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## GENERAL MEMORANDUM 20-008

### DOI Agrees to Temporarily Refrain from Removing Mashpee Land from Trust

On April 6, 2020, the United States District Court for the District of Columbia temporarily set aside the Mashpee Wampanoag Tribe's (Mashpee) emergency motion for a temporary restraining order after the Department of Interior (DOI) agreed to refrain from taking Mashpee's land out of trust until May 15, 2020. An oral argument is set for May 7, 2020.

Mashpee filed its motion for a temporary restraining order in response to a memorandum issued by the DOI Secretary on March 27, 2020, directing the Bureau of Indian Affairs Director and Eastern Regional Director to rescind Mashpee's trust acquisition decision and revoke its reservation proclamation, also annulling the gaming eligibility determination. Should the Secretary's directive ultimately take effect, Mashpee would hold the land in fee title. The Secretary's decision to take Mashpee's land out of trust is remarkable, as it was issued during the COVID-19 pandemic. This type of executive action has not regularly occurred since the Termination Era, and DOI's authority to acquire land into trust for Mashpee is still at issue in ongoing litigation.

In 2015, DOI issued a decision that it would acquire land into trust under the Indian Reorganization Act ("IRA") for Mashpee on the basis that it qualified under the IRA's second definition of Indian: "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." DOI concluded land qualified as a reservation for purposes of the IRA's second definition of Indian when it was set aside for Indian use and occupation and the set aside carried legal effect. For Mashpee, it determined that land set aside by a colonial government over which Mashpee exercised ownership and control and which the federal government acknowledged qualified as a reservation.

Although Mashpee cooperated with Massachusetts and its localities during the trust acquisition process, local residents brought an action challenging DOI's decision. The United States District Court for the District of Massachusetts struck down DOI's decision on the basis that the IRA's second definition of Indian incorporates the first definition's "under federal jurisdiction" requirement at issue in the Supreme Court's *Carciere* decision. During this litigation, DOI voluntarily dismissed its appeal to the First Circuit, leaving Mashpee alone to defend DOI's decision. On March 19, 2020, the First Circuit issued a mandate carrying out its final judgment regarding interpretation of the IRA's second definition of Indian. Asserting the mandate required DOI to rescind its earlier trust acquisition decision, the Secretary issued the March 27, 2020, memorandum directing Mashpee's land be taken out of trust.

However, arguments regarding Mashpee's eligibility to acquire land into trust have not been exhausted. After issuing its decision on the IRA's second definition of Indian, the District Court remanded the decision to DOI, noting that DOI still had authority to determine whether Mashpee satisfied the IRA's first definition of Indian. DOI thereafter issued a decision that Mashpee did not qualify under the IRA's first definition of Indian, which Mashpee challenged in the United States District Court for the District of Columbia. Motions for summary judgment are fully briefed, but no decision has been rendered in this case.

Mashpee filed an emergency motion for a temporary restraining order and a motion for a preliminary injunction on March 30, 2020, in its case before the United States District Court for the District of Columbia seeking to prevent DOI from taking its land out of trust until the litigation is decided. Thereafter, DOI agreed to refrain from completing the "ministerial tasks" necessary to transfer the land out of trust, revoke the reservation proclamation, and annul the gaming eligibility determination until May 15, 2020. Mashpee agreed to the District Court holding its motion for a temporary restraining order in abeyance. The District Court set a briefing schedule for Mashpee's motion for a preliminary injunction, with an oral argument scheduled for May 7, 2020. It may consolidate consideration of the motion for a preliminary injunction with the parties' motions for summary judgment.

Related to Mashpee's efforts to acquire land into trust and associated litigation, in a recently-released M-Opinion dated March 9, 2020, and numbered M-37054, DOI set forth the legal standard it will use when determining whether a tribe is eligible to acquire land into trust under the IRA's second definition of Indian. The M-Opinion follows the First Circuit's decision in Mashpee that the IRA's second definition of Indian incorporates the first definition's "under federal jurisdiction" requirement. However, it goes beyond the First Circuit's decision—requiring a 1934 resident of the reservation to be alive today and requiring the 1934 reservation to have been a federal reservation through a federal set aside or federal superintendence.

As a result of DOI's recent decisions, there is renewed interest in advancing congressional "*Carcieri* fix" legislation and legislation that would directly reaffirm Mashpee's eligibility to acquire land into trust under the IRA and protect its current trust land.

We will continue to monitor and report on DOI's actions affecting trust acquisition applications and decisions as well as ongoing trust acquisition litigation. Please let us know if we may provide additional information regarding this developing situation.

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