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March 20, 2013

Mr. Ken Salazar
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Mr. Kevin Washburn
Assistant Secretary - Indian Affairs
Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Re: Application of The Mashpee Wampanoags for Land into Trust

Dear Mr. Salazar:

I represent several individuals from Taunton, Massachusetts who have a direct interest in the disposition of the currently pending application of the Mashpee Wampanoag Tribe for taking certain Taunton land into trust. These potential plaintiffs have retained me to inform you that the Secretary of the Interior (SOI) does not have authority to take land in Trust on behalf of the Mashpee Wampanoag Tribe as they were not under federal jurisdiction in 1934 – a fact of which the Department of the Interior has been aware for more than 100 years. As set forth herein, it is beyond dispute that the Department of the Interior has held firm, since as early as 1899, that the Mashpee Wampanoag were not under federal jurisdiction both prior to and after 1934—a fact that deprives the Department of jurisdiction to grant the currently pending application.

BACKGROUND

In a letter dated February 7th 2013 from Kevin Washburn, Assistant Director of Indian Affairs, addressed to the Honorable Cedric Cromwell, Chairman of the Mashpee Wampanoag Tribe, Mr. Washburn stated that the Department is reviewing the Mashpee Wampanoag Tribe's Land in Trust Application to acquire land under the Indian Reorganization Act (IRA) 25 USC 465, Section 5 and proclaim such as a reservation pursuant to section 7 of the IRA, 25 USC 467 and qualify those lands as the Tribe's initial reservation pursuant to section 20 of the Indian Gaming Regulatory Act (IGRA) 25 USC 2719(b)(1)(B)(ii) for the purpose of conducting Class III gaming in the State of Massachusetts. Mr. Washburn stated that the Office of Indian Gaming has determined that these lands will qualify as such *if it meets the requirements of the IRA*.

According to the United States Supreme Court, in Carcieri v Salazar, it was held that Tribes not under federal jurisdiction as of 1934 are not eligible for land under the IRA and the Secretary does not have the authority to place land in trust for such tribes. Based on the Department of the Interior's own

actions and documentary record, only some of which is presented here, the Department already has determined, on several occasions, that the Mashpee Wampanoag Tribe was not under federal jurisdiction in 1934, thus depriving the Department of jurisdiction to act on the Tribe's application.

DISCUSSION

In a letter dated July 10, 1899 from the Indian Affairs Commissioner addressed to a Massachusetts lawyer, the status of eastern tribes in the states of the original thirteen colonies, such as the Mashpee Wampanoag, was that such tribes were under state jurisdiction, because no treaties or agreements were ever made with such tribes by the general government, nor did the federal government ever exercise any supervision or control over such tribes. (See a true and correct copy of such correspondence attached hereto as Ex. A) That letter expressly stated that such tribes:

“are residents of a section of the country which constituted the territory of the thirteen original States, as recognized by Great Britain in 1783. No treaties of agreements were ever made with them by the general government, nor has it ever exercised any supervision or control over them. Their political status is unknown, but it is presumed that they are citizens and subject to the laws of the several States in which they reside, and entitled to the rights and privileges of such citizenship.”

The Commissioner goes on to distinguish tribes, such as the Wampanoags, from the “plains” Indians, and states that “these ‘plains’ Indians have been at some time or other, in some manner or other, the subject of legislation by the Congress of the United States, and to that extent recognized by the Government...” However, the Commissioner also notes that Tribes, such as the Wampanoags “appearing to be citizens of the United States, the Secretary of the Interior is without authority....”

We also note that it is significant that the Department of the Interior assembled a list of all tribes which were under the IRA, dated October 16, 1939, file #80524. It states that it is a list which “shows Indian Tribes, grouped by states, which are under Constitutions and Charters, as approved by the Secretary of the Interior in accordance with the provisions of the Indian Reorganization Act...” Notably, the Mashpee Wampanoag *do not* appear on that list. Moreover, and consistent with the Department's prior determination on July 10, 1899, not a single tribe from the “thirteen original States” appears on that list.

In a letter dated June 6, 1977 from the Native American Rights Fund addressed to Solicitor Leo M Krulitz, Department of Interior (a true and accurate copy of which is attached hereto as Ex. B), it was requested that the United States exercise jurisdiction and initiate litigation on behalf of the Wampanoag due to alienation of their land in Mashpee and Sandwich, which the tribe felt was in direct violation of the Indian Non-Intercourse Act, 25 USC 177. Being that the Tribe was not under federal jurisdiction at that time, the Department of the Interior rejected the request, and the tribe themselves brought suit in Federal Court, also naming the United States as a party defendant.

Moreover, the Solicitor General of the Department of Interior, Leo Krulitz, actually testified at trial in Mashpee Tribe v New Seabury Corp. et al. (a true and correct copy is attached hereto as Ex. C) On the stand, Mr. Kurultz testified regarding a letter from the Department of the Interior, dated October 2, 1937, addressed to Chief Wild Horse, then leader of the Mashpee Tribe, and read it into the record. The letter asserts that the Tribe had the same rights and equal status as the citizens of the State of Massachusetts and was not under federal jurisdiction. This 1937 letter was a reiteration of a letter from

the Department dated December 31, 1936, and stated: "As I explained in my letter of December 31, 1936, the Indian office can offer no assistance to Indians not members of a tribe under Federal jurisdiction." This notice to the Mashpee Wampanoag could not have been clearer.

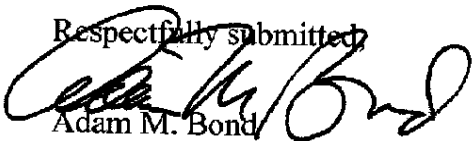
We also note that the lack of federal jurisdiction is again highlighted in the Criteria and Evidence for Final Determination of the Mashpee Wampanoag Indian Tribal Council, Inc. at p. 23 (see the 3rd paragraph), where it states: "Under regulatory criteria, the Mashpee, despite being full state citizens since 1870, were able to use mainstream forms of governmental authority to demonstrate political influence." 1870 was the year that the Town of Mashpee was incorporated in Massachusetts, and the tribal members became state citizens.

In light of the clear and unambiguous evidence presented here, from documents generated by the Department itself, it is beyond cavil that the Mashpee Wampanoag were not under federal jurisdiction as of 1934, when the IRA was enacted, and that the Mashpee Wampanoag tribe were in fact citizens of the Commonwealth of Massachusetts who enjoyed the rights and privileges of citizenship. It is equally clear that the Department of the Interior consistently took this position in writing and placed the Wampanoag tribe on notice of that fact on several occasions.

CONCLUSION

Surprisingly, it appears that the Department is reviewing the Tribe's application for Land in Trust, regardless of its consistent determinations that the Tribe was not under federal jurisdiction at the necessary times, and in the face of the Supreme Court's ruling in Carcieri. We respectfully submit that based on the consistent position taken by the department over the last more than 100 years that the Wampanoags were not under federal jurisdiction (both before and after 1934), that an immediate rejection of the Tribe's land in trust application is required at this time. Since the threshold issue of jurisdiction cannot be met by the Tribe, and since the Department has held firm to that position and documented its commitment to that position, the Office of the Secretary of the Interior does not have the authority to place land in trust for Tribes that were not under federal jurisdiction in 1934, and must accordingly, reject the application of the Mashpee Wampanoag.

Respectfully submitted,



Adam M. Bond

Cc:
Hon. Deval Patrick
Massachusetts State House
Office of the Governor, Room 280
Boston, MA 021

MOHEGAN TRIBE

vs CONN

DEFENDANT'S EXHIBIT 85

Land
29306-1899

DATE _____ IDEN. _____

DATE _____ EVID. _____

BY _____
Deputy Clerk

AO 338A

APPENDIX 1

APP 1

132

July 10, 1899.

Francis M. Morrison, Esq.,
492 Main St.,
Worcester, Mass.

Sir:-

With reference to certain contracts between the Mohegan,
Shinnecock and Narragansett tribes or bands of Indians and yourself,
the following communication, dated June 23, 1899, addressed to this
office by the Honorable Acting Secretary of the Interior, is fur-
nished for your information:-

"I am in receipt of your letter of the 10th instant, transmit-
ting a contract (in triplicate) executed on the 8th ultimo, by
persons purporting to represent the Mohegan tribe of Indians of
Connecticut, and Francis M. Morrison, attorney at law, of Worcester,
Mass., and a similar contract, executed on the 12th ultimo, by
persons purporting to represent the Shinnecock tribe of Indians
of New York, and the same party; also of your letter of the 16th
instant, transmitting a like contract, executed on the 8th instant
by parties purporting to represent the Narragansett tribe of Indians
of Rhode Island and Mr. Morrison.

All of these contracts stipulate for the employment of Mr.
Morrison to prosecute the claims of the several tribes and of the
individual members thereof to distributive shares of the amount
awarded by the Court of Claims in the suit of the New York Indians
vs. The United States, for compensation for lands in Kansas set
apart for the New York Indians by the Treaty of Buffalo Creek,
January 15, 1838, it appearing that each of these tribes claims an
interest in the aforesaid judgment through alleged relationship with
the Brothertown band or clan, a branch of the New York Indians.

For the reasons stated in your letter you have approved the
said contracts, which provide for a fee of thirty-five per cent of
the amounts that may be recovered, and submit the same for such
action as may seem appropriate.

These Indians were and their remnants are residents of a
section of that portion of the country which constituted the ter-
ritory of the thirteen original States, as recognized by Great
Britain in 1783. No treaties or agreements were ever made with
them by the general government, nor has it ever exercised any

EX. A

2

supervision or control over them. Their political status is unknown, but it is presumed that they are citizens and subject to the laws of the several States in which they reside, and entitled to the rights and privileges of such citizenship.

Their political condition is, therefore, radically different from that of what might be termed the "plains" Indians, that large body of persons in the western section of the country who became subjects or wards of the Government with the accession of territory ceded by France in 1803; by the annexation of Texas in 1845; with the territory ceded by Mexico in 1848, and by the cession known as the Gadsden Purchase, in 1853, not all of whom, however, have been officially recognized as wards by formal treaty or agreement.

All of these "plains" Indians have been at some time or other, in some manner or other, the subject of legislation by the Congress of the United States, and to that extent recognized by the Government, so that contracts with them, to be valid and binding, unless, in the meantime, they have become citizens of the United States by the formal action of Congress, require the approval of the Secretary of the Interior.

But the Mohegans, Shinnecoeks, and Narragansetts appearing to be citizens of the United States, the Secretary of the Interior is without authority to approve the contracts in question, and the same are returned for such disposition as may seem to be appropriate."

Very respectfully,


Commissioner.

E. B. F.

C

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http://www.bia.gov/cs/groups/xofa/documents/text/idc-001341.pdf

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June 6, 1977

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127844

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Please reply to:
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Solicitor Leo M. Krulitz
 U.S. Department of the Interior
 Washington, D.C. 20240

Dear Solicitor Krulitz,

I am writing on behalf of my client, the Mashpee Tribe of Mashpee, Massachusetts, to request that the United States institute litigation to enforce the Nonintercourse Act claims of the Tribe. The Tribe has asserted a claim to possession and damages for lands in Mashpee and Sandwich, Massachusetts, which were alienated from the Tribe in violation of the Indian Nonintercourse Act, 25 U.S.C. §177. This action is now proceeding in the United States District Court for the District of Massachusetts, captioned Mashpee Tribe v. New Seabury Corp., C.A. 76-3190-S. Substantial resources have been arrayed against the Tribe in this litigation, and the Tribe fears that it will be unable to adequately assert its claims under these circumstances without the assistance of its trustee, the United States.

Wash. Dist. Ct. re: Mashpee Tribe v. New Seabury Corp.

The Federal Government, as trustee for Indian lands, has historically provided an essential counterbalance to the inequality which generally exists between the Government's Indian wards and the private and local governmental interests which are frequently arrayed against them. In the pending litigation in Mashpee, the Tribe is facing the consolidated opposition of the State and local governments, the major private real estate developers, and a nationwide consortium of title insurance companies which hopes to use the Mashpee case to undermine all of the Nonintercourse Act claims raised in the Eastern states.

idc-001341.pdf

<http://www.bia.gov/cs/groups/xofa/documents/text/idc-001341.pdf>Solicitor Leo M. KrulitzJune 6, 1977

While the United States would not technically be bound by the outcome of the present litigation, as a practical matter this action is likely to be dispositive of the Government's ability to relitigate the ~~issues in its own right. It is therefore essential~~ that the Government act in time to intervene or consolidate its own claims with those of the Tribe. The District Court's ruling which rejected the defendants' motion to dismiss the action for failure to join the United States, expressly invited the United States to intervene in the pending litigation.

I have taken the liberty of enclosing a copy of the Tribe's memorandum to Justice William B. Gunter, which summarizes the Tribe's contentions with respect to the principle legal and factual issues. We will be pleased to provide any further data which you feel would assist the Department in making its recommendations. Please advise me as to how we can be of further assistance. Thank you for your attention.

Sincerely yours,

Barry A. Margolin
Barry A. Margolin
Of counsel

18-221

1 have a letter directed to Chief Wild Horse
2 that says no way, you are not Federally
3 recognized.

4 MR. TUREEN: He should be able
5 to testify to the significance of that
6 letter, whatever that meant.

7 THE COURT: If he can. I don't know
8 if he can or not. He wasn't there. I judge
9 from the looks of him he was in grade school
10 in 1937.

11 MR. TUREEN: He may be able to
12 testify to the significance of that letter.

13 THE COURT: Well, maybe he can.

14 But as to the pendency of an applica-
15 tion, don't ask the question.

16 MR. MARGOLIN: I understand.

17 MR. ST. CLAIR: Thank you very much,
18 your Honor.

19 End of conference at the Bench.)

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21 Leo Krulitz, Sworn

22 Direct Examination by Mr. Margolin

23 Q Will you please state your name and address?

24 A Yes. I am Leo Krulitz, my address is 4089 Ridgeview
25 Circle, Arlington, Virginia.

EX.C

CC jg-sn

1

Q And what is your occupation, Mr. Krulitz?

2

A I am solicitor for the Department of the Interior.

3

Q Does the solicitor have any responsibilities with respect to Indian affairs in the jurisdiction of the Department?

4

5

6

A Yes. I am one of the three top officials of the Department and, as such, participate with the Secretary in responsibilities across Department lines, and I am also the principal legal counsel for the Secretary and his principal legal advisor on Indian affairs.

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Q And can you state whether the Department of the Interior has ever officially recognized the Mashpee Tribe as a Federally-recognized tribe?

12

13

14

A We have not.

15

16

17

18

Q Can you state whether the Department of the Interior has ever refused to recognize or decided not to recognize the Mashpee Tribe as a Federally-recognized tribe?

19

A Not to my knowledge.

20

21

Q And can a tribe which has not previously been Federally recognized by the Department obtain Federal recognition?

22

A Yes.

23

Q At the present time?

24

A Yes.

25

MR. MARGOLIN: That's all.

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1 THE COURT: I assume you are through.

2 MR. MARGOLIN: I am, your Honor.

3
4 Cross Examination by Mr. St. Clair

5 Q Mr. Krulitz, this may be the shortest trip you ever
6 make.

7 I show you a letter from the files of the
8 Department dated October 2, 1937.

9 I ask you if you have any familiarity with
10 that letter?

11 A I believe I have seen a copy of this, yes, sir.

12 Q Is this in the files of the Bureau of Indian Affairs,
13 if you know?

14 A I assume that it is, yes.

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15 MR. ST. CLAIR: May I offer this letter,
16 your Honor, Exhibit 7, Defendants' Exhibit 7?

17 MR. MARGOLIN: No objection, your Honor.

18 THE COURT: All right, it is admitted.

19 (Letter dated October 2, 1937 from the
20 Department of the Interior marked
21 Defendants' Exhibit 7 and received
in evidence.)

22 MR. ST. CLAIR: If I may read this to the
23 jury, your Honor?

24 THE COURT: Yes.

25 MR. ST. CLAIR: This is dated October 2, 1937.

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"Mr. Wild Horse, Box 17, Mashpee,
Mass.

"Dear Mr. Wild Horse: This will
acknowledge your letter of August 29 in
which you discuss the status of Indians
in Massachusetts. As explained in my
letter of December 31, 1936, the Indian
office can offer no assistance to Indians
not members of a tribe under Federal
jurisdiction. I can hold out no greater
encouragement than that contained in our
letter December 31, 1936. Your people
are the same status as other citizens
of the State of Massachusetts and must
look to the local authority for assistance.
The National Youth Administration has
provided assistance or means whereby
eligible students will obtain a higher
education, and I suggest that you take
this problem up with the local authorities
who can advise you more in detail."

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Q Now, sir, would this letter be consistent with a
determination of the Department to decline recognition
to the Mashpee Indians or any Indians in Massachusetts?

A I am sorry, Mr. St. Clair, I am not sure I understand