



July 2, 2018

The Hon. John Tahsuda
Principal Deputy Assistant Secretary-Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Principal Deputy Assistant Secretary Tahsuda:

The Mashpee Wampanoag Tribe makes this submission in response to the Department's Tribal Leader Letter dated December 6, 2017, requesting comments on potential revisions to the Department's trust acquisition regulations at 25 C.F.R. Part 151. The Mashpee Wampanoag Tribe fully concurs in the comments submitted by the National Congress of American Indians (NCAI) and hereby incorporates them by reference as part of our comments. In addition, we provide supplemental comments underscoring our very deep concerns about the impact of the Department's proposed changes to the Part 151 regulations, and its apparent general policy shift, will have on reservation-less, land-poor, and economically disadvantaged tribes. We have attempted to frame our comments below in the context of the Department's ten questions, but we note that the questions themselves seem to ignore the unique problems faced by reservation-less, land-poor, and economically disadvantaged tribes.

INTRODUCTION AND BACKGROUND

The Mashpee Wampanoag Tribe (Mashpee or Tribe) is a federally recognized Tribe that has existed in what is now Massachusetts since time immemorial. Mashpee is the only surviving Tribe of the original nine signers of the first treaty that allowed the establishment of Plymouth colony, and the Wampanoag people protected and assisted in the survival of the Mayflower Pilgrims at the colony. Unfortunately, over the course of time, non-Indian encroachment on Mashpee lands steadily diminished our traditional homeland.

In the nineteenth century, the Department of the Interior failed in its duty under the Trade and Intercourse Act to protect Mashpee's aboriginal title lands from this encroachment, such that by the time the Tribe was restored to recognition in 2007 through the Part 83 process, we had become a landless tribe.

We applied to the Department to take land into trust and proclaim it a reservation the same year in which our recognition was restored in 2007. In the early 2000s, leading up to the submission of our fee-to-trust application, Mashpee initiated a course of successful outreach efforts to the Commonwealth of Massachusetts, the Town of Mashpee and the City of Taunton, and other local stakeholders to ensure that our fee-to-trust application was supported by our neighbors. In 2015, with overwhelming support from these same local governments and the State, the Department acquired 170 acres in trust as a reservation for the Tribe in the Town of Mashpee and City of Taunton. 80 Fed. Reg. No. 196, Sept. 25, 2015. The Department's 2015 decision finally provided Mashpee a homeland within our historical territory to provide for our members and engage in urgently-needed economic development to benefit both our members and the local community. Our reservation includes our Meeting House, Government Center, burial grounds and cemeteries, tribal museum, tribal offices, conservation land, cultural recreation land, and will be expanded to include a tribal housing project and an Indian gaming economic development project.

Shortly after the land was taken into trust, a small group of local citizens challenged the Department's decision primarily based on *Carderi v. Salazar*, 555 U.S. 379(2009). The press reports that their lawsuit is being funded by an out-of-state casino developer that is also actively petitioning the State of Massachusetts to renege on its commitments to the Tribe. The lawsuit challenges Department's 2015 decision to take the land in trust and proclaim the reservation, which was based on the second definition of Indian in the IRA (descendants of tribal members who were residing within the present boundaries of an Indian reservation on June 1, 1934). 25 U.S.C. § 5129. In July 2016, the Massachusetts Federal District Court rejected the Department's construction of the second definition, and by doing so called into question the status of the Tribe's reservation. The district court remanded the case to Interior for reconsideration, and the Department is considering whether the Tribe meets the first definition of Indian in the IRA ("members of any recognized tribe now under federal jurisdiction"), 25 U.S.C. § 5129. Although the Department originally sought to defend its decision and the Tribe's reservation by filing an appeal from the district court decision, in May 2017 the Department of Justice inexplicably withdrew from the litigation and is no longer defending the status of the Tribe's reservation. The Tribe is now extremely concerned that the Department will act to take our land out of trust and disestablish our reservation. This would be the first time since the termination era that the Department has acted to disestablish an Indian reservation and make a tribe landless.

Today, eleven years after our recognition, the status of our reservation remains in doubt.

Question 1: *What should the objective of the land-into-trust program be? What should the Department be working to accomplish?*

In addition to promoting economic development and self-governance for Indian tribes, another key purpose of the IRA is to provide the Secretary of the Interior with a mechanism to acquire land in trust for landless tribes like Mashpee. Landless tribes and tribes with small land bases are not able to acquire land in trust through on-reservation acquisitions.¹ The Department's proposals that place additional unnecessary burdens on tribes seeking to acquire off-reservation land in trust are therefore squarely at odds with the purposes of the IRA and ignore that fact that for some of the poorest and most disadvantaged tribes in the United States, off-reservation acquisitions are the only type of acquisition available to them.

Mashpee is the *only* federally recognized tribe in all of New England that has not yet benefitted from a federal land claim settlement that would provide independent land acquisition authority separate and apart from the provisions of IRA Section 5. Therefore, the IRA provides the only avenue available for Mashpee to acquire land in trust. The Department's land-into-trust program should be focused on ensuring that all tribes, including landless and land-poor tribes, are able to benefit from the land acquisition authority in the IRA. The fee-to-trust regulations must be written and implemented in a way that ensures that every tribe has an adequate reservation land base to meet the needs of its members and further tribal self-sufficiency and self-governance.

Question 2: *How effectively does the Department address on-reservation land-into-trust applications?*

This question illustrates the Department's misconception that most tribes are able to apply for on-reservation acquisitions. There are many tribes, like Mashpee, that are either completely landless or have no fee land within their small reservations as a result of historical injustices inflicted by the federal government.

Questions 3 and 4:

*Under what circumstances should the Department approve or disapprove an off-reservation trust application?
What criteria should the Department consider when approving or disapproving an off-reservation trust application?*

Echoing the comments submitted by NCAI, Mashpee believes that the current criteria in 25 C.F.R. § 151.11 provide a sufficient basis for the Department to determine when to approve or disapprove an off-reservation fee-to-trust application. However, we urge the Department to consider prioritizing off-reservation applications for tribes that are either landless or have no option

¹ The IRA's legislative history confirms this purpose. See S. Rep. No. 1080, at 1 (1934) (declaring that one of the "purposes of this bill" was to "provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land"); H.R. Rep. No. 1804, at 6 (1934) (noting that the IRA would help to "make many of the now pauperized, landless Indians self-supporting"); *see also*, Felix S. Cohen, *Handbook of Federal Indian Law*, 84 (1942).

to acquire land within their reservation. Tribes like Mashpee with no reservation land or very little reservation land struggle to provide much needed services for their members and garner the resources to prepare a fee-to-trust application. By prioritizing applications for landless and land-poor tribes the Department can ensure that all tribes have access to the fundamental benefits a federal reservation provides. An adequate federally-protected land base is an absolutely crucial part of tribal sovereignty, the protection and continuation of tribal culture, and the foundation for tribal economic development.

Question 5 a, b, and c

Should different criteria and/or procedures be used in processing off-reservation applications based on:

- a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?*
- b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?*
- c. Whether the application involves no change in use?*

There is no good policy or legal reason (and no statutory basis) to impose additional regulatory burdens on fee-to-trust applications for economic development purposes -- and frankly, seems antithetical to the Administration's general emphasis on economic growth and job creation. As a landless tribe, when Mashpee applied to have land taken into trust, it applied to use the land both for tribal housing and government buildings as well as for a gaming facility and resort to facilitate economic development on the reservation. Our reservation is absolutely essential to our ability to engage in economic development and generate revenue to support our governmental functions. Having a reservation land base from which we can generate tribal revenue increases our self-sufficiency and decreases our dependence on federal funding and grants. Economic development on our reservation land will not only benefit the Tribe, but will also bring greater economic prosperity to surrounding regions. Only if our reservation is preserved will we be able to create thousands of new jobs, and follow through on our commitments to help fund millions of dollars' worth of local infrastructure improvements. Imposing additional red tape and regulatory requirements for off-reservation applications for economic development (whether for gaming or not) will only serve to stifle tribal economic development to the detriment of tribes and surrounding communities, and is entirely inconsistent with the plain language of the IRA which clearly gives the Secretary authority to acquire land for tribal economic development.

Question 6 *What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?*

Consistent with NCAI's comments, we find that this question is inappropriate and even a little disturbing coming from the federal trustee who should already well understand why trust land is so vital to tribal communities.

Question 7: *Should pending applications be subject to new revisions if/when they are finalized?*

No. As discussed by NCAI, tribes expend significant resources on preparing fee-to-trust applications and should not be forced to conform pending applications to the new regulations. Tribes with pending applications should be allowed to choose whether they wish to proceed under the existing regulations or any new regulations that may be promulgated. Further, the Department needs to understand that every time it changes the rules, it makes it increases the regulatory and financial burdens it places on tribes trying to work through the system. This is bureaucratic red tape at its worst, and is antithetical to the Administration's general policy of promoting economic growth and job creation.

Question 8: *How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?*

As noted above, the purpose of the IRA was to acquire reservation land bases for landless Indians and facilitate tribal self-governance and economic development. Nowhere in the IRA does Congress suggest that the views of state and local governments should be "balanced" with tribal interests in taking land into trust. Mashpee is fortunate to have strong working relationships with the communities surrounding our reservation, but we recognize this is not the case for every tribe. Any requirement in the fee-to-trust regulations giving greater weight to state and local concerns is simply contrary to the IRA and the Department's trust responsibility to encourage tribal self-determination and economic development.

Question 9: *Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?*

MOU agreements help to ensure positive and lasting relationships between tribes and local governments, but they are by no means required by the IRA and should not be required by the Department's fee-to-trust regulations.

Mashpee worked closely with surrounding local communities when preparing its fee-to-trust application, and was fortunate to be able to develop strong and positive relationships with local governments. Mashpee's planned resort and casino is located in an area that was zoned for

industrial use and designated by Taunton for economic development stimulation in 2003. The Tribe first entered into an intergovernmental agreement in 2008 with the Town of Mashpee. Our reservation land in Mashpee will be used for a housing development and tribal government buildings. The City of Taunton and the Tribe then entered into an Intergovernmental Agreement in 2012 that specifies enforceable mitigation steps and indicates that the Tribe will adopt building, health and safety codes that are at least as restrictive as those of the City. The Tribe also negotiated a Tribal-State Gaming Compact with the Commonwealth pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710, which was approved by the Secretary of the Interior. 79 Fed. Reg. 6,213 (Feb. 3, 2014).

Ironically, in our case, Interior's/the Department of Justice's own actions threaten the welfare of our nearby communities. If the Department takes our reservation out of trust that action will not only cause severe negative impacts on Mashpee, but it will also stifle economic development in Southeastern Massachusetts as a whole. The Tribe has committed to funding \$30 million in upgrades to the Taunton water system and roadways, \$10 million per year to local first responders and Taunton city services, and \$65 million per year to the State for broader community development initiatives that will benefit the entire State. Once implemented, these commitments made by the Tribe to the City of Taunton will represent the single largest urban renewal effort in Southeastern Massachusetts in a generation. Mashpee looks forward to continuing to work with our neighbors, and in our case agreements with local governments benefitted both the Tribe and the surrounding communities.

In sum, agreements with local communities cannot and should not be mandated by the Department as part of the fee-to-trust process -- the decision to enter such agreements must be left to the respective sovereign governments. Indeed, any effort to require tribes to enter into MOU's with local governments as a prerequisite to acquiring land in trust would be inconsistent with the purposes of the IRA, and has no place in the fee-to-trust regulations.

But the Department also needs to understand that in not supporting tribes like Mashpee that *have* entered into such agreements, its actions are to the detriment of local communities in addition to tribes.

Question 10: *What recommendations would you make to streamline/improve the land-into-trust program?*

1. Do not change the regulations. The Department's primary goal appears to be to make it even harder than it already is for landless and land-poor tribes to acquire trust land. Indian Country has not asked for the changes to the fee-to-trust regulations contemplated by the Department, and at consultation sessions around the country tribes have loudly and uniformly opposed the Department's proposals.

2. Make an effort to assist tribes with the unconscionable burden that the *Carciari v. Salazar* has imposed on tribes. Since 2009, Indian country repeatedly has asked the Department for assistance in helping to relieve some of the damage that the *Carciari* decision has inflicted on tribes, particularly landless and land-poor tribes that desperately need land to support their members but are frequently faced with *Carciari* challenges. Yet the Department's proposals and ten questions do not even acknowledge the *Carciari* problem, instead focusing on things like the Department's obligations to local governments (of which there are none) and, stunningly, the Department's process for taking land out of trust. The Mashpee Wampanoag Tribe is deeply concerned that the Department's proposals are likely to perpetuate the "second class tribes" problem, which has worsened since the *Carciari* decision was rendered. Rather than amending the fee-to-trust regulations against the wishes of the vast majority of tribes, the Department should spend its time and effort engaging with tribes on supporting the *Carciari* M-Opinion, assisting tribes in their efforts to meet the *Carciari* standard, and fully and completely defend the status of tribes' reservations in court.

3. The Department should not consider any provisions that pertain to taking land out of trust. It is antithetical to the purpose of the IRA and the trust responsibility for the Department to even contemplate adding language to the fee-to-trust regulations that would govern taking land out trust and the ultimate disestablishment of Indian reservations. The Department should have a no exceptions policy of defending a tribe's reservation in litigation challenging the status of that reservation. A federal reservation is integral to every tribe's ability to support a stable tribal government, generate governmental revenues, preserve tribal culture and heritage, provide its members with housing, health and other social services, and receive federal funding from Indian programs specifically tied to a reservation land base. The Department must do everything in its power to protect tribal land because tribal land is at the core of tribal sovereignty and self-determination.

4. The Department's consideration of revisions to the fee-to-trust regulations should not have taken place without the Assistant Secretary- Indian Affairs in place and consideration of revisions should be suspended until both the Assistant Secretary and Deputy Solicitor for Indian Affairs are in place. Finally, Mashpee recommends that the Department halt any review of the fee-to-trust regulations until both the Assistant Secretary-Indian Affairs and Deputy Solicitor for Indian Affairs are in place at Interior and have a full opportunity to consider any revisions. The Assistant Secretary was only confirmed by the Senate last week, and the Department should not have proceeded with evaluating any potential revisions without the Assistant Secretary. The Department's primary political appointees with authority over Indian Affairs and the law underpinning the United States' responsibility to tribes should be in place to consult with tribes and consider tribal comments on these contemplated regulatory changes that could potentially have significant negative impacts on Indian country

CONCLUSION

In closing, the Mashpee Wampanoag Tribe opposes the Department's proposals to amend the fee-to-trust regulations. There has been uniform tribal opposition to the Department's proposed changes. In consideration of this opposition, the Department should abandon its proposal to amend the regulations, and focus solely on implementing its trust responsibility by taking land into trust for tribes under the process already in place in Part 151.

Mashpee has struggled to regain our historical homeland for generations, and now the Department appears poised to take our land out of trust, thereby decimating Mashpee's ability to exercise sovereignty and provide for our members. Any regulatory changes contemplated by the Department should focus solely on implementing the Department's responsibility to protect and increase reservation land bases, rather than add additional regulatory burdens to an already burdensome process.

The Mashpee Wampanoag Tribe appreciates your time and consideration of these comment, and requests that these comment be made part of the official record for this consultation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cedric Cromwell".

Cedric Cromwell
Chairman