RESTATED APPLICATION

CONSOLIDATED AND RESTATED APPLICATION OF THE MASHPEE WAMPANOAG TRIBE TO ACQUIRE 146 ACRES +/- IN TAUNTON, MASSACHUSETTS AND 170 ACRES +/- IN MASHPEE, MASSACHUSETTS FOR GAMING & NON-GAMING PURPOSES PURSUANT TO 25 U.S.C. SECTION 465 & 25 C.F.R. PART 151

AND

FOR A SECRETARIAL PROCLAMATION PURSUANT TO 25 U.S.C. SECTION 467 THAT SUCH LANDS CONSTITUTE THE TRIBE'S INITIAL RESERVATION

AND

FOR A SECRETARIAL DETERMINATION THAT SUCH LANDS WILL BE THE INITIAL RESERVATION OF THE TRIBE PURSUANT TO THE INDIAN GAMING REGULATORY ACT

JUNE 5, 2012

CONFIDENTIAL GOVERNMENT-TO-GOVERNMENT COMMUNICATION

CONTAINS COMMERCIAL AND FINANCIAL PRIVILEGED INFORMATION
EXEMPT FROM FOIA DISCLOSURE

LIST OF EXHIBITS

(*Any exhibits not submitted with the Tribe's June 5, 2012 submission will be submitted as immediately thereafter as possible.*)

I. INTRODUCTION

The Mashpee Wampanoag Tribe (the "Tribe") hereby consolidates in whole its pending application for land in trust and restates its request that the Secretary of the Interior take title to land totaling approximately 170 acres in Mashpee, Massachusetts (the "Mashpee Parcels") and approximately 146 acres of legally contiguous parcels in Taunton, Massachusetts (the "Taunton Parcels," and collectively with the Mashpee Parcels, the "Parcels"), to be held in trust for the benefit of the Tribe. This request (the "Restated Request" or "Request") is made pursuant to the Indian Reorganization Act (the "IRA") at Section 5 (25 U.S.C. § 465) and implementing regulations at 25 C.F.R. Part 151. The United States does not currently hold any lands in trust for the Tribe and the Tribe otherwise lacks a recognized Indian reservation. Thus, pursuant to the IRA at Section 7 (25 U.S.C. § 467) the Tribe further requests that the Secretary of the Interior proclaim the Parcels to be the Tribe's initial reservation within the meaning of federal law. Finally, the Tribe requests that the Secretary determine that all such initial reservation lands will, upon their acceptance into trust, constitute the initial reservation of a newly acknowledged Indian tribe upon which the Tribe may lawfully conduct gaming activities pursuant to the Indian Gaming Regulatory Act ("IGRA") at Section 20(b)(l)(B)(ii) (25 U.S.C. § 2719(b)(l)(B)(ii)). This Restated Request consolidates and restates all application materials and any supplement thereto of the Tribe submitted with respect to the acquisition of land in trust; the Mashpee Parcels and the Taunton Parcels addressed here have already been made part of the existing application before the BIA and this document is intended to consolidate into one location all previously submitted documents.[1]

The Tribe is a federally-recognized Indian tribe. *See* Tab 1, *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian* Affairs, 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010). It was recognized as an Indian tribe after successful completion of the federal acknowledgment process pursuant to 25 C.F.R. Part 83 and by decision of the United States Department of the Interior on February 15, 2007, which became final May 24, 2007.

The Mashpee Parcels have been owned or used by the Tribe or Tribal entities for many years and are currently used for Tribal administrative, educational, health, cultural, and land conservation purposes. Those uses will remain the same, except that certain of the vacant Mashpee Parcels will be used for Tribal member housing (to be built). The Mashpee Parcels are generally unsuitable for gaming and other substantial economic development activities, of which the Tribe is critically in need. Thus, and for the additional reasons explained below, the Tribe also requests the acquisition of the Taunton Parcels for the purpose of developing and operating an Indian gaming facility there pursuant to IGRA. The Tribe will offer class II or class III gaming (as IGRA defines those terms) at its facility.

Complete legal descriptions of the Parcels together with deeds are attached to this document. *See* Tab 2, *Mashpee Legal Descriptions and Deeds*; Tab 3, *Taunton Legal*

[1] The Tribe previously submitted to the Bureau of Indian Affairs ("BIA"), Eastern Regional Office, a fee-to-trust application on August 30, 2007, amended on July 13, 2010, for the acquisition in trust of lands in Mashpee, Massachusetts and further including lands in Middleborough and Fall River, Massachusetts, some of which were planned for use in the Tribe's expected gaming facility to be conducted under the IGRA. On March 7, 2012, the Tribe amended its existing application in order to remove the Fall River and Middleborough parcels from the application and to add parcels in Taunton, Massachusetts. On April 5 and 30, 2012, the Tribe further amended the existing application to add additional parcels in Taunton, Massachusetts.

Descriptions and Deeds. Any existing easements, rights-of-way or encumbrances will not interfere with the Tribe's intended use of the Mashpee and Taunton Parcels.

The Mashpee Wampanoag Tribal Council (the "Tribal Council"), the Tribe's governing body, passed a resolution on March 12, 2012 authorizing the Tribal Council Chairman to request that the Mashpee and Taunton Parcels be acquired in trust for the Tribe. *See* Tab 4, *2012-RES-025, Resolution to Approve the Mashpee Wampanoag Tribe's Land into Trust Application As Amended*.

This Request conforms to the IRA, Sections 5 and 7, and to 25 C.F.R. Part 151, IGRA Section 20(b)(l)(B)(ii), the Nov. 22, 2006 Internal Guidelines and checklist for submitting Proclamation requests to the Central Office (the "Proclamation Checklist"), and the July 13, 2011 Fee-To-Trust Handbook, Version II (the "Handbook"). This Request also meets the requirements of 25 C.F.R. Part 292, which implement IGRA Section 20.

This Request will also satisfy the requirements of the National Environmental Policy Act ("NEPA"). Specifically, it is expected that the BIA will prepare a federal Environmental Impact Statement ("EIS") that will be completed prior to the final approval of this Request.

Since its formal acknowledgment as an Indian tribe in 2007, the Tribe has remained landless. The Parcels will be the first proclaimed reservation of the Tribe following acknowledgement, and thus the Tribe's "initial reservation" within the meaning of IGRA Section 20. The Tribe has significant historical and modern ties to the Taunton area—which sits firmly within the Tribe's aboriginal territory. Its historical ties are discussed and documented in the *Expert Report* (the "*Expert Report*") attached hereto. *See* Tab 5, *Expert Report*.

As discussed in the *Expert Report*, the Tribe has significant historical connections to what is now the City of Taunton (which is today only a part of the much larger Cohannut land purchases ratified by seventeenth-century Wampanoag paramount sachem, Ousameequin, and his heirs, including Pometacom (or Philip), an area that also included Bridgewater, Lakeville, and Middleborough). There are two internationally-known archaeological sites in the Taunton area specifically associated with the Tribe—the Wapanucket site, a 10,000-year-old multiple-level site in Lakeville, Massachusetts, and the Titicut site in Bridgewater, Massachuetts, a site with evidence for occupation going back 6,000 years. At least four historic-period Wampanoag villages were within or abutted the old Taunton bounds, including Assonet, Titicut, Nemasket, and Assawampsett, as well as a seventeenth-century Native Christian community (one of the so-called Indian "Praying Towns") known as Pachade.

People of Wampanoag descent lived on Betty's Neck across the Assawampsett pond from the Wapanucket site, in Lakeville, until the early twentieth century. There are at least two ancient Wampanoag burial grounds in the region, as well as an historic Wampanoag cemetery at Betty's Neck. Documents describing Wampanoag subsistence use in the area include a description of Pometacom's seventeenth-century summer hunting grounds in Taunton.

The Mashpee Wampanoag Tribal Preservation Officer and Cultural Resource Monitors protect these and other sites of cultural and sacred significance today. The Tribe's Director for the Native American Graves Protection and Repatriation Act ("NAGPRA"), Ramona Peters, works to protect the burial sites and re-interred ancestral remains in this area, from where they

were initially removed. The Tribe is the only federally-recognized tribe funded by the National Park Service to carry out the duties of repatriation in Taunton and elsewhere in former Wampanoag territories. Modern Mashpee Indians recognize the ancestral significance of the Cohannut or Taunton region through this work, as well as with their current ceremonial use of lands at Betty's Neck.

Modern Taunton is replete with Wampanoag place names, including the names of several major recreational sites in the region. The Wampanoag Commemorative Canoe Passage runs through the Taunton area, marking the great water pathway linking Wampanoag communities together for hundreds of years. Similarly, modern Routes 44, 105, and 24 directly overlay historic Wampanoag paths to Plymouth and Cape Cod.

In addition to Mashpee Wampanoag responsibilities in NAGPRA determinations, they are also the designated Indian Health Service Area managers for the region including Taunton; the managers for the federal LIHEAP (Low Income Home Energy Assistance Program); and the cooperating Native agency for the Bureau of Energy Management. Through these ties, Mashpee Wampanoag people preserve the past and protect present Tribal members and members of other Wampanoag communities.

Furthermore, Taunton is less than 20 miles from a principal Wampanoag burial ground (Burr's Hill, in Warren, RI, west of Taunton), to which cultural and funerary remains have been repatriated specifically to the Mashpee Tribe "for reasons of geographical proximity and the Mashpee community's importance to the Wampanoag Nation as a cultural center." *See* Tab 6, *National Museum of the American Indian, Smithsonian Institution, Office of Repatriation, Research Report*, at 10-11.

Taunton is only 35 miles from the Tribe's modern headquarters in Mashpee, Massachusetts. *See* Tab 7, *Map – Taunton, MA to Mashpee, MA*. Indeed, over 60% of the Tribe's enrolled members live within 50 miles of Taunton. *See* Tab 8, *Taunton Area – Mashpee Tribe Population*.

The Tribe desires to complete the fee-to-trust process at the earliest possible time, partly due to recent state law enactments. Massachusetts recently passed legislation to permit the issuance of up to three commercial licenses to operate gaming under State law. One license will be available for western Massachusetts, one license for the greater Boston area, and one license for southeastern Massachusetts, which includes Taunton. The southeastern Massachusetts license has been temporarily reserved for a Massachusetts federally-recognized Indian tribe. *See* Tab 9, *M.G.L. c. 194, § 91, An Act to Establish Expanded Gaming in Massachusetts* (Excerpt).

The Tribe enacted a Tribal gaming ordinance to be approved by the National Indian Gaming Commission ("NIGC") and is currently working with the Massachusetts Governor's office to finalize a tribal-state gaming compact governing the conduct of IGRA class III gaming. The Tribe will take all other steps necessary to lawfully conduct class III gaming at the Taunton Parcels pursuant to IGRA.

Below, this Request addresses the fee-to-trust criteria at 25 C.F.R. Part 151, including Sections 151.10 (on-reservation) and 151.11 (off-reservation). Further below, this Request addresses IGRA Section 20 and the "initial reservation" exception under 25 C.F.R. Part 292.

II. 25 C.F.R. PART 151 CRITERIA

This Section addresses the identity of the Tribe as the requesting party, a description of the land to be acquired in trust, the Department's land acquisition policy, and the on- and off-reservation acquisition criteria.

A. Identity of the Party (25 C.F.R. § 151.9)

The applicant is the Mashpee Wampanoag Tribe, which is listed as an Indian tribe recognized and eligible to receive services from the Department. *See* Tab 1. Although formally acknowledged by the United States as an Indian tribe in 2007, the Tribe has existed since time immemorial and has occupied what is now southeastern Massachusetts.

The Tribe's history is summarized here and discussed in detail in the attached *Expert Report*. In brief, the Mashpee Wampanoag Tribe has historically been an integral and component part of the Wampanoag Nation—one nation under the leadership of the Supreme Sachem, Osamequin. The Supreme Sachem was headquartered at the western edge of the Nation's aboriginal territory on a peninsula in Narragansett Bay, located at present-day Bristol, Rhode Island. As noted above and as further discussed and documented in the *Expert Report*, the Tribe has significant historical ties to what is now the City of Taunton.

The Tribe requested federal acknowledgment on July 7, 1975. After 21 years, the Department placed the Tribe on the "ready for active consideration" list as of February 14, 1996. Five years later, on January 19, 2001, the Tribe moved to compel the Department to complete its consideration within one year. Over four years later, on July 22, 2005, the Department agreed that it would place the Tribe's petition on active consideration by October 1, 2005, and issue a proposed finding by March 31, 2006. The Department's proposed finding concluded the Tribe had met all seven mandatory criteria under 25 C.F.R. § 83.7 and proposed to acknowledge the Tribe. The Department issued the Final Determination on February 15, 2007, concluding the Tribe had satisfied all federal acknowledgement criteria, and published notice of the Tribe's federal acknowledgment in the Federal Register on February 22, 2007, effective May 23, 2007. One of those mandatory criteria required the Tribe to establish continuous community and political authority as a tribal entity from the first European contact through the present time—which the Tribe satisfied.

B. Description of the Land to be Acquired in Trust (25 C.F.R. § 151.9)

Mashpee Parcels. The following table describes the Mashpee, Massachusetts lands to be acquired in trust:

TABLE 1
DESCRIPTION OF MASHPEE PARCELS

	Owner	Location	Current Use	Proposed Use	Acreage
1	MWT[2]	Meetinghouse Road	Old Indian Meetinghouse/Old Indian Church	Same	.15

[2] MWT means the Mashpee Wampanoag Tribe.

2	MWITC[3]	17 Mizzenmast	Burial Ground/Cemetery	Same	0.361
3	MWT	414 Meetinghouse Road	Cemetery	Same	11.5
4	MWT	431 Main Street	Parsonage	Tribe Museum	2.0
5	MWT	414 Main Street	Tribe Museum	Tribe Museum	0.58
6	MWITC	483 Great Neck Road South	Tribal Council Offices	New Tribal Government Center (educational, cultural, health)	58.7
7	MWITC	41 Hollow Road	Vacant	Tribal housing	10.81
8	MOIMHA[4]	Meetinghouse Road	Vacant	Tribal housing	46.82
9	MWITC	Es Res Great Neck Road	Cultural/Recreational	Same	8.9
10	MWITC	56 Uncle Percy's Road	Vacant	Tribal Housing	.15
11	Maushop, LLC (MWT)[5]	213 Sampsons Mill Road	Agriculture/Tribal Offices	Same	30.138
Total Acreage					**170.1 acres +/-**

The Mashpee Parcels are located within the exterior boundaries of the Town of Mashpee, and are shown on a number of maps attached to this Restated Application. *See* Tab 10, *Mashpee Parcel Maps*.

Taunton Parcels. The following table describes the Taunton, Massachusetts lands to be acquired in trust:

TABLE 2
DESCRIPTION OF TAUNTON PARCELS

	Owner	Location/Acreage	Current Use	Proposed Use	Acreage
1	One Stevens, LLC	50 O'Connell Way	Industrial/Office/ Warehouse with multiple tenants	Casino/Resort-Hotel Facility	9.15
2	Two Stevens, LLC	60 O'Connell Way	Office/Warehouse/ Light Manufacturing with multiple tenants	Casino/Resort-Hotel Facility	26.25
3	L&U, LLC	Lot 11 O'Connell Way	Vacant	Casino/Resort-Hotel Facility	14.02
4	OCTS Realty Trust	O'Connell Way	Vacant	Casino/Resort-Hotel Facility	7.89
5	OCTS Realty Trust	Stevens Street	Vacant	Casino/Resort-Hotel Facility	0.078
6	Jamins, LLC	73 Stevens Street	Office with multiple tenants	Casino/Resort-Hotel Facility	1.50
7	71 Stevens	71 Stevens Street	Warehouse	Casino/Resort-Hotel	6.88

[3] MWITC means the Mashpee Wampanoag Indian Tribal Council, Inc. (a not-for-profit corporation organized by the Tribe under the laws of Massachusetts).
[4] MOIMHA means the Mashpee Old Indian Meeting House, Authority, Inc. (a not-for-profit corporation organized by the Tribe under the laws of Massachusetts).
[5] Maushop, LLC (a Massachusetts company created to invest in, own, or develop real estate and interests therein).

	Street, LLC		with multiple tenants	Facility	
8	Daniel G. DaRosa & Laurie B. DeRosa	O'Connell Way	Vacant	Casino/Resort-Hotel Facility	1.96
9	Daniel G. DaRosa & Laurie B. DeRosa	61R Stevens Street	Office	Casino/Resort-Hotel Facility	2.13
10	Taunton Development Corporation	O'Connell Way (Lot 9A)	Vacant	Casino/Resort-Hotel Facility	2.73
11	Taunton Development Corporation	O'Connell Way (Lot 9B)	Vacant	Casino/Resort-Hotel Facility	5.47
12	Taunton Development Corporation	O'Connell Way (Lot 13)	Vacant	Casino/Resort-Hotel Facility	22.00
13	Taunton Development Corporation	Middleborough Avenue (Lot 14)	Vacant	Casino/Resort-Hotel Facility	46.34
Total Acreage					**146.39 acres +/-**

The Taunton Parcels are located within the exterior boundaries of the City of Taunton, Massachusetts. *See* Tab 11, *Taunton Parcel Maps*. Taunton is located in southeastern Massachusetts, firmly within the Tribe's aboriginal territory. *See* Tab 5, *Expert Report*.

The Taunton Parcels comprise approximately 146 acres of both developed and vacant land, directly adjacent to state highway Route 24, roughly three to five miles north of downtown Taunton (*see* Tab 12, *Taunton Distance Maps*).

C. Land Acquisition Policy (25 C.F.R. § 151.3)

This Section addresses the Department's land acquisition policy requirements shown at 25 C.F.R. § 151.3.

1. The acquisitions are authorized by an act of Congress (25 C.F.R. § 151.3)

Congress granted the Secretary the authority to acquire land in trust for Indian tribes in Section 5 of the IRA (25 U.S.C. § 465). Congress enacted the IRA for the primary purpose of rebuilding the Indian land base and tribal communities after the devastating effects of failed federal policies, such as allotment and assimilation.[6] *See* 25 U.S.C. §§ 461, 465, 467. In the later enacted IGRA, when Congress established the Section 20 equal-footing exceptions (those at Section 20(b)(1)(B)(i)-(iii)), it clearly provided a remedy for previously landless tribes—whose newly acquired trust land needed special treatment to be eligible for gaming under the IGRA. This provision reflects Congress's understanding that the Interior Department would acquire land in trust for such tribes—and further implies that tribes recognized under the federal

[6] Without Section 465, newly recognized Indian tribes, including the Tribe, for whom Congress has not separately reserved or acknowledged a federally-protected land base, would remain potentially permanently landless (for gaming and non-gaming lands) and cut off from the many obvious benefits of having a land base and from the equal footing Congress intended for such tribes in the IGRA Section 20 exceptions.

acknowledgment process would be eligible for such trust acquisitions—presumably under the IRA.[7] This is especially true for the initial reservation exception (applicable here), which is available exclusively to Indian tribes who were recognized under the federal acknowledgement process, as was the Mashpee Tribe. That process, among many other onerous requirements, requires Indian groups seeking recognition to prove their continuous existence as a community and distinct self-governing entity from historical times to the present. 25 C.F.R. § 83.7(b), (c). The Tribe satisfied this requirement. *See 72 Fed. Reg. 8007 (February 22, 2007).* And, as to Mashpee, whose lands were allotted by the Commonwealth of Massachusetts before the process became widespread through the General Allotment Act, the rebuilding of lost land base is particularly necessary and appropriate.

The U.S. Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) (regarding the Narragansett Tribe's land into trust request), does not impair the Secretary's authority to acquire land in trust for the Mashpee Tribe. While this discussion summarizes the Tribe's position with respect to *Carcieri*, the Tribe submits as an exhibit hereto a comprehensive report documenting its position that despite the *Carcieri* decision, the Secretary retains the power to acquire lands in trust for the Tribe. *See* Tab 13, *Carcieri Report*.

As the Department is aware, the *Carcieri* decision only affects the Secretary's authority under the IRA to acquire lands into trust for tribes who were not, given their unique history, under federal jurisdiction in 1934 when the IRA was enacted, *id.* at 391, or who did not have a relationship with the United States that could be described as jurisdictional. *Id.* at 399 (Breyer, J., concurring). The Tribe unmistakably had a jurisdictional relationship with the United States even prior to its formal acknowledgment in 2007.

Carcieri does not equate federal jurisdiction with federal acknowledgment. According to Justice Breyer, "[t]hat is because a tribe may have been under Federal jurisdiction in 1934 even though the Federal Government did not believe so at the time . . . [and] later recognition reflects earlier Federal jurisdiction . . . ." *Id.* at 397, 399 (emphasis added). This is because the United States, on occasion, mistakenly considered certain tribes dissolved or terminated when the opposite is true. *Id.* at 397-98. The Department's actions in the recent past (e.g., Cowlitz, Tunica Biloxi) acknowledge and implement this aspect of the Breyer concurrence, and provide additional support for acting favorably on the Tribe's application.

In addition, recognition through the Part 83 administrative process (under which the Tribe was recognized) does not constitute the creation of a new Indian tribe but rather the federal government's present-day acknowledgment that the tribe has always existed as an Indian tribe.[8] Further, all Indian tribes are under the exclusive jurisdiction of the federal government, which commenced upon the government's establishment. *See, e.g.*, U.S. Const. art. I, 8, cl. 3 (exclusive congressional power to regulate commerce with Indian tribes); *United States v. Kagama*, 188 U.S. 375, 384-385 (1886) (Indian tribes are wards of the United States); *Worcester v. Georgia*, 31 U.S. 515, 561-562 (1832) (relationship between United States and tribes is committed exclusively to the government of the Union.). This is particularly applicable to the Tribe, which

[7] *See also* Cohen's Handbook of Federal Indian Law (2005 ed.) ("Cohen"), at 84-87. As *Cohen* explains: "The IRA was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains." *Cohen* at 86.

[8] Unlike Congressional restoration of a tribe, Part 83 requires among other things identification as an Indian tribe on a substantially continuous basis since 1900 (thirty-four years before the IRA). *See* 25 C.F.R. § 83.7(a).

was within the territory of the newly established federal government at the time the Indian Commerce Clause established that federal authority. Therefore, as the United States acknowledges that the Tribe has always existed as an Indian tribe, and the Tribe's existence in the United States is concurrent with the existence of the original states under the Constitution, the Tribe has always been under federal jurisdiction.

As the Department is well aware, Congress is actively considering statutory relief from the uncertainty created by the *Carcieri* decision. For example, *see* Senate Bill 676 (Amending the Act of June 18, 1934 [the IRA], to Reaffirm the Authority of the Secretary of the Interior to Take Land Into Trust for Indian Tribes), reported favorably May 17, 2012 and recommended to pass. S. Rep. No. 112-166, at 1 (2012). If the bill passes both houses of Congress and is signed by the President, the Secretary's IRA Section 5 authority will be clear and there will be no need to address the impacts, if any, of *Carcieri*.

In addition, even after *Carcieri* the Department has continued to approve the acquisition in trust of lands for recently acknowledged Indian tribes. For example, *see* the following recent decisions of the Department: *Letter from Acting Director, BIA Eastern Regional Office to Chairman Earl Barbry, Sr. of the Tunica-Biloxi Tribe* (August 2011) (taking 703.26 acres of land in Louisiana into trust for the tribe); *Record of Decision: Trust Acquisition of, and Reservation Proclamation for the 151.87 Cowlitz Parcel in Clark County, Washington for the Cowlitz Indian Tribe* (December 2010). While these recent decisions were based on the unique facts and circumstances at issue, they evidence the Department's determination to continue to approve requests for land in trust for Indian tribes recognized well after 1934. The Tribe attaches hereto a *Carcieri* analysis which provides detailed and documented evidence of the jurisdictional relationship between the Tribe and the United States prior to 1934, and the legal basis underlying the Department's ability to acquire the land in trust on the Tribe's behalf. When applied to the law, and following the recent precedent of the Department, the Mashpee history provides a compelling basis for the Department to act promptly to take land in trust for the Tribe, and to begin the remedial process mandated by Congress in the IRA Section 5 (and IGRA Section 20).

2. The Tribe's ownership interest in the lands (25 C.F.R. § 151.3(a)(2))

Mashpee Parcels. The Tribe or Tribal entities own in fee each of the Mashpee Parcels. *See* above at Section II.B.

Taunton Parcels. The Tribe or an affiliate has entered into final option agreements with various owners for each of the Taunton Parcels listed in Table 2 above, at Section II.B. *See* Tab 14, *Taunton Option Agreements*. The Tribe plans to exercise these options prior to the Department's acceptance of the parcels in trust.

As the Tribe already owns an interest in the land (*see* 25 C.F.R. § 151.3(a)(2)) (either by record ownership of the Mashpee Parcels or by exercisable options for the Taunton Parcels), the Secretary may acquire the Parcels in trust. In addition, the Tribe satisfies the requirements of Section 151.3(a)(3).

3. The acquisitions are necessary to facilitate tribal self-determination and economic development (25 C.F.R. § 151.3(a)(3))

Mashpee Parcels. As stated above, the Tribe remains landless. The Tribe's headquarters at 483 Great Neck Road, South, in Mashpee consist of two outdated trailers that house the Tribe's government services and programs. The trailers are insufficient in size to host the Tribe's monthly general membership meetings, which are hosted by the Tribal Council and open to all 2,633 enrolled Tribal members. Currently, those meetings must be held at Mashpee High School.

Further, the Tribe does not have a facility large enough for a health care center, government center, or library. Recently, through the American Reinvestment and Recovery Act, the Tribe received a $12.7 million loan that it will use to build a new Tribal government center, library, and health care building. The 46,000 square-foot structure will be built at 483 Great Neck Road, South.

Taunton Parcels. The Taunton Parcels and the Tribe's economic development plans there (the "Project") are integral to the Tribe's ability to achieve its goals of increased self-determination and expanded services and programs. Without land in trust, the Tribe's headquarters, along with all the other Tribally-owned parcels in Mashpee, will remain subject to state and local control and the Tribe will never be self-determining. Other Tribal governmental and individual member needs are discussed below.

C. On-Reservation Criteria (25 C.F.R. § 151.3)

This Section addresses the Department's on-reservation acquisition criteria as shown at 25 C.F.R. § 151.10.

1. Statutory authority (25 C.F.R. § 151.10(a))

Section 5 of the IRA (25 U.S.C. § 465) authorizes this Request. Congress enacted the IRA to rebuild the Indian land base, which was decimated by contact, colonization, and failed federal policies. Any concerns raised by *Carcieri* are addressed by the *Carcieri Report* attached hereto.

2. Need for the acquisitions (25 C.F.R. §§ 151.10(b), 151.3)

As noted above in Section C.3., the Tribe has significant Tribal member, governmental, social, cultural, and economic needs that support this Request. As provided above and here, the Tribe's need for trust land and a reservation land base applies to both the Mashpee and Taunton Parcels.

Mashpee Parcels. *See* Section C.3. above. In brief, the Tribe is federally recognized but lacks a federally protected land base, trust lands, or reservation lands. These are critical to allowing the Tribe to gain control over its activities and to achieve self-determination. The Mashpee Parcels must be acquired in trust because those house the Tribe's current headquarters and are otherwise historically and culturally important sites. Acquiring these parcels in trust will

enable the Tribe to assert governmental authority over them and be free from state and local control, zoning, taxation, and potential foreclosure or loss.

Taunton Parcels. The Tribe has significant and longstanding governmental and individual member needs, which the Taunton Project's revenues will be used to address.

Tribal government needs. The Tribal government has a substantial budget shortfall. In 2012, the Tribal government plans to administer nearly 60 programs and has a proposed budget (addressing programs, services, operations, and economic development) totaling approximately $30.8 million ($36.1 million by 2020).[9] However, the Tribe expects to receive only approximately $4.6 million in federal grants to fund these costs. With respect to federal grant funding, the Tribe is "significantly underfunded" as compared to other federal-recognized New England tribes. *See* Tab 15, *Our Tribe is Significantly Underfunded through the BIA Tribal Allocation (TPA) Base Funding (6/21/11)*. Due to this approximate $26.0 million shortfall, the current budget requires the Tribe to borrow over $25.5 million annually (from private and government sources) in order to address its substantial needs. *See* Tab 16, *Mashpee Tribe Plans Spending $30 Million In 2012, Capenews.net (February 17, 2012).*

Developable land needs. The Mashpee Parcels are dedicated to other purposes and are not available for economic development. Similarly, there are no readily available large tracts of land in the Town of Mashpee usable for major economic development. Even so, lands within the Town are generally unsuitable for significant development, mostly due to the prevalence of wetlands in and around Mashpee. Finally, area road and traffic limitations practically limit any substantial development in Mashpee. The Tribe must have trust lands from which to pursue economic development.

Unemployment. Mashpee Tribal members have an unemployment rate of nearly 50%[10](as compared to 8.1% nationally[11]) and there are few job opportunities within the Town of Mashpee (where roughly 40% of Tribal members reside). The median household income of reporting Tribal members was $29,601.11 as of August 31, 2012. *See* Tab 17, *2011-RES-048, Mashpee Wampanoag Tribal FY 2011 Household Median Income Rate*. This is compared with a median household income of $64,509 in Massachusetts and $51,914 nationally.[12] The Taunton Project will create many employment opportunities for Tribal members and will generate revenues to support Tribal programs that serve Tribal members.

Health issues. Many Tribal members have ongoing health issues. A 2002 health survey conducted by the Tribe together with the Massachusetts Department of Health found that the percentage of Wampanoag in poor health was two times higher than the general Massachusetts adult population. 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

[9] The 2020 figure solely accounts for inflation and does not take into account additional Tribal services and programs that may be offered in 2020, nor does it account for a larger Tribal member population in 2020.
[10] *See* http://mashpeewampanoagtribe.com/department-32.html.
[11] Unemployment rate according to the *Bureau of Labor Statistics* as of April 2012, retrieved at: http://www.bls.gov/home.htm.
[12] Median household income provided by the *U.S. Census Bureau*, retrieved at: http://quickfacts.census.gov/qfd/states/25000.html.

obese and to have diabetes and high blood pressure, as compared to the general Massachusetts adult population. *See* Tab 18, *The Health Status of American Indians/Native Americans in Massachusetts, 2006*. Project revenues will be used to address these health concerns.

Tribal housing. Tribal members have substantial unmet housing needs. In recent years, the real estate market on Cape Cod, and Mashpee in particular, has increased dramatically, creating a scarcity of affordable housing. Indeed, in Mashpee, new construction has been dominated by second-home and upscale housing that Tribal members cannot afford. Although a number of Tribal members reside on ancestral home lots along historic Main Street, recent zoning laws preclude them from further subdividing these lots for family-member housing. 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 (where the Tribal headquarters are located). The Tribe's 2011 Indian Housing Plan (IHP) shows the following needs for the 661 families identified as making up the Tribal population: 524 (79%) are identified as low income; 431 (65%) include an elderly family member; 37 (almost 6%) live in substandard housing with inadequate plumbing or cooking facilities; and there is an identified unmet rental housing need for no less than 100 families (15% of the population). *See* Tab 19, *Mashpee Wampanoag Tribe Indian Housing Plan (2011)*.

Project revenues will allow the Tribe to meet member housing needs within Mashpee. Project revenues will also support and extend other Tribal programs that target the Tribal community, such as the Wampanoag Housing Program and the Low Income Home Energy Assistance Program (LIHEAP). Gaming revenues will also enable construction of needed facilities for seniors, such as extended care and assisted living facilities.

Preservation and restoration. Project revenues 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, GED tutoring and education scholarship services offered by the Tribe will also benefit from increased funding and allow for the preservation of Tribal cultural traditions. *See* Tab 20, *Nashauonk Mittark Newsletters* (which provides a more in-depth illustration of the services and programs offered by the Tribe to its Tribal members).

3. Purpose for which the land will be used (25 C.F.R. §§ 151.10(c), 151.3(a)(3))

Mashpee Parcels. As shown in Table 1 above, the Tribe's use of seven of the eleven Mashpee Parcels will remain unchanged. The use of the parcel at 483 Great Neck Road South (the Tribe's current government center) will also remain the same, although the site will be redeveloped to house a new government center to meet the modern-day needs of the Tribe and its members. The three vacant parcels (41 Hollow Road; Meetinghouse Road; and 56 Uncle Percy's Road) will be used to address Tribal housing needs.

Taunton Parcels. The Tribe's proposed use of the Taunton Parcels is to develop and operate a casino facility to be called Project First Light. *See* Table 2 above. As explained in further detail below, the Tribe or its affiliate, SE Mass II LLC, has acquired purchase rights to the Taunton Parcels. These parcels, located at the intersection of Routes 24 and 140, have already been designated by the Taunton Development Corporation (a local government body) as economic development land; and the Liberty and Union Industrial Park (where all of the Taunton Parcels are located) has been designed as a local economic development base. *See* Tab 11, *Taunton Parcel Maps*. The Taunton Parcels' acquisition in trust will provide the Tribe with a protected land base from which it will pursue its economic development needs and build an economy that is not dependent on federal or state grants or loans that the Tribe will need to repay.

As envisioned, Project First Light will include a casino with the full range of class III gaming, three hotels, several restaurants, entertainment venues, meeting and convention facilities and (in future phases) other amenities including a golf course and a water park. Project First Light is described in more detail in the Mashpee Wampanoag Casino Business Plan ("Business Plan"). *See* Tab 22, *Mashpee Wampanoag Casino Business Plan*.

4. Impact from removal of the lands from tax rolls (25 C.F.R. § 151.10(e))

Mashpee Parcels. Due to the current status and history of the Mashpee Parcels, their removal from the local tax rolls will not result in significant financial loss to the Town. In general, the Town Board of Assessors ("Board of Assessors") had historically, prior to 2007, treated the Mashpee Parcels (at least those owned at that time) as non-taxable. From fiscal years ("FY") 2007 to 2010, the Board of Assessors considered all of the Mashpee Parcels exempt from taxation, with the exception of 213 Sampsons Mill Road.

In FY 2011 and 2012, the Tribe and its two non-profit corporations received tax bills on most of the Mashpee properties. They filed for abatement of some of the tax bills in FY 2011. When denied, they appealed to the State Appellate Tax Board ("ATB"). For some of the FY 2012 tax bills, they appealed directly to the ATB.

On May 30, 2012, the Tribe, MWITC, MOIMHA and the Board of Assessors reached a tentative agreement (which may become finale the first week of June 2012), regarding the tax exempt status of all the Mashpee Parcels subject to the appeals. Based on FY 2012, the total tax loss to the Town is approximately $17,117.00 so long as the agreement as drafted is entered into. If the agreement is not entered into, the Tribe will provide an update to this subsection.

Taunton Parcels. Project First Light Project will result in significant financial benefits to Taunton and the surrounding communities, and the impact of removing the Taunton parcels from the tax rolls has been fully mitigated. On May 31, 2012, the City approved an Intergovernmental Agreement ("IGA") to mitigate expected impacts of the Project on the City. *See* Tab 22, *Intergovernmental Agreement By and Between the Mashpee Wampanoag Tribe and the City of Taunton*. The Tribe and City have each approved the IGA, which provides for, among other things, annual payments in lieu of property taxes, or PILOT payments. In general, PILOT payments will be based on the assessed valuation of the Taunton Parcels plus a three percent (3%) annual increase on the previous year's payment.

5. Jurisdictional problems and land use conflicts (25 C.F.R. § 151.10(f))

Mashpee Parcels. No jurisdictional problems or land use conflicts are anticipated with respect to the Tribe's use of the Mashpee Parcels. As discussed above, the use of those parcels will generally remain unchanged, except for the replacement of the Tribal government center and the development of Tribal housing. *See* Table 1.

Taunton Parcels. No jurisdictional problems or land use conflicts are anticipated with respect to the Tribe's use of the Taunton Parcels. As noted above, the Tribe and City of Taunton have approved an IGA by which the City expresses its support for the Project and the Tribe provides the City with substantial mitigation. *See* the IGA, Tab 23.

6. Additional BIA responsibilities (25 C.F.R. § 151.10(g))

The BIA, Eastern Regional Office, has jurisdiction over the Tribe and the Massachusetts region. It heads BIA agency offices located in Cherokee, North Carolina, Hollywood, Florida, and Philadelphia, Mississippi.[13] It also has immediate jurisdiction over twenty-seven Indian tribes, and its service area includes 460,980 acres held in trust, and 102,677 acres of restricted lands.[14] The Mashpee and Taunton Parcels will add roughly 316 acres of trust lands to the Eastern Region's 563,657-acre service area, far less than one-tenth of one percent of the lands under the Eastern Region's care.

In addition, the Taunton Parcels will be utilized for Project First Light, a gaming facility under the Tribe's primary jurisdiction, with additional oversight by the NIGC. Further, the Tribe will satisfy the Taunton Parcels' municipal, emergency, and law enforcement needs through the IGA. Finally, neither the Mashpee nor the Taunton Parcels will be subject to land leases by the Tribe or other matters necessitating the BIA's ongoing involvement. The 316-acre addition is not anticipated to add substantially or even minimally to the Eastern Region's responsibilities.

7. NEPA compliance (25 C.F.R. § 151.10(h))

The Tribe has engaged a qualified environmental consultant to assist the BIA in preparation of an Environmental Impact Statement in compliance with the National Environmental Policy Act ("NEPA"). The Tribe will cooperate fully with the BIA to ensure complete satisfaction of applicable NEPA requirements.

8. Title standards (25 C.F.R. § 151.13)

The Tribe has ordered title commitments from a national title company for both the Mashpee and Taunton Parcels. The Tribe will provide the commitments to the BIA upon completion and will cooperate fully with the BIA and Regional Solicitor's office to address any title issues that must be addressed prior to acquisition of the Parcels in trust. *See* Tab 23, *Mashpee Title Commitments*; Tab 24, *Taunton Title Commitments*.

[13] http://bia.gov/WhoWeAre/RegionalOffices/Eastern/WeAre/WeAre/index.htm.
[14] *Id.*

E. Off-Reservation Criteria (25 C.F.R. § 151.11)

This Section addresses the Department's off-reservation acquisition criteria as shown at 25 C.F.R. § 151.11. The Tribe is newly recognized and landless and has no Indian reservation. As such, while the requirements at 25 C.F.R. § 151.11 are therefore inapplicable, this Request addresses those requirements in order to clarify that the circumstances surrounding the Parcels satisfy any policy concerns about acquisitions not immediately contiguous to the Tribe's current headquarters, especially where intended for use in gaming.

1. Location of the land relative to state boundaries (25 C.F.R. § 151.11(a))

The Mashpee and Taunton Parcels are within the State of Massachusetts.

2. Distance of the land from the Tribe's reservation (25 C.F.R. § 151.11(b))

The Tribe has no federal Indian reservation. The Mashpee and Taunton Parcels are to be the Tribe's initial reservation.

3. Business Plan and "Anticipated Economic Benefits" (25 C.F.R. § 151.11(c))

The Tribe has prepared a business plan that addresses the Taunton Project's anticipated economic benefits. *See* Tab 21, *Business Plan*. In general, the Project is expected to generate $400 million in year-1 revenues.

F. Contacts and Agreements with Local Governments (Handbook at 3.1.1.6)

The Tribe has had substantial communications with the State and City of Taunton. As discussed above, recent State commercial gaming legislation expressly permits the Governor to enter into a tribal-state gaming compact with a federally-recognized Indian tribe. The Tribe and Governor's Office are currently negotiating a compact.

The Intergovernmental Agreement or IGA. As noted above, the City of Taunton and Tribe have approved an IGA. *See* Tab 22. The IGA provides for several items, including a continuing payment equal to 2.05% of the Casino's net revenues generated from slot machines and other electronic games, with a minimum guaranteed amount of $8.0 million per year. The Tribe will also make PILOT or payments-in-lieu of taxes to the City, and a pre-opening mitigation payment of $1.5 million. In exchange for the provision of municipal services to the Taunton Parcels (including police, fire, water, sewer, and other services), the Tribe has also agreed to pay one-time impact costs and annual costs as summarized in Table 3 below. Further, the Tribe has agreed to pay annual costs related to increased local school contribution. The Tribe has agreed to work cooperatively to evaluate and determine the appropriate staffing levels, training, amounts and type of equipment and necessary facilities to provide additional services. The Tribe has agreed to pay all costs related to these additional services as defined within the IGA. The costs in Table 3 are estimates.

TABLE 3 SUMMARY OF MITIGATION COSTS – CITY OF TAUNTON[15]			
Category	**One-Time Phase 1 Cost (estimate)**	**One-Time Phase 2 Cost (estimate)**	**Annual Costs (estimate)**
Fire	$2,140,000.00	$720,000.00	$1,500,000.00
Police	$2,982,000.00	$0.00	$2,500,000.00
Administrative	$132,000	$0.00	$400,000.00
Schools	$0.00	$0.00	$370,000.00
Sewer	$7,500,000.00	$0.00	$20,000.00
Water	$2,000,000.00	$0.00	$20,000.00
Total	**$14,754,000.00**	**$720,000.00**	**$4,790,000.00**

The Tribe has further agreed to make a contribution of $60,000.00 upon the opening of the casino and $30,000 annually thereafter to a local center for the treatment of compulsive gambling. It has also agreed to make payments to certain qualifying charities that operate charitable bingo games in the City. Under the IGA, the Tribe has agreed to be responsible for all costs of improvements to transportation infrastructure, including road construction, bridges, road maintenance and traffic signals necessitated by Project First Light. These improvements will benefit the Tribe's Project and City residents.

The Taunton Referendum. On June 9, 2012, a citywide ballot will be presented to Taunton voters:

> "Shall the City of Taunton, pursuant to Section 91 of Chapter 194 of the Acts of 2011, approve the operation of a tribal gaming establishment proposed by the Mashpee Wampanoag Tribe to be located east of Route 24 in the immediate vicinity of the intersection of Route 24 and Route 140?"

See Tab 25, *Language Finalized In Mashpee Wampanoag Casino Referendum Article*. The Tribe will submit a copy of the results of the above quoted referendum.

In summary, the Tribe satisfies all of the applicable acquisition criteria set out in 25 C.F.R. Part 151.

III. IGRA SECTION 20 – THE "INITIAL RESERVATION" EXCEPTION

The Tribe is landless and upon the Mashpee and Taunton Parcels' acquisition by the United States into trust for the Tribe, as affirmed by the requested reservation proclamation, the Mashpee and Taunton Parcels will constitute the Tribe's "initial reservation" within the meaning of federal law. The Tribe requests that, out of all lands requested to be placed into trust for the Tribe under this Request, the Taunton Parcels shall be the first sites placed into trust (with the Mashpee Parcels to be placed into trust as immediately thereafter as possible). As such, the Taunton Parcels will unambiguously constitute the "initial reservation" of the Tribe within the meaning of IGRA and the Department's implementing regulations.

[15] Table 3 is also provided in the IGA as Exhibit D.

A. General Legal Requirements

Although IGRA Section 20 limits the conduct of gaming on lands acquired in trust after October 17, 1988, it specifically exempts from that limitation the initial reservation of a tribe newly recognized under the federal acknowledgment process. 25 U.S.C. § 2719(b)(1)(B)(ii). The Tribe was federally acknowledged through the administrative process at 25 C.F.R. Part 83 (effective May 23, 2007). Thus, upon the Parcels' acceptance into trust, the Parcels will constitute the Tribe's initial reservation under IGRA Section 20.

1. Congressional intent and meaning of IGRA Section 20.

IGRA Section 20 prohibits gaming on after-acquired lands except, among other reasons, where the land is taken into trust as part of (i) a settlement of a land claim, (ii) the initial reservation of a newly recognized Indian tribe acknowledged under the federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to federal recognition. 25 U.S.C. § 2719(b)(1)(B)(i)-(iii). These exceptions are commonly known as the "equal footing" exceptions. Congress did not define the terms and phrases used in the equal footing exceptions.

IGRA Section 20's legislative history is minimal. However, other IGRA provisions provide guidance as to how these exceptions should be treated. First and foremost, congressional intent with respect to the equal footing exceptions must be interpreted in a manner consistent with the stated purposes of IGRA to promote tribal economic development, self-sufficiency, and strong tribal governments. 25 U.S.C. § 2702.

Consistent with these express purposes, the equal footing exceptions show an intent by Congress to treat certain lands acquired by Indian tribes after the adoption of IGRA the same as lands held by Indian tribes prior to IGRA's adoption. The Office of the Solicitor has taken this approach to the "restored lands" exception, stating that:

> No legislative history explains the 'restored' lands provision of Section 20. The other exemptions to Section 20, however, indicate a congressional intent to 'grandfather' certain lands acquired after IGRA by treating them similarly to lands held by tribes already recognized at the time IGRA was adopted. For example, the provision excepting land acquired through settlement of a land claim treats the land as though it were held in trust for Indians in 1988. Similarly, the provision excepting tribes recognized through the federal acknowledgment process from the bar on gaming treats the initial reservation as though it existed in 1988. In these cases, tribes are provided the opportunity to engage in some gaming free from section 20's limitations, including its requirement of concurrence by the Governor of the affected State. The same is true with respect to tribes restored to recognized status that also have lands returned to their possession.

Pokagon Band of Potawatomi Indians, NIGC Opinion, at 3 (Sept. 19, 1997) (internal citations omitted).[16]

Additionally, the United States Court of Appeals for the D.C. Circuit has drawn similar

[16] http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

conclusions with respect to Congress's intent in the equal-footing exceptions. *See City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). In *City of Roseville*, the court reasoned that " 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." *Id; see also* 25 U.S.C. § 476(f) (prohibiting harmful distinctions between recognized tribes). Discussing the "initial reservation" and "restored lands" exceptions, the court recognized the similar purpose of these two exceptions, stating that "the 'restoration of lands' is to a restored tribe what the 'initial reservation' is to an acknowledged tribe: *the lands the Secretary takes into trust to re-establish the tribe's economic vitality*." *City of Roseville*, 348 F.3d at 1031 (emphasis added).

Finally, the legislative history of H.R. 1920, 99th Cong. (1986), a precursor bill to IGRA that was never enacted into law but that no doubt influenced the provisions of IGRA, is instructive. The Senate Indian Affairs Committee considered provisions in H.R. 1920 similar to the IGRA Section 20 exceptions. The Committee's Report does not discuss the "initial reservation" exception in particular, except to simply state that the gaming prohibition on after-acquired lands contained in H.R. 1920 would "not apply to lands taken into trust as part of a settlement of a land claim or as part of the federal acknowledgement process." S. Rept. No. 99-493, at 11 (1986). However, in discussing exceptions similar to the IGRA Section 20(a)(2) exceptions (those for tribes without a reservation on October 17, 1988), the Report indicates an intent by Congress that gaming by Indian tribes should not be expanded onto "lands which are located outside the state or states in which the tribe has a current and historical presence." *Id*. at 10.

Put simply, Congress foresaw that some un-recognized Indian tribes would gain federal recognition after IGRA's enactment, and that such tribes should have the same economic development opportunities under IGRA as other federally-recognized tribes.

2. Definition of "reservation."

IGRA does not define "reservation" and the term has historically defied rigid definition, although recently enacted federal regulations add some clarity. The leading federal-Indian law treatise identifies at least three definitional concepts of the term "reservation." *See Cohen* at 189. As an extension of public land law, *Cohen* explains that Indian reservation "originally meant any land reserved from an Indian cession to the federal government regardless of the form of tenure." *Id*. During the 1850s the treaty-based meaning of Indian reservation emerged, referring to "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin." *Id*. The two concepts eventually merged to form a single definition describing "federally protected Indian tribal lands without depending on any particular source." *Id*. This merged definition, *Cohen* explains, "has since been generally used and accepted." *Id*. Consistent with the public land concept, the Supreme Court has said that a reservation can be "any body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine*, 215 U.S. 278, 285 (1909).

The Department has defined Indian reservation in a variety of ways. In 1945, an Interior Solicitor's Opinion explained that "the courts have not laid down a general definition of the term." *Opinions of the Solicitor of the Department of the Interior relating to Indian Affairs*, Vol. II (Hein & Co. 2003), at 1378 (Judicial and Departmental Construction of the Words "Indian

Reservation," Dec. 29, 1945). Quoting the Supreme Court, the Solicitor's Office described reservation as a "distinct tract reserved for [Indian] occupation." *Id.* As the opinion discusses, the Court explained further 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." *Id.* The Department has also defined "reservation" to mean "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f) (1980). More recently, the Interior Department has defined "reservation" as "any area established by treaty, Congressional Act, Executive Order, or otherwise for the use or occupancy of Indians." 25 C.F.R. § 81.1(q) (1981).

Upon the United States' acquisition of the Parcels in trust, they will count as the Tribe's reservation. Under the above definitions, the United States' acquisition of the Parcels expressly in trust for the Tribe will necessarily mean the land has been "set aside under federal protection" for the Tribe's use. Further, the Parcels will be a "distinct tract" reserved for the Tribe, "appropriated to certain purposes" (*i.e.*, for tribal use), and the United States will recognize the Tribe's jurisdiction over the Parcels (*i.e.*, Indian tribes possess jurisdiction over "Indian country," 18 U.S.C. § 1151, and trust lands are "Indian country," *see Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991)).

In its most recent definition, the Department has defined "reservation" expansively to include, among other things, "land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent." 25 C.F.R. Part 292 (2008) (implementing IGRA Section 20). Again, under these definitions, the Parcels will count as the Tribe's reservation once the United States acquires them in trust for the Tribe. Once in trust, the Parcels will have been "set aside by the United States by . . . Federal statute [IRA Section 5] for the tribe." Further, due to Part 292's added requirement of a reservation proclamation for IGRA "initial reservation" lands, once in trust and a reservation proclamation issues, the Parcels will also have been "set aside by the United States by Proclamation" for the tribe.

Under all judicial and administrative definitions of the term Indian "reservation," upon acquisition into trust, the Parcels will be the Tribe's reservation within the meaning of federal law, including IGRA Section 20.

3. "Initial reservation" of the Tribe.

Congress chose not to define the phrase "initial reservation" in IGRA Section 20. Neither do the regulations implementing Section 20 at 25 C.F.R. Part 292 define "initial" as applied to the "initial reservation" exception. Therefore, the phrase maintains its ordinary and plain meaning.[17] Further, the courts have prohibited a special meaning from being applied to the other similarly-situated IGRA Section 20 exceptions. In other words, all IGRA Section 20 exceptions are to be applied broadly. *See City of Roseville v. Norton*, 348 F.3d 1020, 1030-31 (D.C. Cir. 2003) (reasoning that all Section 20(b)(1)(B) exceptions "embody policies counseling

[17] Courts must give words in a statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Grand Traverse v. U.S. Atty. for the Western Dist. of Michigan*, 369 F.3d 960, 967 (6th Cir. 2004)(citing *Williams v. Taylor*, 529 U.S. 420, 432-32 (2000)) (analyzing IGRA).

for a broader reading" and stating that "these exceptions should be treated similarly."). Although IGRA Section 20 creates a "presumptive bar" against gaming on after-acquired lands, "that bar should be construed narrowly (and the exceptions to the bar broadly) in order to be consistent with the purposes of the IGRA, which is to encourage gaming." *Grand Traverse*, 369 F.3d at 971.

It is appropriate to look to the dictionary to determine the ordinary and plain meaning of the word "initial." Merriam Webster's Collegiate Dictionary (10th ed.) defines "initial" to mean, in pertinent part, "placed at the beginning: FIRST." In 2007, the Secretary of the Interior argued to the United States Court of Appeals for the D.C. Circuit that the plain meaning of "initial reservation" is simply "the first land taken into trust for a tribe under federal law and proclaimed a 'reservation' under 25 U.S.C. § 467." *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007). The *Citizens* court found this definition permissible. *Id*. at 470. Therefore, as the Parcels will be the first land placed in trust for the Tribe, the Parcels will constitute the Tribe's first Indian reservation following the Tribe's 2007 federal acknowledgment.

B. Regulatory Requirements for Initial Reservation (25 C.F.R. § 292)

Here, we address each of the requirements added to IGRA Section 20 by way of the Department's regulations at 25 C.F.R. Part 292 with respect to the initial reservation exception. The Tribe satisfies each requirement or will satisfy each requirement once all processes are complete.

1. Section 292.6(a) – The Tribe was acknowledged under Part 83.

The Tribe was acknowledged as a federally-recognized Indian tribe by successfully completing the Federal acknowledgment process, which was effective on May 23, 2007. *See 72 Fed. Reg. 8007* (February 22, 2007). The Tribe satisfies this requirement.

2. Section 292.6(b) – No gaming facility under the restored lands exception.

The Tribe has no trust lands and neither owns nor operates any gaming facility under IGRA or any other law. The Tribe does not have a gaming facility under IGRA Section 20's restored lands exception. The Tribe satisfies this requirement.

3. Section 292.6(c) – Land proclaimed a reservation under 25 U.S.C. § 467.

The Tribe requests that the Secretary of the Interior issue to the Tribe immediately following acquisition of title to the Parcels in trust a proclamation that the Parcels constitute the Tribe's reservation within the meaning of federal law. *See* Tab 26, *Request For A Secretarial Proclamation.* Once the Secretary issues the proclamation, this requirement will have been satisfied.

4. Section 292.6(c) – First proclaimed reservation following acknowledgment.

The Parcels subject to this Request will be the first proclaimed reservation of the Tribe.

5. Section 292.6(d) – Land located in state where tribe is now located.

The Tribe and its members are now located, and from time immemorial have been located, in what is today southeastern Massachusetts and eastern Rhode Island. With respect to governmental presence, the Tribe's headquarter offices are located in Mashpee, Massachusetts, and have been located there for years. *See Expert Report*. With respect to Tribal population, the Tribe has 2,633 enrolled Tribal members, 1,706 (or 64.79%) of whom reside within Massachusetts. *See* Tab 278, *Residency Data-Massachusetts*.

6. Section 292.6(d) – Significant historical connections to the land.

Congress did not define "initial reservation" in IGRA and the Department added the "significant historical connection" requirement by regulation in 2008. *See* 25 C.F.R. § 292.6. The historical-ties test was added to address Departmental policy that (at least for gaming purposes[18]) a reservation should not be proclaimed for a tribe in an area where the tribe has no preexisting connections. As discussed in the *Expert Report*, the Tribe satisfies this policy concern. Further, the historical-ties requirement is not an independent obligation under Part 292. Rather, and critically, as the Department's Section 20 regulations and the publication of the regulations make clear, the historical-ties requirement arises only as a subset of the regulation's proclamation requirement. The relevant portion of the regulations requires, among other items, the following:

> (c) The land has been proclaimed to be a reservation under 25 U.S.C. section 467 and is the first proclaimed reservation of the tribe following acknowledgment.
>
> (d) *If a tribe does not have a proclaimed reservation on the effective date of these regulations* [June 19, 2008,] *to be proclaimed an initial reservation under this exception,* the tribe must demonstrate the land is located within . . . an area where the tribe has significant historical connections . . .

25 C.F.R. § 292.6(c), (d) (emphasis added). Thus, if a newly recognized tribe had been issued a reservation proclamation prior to June 19, 2008, it would not now need to demonstrate its historical ties to the area in which that reservation is located in order to commence gaming activities there. It is only those newly recognized tribes who did not have a proclaimed reservation by June 19, 2008, who must demonstrate historical ties to the area in which they desire a proclaimed reservation for purposes of IGRA Section 20. For those tribes without a proclaimed reservation as of June 2008, such as the Mashpee Wampanoag Tribe, the Section 20 regulations therefore impose the additional requirement of demonstrating "significant historical connections" within the meaning of the Department's Section 20 regulations. This distinction amongst federally recognized Indian tribes may violate Congress' express prohibition in its 1994 IRA amendments not to create such regulations or make such determinations.[19] For purposes of

[18] The current Central Office Proclamation Guidelines inquire at paragraph 9 into whether the subject land is within the tribe's land consolidation area or aboriginal territory, but nowhere requires a "significant historical connection" to the subject land.

[19] The regulations have created a distinction between two classes of newly recognized tribes (all of whom have already overcome significant obstacles to achieve federal recognition through the Part 83 process): those tribes with a proclaimed reservation as of June 19, 2008, and those without. As amended in 1994, the IRA (under which the proclamation authority generally is found), provides as follows:

this Request, the Tribe will proceed as if the historical-ties requirement is valid.

The Section 20 regulations define "significant historical connections," in relevant part, to mean that "a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2. This definition provides a certain context against which a tribe may prove its historical ties to a particular region, and these factors are discussed and documented in the *Expert Report*. However, it fails to define its key underlying terms—namely, "area," "significant," and "historical." In short, the Department's comments accompanying the Section 20 regulations[20] (attached hereto at Tab 28, *Federal Register Publication of 25 C.F.R. Part 292*, hereinafter the "*Commentary*") clarify that "significant historical connections" is not intended to be construed narrowly, but broadly interpreted in order to give effect to Congress' goals in IGRA of promoting tribal self-determination and economic development. Here, this Request discusses these critical underlying terms as addressed in the Department's *Commentary*.

The "Area." The Section 20 regulations do not define the "area" to which a tribe must demonstrate its historical ties. However, the *Commentary* indicates "area" is intended to be read flexibly. First, the *Commentary* provides that a tribe need not have significant ties to the actual planned gaming site because the particular parcel or parcels to which a tribe may be able to establish specific connections may not themselves be available to the Tribe. *Commentary* at 29360. The only requirement is that the tribe has connections to "the area" where the intended gaming site is located. *Id*. Second, the *Commentary* indicates that "area" may be construed to be larger than a tribe's ancestral homelands. *Id*. at 29361. In other words, a tribe may have "initial reservation" land outside its ancestral homelands or aboriginal territory. Similarly, even lands "far removed from historical territory" or those that are "[not] close to aboriginal homelands" may be considered for "initial reservation." *Id*.

"Significant." The *Commentary* similarly indicates an expansive interpretation of the term "significant" as used in Section 292.6. In fact, the word "significant" was made part of the regulation to address the concern that a tribe possess more than a "transient connection" to the lands, and because it "reinforces the notion that the connection must be *something more than any connection*" to the area. *Id*. at 29360, 29366 (emphasis added). Similarly, the term "establishes criteria which require *something more than evidence that the tribe merely passed through a particular area*" at one point in the tribe's history. *Id*. at 29366 (emphasis added). The *Commentary* also reflects that the Department included the qualifier "significant" so that the benefit to newly recognized tribes (*i.e.*, the benefit of gaming on after-acquired lands) would not become so broad so as to be "detrimental to other recognized tribes." *Id*. at 29364. In other words, while the Department does not seek to protect one tribe's gaming facility from another's, *id*. at 29371, it does desire to ensure that one tribe is not illegitimately encroaching on another federally-recognized tribe's aboriginal territory. Neither the regulations nor the *Commentary*

"Departments or agencies of the United States *shall not promulgate any regulation* or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe *that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.*" 25 U.S.C. § 476(f). Federal regulations that violate federal statutes can have no force or effect.

[20] 73 Fed. Reg. 29354-29375 (May 20, 2008).

express any concern over the claimed territory of non-federally recognized Indian groups.[21]

"Historical." Although this term is not specifically defined for purposes of "significant historical connection," the *Commentary* explains that it "is somewhat imprecise." *Id*. at 29362. In effect, the Department has indicated it will interpret this term broadly and in accordance with the specific facts of each case. Further, the *Commentary* provides that a tribe is not required to show an "uninterrupted connection" to its intended initial reservation land, and is not required to show "historically exclusive use" of the area. *Id*. at 29360. The Department explained that such requirements would create "too large a barrier to tribes in acquiring lands" for gaming, and that they are inconsistent with IGRA. *Id*.

Important policy considerations. The *Commentary* makes clear that the initial reservation exception in particular is intended to "assist newly recognized tribes in economic development." *Id*. at 29365. As a reminder, one of IGRA's main goals is to promote—not discourage—tribal economic development through Indian gaming. *See* 25 U.S.C. § 2702(1).

Finally, the *Commentary* makes clear that the goal of the "initial reservation" requirement is to ensure that the tribe has some "preexisting connection" to the area. *Id*. at 29360. The *Commentary* explains that:

> *The significant historical connection requirement insures that the tribe has a preexisting connection to the newly acquired lands proposed to be its initial reservation*. Furthermore, the Department does not believe it is good policy to create an initial reservation in an area where the tribe has no preexisting connection.

Id. (emphasis added).

Taunton is located in modern-day southeastern Massachusetts—an area indisputably within the Tribe's aboriginal territory and to which the Tribe has strong historical ties—and this policy concern is easily satisfied. *See Expert Report* and above at Section I. The Town of Mashpee is the site of the Tribe's modern headquarters and the Tribe has significant historical connections there as well.

7. Section 292.6(d) – Modern ties to the land.

1,584 of the Tribe's enrolled members—over 60% of its membership—live within 50 miles of Taunton, and the Tribe otherwise has extensive modern connections to Taunton and the surrounding area. Under current economic conditions, that distance is well within the range that many Tribal members commute to secure employment. The Tribe has the requisite modern connections necessary for purposes of section 292.6 and therefore satisfies the Department's concern regarding notice to the surrounding community.

Section 292.6(d)(1) – The Land is near Where a Significant Number of Tribal Members Reside. As noted above, as of May 1, 2012, there were 2,633 enrolled Mashpee Wampanoag

[21] *See* 25 C.F.R. § 292.2 (definition of "Surrounding Community" and "Indian tribe" includes only federally-recognized Indian tribes).

tribal members, 1,708 (or 65%) of whom resided within Massachusetts. *See* Tab 27, *Residency Data-Mass*. Further, as of April 25, 2012, over 60% of the Tribe's enrolled members resided within 50 miles of Taunton.

See Tab 8, *Taunton Area—Mashpee Tribe Population.* This data establishes that a significant number of Tribal members live in the area.

Section 292.6(d)(3)) – Other Factors that Establish the Tribe's Current Connection to the Land. The Tribe's aboriginal territory includes all of southeastern Massachusetts, from Cape Cod to the eastern shore of Narragansett Bay in present-day Rhode Island, a territory which extends beyond and encompasses Taunton. The entire area has been within the Tribe's ancestral homelands since time immemorial.

Additionally, officers of the Tribe are the designated Indian Health Service Area and LIHEAP ("Low Income Home Energy Assistance Program") managers for the Taunton area. The Tribe is currently the cooperating local Native agency for the Bureau of Energy Management. The Tribe also represents a five-county service area, the geographic location designated in comprehensive plans developed in cooperation with the Department of Health and Human Services, the United States Department of Agriculture, the Indian Health Service, and the Bureau of Indian Affairs. *See Expert Report.* The service area includes the counties of Barnstable, Bristol, Plymouth, Suffolk, and Norfolk (modern Taunton is in Bristol County).

For all these reasons, the Tribe has substantial modern connections to Taunton and the surrounding area. Similarly, the Town of Mashpee is the site of the Tribe's current headquarters and the Tribe has significant modern ties there. The United States' acquisition of the Parcels in trust for the Tribe will not result in surprise to the local communities of Taunton or Mashpee or upset local expectations concerning land use or jurisdiction.

IV. CONCLUSION

The Tribe's application meets or will meet all of the requirements of Section 5 of the IRA, 25 U.S.C. § 465, and its implementing regulations at 25 C.F.R. Part 151.