino requires, for example, roadway and sewer improvements that are proposed to be constructed on land outside of the proposed trust acquisition. Any such work on non-tribal lands would be fully subject to state and local laws and regulatory permitting programs. Specifically, Alternative A will require a NPDES Construction General Permit from EPA, a Section 404 Permit from the Corps for discharge of materials to waters of the U.S., a Clean Water Act Section 401 Permit (Water Quality Certification) from MassDEP, a Highway Access Permit from MassDOT, and an Order of Conditions from the Taunton Conservation Commission for off-site wetlands impacts.

With the exception of unavoidable impacts identified for each of the development alternatives as a result of development and vehicle emissions, the additional impacts from Preferred Alternative A would be reduced to less than significant levels after the implementation of mitigation measures. Accordingly, the Department will implement Preferred Alternative A subject to implementation of mitigation measures discussed in **Section 6.0** of this ROD.

10.1 Preferred Alternative A Results in Substantial Beneficial Impacts

Preferred Alternative A is expected to result in beneficial effects for the Tribe and its members as well as the City of Taunton, surrounding communities, and the Commonwealth of Massachusetts. Key beneficial effects include:

- Establishment of a land base for the Mashpee Wampanoag Tribe, from which it can operate its tribal government and provide a variety of housing, educational, social,

cultural, and other programs and services, as well as employment opportunities for its members.

- Generation of needed revenues for the Tribe that will allow it to fund the governmental operations and programs to meet tribal needs and allow the Tribe to achieve self-sufficiency, self-determination, and self-government.
- Creation of approximately 300 full-time equivalent jobs per year during the eight-year construction period for the resort-casino facilities, with direct compensation totaling approximately $123.8 million.
- Creation of approximately 3,500 permanent full- and part-time jobs during operation, with direct compensation of approximately $93.2 million annually. As described in Section 8.20.3.1 of the Final EIS, it is anticipated that approximately 90 percent of the employees currently reside in Bristol and Plymouth Counties.
- Indirect and induced employment and economic growth in Bristol and Plymouth Counties and Massachusetts, including approximately 271 full-time equivalent jobs during the eight-year construction period and approximately 1,720 permanent jobs during operations, for a total of approximately $836.5 million of economic activity during construction and approximately $511.8 million annually during operations.[442]
- Generation of annual and one-time revenues to the Commonwealth through the Tribal-State Compact for the regulation of class III gaming, and to the City of Taunton through the IGA.

10.2 Reduced Intensity Alternative I Restricts Beneficial Effects

While the Reduced Intensity Alternatives would result in lesser environmental impacts, they would limit the ability of the Tribe to facilitate and promote tribal economic development, self-determination, and self-sufficiency. The Reduced Intensity Alternative I (Alternative B) would generate less gaming revenue than Preferred Alternative A. As a result, it would restrict the Tribe's ability to meet its needs and to foster tribal economic development, self-determination, and self-sufficiency.

The reduced development program proposed under Alternative B compared to Preferred Alternative A would result in reduced economic benefits both during construction and subsequent operation of the project. Alternative B includes roughly half of the casino space and one-third of the hotel space proposed under Preferred Alternative A, and total economic benefits and employment expected from construction would be reduced roughly proportionately. Alternative B would also support fewer direct, indirect, and induced jobs, less employee compensation, and less economic output than Alternative A.

Due to less development under Alternative B, the effects on the natural environment would be slightly less than those created by Preferred Alternative A. Both alternatives would result in similar levels of impacts after mitigation. While Alternative B would generate substantially

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[442] These figures represent estimates of effects to the Commonwealth of Massachusetts; Section 8.16.4 of the Final EIS also provides estimates of impacts specific to Bristol and Plymouth Counties.

fewer new vehicle trips than Preferred Alternative A, mitigation measures proposed in Section 8.1.3.4 of the Final EIS to improve traffic flow and reduce harmful emissions under Preferred Alternative A would minimize those effects. The BIA believes that the reduced economic benefits of Alternative B make it a less viable option for fulfilling the purpose and need for action (acquiring the Sites in trust and proclaiming them to be the Tribe's reservation). Accordingly, BIA has selected Preferred Alternative A over Alternative B.

10.3 Reduced Intensity Alternative II Restricts Beneficial Effects

The Reduced Intensity Alternative II (Alternative C), identified in **Section 4.0** of this ROD as the Environmentally Preferred Alternative, would limit the beneficial effects that would otherwise be available to the Tribe, the City of Taunton, and the Commonwealth under Preferred Alternative A, and would not substantially meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation.

Because Alternative C does not include a water park and includes 300 fewer hotel rooms compared to Preferred Alternative A, this Alternative would result in fewer economic benefits, when measured in terms of jobs, employee compensation, and economic output, both during construction and continued operation of the casino/resort.

Due to less development under Alternative C, the effects on the natural environment would be less than those created by Preferred Alternative A. Both alternatives would result in a similar level of impacts after mitigation. While Alternative C would avoid impacts to land on the northern portion of the project site in Taunton, the layout of facilities proposed in that area under Preferred Alternative A was designed to minimize and avoid negative environmental impacts, to the extent possible, including avoidance of potential vernal pools and terrestrial habitats as described in Section 8.2.1.1 of the Final EIS. The reduced economic benefits of Alternative C make it a less viable option for fulfilling the purpose and need for action (acquiring the Sites in trust and proclaiming them to be the Tribe's reservation). Accordingly, the BIA has selected Preferred Alternative A over Alternative C.

10.4 No Action Alternative Fails to Meet the Purpose and Need for Acquiring the Sites in Trust and Proclaiming them to be the Tribe's Reservation.

The No Action Alternative (Alternative D) would not meet the stated purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. Specifically, it would not provide a land base for the Tribe or a source of income to allow the Tribe to achieve self-sufficiency, self-determination, and a strong tribal government. This alternative would also likely result in substantially less economic activity and benefits than Preferred Alternative A. Accordingly, the BIA has selected the Preferred Alternative A over Alternative D.

11.0 DECISION

We find that the statutory and regulatory requirements for acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation pursuant to Sections 5 and 7 of

the IRA and its implementing regulations at 25 C.F.R. Part 151 have been satisfied. Section 20 of IGRA generally prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. One exception is made for lands that are acquired in 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). Upon review of Section 20 and its implementation regulations at 25 C.F.R Part 292, we find that the Mashpee and Taunton Sites meet the requirements for the "initial reservation" exception and will be eligible for gaming after they are acquired in trust and proclaimed to be the Tribe's reservation. We, therefore, announce that the Department will implement the Preferred Alternative and acquire the Mashpee and Taunton Sites in trust and proclaim them to be the Tribe's reservation. The Regional Director will be authorized to approve the conveyance document accepting the Sites in trust for the Tribe subject to any remaining regulatory requirements and approval of all title requirements.

Kevin K. Washburn
Assistant Secretary – Indian Affairs

SEP 18 2015
Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, MICHELLE LITTLEFIELD, TRACY ACORD, DEBORAH CANARY, FRANCIS CANARY, JR., VERONICA CASEY, PATRICIA COLBERT, VIVIAN COURCY, WILL COURCY, DONNA DEFARIA, ANTONIO DEFARIA, KIM DORSEY, KELLY DORSEY, FRANCIS LAGACE, JILL LAGACE, DAVID LEWRY, KATHLEEN LEWRY, MICHELE LEWRY, RICHARD LEWRY, ROBERT LINCOLN, CHRISTINA McMAHON, CAROL MURPHY, DOROTHY PEIRCE, DAVID PURDY, and LOUISE SILVIA,	Plaintiffs,	
v.		CIVIL ACTION NO. 16-10184-WGY
UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity; BUREAU OF INDIAN AFFAIRS; LAWRENCE ROBERTS, in his official capacity, and UNITED STATES OF AMERICA,	Defendants.	

MEMORANDUM & ORDER

YOUNG, D.J. July 28, 2016

I. INTRODUCTION

This case arises out of a decision of the Secretary of the Department of the Interior (the "Secretary") to acquire land in trust for the benefit of the Mashpee Wampanoag Tribe (the

"Mashpees") under Section 465 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. The Plaintiffs are residents of Taunton who claim they are injured by the acquisition and planned development of the land at issue. They have filed suit against the Department of the Interior (the "Department"), the Bureau of Indian Affairs (the "BIA"), Acting Assistant Secretary of Indian Affairs Lawrence Roberts, and the United States (together, the "government"), challenging the Secretary's decision pursuant to Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The parties make cross-motions for summary judgment on the Plaintiffs' first cause of action, United States' Mot. Partial Summ. J., ECF No. 55; Pls.' Mot. Summ. J. First Cause Action, ECF No. 58, which involves the Mashpees' eligibility as beneficiaries under the IRA, and correspondingly, the authority of the Secretary to take land into trust for the Mashpees' benefit.

A. Factual Background[1]

[1] As the motions presently before the Court involve a narrow question of statutory interpretation rather than a factual dispute, the Court sketches only a brief outline of the relevant facts, accepting as true the uncontested factual assertions set forth in the Secretary's Record of Decision and the statements of fact submitted in conjunction with the parties' summary judgment motions, which are not the subject of dispute. See Stip. and Order Limiting Scope Rule 65(a)(2) Trial Plaintiffs' First Cause Action and Deferring Other Matters Pending Disposition Same 3-4, ECF No. 50 (stating that the "Plaintiffs' First Cause of Action challenges the [Department of the Interior's] Record of Decision on the alleged grounds, inter

The Mashpees are a federally recognized tribe that obtained official acknowledgement from the BIA in 2007.[2] Pls.' Local Rule 56.1 Separate Statement Facts Supp. Mot. Summ. J. First Cause Action ("Pls.' Statement Facts") 1, ECF No. 60; Compl., Ex. 1, R. Decision 4, ECF No. 1-1.[3] Previously, the Mashpees had been subject to colonial and state governmental jurisdiction. Pls.' Statement Facts ¶ 5. Upon receiving federal acknowledgement, the Mashpees filed a "fee-to-trust" application with the BIA requesting that the Department acquire tracts of land for the Mashpees' use as a tribal reservation in Mashpee and Taunton,

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alia, that it is inconsistent with the plain language of the Indian Reorganization Act of 1934 and the Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009)," and noting that such claim "is amenable to resolution even in the absence of the complete [administrative record] . . . on the basis of cross-motions for summary judgment[.]").

[2] For a historical overview of the politics involved in according federal recognition to various tribal entities, see generally Lorinda Riley, When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations, 39 Am. Indian L. Rev. 451 (2015), http://digitalcommons.law.ou.edu/ailr/vol39/iss2/2.

[3] The Record of Decision issued by the Secretary of the Department of Indian Affairs appears on pages 50 through 189 of the Administrative Record. See Notice Filing Certified Provisional Admin. R., ECF No. 51. It was also attached as an exhibit to the Plaintiffs' complaint. Compl., Ex. 1, ECF No. 1-1. For purposes of clarity and simplicity, the Court cites the internal page numbers in the Record of Decision rather than the corresponding pagination in the Administrative Record.

Massachusetts. R. Decision 4.[4] Of concern to the Plaintiffs here is the Taunton site, which "[t]he City of Taunton has designated . . . for economic development purposes" and which the Mashpees "would use . . . to meet [their] needs for economic development." Id. Specifically, the Mashpees intend to construct and operate "an approximately 400,000 sq. ft. gaming-resort complex, water park, and 3 hotels" on the Taunton site. Id. at 5.

On September 18, 2015, the Secretary issued a written decision (the "Secretary's Decision" or "Record of Decision") granting the Mashpees' fee-to-trust application. See id.; Admin. R. 000049 (memorandum from the Assistant Secretary of Indian Affairs to the Regional Director, Eastern Region, approving the Mashpees' request that the Department acquire land in trust in Taunton "for gaming and other purposes" and declare the acquired land the Mashpees' "initial reservation"). As relevant to the matter at issue here, the Secretary specifically found that "the Mashpee Tribe qualifies" -- i.e., is "eligible to receive land into trust under the IRA" -- pursuant to the

[4] CD-ROMs containing the Administrative Record were filed with the Court, along with notices and indexes, which are part of the online docket. See Notice Filing Certified Provisional Admin. R., ECF No. 51; Notice Filing Certified Second Provisional Admin. R., ECF No. 52.

second definition of "Indian" set forth in Section 479 of the IRA. R. Decision 112.

Both parties acknowledge that the land was subsequently taken into trust on November 10, 2015. Am. Compl. Decl. and Inj. Relief ¶¶ 78, 82, ECF No. 12; United States' Mem. Law Supp. Mot. Partial Dismissal 1, 9, ECF No. 17. In the months since, development of the Taunton site has been widely reported. See, e.g., Sean P. Murphy, Mashpee Tribe Speeds Up Timetable For Taunton Casino Opening, Boston Globe (Mar. 14, 2016) https://www.bostonglobe.com/metro/2016/03/14/mashpee-wampanoag-tribe-prepares-unveil-schedule-for-massive-casino-taunton/eHpal5nQfslYIyNgaSuFBJ/story.html; Philip Marcelo, Tribe Breaks Ground on Massachusetts' Latest Casino Project, WBUR News (Apr. 05, 2016) http://www.wbur.org/news/2016/04/05/tribe-breaks-ground-casino.

B. Procedural History

The Plaintiffs filed suit challenging the Secretary's Decision on February 4, 2016, Compl. Decl. and Inj. Relief, ECF No. 1, and later amended their complaint to include additional claims, Am. Compl. Decl. and Inj. Relief, ECF No. 12. The government timely moved to dismiss the Plaintiffs' fifth through eighth causes of action. United States' Mot. Partial Dismissal, ECF No. 16; United States' Mem. Law Supp. Mot. Partial Dismissal, ECF No. 17.

On May 27, 2016, the Plaintiffs filed their opposition to the government's partial motion to dismiss. Pls.' Mem. Law Opp'n Defs.' Mot. Partial Dismissal, ECF No. 22. The same day, the Plaintiffs moved for a preliminary injunction on the basis of their first cause of action, seeking that the land at issue be removed from trust, or, at minimum, that further development of the site be halted. Mot. Prelim. Inj. or Writ, ECF No. 25; Pls.' Mem. Law Supp. Mot. Prelim. Inj. or Writ ("Pls.' Mem. Supp. Prelim. Inj."), ECF No. 26. They also requested that the Court "advance the merits of" the first cause of action to permit the parties to then "exercise their right under 28 U.S.C. 1292(a) to immediately appeal this central, dispositive issue." Pls.' Mem. Supp. Prelim. Inj. 6. The government opposed the Plaintiffs' motion. United States' Mem. Opp'n Pls.' Mot. Prelim. Inj. or Writ ("Defs.' Mem. Opp'n Prelim. Inj."), ECF No. 38.

At a hearing on June 20, 2016, the Court combined further hearing on the injunction with trial on the merits, Fed. R. Civ. P. 65(a), and scheduled further oral argument for July 11, 2016, with additional briefing and production of the administrative record to occur in the interim. Elec. Clerk's Notes, ECF No. 40. On June 29, 2016, following a final pretrial conference, Elec. Clerk's Notes, ECF No. 49, the Court entered a joint stipulation limiting the scope of the upcoming hearing to the

merits of the Plaintiffs' first cause of action, Stip. and Order Limiting Scope Rule 65(a)(2) Trial Plaintiffs' First Cause Action and Deferring Other Matters Pending Disposition Same, ECF No. 48. The other seven counts in the Plaintiffs' complaint were administratively closed. Elec. Clerk's Notes, ECF No. 49.

The government filed the administrative record in two pieces on June 30, 2016, and July 6, 2016. See Notice Filing Certified Provisional Admin. R., ECF No. 51; Notice Filing Certified Second Provisional Admin. R., ECF No. 52. On July 7, 2016, the parties filed cross-motions for summary judgment on the first cause of action along with supporting memoranda. United States' Mot. Partial Summ. J., ECF No. 55; United States' Mem. Law. Supp. United States' Mot. Partial Summ. J. ("Defs.' Mem."), ECF No. 56; Pls.' Mot. Summ. J. First Cause Action, ECF No. 58; Pls.' Mem. Law Supp. Mot. Summ. J. ("Pls.' Mem."), ECF No. 59. The Court heard oral argument on the parties' summary judgment motions on July 11, 2016, and took the matter under advisement. Elec. Clerk's Notes, ECF No. 67. The parties have since filed supplemental memoranda. United States' Supp. Mem. Law Supp. United States' Mot. Partial Summ. J. ("Defs.' Supp.

Mem."), ECF No. 81; Pls.' Post-Hearing Mem. Law ("Pls.' Supp. Mem."), ECF No. 82.[5]

II. ANALYSIS

The Plaintiffs' first cause of action challenges the Secretary's determination that the Mashpees are eligible beneficiaries of the IRA provision that grants the Secretary authority to acquire and hold land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. Specifically, the Plaintiffs argue that the Mashpees do not qualify as "Indian" under the definitions section of the IRA, 25 U.S.C. § 479, and accordingly, that the Secretary lacked authority to acquire land in trust for their benefit. The government, meanwhile, contends that the definition of "Indian" at issue here is ambiguous, that the Secretary permissibly interpreted it to include the Mashpees, and that the Secretary's interpretation is entitled to deference.

The Court first discusses the standard of review it must apply in its review of these cross-motions. It then sketches the applicable legal framework, before finally applying that framework to the particulars of this case.

A. Standard of Review

[5] The Court acknowledges with appreciation the briefs amicus curiae of the City of Taunton, ECF No. 68, and USET Sovereignty Protection Fund, Inc., ECF No. 83.

The Plaintiffs are entitled to judicial review of the Department's action under Chapter 7 of the APA. See 5 U.S.C. §§ 702, 704. The scope of the Court's review is governed by Section 706, which provides that, "[t]o the extent necessary to [its] decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Id. § 706. Further, it empowers courts to "hold unlawful and set aside agency action, findings, and conclusions" that are held to be, inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" Id.

The First Circuit has stated, somewhat confusingly, that an agency's legal conclusions "engender de novo review, but with some deference to the agency's reasonable interpretation of statutes and regulations that fall within the sphere of its authority." Jianli Chen v. Holder, 703 F.3d 17, 21 (1st Cir. 2012); see also Gourdet v. Holder, 587 F.3d 1, 5 (1st Cir. 2009) ("We review legal questions de novo, with appropriate deference to the agency's interpretation of the underlying statute in accordance with administrative law principles.") (internal quotation marks and citation omitted). This articulation of the

applicable standard of review is perplexing because de novo review means no deference ought be given. See, e.g., Orndorf v. Paul Revere Life Ins. Co., 404 F.3d 510, 517 (1st Cir. 2005) ("[N]o deference is given to the administrator's interpretation of the plan language. Rather, the court interprets the plan de novo[.]").

The Court interprets the First Circuit's statement as a muddled articulation of the two-step legal framework set forth in Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Under so-called Chevron deference, the Court must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." Id. at 842; see also Holly Farms Corp. v. Nat'l Labor Relations Bd., 517 U.S. 392, 398 (1996) ("If a statute's meaning is plain, . . . reviewing courts must give effect to the unambiguously expressed intent of Congress.") (internal quotation marks and citation omitted). At this first step, then, the agency's interpretation receives no deference. If there is ambiguity -- i.e., the Court has determined that a statute is susceptible to multiple reasonable interpretations, see, e.g., Holly Farms Corp., 517 U.S. at 398-99 -- then the Court must defer to the agency's interpretation, so long as it is "rational and consistent with the statute," Sullivan v. Everhart, 494 U.S. 83, 89 (1990) (internal quotation

marks and citation omitted). Thus, the First Circuit's articulations of the standard of review of agency actions quoted above are flawed to the extent they suggest that "some" deference is always due an agency's reasonable interpretations of its governing statute: in fact, the question of whether statutory language is ambiguous is for the Court alone, and if such language is not ambiguous, then no deference is due. If there is ambiguity, then the agency's reasonable interpretation is controlling.

B. Legal Framework

This case involves two provisions of the Indian Reorganization Act (again, the "IRA"). The first is the section from which the Secretary derives authority to acquire land "in trust" for the benefit of an "Indian tribe or individual Indian." 25 U.S.C. § 465. That section provides, in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id. Thus, acquisition is proper pursuant to Section 465 only if the beneficiary of such acquisition falls within the statutory definition of "Indian." Section 479 defines this term as follows:

> 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. § 479 (numbers in brackets supplied).

The Supreme Court interpreted the first of these three definitions of "Indian" in Carcieri v. Salazar, 555 U.S. 379 (2009). As is the case here, Carcieri involved a tribe that was not under federal jurisdiction at the time the IRA was enacted in 1934, but was under federal jurisdiction by the date on which land was purportedly taken into trust for its benefit. See id. at 384-85, 395. The Supreme Court held that "the term 'now under Federal jurisdiction' unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." Id. at 395. Accordingly, the tribe for whom the land was taken into trust was not "Indian" for the purpose of Section 479, and in turn, the Department was not entitled to take land into trust for the tribe's benefit pursuant to Section 465. See id. at 396

(reversing the First Circuit's holding that the Secretary was authorized to take the land at issue into trust for the tribe's benefit).

C. Application to the Plaintiffs' First Claim

The matter before the Court involves the second definition of "Indian" provided in Section 479 of the IRA. It presents the question: are the Mashpees "descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"? 25 U.S.C. § 479. To answer this requires defining the term "such members," and it is here that the parties diverge.

The Plaintiffs argue that "such members" plainly refers to the entire preceding clause in the first definition of "Indian" ("all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"). Pls.' Mem. 8. The government, meanwhile, contends that the phrase is ambiguous and that the Secretary reasonably interpreted it to refer only to the first several words of the preceding clause ("all persons of Indian descent who are members of any recognized Indian tribe"). Defs.' Mem. 1, 12-14.

This difference is critical, because under the Plaintiffs' reading, a descendant of a "recognized Indian tribe" will be an eligible beneficiary of the IRA's land-into-trust provision only if that tribe was under federal jurisdiction in June 1934 (when

the IRA was enacted). By contrast, under the government's reading, descendants may qualify as "Indian" under Section 479 even if their tribal ancestors were not under federal jurisdiction in 1934. As the Mashpees gained federal recognition in 2007, they are excluded from the version of the second definition of "Indian" proffered by the Plaintiffs, but they fall within such definition under the Secretary's reading.

As described supra, the Court, in reviewing an agency's legal interpretation under the APA, must first determine whether the statutory phrase at issue is ambiguous. In doing so, the Court begins, as it must, with the plain meaning of the relevant statutory language. See, e.g., In re Rudler, 576 F.3d 27, 44 (1st Cir. 2009). Here, that language is the second statutory definition of "Indian." With respect, this is not a close call: to find ambiguity here would be to find it everywhere.

Post-Carcieri, Section 479 of the IRA effectively reads:

> The term 'Indian' as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe . . . under Federal jurisdiction [in June 1934], 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. § 479. The second definition of "Indian" uses the word "such" to indicate that the "members" to which it refers are those described in the first definition. See Merriam

Webster's Collegiate Dictionary 1247 (11th ed. 2003) (defining "such" as "of the character, quality, or extent previously indicated or implied"); American Heritage Dictionary 1729 (4th ed. 2000) (defining "such" as "[o]f a kind specified or implied" and "[o]f a degree or quality indicated"). In the wake of Carcieri, the Plaintiffs' interpretation is the one compelled by the plain text of the statute, and thus the Court "must apply [it] according to its terms." Carcieri, 555 U.S. at 387 (internal citations omitted). This means that, despite their subsequent acknowledgement by the federal government, for purposes of Sections 465 and 479 of the IRA the Mashpees are not considered "Indians" because they were not under federal jurisdiction in June 1934. Thus, the Secretary lacked the authority to acquire land in trust for them, at least under the rationale the Secretary offered in the Record of Decision. See id. ("The Secretary may accept land into trust only for 'the purpose of providing land for Indians.") (citing 25 U.S.C. § 465).

The Court finds support for its statutory analysis from that of Judge Ketanji Brown Jackson of the District of Columbia, who was tasked with interpreting somewhat analagous statutory language. See Takeda Pharms., U.S.A., Inc. v. Burwell, 78 F.Supp.3d 65 (D.D.C. 2015), appeal filed Takeda Pharms. U.S.A., Inc. v. Burwell, 15-5021 (D.C. Cir. Jan. 26, 2015) (internal

citations omitted). In Takeda, the D.C. District Court interpreted Section 355 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355. Id. at 68. Paragraph 2 of that section states:

> An application submitted . . . shall also include—
>
> (A) a certification, in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the drug for which such investigations were conducted or which claims a use for such drug for which the applicant is seeking approval under this subsection and for which information is required to be filed under paragraph (1) or subsection (c) of this section[.]"

21 U.S.C. § 355(b)(2)(A) (emphasis added). The court explained that "[t]he term 'such,' when used as an adjective, is an inclusive term, showing that the word it modifies is part of a larger group . . . . and, even more important, 'such' nearly always operates as a reference back to something previously discussed." Id. at 99. The court held that, "in accordance with its plain meaning, the term 'such drug' unambiguously refers back to the 'drug for which such investigations were conducted[.]" Id. at 99. In so doing, that court rejected the interpretation proffered by the plaintiffs that removed the language "for which such investigations were conducted" from the referent antecedent phrase, effectively "ignor[ing] 'such' entirely, and . . . replac[ing] it with 'the[.]'" Id.

The Ninth Circuit's analysis in University Medical Center of Southern Nevada v. Thompson, 380 F.3d 1197 (9th Cir. 2004) also sheds light on the question of whether and when there exists ambiguity with respect to the antecedent phrase referenced by the word "such." There, the court was charged with interpreting a paragraph of the Medicare statute that described a hospital that

> is located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to this subchapter or State plans approved under subchapter XIX of this subchapter), during the cost reporting period in which the discharges occur, for indigent care from state and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period.

42 U.S.C. § 1395ww(d)(5)(F)(i)(II) (emphasis added). The parties there disputed "whether the word 'such' in the phrase 'such net inpatient care revenues' refers back to 'net inpatient care revenues (excluding any of such revenues attributable to [Medicare or Medicaid])' or simply to 'net inpatient care revenues,'" with University Medical Center arguing for the former reading. 380 F.3d at 1199-1200 (alterations in original). While the court ultimately concluded that the phrase "such net inpatient care revenues" did not reference the more complete version of the antecedent phrase, it arrived at this conclusion only because of the statute's inclusion of the word "total" before the "such" phrase. Id. at 1200. The court was

clear that in the absence of "total," the plain meaning of "such," referring back to the entire antecedent, would control:

> In the context of this statute, the word 'total' implies that the word 'such' refers to aggregate net inpatient care revenues, and that the Medicare and Medicaid payments that were previously deducted from net inpatient care revenues for purposes of determining a hospital's revenue from non-federal sources should not be added back for purposes of determining a hospital's revenue from all sources. [University Medical Center]'s interpretation would be correct -- and the statute would unambiguously support its interpretation -- if the words 'its total of' were deleted and the statute read '30 percent of such net inpatient care revenues.' In this circumstance the antecedent would be unmistakable.

Id. at 1200-01 (emphasis supplied).

Unlike the Medicare statute at issue in University Medical Center, however, there is no language in Section 479 of the IRA to indicate that the term "such members" references only a portion of the antecedent phrase "members of any recognized Indian tribe now under Federal jurisdiction[.]" Thus, as in the hypothetical version of the Medicare statute the court considered in University Medical Center, 380 F.3d at 1201, the term "such" here "unmistakabl[y]" references the entire antecedent phrase.

The government argues that the phrase "such members" is ambiguous not based on principles of grammar or syntax, but rather based on the legislative history of the IRA. See Pls.' Mem. 7 ("[N]othing in the legislative history indicates that

[the Plaintiffs' reading of the second definition] is what Congress intended"). To look beyond the unambiguous plain meaning in order to discern congressional intent, however, is improper. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve statutory ambiguity") (internal quotation marks and citation omitted); Palmieri v. Nynex Long Distance Co., 437 F.3d 111, 115 (1st Cir. 2006) ("We have consistently held that when the plain meaning of a statute is clear, we are not to look beyond that text to discern legislative intent."); People To End Homelessness, Inc. v. Develco Singles Apartments Assocs., 339 F.3d 1, 5 (1st Cir. 2003) ("When the language of a statute is plain and admits of no more than one meaning the sole function of the courts is to enforce the statute according to its terms.") (internal quotation marks, citations, and alterations omitted). Only in "rare and exceptional" circumstances is such further inquiry appropriate. Mullane v. Chambers, 333 F.3d 322, 330 (1st Cir. 2003) (internal citation and quotation marks omitted).

The government appears to argue that this case presents just such anomalous circumstances because adopting the Plaintiffs' reading of Section 479 would render the second statutory definition of "Indian" "entirely surplus." Defs.' Mem. 1. The Court, however, fails to see how this is so. Under

the Plaintiffs' reading, the second definition covers descendants of members of recognized Indian tribes that were subject to federal jurisdiction in 1934 and who were also living on Indian reservations at that time. This is distinct from the first definition, which requires actual membership in a tribe that was under federal jurisdiction in 1934 in order to qualify as "Indian." See 25 U.S.C. § 479 (referencing "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction") (emphasis supplied). It is surely plausible that not all descendants of members of tribes that were under federal jurisdiction in 1934 and whose members resided on Indian reservations are also members of such a tribe.[6] Indeed, while descendancy may be a factor in determining membership it is not necessarily determinative. See, e.g., B.J. Jones, In Their Native Lands: The Legal Status of American Indian Children in North Dakota, 75 N.D. L. Rev. 241, 241 n.3 (1999) ("Most Indian tribes determine membership by a process of enrollment whereby one must demonstrate that she meets the various requirements of membership . . . . There is no one generally-accepted definition of an 'Indian,' although it is

[6] The government acknowledges as much in its supplemental memorandum. See Defs.' Supp. Mem. 5 ("To be sure, one could be a descendant of a 'recognized Indian tribe' who is not a member of that tribe, and thus need to resort to the reservation residence requirement[.]").

generally acknowledged that Indian tribes have the inherent authority to determine their own membership").[7]

Having concluded that the Secretary erred in finding that the Mashpees fell within the second definition of "Indian" provided in Section 479 of the IRA, the Court need not address the Plaintiffs' additional arguments regarding the Mashpees' recognition as a tribe, Pls.' Mem. 25-28, and the residence-on-a-reservation requirement, id. at 28-30.[8]

III. CONCLUSION

[7] What is more, even were the government's surplusage argument convincing, it is not clear that this would cause the Court to depart from the plain text of the IRA. The First Circuit has held that, where statutory language is unambiguous, "we consider Congress's intent only to be certain that the statute's plain meaning does not lead to 'absurd' results." In re Rulder, 576 F.3d at 44-45 (citing Lamie v. United States, 540 U.S. 526, 534 (2004)); see also Pritzker v. Yari, 42 F.3d 53, 67-68 (1st Cir. 1994) ("As a fundamental principle of statutory construction, we will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity . . . or some other extraordinary consideration, such as the prospect of yielding a patently absurd result") (internal citations omitted). The government has not argued that adopting the Plaintiffs' interpretation produces "absurd" results.

[8] To the extent the Plaintiffs argue that Carcieri stands for the principle that there exists no ambiguity as to any of the terms used in Section 479, see Pls.' Supp. Mem. 3, however, the Court considers this too broad a reading of that case. As the government has pointed out, courts reviewing decisions of the Secretary since Carcieri have agreed with the Secretary that certain terms are ambiguous and have deferred to the Secretary's interpretation of those terms. See Defs.' Mem. Opp'n Prelim. Inj. 3-4.

Upon thorough consideration of the parties' submissions, the Court rules that the second definition of "Indian" in Section 479 of the IRA unambiguously incorporates the entire antecedent phrase -- that is, "such members" refers to "members of any recognized Indian tribe now under Federal jurisdiction." Thus, no deference is due the Secretary's interpretation. In light of the Supreme Court's interpretation of "now under Federal jurisdiction" to mean under Federal jurisdiction in June 1934, the Secretary lacked the authority to acquire land in trust for the Mashpees, as they were not then under Federal jurisdiction. See Carcieri, 555 U.S. at 382-83.

In keeping with the parties' stipulation and to enable a prompt appeal of this declaration, the Court determines there is no just cause for delay, Fed. R. Civ. P. 54(b), and enters this declaratory judgment on the Plaintiffs' first cause of action. The matter is remanded to the Secretary for further proceedings consistent with this opinion.

SO ORDERED.

/s/ William. G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, MICHELLE LITTLEFIELD, TRACY ACORD, DEBORAH CANARY, FRANCIS CANARY, JR., VERONICA CASEY, PATRICIA COLBERT, VIVIAN COURCY, WILL COURCY, DONNA DEFARIA, ANTONIO DEFARIA, KIM DORSEY, KELLY DORSEY, FRANCIS LAGACE, JILL LAGACE, DAVID LEWRY, KATHLEEN LEWRY, MICHELE LEWRY, RICHARD LEWRY, ROBERT LINCOLN, CHRISTINA McMAHON, CAROL MURPHY, DOROTHY PEIRCE, DAVID PURDY, and LOUISE SILVIA, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity; BUREAU OF INDIAN AFFAIRS; LAWRENCE ROBERTS, in his official capacity, and UNITED STATES OF AMERICA, Defendants.	CIVIL ACTION NO. 16-10184-WGY

JUDGMENT

YOUNG, D.J. July 28, 2016

Upon thorough consideration of the parties' submissions, the Court rules that the second definition of "Indian" in Section 479 of the Indian Reorganization Act, 25 U.S.C. § 479, unambiguously incorporates the entire antecedent phrase -- that

is, "such members" refers to "members of any recognized Indian tribe now under Federal jurisdiction." Thus, no deference is due the Secretary's contrary interpretation. In light of the Supreme Court's interpretation of "now under Federal jurisdiction" to mean under Federal jurisdiction in June 1934, the Secretary lacked the authority to acquire land in trust for the Mashpees, as they were not then under Federal jurisdiction. See Carcieri v. Salazar, 555 U.S. 379, 382-83 (2009).

In keeping with the parties' stipulation, ECF No. 77, and to enable a prompt appeal of this declaration, the Court determines there is no just cause for delay, Fed. R. Civ. P. 54(b), and enters this declaratory judgment on the Plaintiffs' first cause of action. The matter is remanded to the Secretary for further proceedings consistent with this opinion.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, MICHELLE LITTLEFIELD, TRACY ACORD, DEBORAH CANARY, FRANCIS CANARY, JR., VERONICA CASEY, PATRICIA COLBERT, VIVIAN COURCY, WILL COURCY, DONNA DEFARIA, ANTONIO DEFARIA, KIM DORSEY, KELLY DORSEY, FRANCIS LAGACE, JILL LAGACE, DAVID LEWRY, KATHLEEN LEWRY, MICHELE LEWRY, RICHARD LEWRY, ROBERT LINCOLN, CHRISTINA McMAHON, CAROL MURPHY, DOROTHY PEIRCE, DAVID PURDY, and LOUISE SILVIA, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity; BUREAU OF INDIAN AFFAIRS; LAWRENCE ROBERTS, in his official capacity, and UNITED STATES OF AMERICA, Defendants, and MASHPEE WAMPANOAG INDIAN TRIBE, Intervenor Defendant.	CIVIL ACTION NO. 16-10184-WGY

ORDER

YOUNG, D.J. October 12, 2016

This case arises out of a decision of the Department of the Interior (the "Department") to take land into trust for the benefit of the Mashpee Wampanoag Tribe (the "Mashpees"). This Court entered judgment for the Plaintiffs on their first cause of action on July 28, 2016, and remanded the matter to the Secretary of the Department. Mem. and Order, ECF No. 87; J., ECF No. 88. The government now seeks partial reconsideration or clarification of that decision. United Sates' Mot. Partial Reconsideration or Clarification, ECF No. 99. The Court denies the government's motion for reconsideration, and makes the following clarification.

After reviewing the memoranda submitted in connection with this motion, the Court clarifies that it ruled that in order to qualify as eligible beneficiaries under the second definition of "Indian" set forth in the Indian Reorganization Act, 25 U.S.C. § 479, the Mashpees were required to have been "under federal jurisdiction" in 1934. The Secretary made no such finding in the Record of Decision, having concluded that the "under federal jurisdiction" phrase was not incorporated into the second definition. Nor did the government argue that the Mashpees were under federal jurisdiction in 1934. The Court's language stating the premise that the Mashpees were not under federal

jurisdiction is thus consonant with the parties' briefing of the first cause of action.

Having remanded this matter to the Secretary, it is no violation of the Court's order should the agency wish to analyze the Mashpees' eligibility under the first definition of "Indian" provided in Section 479, or to reassess the Mashpees' eligibility under the second definition consistent with the Court's ruling on the proper interpretation of that definition.

SO ORDERED.

William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 701

§ 701. Application; definitions

Effective: January 4, 2011
Currentness

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; [1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Footnotes

1 See References in Text note set out under this section.

5 U.S.C.A. § 701, 5 USCA § 701

Current through P.L. 116-66.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 75. Passports and Visas (Refs & Annos)

18 U.S.C.A. § 1546

§ 1546. Fraud and misuse of visas, permits, and other documents

Effective: November 2, 2002
Currentness

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses--

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 771; June 27, 1952, c. 477, Title IV, § 402(a), 66 Stat. 275; Pub.L. 94-550, § 5, Oct. 18, 1976, 90 Stat. 2535; Pub.L. 99-603, Title I, § 103(a), Nov. 6, 1986, 100 Stat. 3380; Pub.L. 100-525, § 2(c), Oct. 24, 1988, 102 Stat. 2610; Pub.L. 101-647, Title XXXV, § 3550, Nov. 29, 1990, 104 Stat. 4926; Pub.L. 103-322, Title XIII, § 130009(a)(4), (5), Title XXXIII, § 330011(p), Sept. 13, 1994, 108 Stat. 2030, 2145; Pub.L. 104-208, Div. C, Title II, §§ 211(a)(2), 214, Sept. 30, 1996, 110 Stat. 3009-569, 3009-572; Pub.L. 104-294, Title VI, § 607(m), Oct. 11, 1996, 110 Stat. 3512; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(3), Nov. 2, 2002, 116 Stat. 1806.)

18 U.S.C.A. § 1546, 18 USCA § 1546
Current through P.L. 116-66.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5108
Formerly cited as 25 USCA § 465

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

Currentness

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Pub.L. 100-581, Title II, § 214, Nov. 1, 1988, 102 Stat. 2941.)

25 U.S.C.A. § 5108, 25 USCA § 5108
Current through P.L. 116-66.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5110
Formerly cited as 25 USCA § 467

§ 5110. New Indian reservations

Currentness

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.

CREDIT(S)

(June 18, 1934, c. 576, § 7, 48 Stat. 986.)

25 U.S.C.A. § 5110, 25 USCA § 5110
Current through P.L. 116-66.

End of Document

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Proposed Legislation

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5129
Formerly cited as 25 USCA § 479

§ 5129. Definitions

Currentness

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and 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 all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

CREDIT(S)

(June 18, 1934, c. 576, § 19, 48 Stat. 988.)

25 U.S.C.A. § 5129, 25 USCA § 5129
Current through P.L. 116-66.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 116-66.

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