MASSACHUSETTS GAMING COMMISSION
HOST COMMUNITY HEARING

March 1, 2016
4:00p.m.
Massasoit Community College – Conference Center
770 Crescent Street
Brockton, MA

Massachusetts Gaming Commission
101 Federal Street, 12th Floor, Boston, Massachusetts 02110 | TEL 617.979.8400 | FAX 617.725.0258 | www.massgaming.com

NOTICE OF A PUBLIC HEARING IN THE HOST COMMUNITY PURSUANT TO M.G.L. c.23K §17 (c) AND 205 CMR 118.05 TO CONSIDER THE APPLICATION FOR A CATEGORY 1 GAMING LICENSE

Pursuant to the Massachusetts Open Meeting Law, G.L. c. 30A, §§ 18-25 and G.L. c.23K, §§17(c) and (d), notice is hereby given of a meeting of the Massachusetts Gaming Commission. The meeting will take place:

Tuesday, March 1, 2016 @ 4 P.M. – 6 P.M. (longer if necessary)
Conference Center at Massasoit Community College
770 Crescent Street, Brockton, MA

PUBLIC MEETING

This public hearing is intended to provide the Commission with the opportunity to pose questions to the applicant and address concerns relative to the proposal of **Mass Gaming & Entertainment, LLC** ("applicant") to build a gaming establishment in Brockton, Massachusetts including the scope and quality of the gaming area and amenities, the integration of the gaming establishment into the surrounding community and the extent of required mitigation plans and receive input from members of the public from an impacted community. A copy of the applicant's application is available for review on the Commission's website: massgaming.com. No votes or decisions will be made at this hearing; it is simply intended as an opportunity for the Commission to gather information and gauge public sentiment relative to the application.

The Commission will schedule a pre-hearing conference with the applicant approximately 7-10 days prior to the public hearing to advise the applicant of the issues that it may be required to address in the public hearing.

The chair will preside over this public hearing. The applicant and its agents and representatives shall attend the public hearing, may make a presentation, and respond to questions as directed by the chair. Representatives of Brockton, representatives of the surrounding communities, and representatives of the impacted live entertainment venues may attend the public hearing, may make a presentation, and respond to questions as directed by the chair. Any other interested person may attend the public hearing and may make a presentation in the discretion of the Commission.

Those who wish to submit written comments in advance of the hearing may do so by sending an email to mgccomments@state.ma.us with MG&E Brockton in the subject line. All

comments received via email will be made public and distributed to the Commission for their review prior to the hearing.

Public officials from a host or surrounding community, representatives of interested parties, and members of the host or surrounding communities who wish to address the Commission at the hearing may place their name on the list of speakers by sending an email to mgccomments@state.ma.us with 'Request to address the Commission***/MG&E Brockton***" in the subject line. In order to use the available time most efficiently, the Commission reserves the right to limit the amount of time for speakers depending on attendance at the meeting.

The following is the anticipated agenda for the public meeting:

1. Call to order and introductory remarks by the chair
2. Presentation by the applicant
3. Commission questions to the applicant
4. Comments by representatives of the Host Community
5. Comments by representatives of the Surrounding Communities
6. Comments by representatives of Impacted Live Entertainment Venues
7. Comments by members of the public
8. Comments from the applicant
9. Other business – reserved for matters the Chair did not reasonably anticipate at the time of posting.

I certify that on this date, this Notice was posted as "Gaming Commission Meeting" at meeting-notifications-agendas and emailed to: regs@sec.state.ma.us, melissa.andrade@state.ma.us.

January 29, 2016
(date)

Bor Stephen P. Crosby, Chairman

Date Posted to Website: January 29, 2016 at 4:00 pm.

MASS GAMING

& ENTERTAINMENT, LLC

March 1, 2016

Introduction

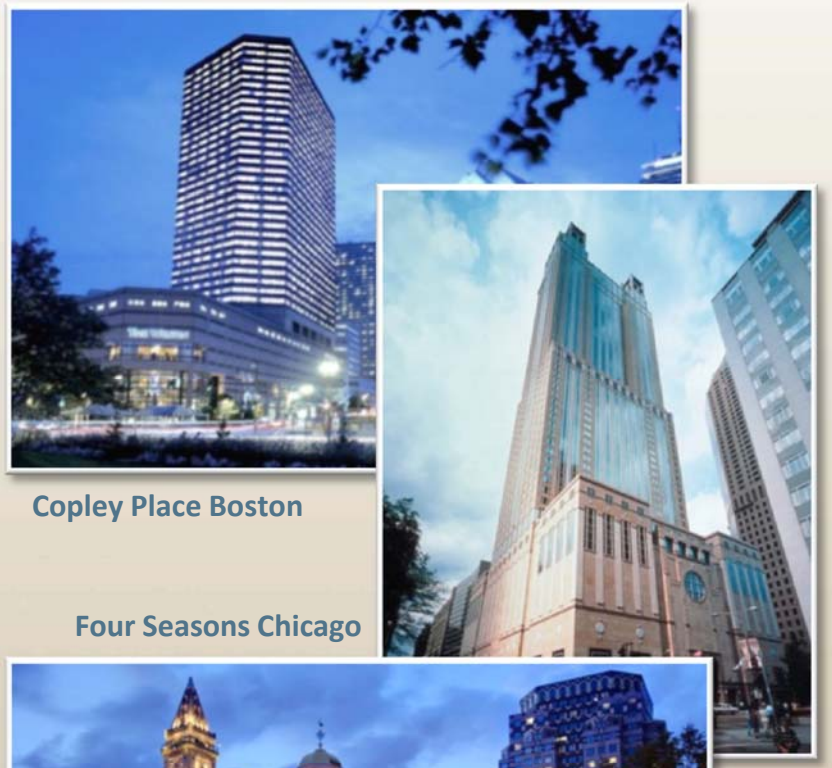
Best for the Commonwealth

- $677.5 million investment
  - Our proposal would be among the largest commercial developments in southeastern Massachusetts
- $85 million license fee paid upon award of license
- $700 million of gaming tax revenue over the next 10 years (net of cannibalization)
- 1,800 permanent casino & resort jobs plus 2,000 construction jobs
- Will help to revitalize Brockton and southeastern Massachusetts
  - School funding
  - Infrastructure improvements
  - Enhanced law enforcement
- Open Spring of 2019 or sooner

Note: Figures are estimates

Neil Bluhm, Chairman
Rush Street Gaming

- Co-founder of JMB Realty and Walton Street Capital
- More than $50 billion in developments and acquisitions
- Philanthropist and community leader
- Founder of Rush Street Gaming



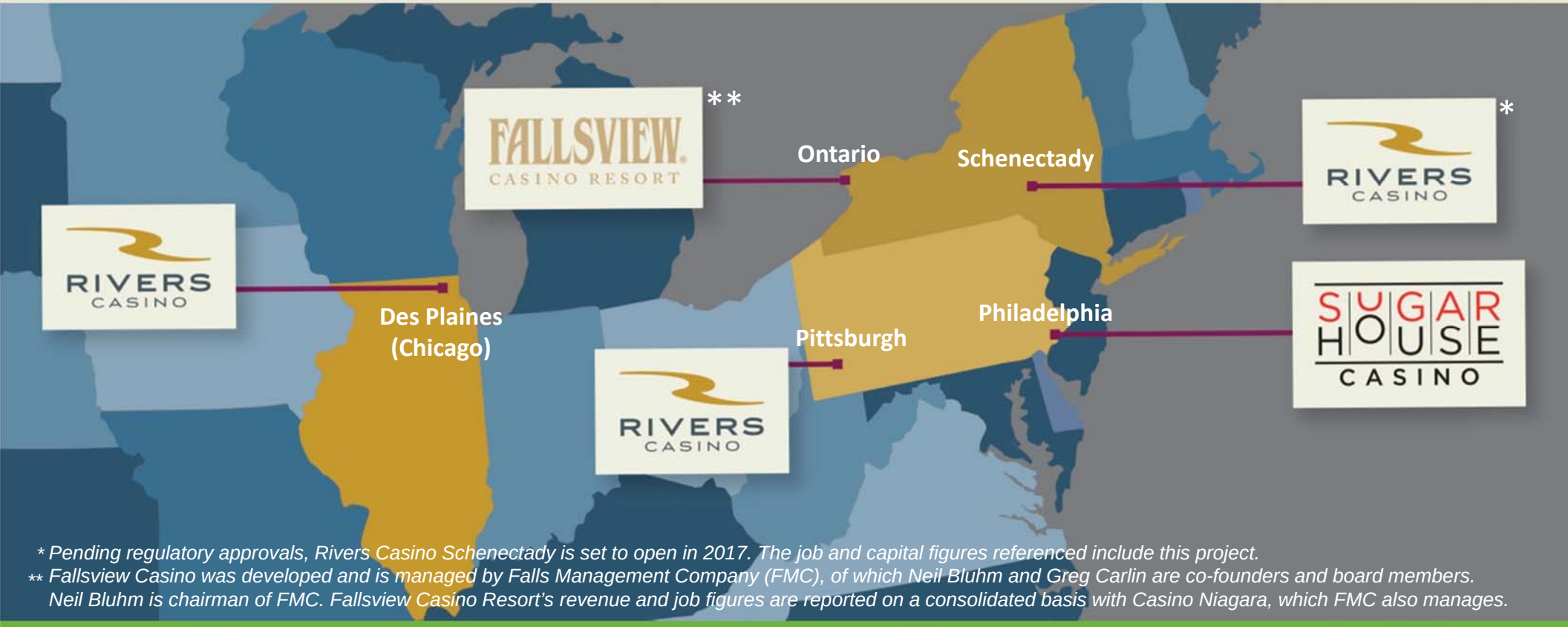
Copley Place Boston

Four Seasons Chicago

Faneuil Hall Boston

Market-Leading Gaming & Entertainment Resorts

- All gaming facilities are ground-up developments, delivered on time and on budget
- Approximately $3.0 billion of total capital invested
- More than 9,000 employees and $1.5 billion of annual gaming revenue



** Pending regulatory approvals, Rivers Casino Schenectady is set to open in 2017. The job and capital figures referenced include this project.*

*** Fallsview Casino was developed and is managed by Falls Management Company (FMC), of which Neil Bluhm and Greg Carlin are co-founders and board members. Neil Bluhm is chairman of FMC. Fallsview Casino Resort's revenue and job figures are reported on a consolidated basis with Casino Niagara, which FMC also manages.*

Getting The Job Done

Case Study: Rivers Casino

Pittsburgh, PA

- Original developer lost financing in 2008 causing construction to stop
- Rush Street Gaming rescued and completed project
- 1,700 high-quality jobs
- Currently planning a hotel development

Case Study: SugarHouse Casino

Philadelphia, PA

- Two Philadelphia licenses awarded in late 2007; only SugarHouse built
- 1,200 high-quality jobs
- Recent $164 million expansion expected to add 500 jobs

Pittsburgh Post-Gazette®

Bluhm Praised for Rescuing Casino Project

"In hindsight, we really look back now and see how important it was that Neil Bluhm and his team stepped forward because of the collapse of the financial markets around the world, particularly in the United States."

– Allegheny County Executive Dan Onorato

The Project

Location

- Easy access to Route 24 and regional highway system

Brockton Casino Resort

- Estimated $677.5 million casino resort development
- Approximately 92,000-square-foot gaming floor
  - 2,100 slots
  - 124 table games
- Expansive food & beverage options
- 250-room hotel with spa
- Approximately 26,000-square-foot multi-purpose space

Designed to Complement Surroundings

Designed to Complement Surroundings

Site Plan


Torrey Street
Belmont Street
Kenelworth Ave.
West Street
Forest Ave.
Memorial Drive
PARKING GARAGE 1,487 SPACES
BUS

Outstanding Amenities

- Food & Beverage
  - Steakhouse
  - Marketplace
  - Authentic noodle bar
  - Italian
  - Sports bar
  - Entertainment lounge
  - VIP lounge
- Multi-purpose space
  - Meetings & Conferences
  - Exhibitions
  - Fashion shows
  - Weddings
  - Entertainment
- Outdoor patio areas

Note: Specific cuisine and themes may change after further study of the customer demands.

Hotel & Resort

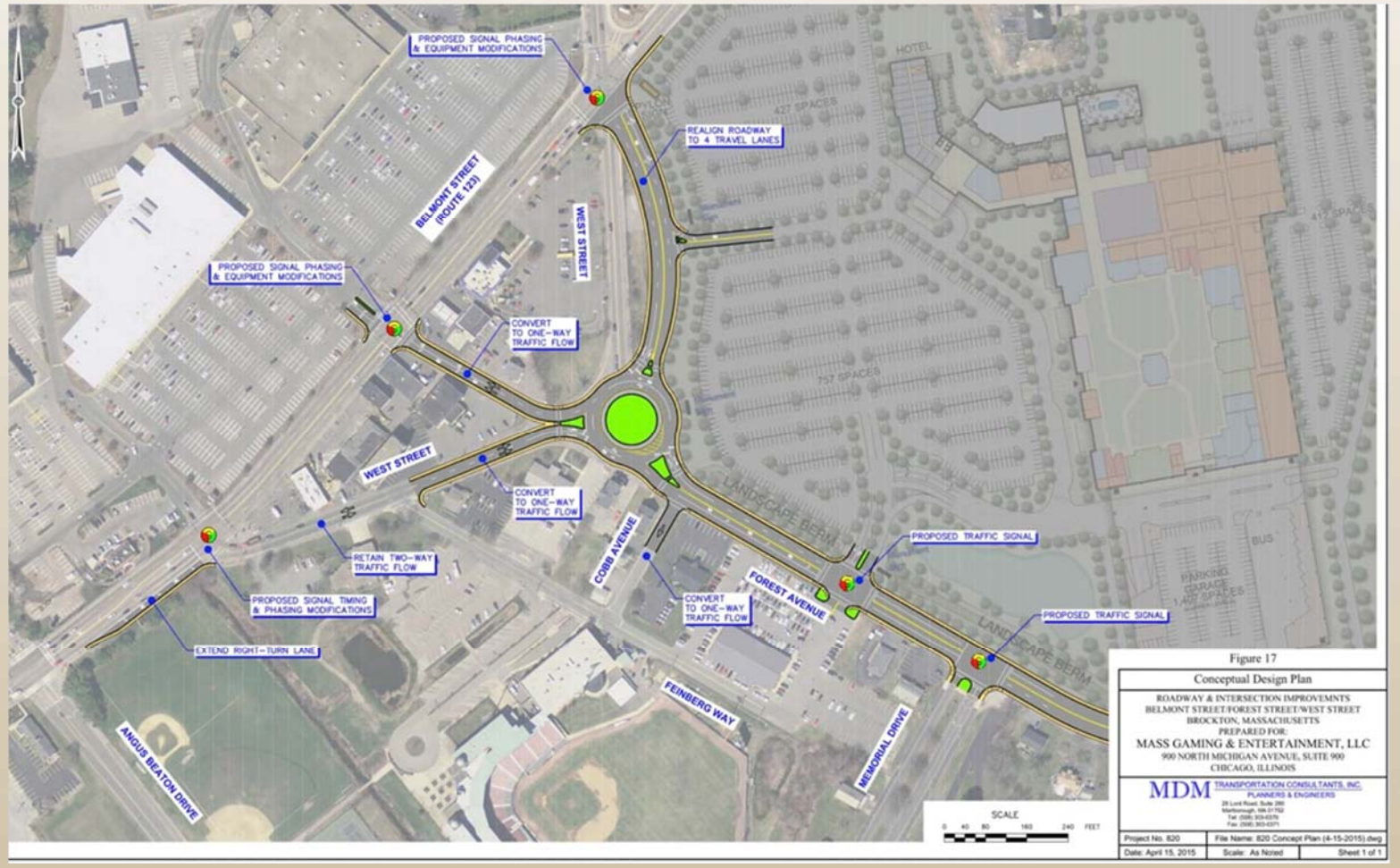
- Features
  - 250-room hotel
  - 3,250-square-foot restaurant
  - Spa/fitness center
  - Pool
  - 10,000-square-foot courtyard
  - Meeting spaces

Make Brockton a Destination

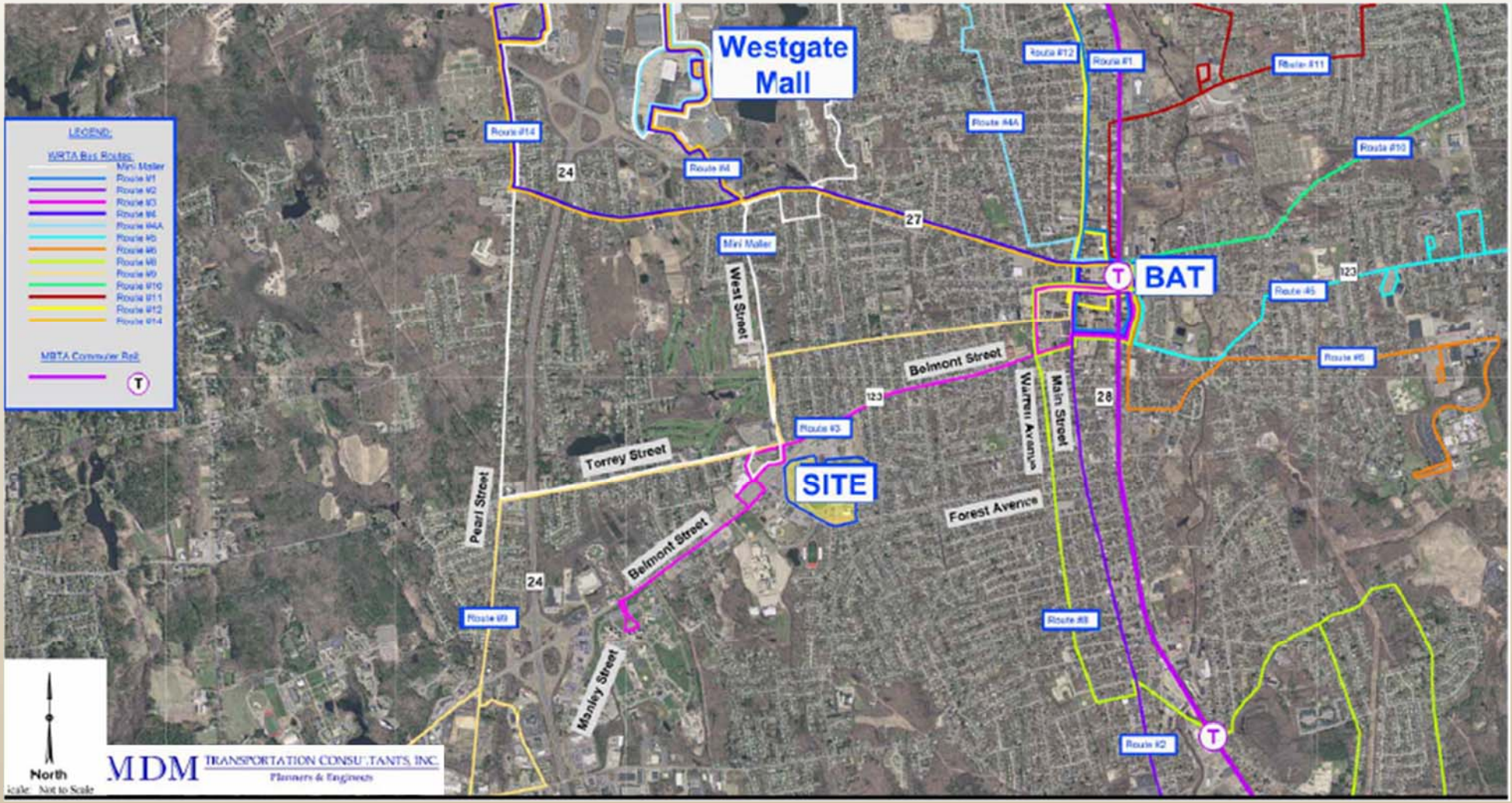
- Agreed to pay $100,000 for Entertainment District master plan
- Catalyst to locate retail, restaurants and other venues (e.g. bowling alley & movie theatre) nearby
- Partner with Campanelli Stadium and The Shaw's Center
- Attract investment to restore adjacent Brockton Fairground Exhibit Hall
- Increased Tourism
- More jobs

Brockton—Traffic Improvements

- More than $10 million in traffic improvements for Brockton



Importance of Public Transportation



Rush Street Gaming

RUSHSTREET GAMING

MASS GAMING & ENTERTAINMENT, LLC

Property Highlights

- Rivers Casino, Pittsburgh, PA (Opened August 2009)
  - Original developer lost financing in 2008, causing construction to stop
  - Rush Street Gaming rescued and completed the project

- SugarHouse Casino, Philadelphia, PA (Opened September 2010)
  - Two Philadelphia licenses awarded in late 2007; only SugarHouse was built
  - $164 million expansion set to open next month

- Rivers Casino, Des Plaines, IL—next to O'Hare Airport (Opened July 2011)
  - Most successful casino in Illinois, with more than two times the revenue of any other casino in the state
  - Highest daily slot win per unit ($791) in North America*
  - First casino in the world certified LEED Gold

- Fallsview Casino Resort, Niagara Falls, Ontario (Opened June 2004)
  - C$1 billion resort overlooking Niagara Falls
  - Features CAA/AAA Four Diamond Awarded hotel, state-of-the-art theatre, shops and award-winning dining

- Rivers Casino & Resort, Schenectady, NY (Anticipated to open in 2017)
  - Casino Resort featuring slots and table games, 150+ room hotel, banquet space, and expansive food and beverage amenities

** Per 2014 Illinois Gaming Board Annual Report*

Award-Winning Properties

All Rush Street Gaming casinos have been voted a "Best Place to Work" by their team members.

- Rivers Casino – Des Plaines, IL
  - Best Casino for three years running (*Chicago Reader*)
  - One of Chicago's Top 20 Workplaces for three years running (*Chicago Tribune*)
- SugarHouse Casino – Philadelphia, PA
  - Best Places to Work for five years running (*Philadelphia Business Journal*)
  - One of Philadelphia's Top Workplaces for four years running (*Philadelphia Inquirer* and *Daily News*)
- Rivers Casino – Pittsburgh, PA
  - Best Overall Gaming Resort in Pennsylvania for five years running (*Casino Player Magazine*)
  - One of Pittsburgh's Best Places to Work in 2015 (*Pittsburgh Business Times*)
  - One of Pittsburgh's Top Workplaces in 2015 (*Pittsburgh Post-Gazette*)
- Fallsview Casino Resort – Ontario, Canada
  - Ontario's Favorite Casino for seven consecutive years *(Toronto Sun*)
  - CAA Four-Diamond Award — Fallsview Hotel, Ponte Vecchio & 21 Club (AAA/CAA Diamond Awards)

A Significant Community Partner

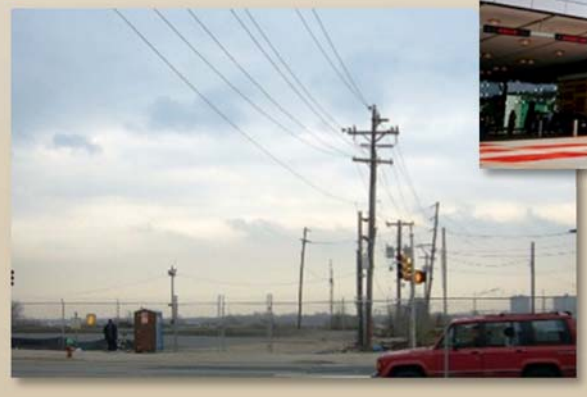
- Rivers Casino – Pittsburgh, PA
  - Recognition for Partnership, Mario Lemieux Foundation
  - Community Champion Award, NorthSide/NorthShore Chamber of Commerce
  - Visit Pittsburgh, Tourism Partner Award
- SugarHouse Casino – Philadelphia, PA
  - Rising Star Award, Susan G. Komen for the Cure, Philadelphia Affiliate
  - Police Athletic League PAL Award – Wendy Hamilton
  - Business of the Year, Fishtown AOH Division 51
- Rivers Casino – Des Plaines, IL
  - Outstanding Community Partners, Leukemia & Lymphoma Society
  - One Vision Award, refugeeONE (for support of refugees)
  - Working Together to Help Students Succeed, Des Plaines School District 62

Positive Ripple Effect – SugarHouse

"Over the last five to 10 years, Fishtown has exploded with bars, restaurants, amenities and new construction to accommodate an increasingly younger, artistic base of residents."

BILLYPENN

2008



2015

The Fillmore Philadelphia

PHILADELPHIA DISTILLING

Philadelphia Distilling

La Colombe Coffee

Positive Ripple Effect – Des Plaines

- In 2010, the City collected $1,357,844 in taxes from 8 Hotels
- The Rivers Casino opened in July 2011 with 6 of the 8 hotels within two miles
- In 2015, the tax the City collects has grown to $2,145,559 for the same 8 Hotels

Sources: Des Plaines City Manager

Team Member Commitment

- Training programs in place
- Average non-manager compensation including tips and benefits exceeds $50,000 annually
- Philosophy of promoting from within the organization and coaching employees to achieve their career goals
- Ongoing career development (certifications & seminars), education and wellness programs
- Health and dental benefits, 401(k) immediately vested, tuition reimbursement
- All Rush Street Gaming Team Members receive training on the scope, practice and procedures of their Responsible Gaming Plan as part of new-hire orientation and annually as reinforcement training

Commitment to Diversity

	Women	Minority
Des Plaines	43%	57%
Philadelphia	41%	53%
Pittsburgh	40%	28%
VP and Up	45%	35%

Source: Human Resources from each property. Current as of October 22, 2015.

Committed to Quality Jobs for the Unemployed

- **35% of SugarHouse workforce was unemployed prior to casino opening**
- Strong ties to community job training organizations
  - Veterans Multi-Service Center
  - The Cara Program
  - CareerLink
  - Life'sWork of Western PA
  - Urban League of Philadelphia
- Partnerships with local community colleges
  - Community College of Philadelphia
  - Schenectady County Community College
  - Oakton Community College

Identifying Great Candidates Locally

- Hiring from local community and pre-opening training
- Ongoing recruitment

Support Local Business

- Rush Rewards Plus: Partners with local businesses
  - Restaurants
  - Entertainment Venues
  - Museums
  - Car Rentals
  - Sporting Events
- Locally sourced goods, ingredients and services
- Vendor fairs to create business connections
- Joint ventures between local businesses and national businesses' to meet demand needs

Annual Local Spend

	Des Plaines	Philadelphia	Pittsburgh
Local Business Enterprise	$36.7 million*	$13.4 million**	$21.4 million**
Minority & Women Business Enterprise	$7.3 million	$7.6 million	$5.9 million

*Spending in State of Illinois **Spending In host county

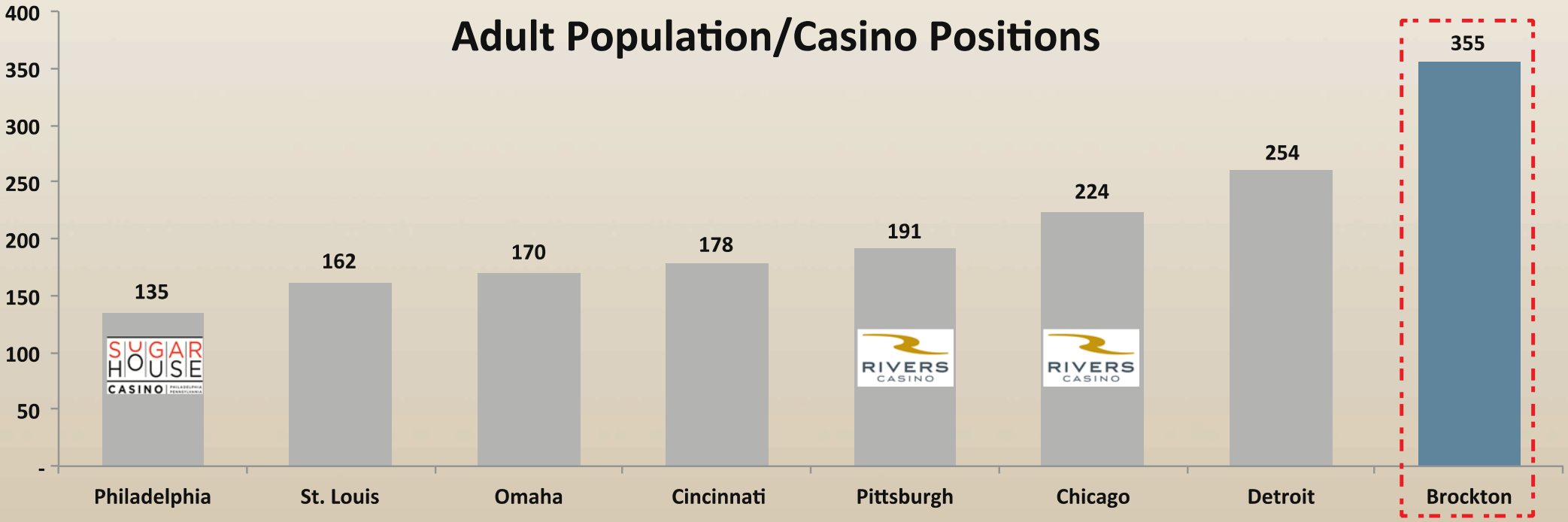
Sources: 2014 annual Economic Impact Statements provided to Illinois Gaming Board & 2015 Pennsylvania Gaming Control Board relicensing hearings

Economics

Without Tribal Casino

Supply & Demand Imbalance

- Brockton has more adults per position than most of the major markets in the United States



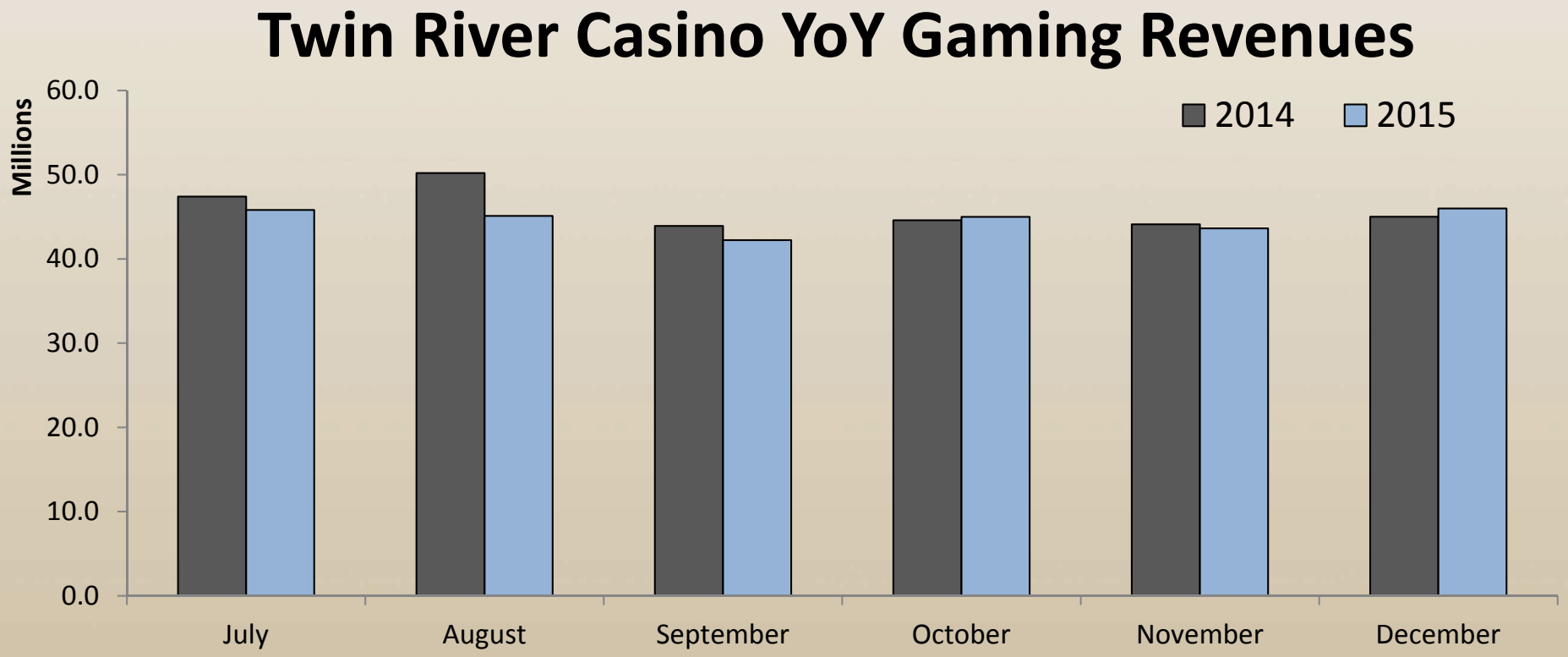
Sources: US Census Bureau, Casino City's GamingDirectory.com, Illinois gaming board monthly reports and Statistics Canada; 2011 Census of Population.
Note: Brockton market assumes the following casinos: MG&E/Brockton, Wynn/Everett, Penn/Plainridge, Twin River and Newport Grand.
Population and positions are measured by 60-mile radius. In Chicago, positions include the VLTs in taverns.

Location

Note: Mileage is by car using Google Maps preferred routes

Plainridge - No Impact on Twin River

- Since the opening of the Plainridge Park Casino, Twin River in Rhode Island has seen minimal cannibalization
- A casino resort in Brockton is the destination that the Commonwealth needs



Sources: Rhode Island Lottery

Impact on the Commonwealth

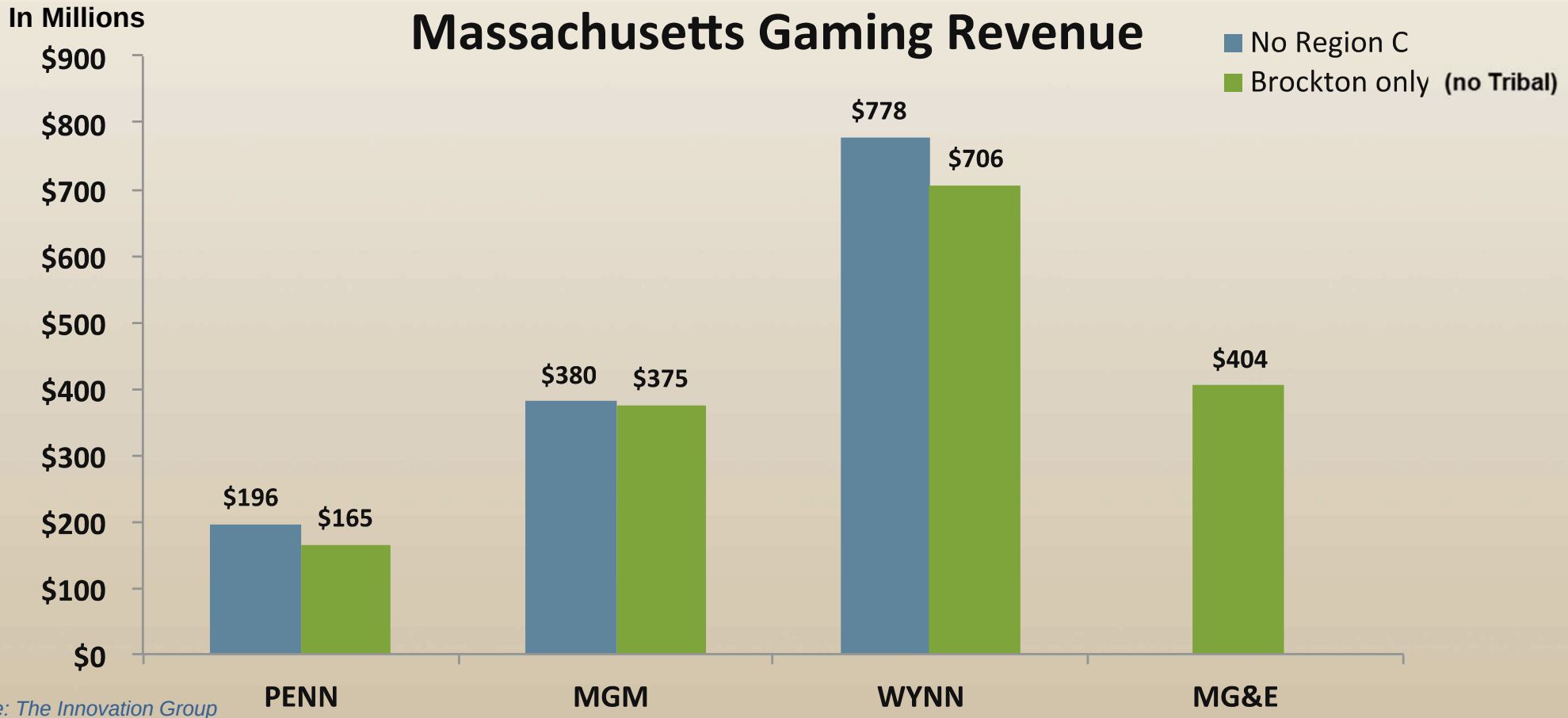
- Gaming Tax Revenue
  - Net of cannibalization, the Commonwealth is projected to collect an additional $71 million (+19.1%) annually
    - Attract guests from out of state to contribute tax revenue to the Commonwealth
    - Repatriate residents of the Commonwealth from driving to out-of-state competitors
  - $85 million license fee

- Existing Massachusetts Casinos
  - Cannibalization will be minimal and will not materially hinder the existing licensees

Source: The Innovation Group

Annual Gaming Revenue Increase

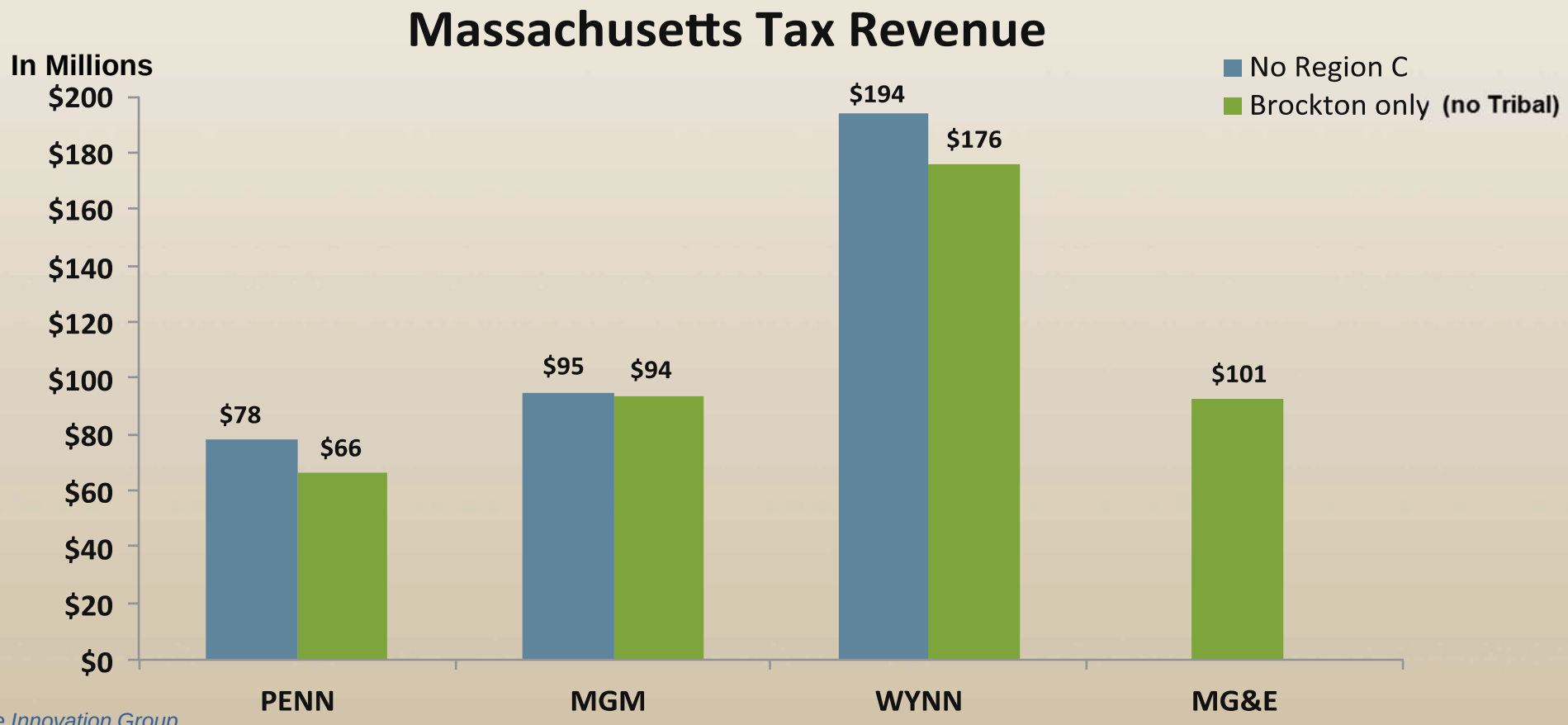
- Overall annual Commonwealth gaming revenue increases by $296 million (+21.9%) with a casino in Brockton, MA



Source: The Innovation Group
After impact of cannibalization

Annual Gaming Tax Increase

- Commonwealth collects an additional $71 million (+19.1%) with a casino in Brockton*
- One-time $85 million license fee



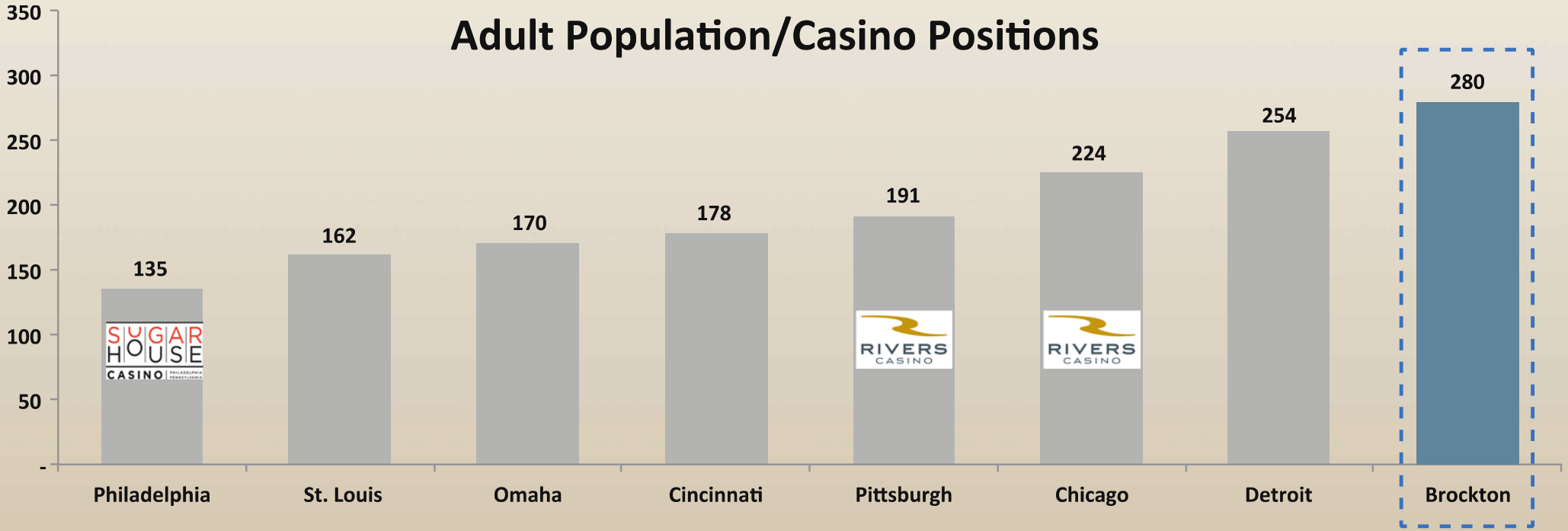
Source: The Innovation Group
After impact of cannibalization

Economics

With Tribal Casino

Supply & Demand Imbalance

- Brockton with a tribal casino in Taunton has more adults per position than most of the major markets in the United States



Sources: US Census Bureau, Casino City's GamingDirectory.com, Illinois gaming board monthly reports and Statistics Canada; 2011 Census of Population.
Note: Brockton market assumes the following casinos: MG&E/Brockton, Wynn/Everett, Penn/Plainridge, Twin River and Newport Grand.
Population and positions are measured by 60-mile radius. In Chicago, positions include the VLTs in taverns.

Location

Note: Mileage is by car using Google Maps preferred routes

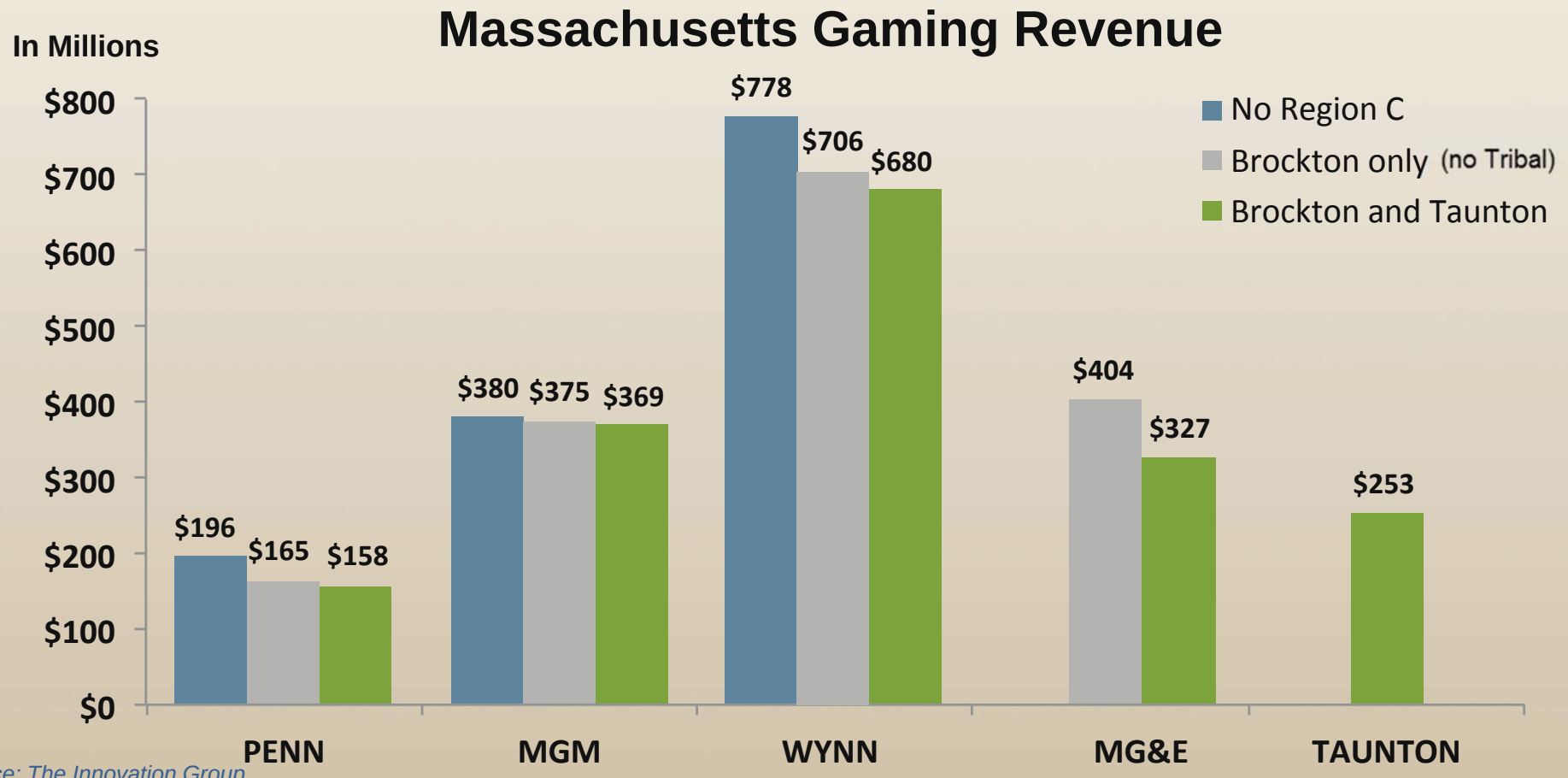
Impact of a Casino in Brockton and Taunton to the Commonwealth

- Gaming Tax Revenue
  - Always greater with a casino in Brockton
  - Net of cannibalization, the Commonwealth is projected to collect an additional $40 million (+10.9%) annually
  - While a tribe would not share revenue, MG&E pays a 25% gaming tax
  - In addition to the annual taxes, MG&E pays an $85 million license fee; none paid by the tribe
- Existing Massachusetts Casinos
  - Cannibalization impact will be minimal and will not materially hinder the existing licensees

Source: The Innovation Group

Annual Gaming Revenue Increase

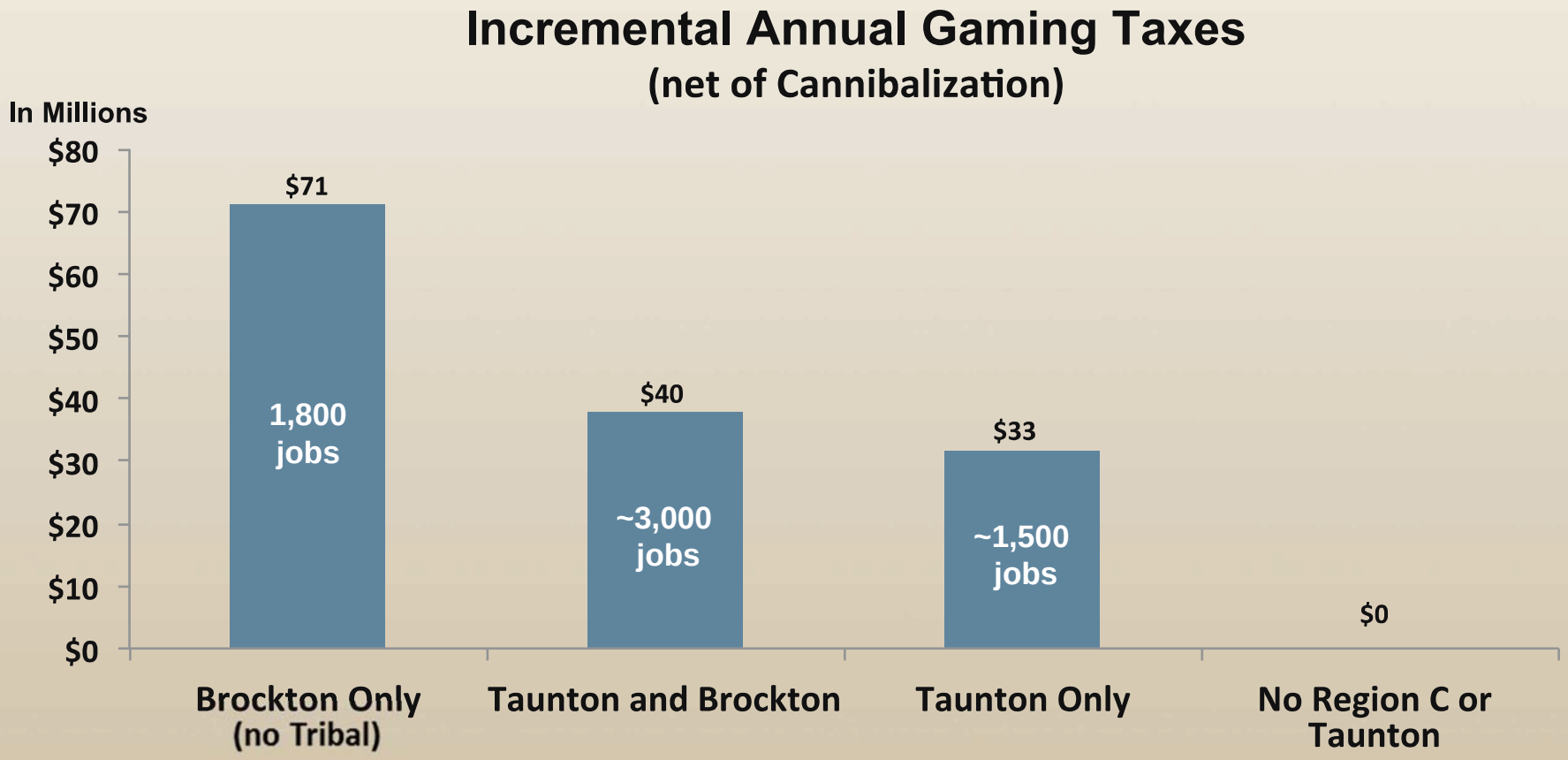
- Overall Commonwealth gaming revenue increases by $433 million (+32%) with a casino in Brockton and Taunton.



Source: The Innovation Group
After impact of cannibalization

Incremental Annual Gaming Taxes & Jobs

- In all scenarios, the Commonwealth collects more annual gaming taxes with Brockton **and** receives an $85 million license fee with Brockton



Source: The Innovation Group
After impact of cannibalization

Brockton—Best for the Commonwealth

- The Commonwealth earns more tax revenue with a commercial casino in Brockton, or with Brockton and Taunton, than Taunton alone, and receives nothing if no Region C
- The Brockton casino will be successful even if there is tribal casino in Taunton
- There is significant risk and cost to the Commonwealth if a license is not awarded to Brockton—it is highly likely that a casino in Taunton will be delayed many years and may ultimately never be allowed

Challenge to Land in Trust Decision

RUSHSTREET GAMING

MASS GAMING & ENTERTAINMENT, LLC

Challenge to Land in Trust Decision

- A group of residents of East Taunton, long opposed to the creation of an Indian reservation in their community, filed a lawsuit in federal court on February 4, 2016, seeking to overturn the decision of the U.S. Department of the Interior ("DOI") to take land into trust for the benefit of the Mashpees
  - We believe the DOI's decision to take land into trust in Taunton for the benefit of the Mashpees will be overturned
  - Litigation will last many years, and we believe it will not be possible to finance and build the casino in Taunton during that time, if ever
  - The Commonwealth will collect more gaming tax revenue with our proposed Brockton casino resort (with or without a Taunton casino), and in fact, will collect the most gaming tax revenue with our proposed Brockton casino resort and without a Taunton casino

The Right City at the Right Time

RUSHSTREET GAMING

MASS GAMING & ENTERTAINMENT, LLC

Economic Benefits for Brockton

- $5 million of upfront payments
- Projected $12-13 million[1] a year in revenue from the resort casino
- More than $10 million in traffic improvements on dangerous roads and intersections prone to vehicle and pedestrian accidents
- Expected improvement of bond rating will ease the City's finances now and into the future
- MG&E is the right partner for Brockton
  - 1,800 new, permanent, good-paying jobs is a once-in-a-lifetime opportunity for our city
  - 2,000 construction jobs
  - Thousands of additional "ripple effect" jobs
- Anchor and catalyst for new Entertainment District
- No other proposal can bring this level of opportunity for Brockton and its residents
- Completed agreements with all nine designated surrounding communities, with guaranteed upfront and annual payments

[1] *Assumes no tribal casino and based on sliding annual mitigation scale*

Transformative Opportunity

RUSHSTREET GAMING

MASS GAMING & ENTERTAINMENT, LLC

Conclusion

- Awarding a license to Brockton will create urgently needed jobs, tax revenue and economic development that are desperately needed in Brockton, its surrounding communities and all of Region C
- Very likely that the development of a tribal casino in Taunton will be delayed many years and perhaps never allowed
- The Gaming Act and the tribal Compact each contemplated the possibility of two casinos in Region C
- Commonwealth earns more tax revenue with a commercial casino in Brockton, or with Brockton and Taunton, than Taunton alone
- With both Brockton and Taunton, jobs are almost doubled and economic development increases

Conclusion (continued)

- If you don't award a license to Brockton, and the tribal casino never opens, the Commonwealth would lose $700 million over ten years, additional economic benefits, 1,800 direct permanent jobs and thousands of other indirect permanent jobs
- Not awarding a license to Brockton is a BIG gamble for the Commonwealth
- If you award a license to Brockton, the tribe can still have a casino and be successful because it would not share revenue with the Commonwealth, and the Brockton casino would be successful as well
- Not awarding a license to Brockton will permanently hurt Brockton, its surrounding communities and Region C
- Open Spring of 2019 or sooner

MASS GAMING

& ENTERTAINMENT, LLC

March 1, 2016

Testimony in Support of the Rush Gaming Brockton Resort Casino Proposal to the

Massachusetts Gaming Commission

Jass Stewart

Tuesday, March 1, 2016

Dear Commission Members,

Thank you for the opportunity to speak today. I'm Jass Stewart, a former, three-term City Councilor at Large in Brockton. I decided not to seek reelection last year, and I continue to live in Brockton.

I am in full support of the proposed resort casino in Brockton—with an initial investment of $650 million.

Rush Gaming is a reputable company, having built, been the investor in, and/or served as property manager for major American landmarks, including Copley Place and Faneuil Hall in Boston, the Chicago Mercantile Exchange Center, the Four Seasons in Philadelphia, and MGM Tower in Los Angeles.

On the issue of crime

In every location where Rush Gaming has built casinos—Des Plaines, IL, Philadelphia, PA, Pittsburgh, PA, and Schenectady, NY—crime has remained steady or decreased. Mayors and police chiefs, who were initially skeptical, have written letters of support for the positive impact of the casinos on their communities. *And in Brockton, the Police Patrolmen's Association has endorsed the proposed casino and is urging Brockton residents to support the proposal.*

On the issue of traffic

The simple business fact is, if traffic becomes a problem, Rush Gaming has a problem. One of their prime objectives is to create good traffic flow to the casino to ensure their customers return. This translates into much needed roadway improvements for Brockton, including better sidewalks, more street crossings, and safer streets for residents and Brockton High School students. The traffic report is available on the city's website.

On the issue of jobs

The Brockton casino would create 1,500 permanent jobs with an average pay of $50,000 a year. These are non-management jobs that do not require a college degree. Rush Gaming provides training, and offers educational advancement opportunities for their employees. In addition, the project would create 1,400 construction jobs. Knowing that all the casino jobs wouldn't go to Brockton residents—but likely most—if 1,200 of the 1,500 jobs went to Brockton residents, over 40 million new dollars would be in the hands of residents, plus health insurance, 401K plans, and $6 million in college tuition reimbursements.

On the issue of small businesses

Rush Gaming would work to contract with local suppliers, and is expected to spend millions of dollars a year on goods and services to support the casino and hotel—from the purchase of food and beverages to the cleaning of linen and uniforms.

On the issue of property values and household income

In every location where Rush Gaming has built casinos, property values have increased, as well as the average household income. *For example, in the Fishtown neighborhood of Philadelphia where the casino is located, property values have increased 37% (the fastest 10-year increase in Philadelphia history) and the number of residents with a Bachelor's degree has increased 218%.*

On the issue of taxes

To operate in Brockton, Rush Gaming would pay at least $10 million a year in new revenue to the city, helping to lower property taxes, fund youth programming, and increase city services. In addition, hotel, meals, and water/sewer taxes and fees are projected to generate an additional $1.5 to $2 million per year.

I understand and appreciate the ongoing concerns and issues related to compulsive gambling. The Massachusetts Gaming Commission recognizes this, as well, and provides resources for problem gambling.

In closing

My support of the casino comes down to three important realities:

1. Not including the $650 million start-up investment that would be pumped into the Brockton economy, the city would benefit from $58 million a year in salaries, fringe benefits, and taxes;
2. By examining Rush Gaming's other casino projects, the impact on those communities has been overwhelmingly positive, including reductions in crime, increases in property values, and a more educated workforce; and
3. Because gaming is legal in Massachusetts, as a former Brockton City Councilor and a Brockton resident, I much prefer that the financial benefits come to Brockton vs. someplace else.

Again, thank you for the opportunity to share my opinion.

NEJB
UNITEHERE!

The North East's Textile, Garment, Manufacturing, Laundry, Distribution, Disability Services, and Food Service Workers Union.

Warren Pepicelli
Joint Board Manager
International Executive V.P.

Andy Press
Secretary-Treasurer

Stephen Crosby, Chair
Massachusetts Gaming Commission
101 Federal St., 12th Floor
Boston, MA 02110

RE: OPPOSITION TO MG&E/BROCKTON DUE TO EXISTING LOW QUALITY JOBS

via email to mgccomments@state.ma.us
Subject Line: 'MG&E Brockton'

Dear Mr. Crosby,

We oppose the Brockton casino proposal because of the atrocious labor record of the Chicago group that controls it. This Chicago group, called Rush Street Gaming, is holding back working families at the casinos they already operate: Sugarhouse Casino in Philadelphia, Rivers Casino Pittsburgh, and Rivers Casino Des Plaines (outside Chicago, IL). As you know, Rush Street Gaming and Mass Gaming & Entertainment LLC (the applicant for the Brockton casino license) share three senior officers (the same Chairman, CEO, and Secretary/Treasurer).[1] And Rush Street Gaming would operate the Brockton casino if it is built.[2]

We know the difference between good casino jobs and the existing low quality jobs at Rush Street properties. We represent 10,000 workers in New England in the textile, garment, manufacturing, laundry, distribution, human services, and food service industries including 1,000 workers in and around Brockton. Nationally, UNITE HERE represents 100,000 casino workers making us the largest casino workers' union in the world.

The existing Rush Street casinos have been embroiled in multi-year labor disputes. Rush Street Gaming and its affiliates have refused to agree to a fair process to end the conflict.

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[1] "UPDATED INVESTIGATIVE REPORT FOR THE MASSACHUSETTS GAMING COMMISSION APPLICANT: MASS GAMING AND ENTERTAINMENT, LLC," Massachusetts Gaming Commission, May 1, 2015, pp.7-8.
[2] *Ibid.*, pp.3-6.

Here are some examples of the poor job quality and labor disputes at Rush Street properties:

- Turnover at Rivers Casino Pittsburgh casino stood at 40% last fiscal year, double the rate of the union casino that is its nearest competitor.[3]
- Sugarhouse Casino in Philadelphia pledged "the best jobs in Philly" but workers there have complained of insecure jobs, understaffing, and a lack of basic respect on the job.[4]
- Each existing Rush Street casino in the US has run anti-union campaigns.[5] They've settled a total of 38 federal unfair labor practice charges rather than face administrative trials.[6]
- Rivers Casino Pittsburgh broke federal labor law by illegally interfering with a union election through surveillance of union activity and preventing the distribution of union materials.[7]
- And casino workers have reported harassment from their managers including threats, surveillance, and other intimidation tactics including the threat to fire union supporters, managers closely observing and interrupting workers' conversations on their breaks, and managers swarming workers in the cafeteria.[8]

Permanent casino jobs are the major benefit for host communities like Brockton. But at the Rush Street casinos the job track record is marred by high turnover, low wages, poor benefits, and ongoing labor conflict .

Fifty-four state, local, and federal elected officials representing communities hosting existing Rush Street properties have signed statements of support pledging to stand

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[3] FYE 6/30/15. Calculated as positions hired + jobs lost / average of beginning and end of year employment. Source: "Gaming Diversity Report 2014-2015," Pennsylvania Gaming Control Board.

[4] Sugarhouse Casino "Team Playbook" and worker statements.

[5] For example: Rivers Casino Pittsburgh flier Apr. 16, 2013, "Keep your hard earned money, Don't sign a card!"; Sugarhouse letter to security guards, Nov. 29, 2011, "I hope that you agree and will vote NO"; Rivers Casino Des Plaines presentation 10/23/12, "Voting 'NO' is the Safe Option."

[6] NLRB Cases 04-CA-064105, 04-CA-068719, 04-CA-072369, 06-CA-102653, 06-CA-102656, 06-CA-102780, 06-CA-103059, 06-CA-103073, 06-CA-103079, 06-CA-103088, 06-CA-103091, 06-CA-103104, 06-CA-103112, 06-CA-103115, 06-CA-103139, 06-CA-103143, 06-CA-103144, 06-CA-103856, 06-CA-103935, 06-CA-105336, 06-CA-106932, 06-CA-108301, 06-CA-107027, 06-CA-107028, 06-CA-107029, 06-CA-107030, 06-CA-107032, 06-CA-107033, 06-CA-107036, 06-CA-108874, 06-CA-108877, 04-CA-108926, 04-CA-117205, 13-CA-117472, 13-CA-120909, 06-CA-143793, 06-CA-144519, 04-CA-140957

[7] NLRB Case 06-RC-12701: 356 NLRB No. 142 (2011)

[8] NLRB cases as cited above.

with the casino workers. These fifty-four public officials called on Rush Street to respect its casino workers' call for a fair process to organize free of harassment or intimidation.[9]

Other Massachusetts host communities will see a great difference. UNITE HERE has had long-term and cooperative relationships with the casino companies that will be operating in Springfield and in Everett. We are confident that those casino jobs will be family-sustaining jobs. Our experience as the casino workers union shows that real partnerships are possible. Some casinos do provide good union jobs, where workers have a voice and where the wages and benefits are excellent.

No serious and objective review of Rush Street's record in the realm of labor relations could conclude that the company has operated with labor peace at any of its existing locations.

We have attached to this letter a sampling of the activities and controversies that have arisen out of the labor disputes at Rush Street's three existing casinos. We stand ready to provide any additional documentation you may request.

We urge you to reject the Rush Street casino proposal for Brockton.

Sincerely,

Ethan Snow
Chief of Staff / Political Director
New England Joint Board
UNITE HERE

cc: Commissioner Bruce Stebbins
Commissioner Enrique Zuniga
Commissioner Lloyd Macdonald
Commissioner Gayle Cameron

attachments

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[9] *Will of Council in Support of Rivers Casino Employees*, Unanimously adopted by the Pittsburgh City Council, June 2015.
We Stand With Workers at Sugarhouse Casino, statement signed by various Pennsylvania elected officials, Oct. 2013.
Will of Council in Support of Rivers Casino Employees, Unanimously adopted by the Pittsburgh City Council, May 14, 2013.
We Stand With Workers at Rivers Casino, statement signed by various Pittsburgh, Allegheny County, and Pennsylvania state and federal elected officials, April 2013.

Table of Contents

Representative press coverage (links)

1. "Union Supporters Rally Outside Rivers Casino License Renewal Hearing," WESA (NPR) Pittsburgh, June 2, 2015.
http://wesa.fm/post/union-supporters-rally-outside-rivers-casino-license-renewal-hearing

2. "Union protest roils Brockton casino developer's Pittsburgh property," The Brockton Enterprise, April 30, 2015.
http://www.enterprisenews.com/article/20150430/NEWS/150425970

3. "Labor board files complaint over action by Rivers Casino involving workers trying to unionize," Pittsburgh Post-Gazette, April 7, 2015.
http://www.post-gazette.com/local/city/2015/04/07/Labor-board-files-complaint-over-action-by-Rivers-Casino-involving-workers-trying-to-unionize/stories/201504070179

4. "Casino workers union raps gaming firm: Labor group claims harassment by Rush Street managers," Albany Times Union, Sept 10, 2014.
http://www.timesunion.com/local/article/Casino-workers-union-raps-gaming-firm-5747155.php

5. "SugarHouse contracts radical anti-union consultant," Philadelphia CityPaper, Jan. 30, 2014.
http://citypaper.net/News/SugarHouse-contracts-radical-anti-union-consultant/

6. "Rivers Casino employees march for right to unionize," Pittsburgh CityPaper, Nov. 19, 2013.
http://www.pghcitypaper.com/Blogh/archives/2013/11/19/rivers-casino-employees-march-for-right-to-unionize

7. "Food Workers at Rivers Casino Garner Pittsburgh Support for Union," WESA, May 14, 2013.
http://wesa.fm/post/food-workers-rivers-casino-garner-pittsburgh-council-support-union

8. "Employees file complaint with National Labor Relations Board against Rivers Casino," Pittsburgh CityPaper, April 18, 2013.
http://www.pghcitypaper.com/Blogh/archives/2013/04/18/employees-file-complaint-with-national-labor-relations-board-against-rivers-casino

9. "Rivers Casino workers renew union effort, deliver a petition and a cake," Pittsburgh CityPaper, April 11, 2013.
http://www.pghcitypaper.com/Blogh/archives/2013/04/11/rivers-casino-workers-renew-union-effort-deliver-a-petition-and-a-cake

We are standing up for respect at Rivers!

We are loyal, hard-working employees of Rivers Casino in Pittsburgh, PA. We value the casino, our co-workers, and our customers. We believe that we should be a part of the future of the casino.

We deserve job security, economic stability, and to be treated with respect every day. We demand that the owner and management of Rivers Casino respect our signatures and agree to a fair process for us to decide whether to have union representation without management interference or intimidation.

STEEL CITY CASINO WORKERS COUNCIL
SCCWC

OFFICE OF CITY COUNCIL

510 City-County Building 414 Grant Street Pittsburgh, Pennsylvania 15219
412-255-2142 Fax: 412-255-2821

WHEREAS, the Council of the City of Pittsburgh has continually supported workers' rights to organize for fair wages, fair working conditions, and a union; and

WHEREAS, the City of Pittsburgh, through the city code and community engagement, works to ensure that major developments directly benefit the neighborhoods in which they are located; and

WHEREAS, Rivers Casino was welcomed to Pittsburgh on the promise that its casino jobs would be good quality jobs that build the community, and the community seeks to work with management to deliver on that promise; and

WHEREAS, a two-thirds majority of the workers at Rivers Casino signed a petition demanding job security, economic stability, and to be treated with respect every day; and

WHEREAS, the City of Pittsburgh, its residents, and families of Casino workers will stand stronger when the employees and management of Rivers Casino work together to achieve these goals; and

NOW, THEREFORE BE IT RESOLVED, that the Council of the City of Pittsburgh does hereby stand with the Rivers Casino workers' in their campaign to organize a union.

Sponsored by Councilmember Natalia Rudiak

Co-Sponsored by Council President Bruce Kraus and Councilmembers Rev. Ricky V. Burgess,Daniel Gilman, Deborah L. Gross, Darlene M. Harris, Theresa Kail-Smith, R. Daniel Lavelle, and Corey O'Connor

If you are attending the Walton Street Capital investor meeting in Chicago on June 2-3, 2014, please join us immediately across the street for a Walton Street Capital limited partner briefing:

Is labor harmony a possibility at Walton Street Capital investments?

For the past few years, multiple Walton Street Capital-owned properties including the Rivers Casino in Pittsburgh, PA (Walton Street Real Estate Fund VI) and the Knickerbocker Hotel in New York City (Fund VI) have seen labor disputes that have created headline risk for Walton Street Capital and limited partners.

A panel of employees from the Rivers Casino will discuss operations at the property, recent federal Unfair Labor Practice complaints, and their view of the prospect of labor harmony at that and other Walton Street Capital investments.

7:30am-9am, Tuesday, June 3, 2014

Gratz Center, Fourth Presbyterian Church

121 E Delaware Place, immediately across the street from the Four Seasons Hotel entrance

Coffee and light breakfast will be served

To RSVP please contact Jim Baker at jbaker@unitehere.org or 312-933-0230.

UNITE HERE!

June 3, 2014

Dear Mr. Bluhm,

We are members of the organizing committee at Rivers Casino in Pittsburgh.

We are proud to have made Rivers Casino a success with over $1 billion in revenue. Some of us have worked at Rivers since the day it opened. As you know, we want a fair process to organize our union so we can have a voice on the job to ensure fair treatment, respect, and a seat at the table.

Our General Manager told us that we'd have to explain to him what "fair" means. Meanwhile, the casino has waged an aggressive anti-union campaign of intimidation, retaliation, and pressure tactics.

We know what fair is and what it is not. It is not intimidation. It is not violating federal labor law, which is what the National Labor Relations Board found Rivers had done during a 2009 union organizing drive.

More recently, we helped workers file 52 unfair labor practice charges in the weeks after we went public with our request for fair play. The NLRB authorized a complaint for more than half of those charges.

Fair is not firing workers who speak out for fair play, which is what happened to several workers at your Sugarhouse Casino in Philadelphia in 2011 after they spoke out publicly about their desire for good working conditions and a fair process.

Mr. Bluhm, our managers answer to Rush Street Gaming, which you and your family's trust funds wholly own. Only you can end managers' attacks against us.

You can sign a labor peace agreement guaranteeing real neutrality – the very same agreements under which thousands of casino workers in Pennsylvania, Ohio, New Jersey, and across the country have exercised their rights without fear of reprisal.

We will never stop standing up for our rights. This means that as long as our rights at Rivers Casino are denied, this dispute will not go away.

Now is the time for you to end this dispute. Continuing to resist our right to have a voice and a fair process is not fair to workers, customers, or Walton Street limited partners.

Signed

AFL-CIO President Richard Trumka Leads Organizing Roundtable At PA AFL-CIO Convention

April 11, 2014 | Filed under: Labor In Action, PA AFL-CIO 2014 Convention, Top News Stories and tagged with: 2014 Convention, IUOE, Organizing, Richard Trumka, SEIU, Teamsters, UNITE-HERE, USW

On the final day of the Pennsylvania AFL-CIO Convention in Pittsburgh on Thursday, AFL-CIO President Richard Trumka led an inspiring roundtable discussion with four workers who are fighting for union representation on the job. Speaking to the disconnect that all too often exists between workers' legal rights, and the experiences that workers have when trying to form a union, President Trumka framed the discussion and encouraged the panelists to share their personal stories.

Rebecca Taksel, Adjunct Professor at Point Park University; Meredith Maloney, a Banquet Server at Rivers Casino; Fred Lapka, a Server at Rivers Casino; and Lou Berry, a worker at UPMC; all shared their own experiences, being followed, intimidated, or threatened because they are looking to exercise their right to have a voice on the job.

UPMC, the Commonwealth's largest private employer, and the beneficiary of hundreds of millions of dollars in tax exemptions each year, even broadcasts anti-union propaganda on computer monitors throughout their hospital, in view of both employees and patients.

While the conditions that drive the strong organizing campaigns at these different workplaces are unique, the common thread is the demand for respect on the job.

We would like to thank President Trumka for leading this unique event, and we would like to applaud the bravery and determination of the workers who participated, and the thousands more who are fighting every day all across Pennsylvania for dignity at work!

PCN-TV will be broadcasting many of the proceedings from this week's convention, please refer to **PCN's Broadcast Schedule** to see the broadcast times.

Comments

comments

Written by PA AFL-CIO

We Stand With Workers at SugarHouse Casino

Neil Bluhm
Chairman
SugarHouse HSP Gaming, LP
1080 N. Delaware Avenue, Suite 800
Philadelphia, PA 19125

Chairman Bluhm:

Workers at SugarHouse Casino have stood up to demand a fair process to form a Union. We stand with them.

We welcomed Sugarhouse to Philadelphia on the promise of good quality jobs for our community. We are convinced the best way to ensure good quality jobs is for Sugarhouse workers to have a fair process to form their Union.

Workers at Harrah's Casino in nearby Chester have improved their jobs by forming a union, and their employer honored their choice by agreeing to a free, fair and quick process to form a Union. SugarHouse workers deserve the same fair process.

But workers at Sugarhouse have been met by an intimidation campaign which has included your Company paying over $425,000 to an anti-union consultant to run forced attendance meetings. We are outraged.

Now is the opportunity for SugarHouse Casino to choose the right path forward to become the neighbor your company promised to be. As elected leaders of the Philadelphia region, we therefore call on SugarHouse to:

1) End its relationship with anti-union consultants, requiring workers to attend mandatory anti-union meetings, and using firings, suspensions, and intimidation as tactics to stall unionization, and
2) Agree in advance that SugarHouse will respect the will of the majority of its workers by recognizing the workers' union if 50% plus one sign union cards authorizing a union to represent them.

We understand that our counterparts in Pittsburgh have called on you to make the same commitments at your casino in that city as well. We will continue to stand with workers at SugarHouse in Philadelphia and Rivers Casino in Pittsburgh until your casino companies respect workers' demands for a free and fair process to form a Union and fulfill the promise of good jobs for our communities.

Sincerely,

Rep. Brendan F. Boyle
170th Legislative District

Rep. Kevin J. Boyle
172nd Legislative District

Rep. Louise W. Bishop
192nd Legislative District

Rep. Michelle Brownlee
195th Legislative District

Rep. James Clay, Jr.
179th Legislative District

Rep. Mark B. Cohen
202nd Legislative District

Rep. Angel Cruz
180th Legislative District

Rep. Maria P. Donatucci
185th Legislative District

Rep. Jordan A. Harris
186th Legislative District

Rep. William F. Keller
184th Legislative District

Rep. Stephen Kinsey
201st Legislative District

Rep. Mike McGeehan
173rd Legislative District

Rep. J.P. Miranda
197th Legislative District

Rep. Edward J. Neilson
169th Legislative District

Rep. Cherelle L. Parker
200th Legislative District

Senator Mike Stack
5th Senatorial District

Rep. James R. Roebuck
188th Legislative District

Rep. W. Curtis Thomas
181st Legislative District

Rep. John J. Taylor
177th Legislative District

ILLINOIS STATE BOARD OF INVESTMENT
180 North LaSalle Street, Suite 2015
Chicago, Illinois 60601
(312)793-5718

May 22, 2013

Mr. Neal Bluhm
Managing Partner
Walton Street Advisors
900 North Michigan
Chicago, IL 60611

Dear Mr. Bluhm:

Yesterday afternoon I met with a number of employees of the Sugarhouse Casino in Philadelphia and the Rivers Casino in Pittsburgh. The meeting was held at their request so that they could share with the Illinois State Board of Investment (ISBI) concerns regarding their treatment as employees of those casinos.

The workers spoke of arbitrary and capricious termination of health care benefits; inadequate and improper application of Family and Medical Leave Act provisions; inadequate worker training; activities on the part of management to impede workers' efforts to organize; and a general work environment described as hostile and disrespectful.

Clearly, I am in no position to determine the veracity or validity of these issues. However, it was apparent that the individuals were sincere in their expressions of concern and disappointment. Further, it struck me that the workers who came by today, who indirectly work for ISBI and ISBI's annuitants, took these issues seriously enough to travel from Pittsburgh and Philadelphia to Chicago to meet with ISBI and other Walton Street Limited Partners.

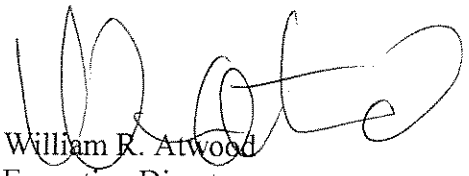
Over the years various issues have been brought to ISBI's attention regarding the difficult relationship between Walton Street and its workers as they have sought to collectively bargain wages, benefits, and work rules. As in the past, I made clear yesterday that ISBI is a limited partner so has virtually no role in the operation of Walton Street portfolio companies. Further, I respectfully submit to Walton Street that these issues do in fact fall into its portfolio, and as a limited partner, ISBI would greatly prefer for Walton Street to manage these issues so that aggrieved parties might have an alternative to directly approaching limited partners.

Finally, the issues raised by the casino employees are referenced in the Responsible Contractor Policy attached to Walton Street Fund VI, in which the firm committed to resolving such issues fairly and equitably.

Thank you for your consideration.

Sincerely,

ILLINOIS STATE BOARD OF INVESTMENT



William R. Atwood
Executive Director

510 City-County Building
414 Grant Street
Pittsburgh, PA 15219

City of Pittsburgh

Legislation Details (With Text)

File #:	2013-1540 **Version:** 1		
Type:	Will of Council	**Status:**	Adopted
File created:	5/14/2013	**In control:**	City Council
On agenda:		**Final action:**	5/14/2013
Enactment date:	5/14/2013	**Enactment #:**	357
Effective date:	5/14/2013		
Title:	NOW, THEREFORE BE IT RESOLVED, that the Council of the City of Pittsburgh does hereby stand by the Rivers workers until the Rivers Casino respects their demand for a free and fair process to form a union and fulfills its promise of good jobs for our community.		
Sponsors:	R. Daniel Lavelle, All Members		
Indexes:	PROCLAMATION - MR. LAVELLE		
Code sections:			
Attachments:	1. 2013-1540.doc		

Date	Ver.	Action By	Action	Result
5/14/2013	1	City Council	Adopted	Pass

WHEREAS , the Rivers Casino Workers are publicly standing up and demanding a fair process to form a union; and

WHEREAS , the Rivers Casino was welcome to Pittsburgh on the promise that good quality jobs would be provided to the community, and the best way to ensure good quality jobs is for the Rivers to have a fair process through which to form a union; and

WHEREAS , workers at the Meadows Racetrack and Casino, at Presque Isle Downs and Casino in Erie, and at Horseshoe Casino in Cleveland have improved their jobs by forming a union, and their employers have honored their choices by agreeing to a free, fair and quick process whereby the union was recognized once the majority of workers had signed union cards; and

WHEREAS , Rivers Workers demand a similar process for union approval, calling on the Rivers to refrain from hiring anti-union consultants, to refrain from requiring workers to attend mandatory anti-union meetings, and to refrain from using firings, suspensions and intimidation tactics to stall unionization; and

WHEREAS , Rivers Workers request the Rivers to agree in advance that it will respect the will of the majority of its workers by recognizing the workers' union if 50% plus one sign union cards authorizing the union to represent them; and,

WHEREAS , Pittsburgh's union history has proven that everyone benefits when workers have the right and the power to improve their jobs;
NOW, THEREFORE BE IT RESOLVED , that the Council of the City of Pittsburgh does hereby stand by the Rivers workers until the Rivers Casino respects their demand for a free and fair process to form a union and fulfills its promise of good jobs for our community.

IF YOU ARE ASKING YOURSELVES . . .

RIVERS CASINO

WHO IS THE STEEL CITY CASINO WORKERS COUNCIL?

WE ARE TOO . . .

With union membership continuing to plunge in this country (down to 6.3% of the private sector workers) it does not surprise us that from time to time we will have union activity. BUT WE HAVE NEVER HEARD OF THE STEEL CITY CASINO WORKERS COUNCIL, UNTIL AN AD APPEARED ON APRIL 11th IN *THE PITTSBURGH POST GAZETTE* . . .

It appears that four unions are "behind" this group: UNITE HERE Local 57, Teamsters Local 211, Operating Engineers Local 95 and the Steelworkers.

Here is what we do know about these four:
Some of these unions appear to have several things in common: **Membership losses and expensive dues.**

UNION MEMBERSHIP:*
Membership losses since 2007 according to the United States Department of Labor

UNITE HERE LOCAL 57: Down 196 members
TEAMSTERS LOCAL 221: Down 80 members
UNITED STEELWORKERS OF AMERICA: Down 108,491 members

IN CONTRAST RIVERS CASINO HAS GROWN FROM ZERO TO OVER 1,750 EMPLOYEES

MONTHLY DUES:*
UNITE HERE, Local 57 – Minimum: $33.25 - Maximum dues: $39.25
TEAMSTERS, LOCAL 211 – Minimum: $28 - Maximum dues: $70
OPERATING ENGINEERS, LOCAL – 2 times a member's hourly wage rate, + $4.25
UNITED STEELWORKERS OF AMERICA – 1.45% of earnings

THE FACTS ABOUT THE UNIONS BEHIND THE STEEL CITY CASINO WORKERS COUNCIL, WHO APPEAR TO BE CALLING THE SHOTS, DO NOT PAINT A PRETTY PICTURE.

KEEP YOUR HARD EARNED MONEY
DON'T SIGN A CARD!

*Source of Information: LM-2 Forms filed by these unions with the United States Department of Labor.

We Stand With Workers at Rivers Casino

Today Rivers Casino workers are publicly standing up and demanding a fair process to form a union. We are proudly standing with them.

We welcomed the Rivers Casino to Pittsburgh on the promise of good quality jobs for our community. We are convinced the best way to ensure these are good quality jobs is for Rivers workers to have a fair process through which to form a union.

Workers at the Meadows Racetrack and Casino, at Presque Isle Downs and Casino in Erie, and at Horseshoe Casino Cleveland have improved their jobs by forming a union, and their employers have honored their choices. These employers agreed to a free, fair and quick process whereby the union was recognized once the majority of workers had signed union cards. Rivers workers want and deserve the same fair process.

As leaders of this community, we therefore call on Rivers to:
1. Refrain from hiring anti-union consultants, requiring workers to attend mandatory anti-union meetings, and using firings, suspensions and intimidation as tactics to stall unionization, and
2. Agree in advance that it will respect the will of the majority of its workers by recognizing the workers' union if 50% plus one sign union cards authorizing a union to represent them.

Pittsburgh's union history has proven that we all benefit when workers have the right and the power to improve their jobs. For these reasons, we will continue to stand with Rivers workers until the Rivers Casino respects their demand for a free and fair process to form a union and fulfills its promise of good jobs for our community.

Bill Bartlett
ACTION United Western PA Regional Council

Jim Brewster
State Senate, 45th District

Ricky Burgess
Pittsburgh City Council District 9

Jeanne Clark
Candidate for Pittsburgh City Council, District 8

Dom Costa
State House of Representatives, 21st District

Jay Costa
State Senate, 43rd District

Paul Costa
State House of Representatives, 34th District

Dan Deasy
State House of Representatives, 27th District

John DeFazio
Allegheny County Council at Large, USW District 10 Director

Anthony DeLuca
State House of Representatives, 32nd District

Frank Dermody
State House of Representatives, 33rd District

Patrick Dowd
Pittsburgh City Council, District 7

Mike Doyle
U.S. House of Representatives PA-District 14

Jim Ferlo
State Senate, 38th District

Wayne D. Fontana
State Senate, 42nd District

Lisa Frank
Coordinator, One Pittsburgh

Dan B. Frankel
State House of Representatives, 23rd District

Ed Gainey
State House of Representatives, 24th District

Helen Gerhardt
Pittsburghers for Public Transit

Dan Gilman
Candidate for Pittsburgh City Council, District 8

Darlene M. Harris
President, Pittsburgh City Council, District 1

William C. Kortz
State House of Representatives, 38th District

Nick Kotik
State House of Representatives, 45th District

Bruce A.Kraus
Pittsburgh City Council, District 3

R. Daniel Lavelle
Pittsburgh City Council, District 6

Antonio Lodico
Co-Director, Mon Valley Unemployed Committee

Pittsburgh United
Action United
Clean Water Action
Group Against Smog and Pollution (GASP)
Hill District Consensus Group
Iron Workers Local 3
Mon Valley Unemployed Committee
Pennsylvania Interfaith Impact Network (PIIN)
Pittsburgh Branch NAACP
SEIU 32BJ
Sierra Club
UFCW Local 23

Barney Oursler
Executive Director, Pittsburgh United

Joseph F. Markosek
State House of Representatives, 25th District

Robert Matzie
State House of Representatives,16th District

Dr. Charles J. McCollester
President, Battle of Homestead Foundation

Erin C. Molchany
State House of Representatives, 22nd District

Corey O'Connor
Pittsburgh City Council, District 5

William Peduto
Pittsburgh City Council, District 8

Adam Ravenstahl
State House of Representatives, 20th District

Luke Ravenstahl
Mayor of Pittsburgh

Harry Readshaw
State House of Representatives, 36th District

Natalia Rudiak
Pittsburgh City Council, District 4

Jack Shea, President
Allegheny County Labor Council

Matthew Smith
State Senate District 37

Theresa Smith
Pittsburgh City Council, District 6

Richard Stanizzo
Business Manager, Pittsburgh Building Trades Council

Jake Wheatley Jr.
State House of Representatives, 19th District

Jesse White
State House of Representatives, 46th District

STEEL CITY CASINO WORKERS COUNCIL
SCCWC

UNITE HERE Local 57 • Teamsters Local 211 • Operating Engineers Local 95 • United Steelworkers

MacLachlan, Amy (MGC)

From: john simpson <annejohn2@outlook.com>
Sent: Tuesday, March 01, 2016 10:42 AM
To: MGCcomments (MGC)
Subject: MG+E BROCKTON

Sent from Mail for Windows 10

My comment has to do with the traffic from the east side of Brockton We have to the best of my knowledge seen no information on the impact of traffic from the east side. There are two roads for the traffic to use Crescent Street and Centre st to the east of Main St. West Elm Street (residential) Belmont Street already a busy street, and Forest Ave also heavy traffic. What plan has the casino and the city of Brockton proposed to handle this problem?

John Simpson

MacLachlan, Amy (MGC)

From: jcaponyx@aol.com
Sent: Monday, February 29, 2016 10:02 PM
To: MGCcomments (MGC)
Subject: MG&E Brockton

Dear Commissioners,

I am opposed to the proposed casino in Brockton. It is the wrong location, the wrong people involved and it will have a negative impact on Brockton and the surrounding communities. Some of the negative impacts that a Brockton casino will have on Brockton is preying on elders, minorities, low income people and Veterans; causing poor influence on impressionable children; causing unsafe conditions; causing traffic problems throughout the city, surrounding communities and Route 24, which is the only highway to Brockton; and draining valuable resources from the city and surrounding communities. The cost to the city and surrounding communities is far far greater than what the applicant is committed to pay. I am particularly concerned with the traffic because the city, Bluhm, Carney and all the proponents have not addressed the traffic problem. They looked at simply one exit off Route 24 and have addressed that exit. But the truth is that people would not just use that exit but they will use the Mall exit; the Mall exit was just written up as being the most dangerous intersection in the state. Yet, the traffic study that the proponents did has not even looked at how much worse and dangerous the Mall exit will be with the casino. They completely excluded that exit from the study as if that exit was not even real. Furthermore, they have not addressed the fact that people will not just use Route 24; rather people will use Routes 123, 27, 138, 28, 18, etc. None of these roads were even considered nor addressed in the traffic study that they did.
The applicant's are out of touch with the detrimental impacts and simply do not care about anything other than filling their pockets at the expense of the vulnerable. The applicants are a win at all cost group; whether their behavior is legal and ethical is none of their concern. But it should be the concern of the Commission. The proponents have been paying people to come to meetings and say they are in support even though those people speaking have not interest in the welfare of Brockton. They have also been getting the Metro South to have businesses in and near Brockton send letters but the truth is that those business do not care about the health and welfare of the citizens of Brockton; in fact, most of the businesses are not owned by people in Brockton and the business are only caring about their own greed and not the health, welfare and safety of the citizens and children in Brockton. I hope the Commission is not fooled by those people who are saying how good the casino would be when the truth is what they really are saying is that the casino will be good for my home and family that would not ever think of living in Brockton near the casino. Case in point, you can ask Bluhm and he will tell you that he would never spend money at a casino. What does that tell you if the owner will not even touch his product?

Please do not award the Region C license at this time. Let the Tribe have their chance. If the Tribe does not succeed, then you can always return to consider a private casino in Region C. This approach is only right given the history of ill treatment of the Native Americans. Furthermore, it allows for you to see how the other casino licensees do in the state. If the Tribe fails and the casinos are prospering, then you could open up Region C at that time to a private casino. This is the most reasonable and sensible approach; it would also give you time to look into the questionable actions of Bluhm, Carney and the other proponents.

Thank you,

Paul A. Kireilis
PO Box 1874
Brockton, MA

MacLachlan, Amy (MGC)

From: Jeanne Holmes-Kireilis <friendoftag@gmail.com>
Sent: Monday, February 29, 2016 9:44 PM
To: MGCcomments (MGC)
Subject: MG&E Brockton Opposition

Dear Commissioners,

I ask that you consider my comments.

I am opposed to the proposed casino in Brockton. It is the wrong location, the wrong people involved and it will have a negative impact on Brockton and the surrounding communities. In addition, I believe that the Native Americans deserve the right to operate their casino in Taunton without the negative impact that the Brockton casino may have on their efforts. I believe it is in the best interest of the state, region, city of Brockton and surrounding communities for the Wampanoag tribe to have their opportunity without competition from another casino in Region C.

Some of the negative impacts that a Brockton casino will have on Brockton is preying on elders, minorities, low income people and Veterans; causing poor influence on impressionable children; causing unsafe conditions; causing traffic problems throughout the city, surrounding communities and Route 24, which is the only highway to Brockton; and draining valuable resources from the city and surrounding communities. The cost to the city and surrounding communities is far far greater than what the applicant is committed to pay.

The applicant's are out of touch with the detrimental impacts and simply do not care about anything other than filling their pockets at the expense of the vulnerable.

The applicants are a win at all cost group; whether their behavior is legal and ethical is none of their concern. But it should be the concern of the Commission. Bluhm, et al were not forthright to the Commission when they appeared in front of you in November. They said they did not care about the Taunton casino and were not worried about it but now that the Taunton casino is likely, they are acting in complete contradiction to their statements. They clearly are worried about the Taunton casino to the point that when they found out that the citizens in Taunton, who wanted to file a lawsuit against the Tribe, did not have the money and would be delaying filing the lawsuit, then Bluhm came rushing in to pay for their lawsuit. These are people he does not even know yet he is ponying up the money for their lawsuit; sounds like the actions of a desperate man and it goes to show what he is willing to do. He is willing to misrepresent to you, the Commission, to get his way. He has a history of doing this whether it be by involving the mafia in his business dealings, paying fines as opposed to following the law and many other shady actions. Furthermore, he also spoke to you in November about the fact that there would be a lawsuit against the Tribe but what he failed to tell you in an honest and forthright manner was that he knew there would be a lawsuit because he was going to pay for the lawsuit. Is this really the type of person that Massachusetts should have involved in the casino industry that you are working so hard to be reputable? I say not.

Please do not award the Region C license at this time. Let the Tribe have their chance. If the Tribe does not succeed, then you can always return to consider a private casino in Region C. This approach is only right given the history of ill treatment of the Native Americans. Furthermore, it allows for you to see how the other casino licensees do in the state. If the Tribe fails and the casinos are prospering, then you could open up Region C at that time to a private casino. This is the most reasonable and sensible approach.

Thank you,

Jeanne L. Holmes
Belcher Ave
Brockton, MA

MacLachlan, Amy (MGC)

From: plainlynda@aol.com
Sent: Monday, February 29, 2016 1:19 PM
To: MGCcomments (MGC)
Subject: MG & E Brockton

I would like to make a public appeal to stop the casino. There are so many other vacant locations more appealing than across from a Public High School and a congested common area of Brockton. Building this will make a mass exit. We have crime that already cannot be controlled, add gambling?!? Three shootings around my neighborhood just last summer. What's wrong with the old dog track for instance if Mass really wants a casino? right off the highway, less congested, much larger grounds.

MacLachlan, Amy (MGC)

From: Cathy <cag17@comcast.net>
Sent: Monday, February 29, 2016 12:59 PM
To: MGCcomments (MGC)
Subject: "MG2ndEBrockton"

Follow Up Flag: Follow up
Flag Status: Flagged

I am against the Casino for Brockton Fairgrounds. Would like to see a venue for the family.

Sent from my iPhone

March 1, 2016

Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Dear Commissioners:

In Brockton, we have before us an opportunity of great significance that will affect the local economy for generations to come. Destination resort casino gaming is not a silver bullet, designed to solve all of the challenges facing us today. However, the revenue and jobs that casino gaming delivers IS a critical component of driving Brockton's future economic opportunities.

The Metro South Chamber of Commerce has long been in support of this project. Our board voted unanimously in support of a Brockton Destination Resort Casino. We have spoken at numerous hearings, testifying on behalf of the business community on the benefits of local investment, job creation, tax revenue and diversification of entertainment options. We have also hosted a vendor fair where several regional business owners registered interest in hopes of providing goods and services to the destination resort casino.

We have analyzed Mayor Carpenter's host community agreement and reviewed reams of data on both sides of the issue. Not long ago, however, I realized that we would not be able to understand the full impact of the proposed casino without having seen the inside of an actual Rush Street casino and talking to leaders in one of the communities that a Rush Street gaming facility has directly impacted.

Last weekend I changed that. With little notice, I went to Des Plaines Illinois, to the Rivers Casino, the Rush Street developed facility that is most similar to the suburban model that is proposed in Brockton. From this visit, I would like to share with you several observations.

Des Plaines is a working city in the suburbs of Chicago with a population of over 55,000. It has a proud history as the birthplace of McDonald's. Like so many of our once-great cities, however, the economy has declined as it seeks new pathways to prosperity. The Rivers Casino is seen by city leaders as an important part of a comprehensive plan for the city's revival.

In pulling up to the casino, I was stuck by its sophisticated, but modest exterior. It had a prominent presence, but the structure was balanced in regards to its surroundings and was neither garish nor imposing. In fact, it looked most like a large, upscale Panera Bread building.

The interior, likewise, was modest in its footprint. It contained tasteful and detailed finishes throughout, and no overbearing structures, with all four exits clearly visible from its center. For a facility that has seen 10,000 visitors per day for nearly five years, the interior looked fresh and new. Clearly, it is well maintained.

Much like the proposed Brockton gaming and entertainment facility, there are other casinos that are located within close proximity to the Rivers Casino in Des Plaines. The Horseshoe Casino and the Joliet-Harrah's are only about 30 miles away, and the Elgin Casino is about 20 miles away.

Despite the competition, there is plenty of business to go around. Since its opening in 2011, Rivers Casino has grown and prospered, increasing in performance each year.

For a casino so well physically integrated into its suburban commercial neighborhood, Rivers Casino's programs demonstrated even more intentional integration into the surrounding communities.

I visited with leaders from a Chicago-based workforce training program for homeless and at risk families called The Cara Program (Cara), to learn about the ongoing relationship that they have with the Rivers Casino. They reported that Rivers Casino has demonstrated a commitment to local hiring, creating a collaborative partnership for sourcing, training and referring candidates. Since 2011, Rivers Casino has mentored hundreds and hired 26 individuals from Cara in a variety of positions. Rivers Casino has also invested over $200,000 through grants, scholarships and sponsorships to Cara.

I also spoke with faith based community leaders who stated that the support in volunteerism and in direct food and financial aid from Rush Street was a "God send" to the community in need. The Des Plaines Chamber of Commerce leadership spoke with great specificity about the countless programs in the community that Rush Street provides in the form of employee volunteer programs and community contributions. Rivers Casino employees from all levels review and decide on all non-profit contributions. These investments, well beyond their negotiated obligations, totaled $1.7 million this past year alone.

Des Plaines' hotel tax collections have almost doubled since the Rivers Casino opened in 2011. In 2010, the City's total tax collected was $1,357,843.62 for 8 hotels. In 2015, the City's total hotel tax collected has grown to $2,145,559.07 for the same 8 hotels.

I traveled on roadways undergoing massive reconstruction funded through Casino taxes to the city. These roadway investments are the result of forward thinking set-asides that city leaders negotiated in the interest of directing casino tax revenues towards vital infrastructure projects. I also spoke to the Des Plaines city manager about a transformative drinking water project costing $6 million that the city is embarking on through casino tax dollars, which will save city water rate payers $3.6 million per year going forward.

In closing, I arrived in Des Plaines as an inquisitive supporter, very interested in verifying claims of casino success and seeking real world evidence and experience to confirm the same. After the aforementioned independent meetings with city officials, business leaders, community non profits, and faith based organizations, I left a true believer in the real and tremendously positive impact that an appropriately sized, and expertly managed, destination resort gaming facility can have within our community, now and into the future.

Commissioners, there remains questions about whether or not the proposed tribal facility will ever be built;

Even still, several studies confirm that Region C has ample market to produce success for both a tribal and Brockton destination resort gaming facilities;

In Rush Street (Mass Gaming & Entertainment), Brockton has a well financed, world class casino operator, the envy of any community pursuing this industry.

Representing over one thousand businesses in and around the city of Brockton, I implore you to approve the license for the Mass Gaming Destination Resort Casino in Brockton.

Respectfully,

Christopher Cooney, CCE
President & CEO

Metro South Chamber of Commerce
Sixty School Street • Brockton, MA 02301-4087 • (508) 586-0500 • Fax (508) 587-1340 • www.metrosouthchamber.com

cara
25 YEARS OF JOBS & HOPE

February 25, 2016

To Whom It May Concern,

I am writing on behalf of The Cara Program (Cara) in support of Rivers Casino/Midwest Gaming. Since opening in July 2011, Rivers Casino has meaningfully supported Cara's work by hiring our motivated candidates, providing generous financial support, and leveraging their talents and resources as volunteers.

Cara, a Chicago-based nonprofit, cultivates individual self-sufficiency through a comprehensive service delivery model, which includes intensive job training, placement, retention, and career advancement services, and creates businesses – or social enterprises – that utilize market solutions to create training opportunities and quality jobs for motivated adults affected by homelessness and poverty. Since our founding in 1991, we have placed more than 5,200 individuals into more than 7,500 quality jobs.

Rivers Casino has demonstrated a commitment to local hiring, creating a collaborative partnership for sourcing, training and referring candidates. Overall, since December 2011, Rivers Casino has hired 26 individuals from Cara. These positions (including EVS Attendant, Security, Cage Cashier and Dealer) average $12.17 per hour with a one-year retention rate of 75%.

April's success is indicative of the impact of this partnership. A determined single mother who, despite being born deaf, had taught herself to read lips and to speak, April came to Cara in March 2014 never having held a permanent job. In June 2014, April did a mock interview with Rivers Casino's HR team, who saw past April's lack of work experience and immediately referred and later hired her as an EVS Attendant (Housekeeper). With the support of Rivers Casino's staff, April not only was successful within this role but also took advantage of opportunities to advance her career, and in August 2015 she was promoted to Cage Cashier, where she continues to thrive today.

In addition to being a key employment partner, Rivers Casino has also been a generous contributor to Cara investing over $200,000 through grants, scholarships, and sponsorships, and providing countless volunteer hours as mock interviewers and volunteer trainers in helping the individuals we serve prepare for the workplace.

As Cara continues to grow and scale our services, we are grateful to work with Rivers Casino, who has been such a valuable partner in our fight to end poverty and homelessness in Chicago.

Sincerely,

Maria Kim
President & CEO

Todd&Weld LLP

Howard M. Cooper
E-mail: hcooper@toddweld.com

February 29, 2016

By Hand

Mr. Stephen Crosby, Chairman
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Re: Mashpee Wampanoag Tribe

Dear Chairman Crosby:

As you know, this office represents the Mashpee Wampanoag Tribe ("the Tribe").

I am informed and understand that the Tribe and the Massachusetts Gaming Commission ("the Commission") are currently engaged in important and highly constructive discussions concerning the Tribe's destination resort casino project in Taunton, Massachusetts; discussions which are taking place pursuant to the Tribal-State Compact entered into between the Tribe and the Commonwealth dated March 19, 2013 and enacted into law on November 15, 2013 ("the Compact"). The Tribe is deeply appreciative of the excellent working relationship which it has developed with the Commission and looks forward to continuing those discussions towards the successful implementation of its long-awaited project. Despite those ongoing discussions, however, it is nevertheless necessary, in anticipation of the Commission's upcoming March 31, 2016 decision regarding whether to award Mass Gaming and Entertainment, LLC ("MGE") a Category 1 casino license for Region C, for the Tribe to set forth in writing its clear and long-standing opposition to, and disagreement with, the Commission's consideration of MGE's pending application.

As you know, the Tribe believes that the Commission lacked authority to open Region C to Category 1 license applicants in the first place, and that it lacks authority even to consider the MGE application, much less authority to award a license to the applicant. In summary, the 2011 Massachusetts Expanded Gaming Act ("the Act") at General Laws Chapter 23K, Section 91(e), unambiguously provides that the Commission shall consider bids for a Category 1 license in Region C only if it "determines that the tribe *will not have land taken into trust by the United States Secretary of the Interior*[.]" (emphasis supplied). In turn, the Compact, enacted as Massachusetts law at a time when the Legislature was fully cognizant of the terms of the Act, at Part 2.6 is unambiguous in both referencing Section 91 of the Act and in providing that "the MGC *will not* issue a request for Category 1 License applications in Region *C unless and until* it determines that the Tribe will not have land taken into trust for it by the United States Secretary of the Interior." (emphasis supplied). The quoted provisions of the Act and Part 2.6 of the Compact are mandatory, not discretionary. Both provisions carry the full weight of law having been enacted by the Legislature. As you are well aware, the Commission has never determined that the Tribe "will not have its land taken into trust;" nor could it possibly reach such a conclusion where the United States Department of the Interior ("the Department") on September

18, 2015 published its Record of Decision ("ROD") announcing that it would take the Tribe's land into trust *and thereafter did so*. Accordingly, the Commission's actions to date in requesting and/or reviewing applications for a Category 1 license in Region C have been unlawful and violate both the Act and the Compact. Awarding a license to MGE by definition will likewise unlawfully violate both the Act and the Compact.

i. The Act and the Compact Preclude the Commission from Approving MGE's Application for a Category 1 License in Region C.

I respectfully refer you to the prior submissions made by my office to the Commission on behalf of the Tribe dated March 28, 2013 and April 12, 2013. Those submissions explain in detail the reasons why, as a matter of law and based upon the clear and unequivocal language of the Act and the Compact, the Commission lacks authority to award a Category 1 license in Region C absent an actual adverse decision by the Department that the United States of America *will not take* land into trust for the Tribe—the opposite of what has now taken place. Although I will not repeat the content of those submissions here, I do wish to expand briefly on the arguments previously presented.[1]

As stated above, the clear and unambiguous language of the Act prohibits the Commission from requesting, reviewing, or approving a Category 1 license for Region C absent a determination that the United States will not take the Tribe's land into trust. Significantly, in litigation in federal court in which the Commonwealth and the Commission as defendants ultimately prevailed, *KG Urban Enters., LLC v. Patrick*, the Commission did not dispute that the Act barred it from issuing a Region C Category 1 license where it had not first determined that the Tribe would not have its' land taken into trust. As stated in the United States Court of Appeals for the First Circuit's August 1, 2012 opinion in that matter:

> KG argued . . . that the [Act] does bar issuance of a license of a [Category 1] license [in Region C] if a compact is approved by the legislature by July 31 and the Commission has not then determined that the tribe will not have land taken into trust. **The defendants do not dispute that interpretation of the statute.**

693 F.3d 1, 6 (1st Cir. 2012) (emphasis supplied).

Having made this representation to the federal court and having prevailed in the federal court litigation, the Commission is estopped from reversing itself with respect to its own interpretation of Section 91(e). See Canavan's Case, 432 Mass. 304, 308 (2000) ("A party who has successfully maintained a certain position at trial cannot in a subsequent trial between the same parties be permitted to assume a position relative to the same subject that is directly contrary to that taken at the first trial.") (quoting Paixao v. Paixao, 429 Mass. 307, 309 (1999).

[1] As the Tribe made clear in reserving its rights in prior submissions, the Commission has breached the Act and the Compact by inviting applications for a Category 1 casino license in Region C where it had not been determined that the Tribe's land will not be taken into trust. The Tribe continues to reserve all rights as to these prior violations.

Likewise, the prior suggestion by some Commission members that Section 91(e) of the Act only provides for *when* the Commission must solicit Category 1 License applications in Region C and does not bear on *whether* the Commission may solicit such bids is without merit under the plain language of the Act, especially as repeated and expanded upon by the language in the Compact. Indeed, the previously advanced contention by certain Commissioners that there is no prohibition in the Act other than a temporal trigger against soliciting and awarding a Class 1 license in Region C improperly ignores the later enacted Part 2.6 of the Compact which itself makes explicit that Section 91 ***prohibits*** the Commission from soliciting Category 1 Licenses for Region C absent a determination that the Tribe will not have its' land taken into trust. Again, the prohibitive nature of the words could not be more clear: "Section 91 of the Act provides that if a compact negotiated by the Governor is approved by the General Court by July 31, 2013, ***the MGC will not issue a request for Category 1 license applications in Region C unless and until it determines that the Tribe will not have land taken into trust for it.***" Compact, at Part 2.6. (emphasis supplied).

To be clear, in the past the Commission has seemingly failed to appreciate that the Massachusetts General Court made clear through its ratification of the Compact that the Commission *lacks authority* to request or grant a Category 1 license in Region C absent a determination that the Tribe will not have land taken into trust by the Department. As a matter of basic statutory construction, the effect of *all* legislation enacted by the Commonwealth must be given effect here, not just selective portions of the Act alone. See Ciardi v. F. Hoffmann–La Roche, Ltd., 436 Mass. 53, 62 (2002) ("Statutes addressing the same subject matter clearly are to be construed harmoniously so as to give full effect to all of their provisions and give rise to a consistent body of law."); *Ropes & Gray LLP v. Jalbert,* 454 Mass. 407, 412 (2009) (explaining statutes must be construed "so as to give effect to each word, and no word shall be regarded as surplusage"); *Franklin Office Park Realty Corp. v. Comm'r of Dep't of Envtl. Prot.*, 466 Mass. 454, 464 (2013) ("A basic tenet of statutory construction requires that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.") (internal quotations and citations omitted). Again, the language of the Compact made clear both the meaning of the prohibition set forth in the Act against opening up Region C to applicants for a Category 1 license and the prohibition to that effect set forth in the Compact itself. Where the Commission has never made any determination that the Department will not take land into trust for the Tribe, and where it cannot do so now because the United States taken the Tribe's land into trust, the Commission is without lawful or proper authority to issue a Category 1 license in Region C.

Finally, as you know, the Compact at Part 9.2.1.4 provides a *non-exclusive*, automatic remedy for the Commonwealth's breach of exclusivity in Region C which excuses the Tribe from paying any revenue share to the Commonwealth whatsoever. I note that some members of the Commission have previously mistakenly argued that Part 9.2.1.4 somehow contemplates the possibility of two casinos in Region C. The notion that the provision in the Compact of a non-exclusive economic remedy for the Tribe provides a basis for the Commission to act unlawfully is without merit.

First, on its face, Part 9.2.1.4 provides an immediate economic remedy for the Tribe in the event that the Commonwealth breaches Part 2.6 by approving a Category 1 licensee in Region C, but it does not state the remedy is exclusive nor does it prohibit the Tribe from seeking to enforce the actual terms of the Compact otherwise. Indeed, the Compact at Part 21.8 explicitly permits the Tribe to go to Court to seek to enjoin a violation of the Compact by the Commonwealth. Part 21.11 similarly makes clear that the remedies available to the Tribe are not limited whatsoever in the dispute resolution procedure.

Second, any argument that the referenced language about the revenue share being eliminated can somehow be construed as a license for the Commission to violate the Compact would effectively and impermissibly render meaningless the Compact's affirmative and outright prohibition on even requesting such licenses "unless and until [the Commission] determines that the Tribe will not have land taken into trust." Compact, at Part 2.6; *see Brillante v. R.W. Granger & Sons, Inc.*, 55 Mass. App. Ct. 542, 548 (2002) (contract "must . . . be interpreted as a whole and effect must be given to all of its provisions in order to effectuate its overall purpose"); *Lexington Ins. Co. v. All Regions Chem. Labs, Inc.*, 419 Mass. 712, 713 (1995) ("A contract should be construed in such a way that no word or phrase is meaningless by interpreting another word or phrase, because the interpretation should favor a valid and enforceable contract . . . rather than one of no force and effect.").

Third, the Commission itself exists as a matter of legislative enactment. It cannot exceed its authority or ignore the limits of its enabling law as made clear by the Legislature. This is not a matter of the Commission making a decision which it knows violates its enabling statute and accepting the consequences. Rather, the Commission is required to act within the bounds of its authority or its actions are a nullity. Here, given the clear limitation of its authority to act in Region C, any attempt by the Commission to seize upon the non-exclusive remedy provision in the Compact would be unauthorized and indeed prohibited by law. At a minimum, inevitable litigation over the issue of the Commission's authority would place a substantial cloud on the validity of any Category 1 license awarded in Region C.

ii. It is in the Best Interests of the Commonwealth for the Commission to Deny MGE's Application.

Even apart from the fact that the Commission's review, and potential approval, of MGE's Category 1 License application would be unlawful under both the Act and the Compact, as a practical matter the Commission should deny MGE's application because doing so is in the best economic interests of the Commonwealth. As the Commission has previously stated, it will issue a Category 1 License in Region C only if such a "license would be beneficial to the Commonwealth given the totality of the then existing and foreseeable economic circumstances. For the Region C review, ***this totality would include the potential for competition by a Tribal casino***." See Request for Public Comment: Region C casino licensing process (Sept. 4, 2015) (available at http://massgaming.com/blog-post/request-for-public-comment-region-c-casino-licensing-process/) (emphasis supplied), a true and correct copy of which is attached here at Tab A. The Commission has likewise announced that any future decision as to a license for Region C would be made only after "***taking into account the economic consequences of what then***

appears to be the status of the Tribal State and Federal land in trust process." See April 18, 2013 Transcript, at 69:13-23 (Com. James F. McHugh), a true and correct copy of which is attached here as Tab B. As described below, the economic consequences of the Commission's approval of MGE's application compel the Commission to deny it based upon the very criteria, albeit erroneous, which the Commission set for itself.

To state the obvious, now that the Tribe's land is in trust and the Tribe will be building and operating a casino in Region C there will be a substantial economic impact on the existing gaming market in the Commonwealth. Any such impact must necessarily be part of the findings the Commission is required to make regarding any Category 1 License application under Section 18(7) as to a "market analysis" and Section 18(13) regarding the "highest and best value to create a secure and robust gaming market." More broadly, Section 18 of the Act requires that in "determining whether an applicant shall receive a gaming license" the Commission "*shall* evaluate and issue a statement of findings of how each applicant proposes to advance the following objectives." See G.L. c. 23K, § 18 (emphasis supplied). Among the Act's objectives as to which the Commission must make findings are the following:

> (7) providing a market analysis detailing the benefits of the site location of the gaming establishment and the estimated recapture rate of gaming-related spending by residents travelling to out-of-state gaming establishments;
>
> . . .
>
> (11) maximizing revenues received by the commonwealth;
>
> (12) providing a high number of quality jobs in the gaming establishment;
>
> (13) offering the highest and best value to create a secure and robust gaming market in the region and the commonwealth; . . .

G.L. c. 23K, § 18.

These factors uniformly require the denial of MGE's application. If the Commission approves MGE's application, pursuant to Part 9.2.1.4 of the Compact the Tribe's casino would not pay any revenue share to the Commonwealth. In addition to the direct loss to the Commonwealth caused by the Commission's actions, the existence of a "tax free" tribal casino would negatively impact the commercial gaming establishments in the Commonwealth. Without limitation, the slot parlor located in Region C has struggled since opening to maintain gross receipts which have been less than predicted. The opening of a "tax free" tribal casino will seriously impact the viability of the slot parlor where there would be three gaming establishments within a twenty five (25) mile radius in Southeastern Massachusetts. As Clyde Barrow, a casino expert with Nathan Associates Inc. succinctly explained, if the Commission approves MGE's Category 1 license application, "***There's no scenario where that comes out better for the state.***" George Brennan, Cape Cod Times, "Experts: Land-in-trust decision a fatal

one for region's commercial casino process" (Sept. 22, 2015) (emphasis supplied), a true and correct copy of which is attached hereto as Tab C.

As Mr. Barrow further explained:

> There's an inherent natural advantage for a tribal casino versus a commercial casino. That's tens of millions of dollars per year, they can give to their customers in free slot play, free rooms, free food and free tickets for entertainment. They can make their facility more lavish and attractive. There's a whole range of benefits.

Id.

Indeed, if the Commission approves MGE's application the likely negative economic impact will extend beyond Region C and will be felt throughout the Commonwealth. The approval and operation of a fourth casino in the Commonwealth likely will compromise the entire gaming market that the General Court carefully delineated in the Act, resulting in substantially less tax revenue for the Commonwealth and a far weaker gaming market. As Spectrum Gaming Group ("Spectrum"), the consultant hired to analyze the legislative proposal to expand gaming in the Commonwealth, concluded, the presence of a tribal casino that does not share revenue with the Commonwealth "would have ***potentially disastrous*** effects on commercial casinos in the Commonwealth, as a tribal casino in this case would potentially contribute no tax money to the Commonwealth, and would ***obviously*** cause a decline in the gross gaming revenues to the commercial casinos." Comprehensive Analysis: Projecting and Preparing for the Potential Impact of Expanded Gaming on Commonwealth of Massachusetts, at 283–84 (Aug. 1, 2008) (emphasis supplied), a true and correct copy of which is attached here as Tab D. I note that the underperformance of slot parlor in Region C to date only amplifies the concern expressed in the 2008 Spectrum analysis.

As Spectrum also concluded in its more recent analysis, if the Commission were to approve MGE's application, the operation of both an MGE and tribal casino in Region C will likely result in the loss of over $28 million less in tax revenue to the Commonwealth per year than if only the Tribe's casino were in operation. Competitive Analysis, Understanding Risk Factors, Economic Impacts of Casinos in Massachusetts Region C, at iii (Dec. 9, 2015), a true and correct copy of which is attached here as Tab E.

Of course, all of this is obvious and the primary reason why existing Category 1 license holders themselves have made clear to the Commission that they will face a disastrous impact in their own operations from the presence of a fourth casino and/or a "tax free" tribal casino. See Letter from Bill Hornbuckle, President and Chief Operating Officer, MGM Springfield to Chairman Stephen Crosby (Apr. 16, 2013), a true and correct copy of which is attached here as Tab F. As MGM Springfield, the approved Region B Category 1 licensee, explained to the Commission in 2013, even just opening Region C to commercial applications "will create instability in this market with many direct and indirect adverse impacts on the remaining licenses." Id. at 1. Doing so "would significantly alter the Massachusetts gaming market and may impact the overall value of each of the three individual Category 1 licenses originally

contemplated by the legislature following years of detailed studies of the market." Id. Indeed, "[t]he potential for a fourth license in the Commonwealth was not a possibility any applicant considered when they balanced the significant capital expenditure expected from them and the scope of the market based on the statute."[2] Id. at 2.

All of this is before even considering the impact on the Tribe itself. I will not repeat here all that you have learned about the Mashpee Wampanoag and their history. The Tribe is a proud, distinguished people who trace their lineage to those Native Americans who greeted the Pilgrims and sheltered and fed them during their first difficult winter. I need not remind the Commission what the Tribe received in return. When the Legislature passed the Act, it made specific provision for the negotiation of a compact with a recognized Native American Tribe for a reason. When Governor Patrick took the step of negotiating and completing the Compact with the Tribe he did so not just because it was in the best interests of the Commonwealth but also because it presented an opportunity to remedy, in some small part, the mistreatment of the Tribe and the barriers to its economic development which have existed for generations. I do not think it overly dramatic to say that in light of the language of the Act and the Compact, the Commission's grant of MGE's application in direct contravention of its authority would be seen by the Tribe as yet one more breach of the promises to Native Americans which have taken place for generations.

iii. Litigation Will Not Delay the Tribe's Land Into Trust, But It Will Delay MGE's Project If It Is Awarded A License.

Finally, it is tiresome to hear the repeated and inaccurate claim that the Tribe's project will be delayed by litigation now that the Tribe's land has been taken into trust. Although a group of residents, openly and cynically financed by MGE, have now sued the Department in an attempt to undo the Department's decision to take the Tribe's land into trust, that lawsuit is without merit and will not delay the Tribe's project. As you know, the Department has abandoned its policy concerning any self-stay in the event of litigation such that those seeking to stop the Tribe's project will actually need to obtain an injunction in order to do so. To date, the plaintiffs in that action have not even sought an injunction. It should also be noted that, where plaintiffs in similar suits have sought a preliminary injunction against proceeding with the tribal project, the courts have denied those requests. *Stand Up for California! v. U.S. Dept. of the Interior,* Civ. No. 12-2039 WL 324035 (D.D.C. Jan. 29, 2013); *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Salazar,* No. 2:12-CV-JAM-ACT, 2013 WL 417813 (E.D. Calif. Jan. 30, 2013). It is highly unlikely that these plaintiffs would be the first to obtain such extraordinary relief, even were they to seek it.

[2] As well, the communities in Regions A and B that are to host Category 1 casinos, and also the host community of the slots parlor, Plainville, Massachusetts, all voted to approve their respective host community agreements with the understanding that there were to be at most 3 casinos in the Commonwealth and that the contemplated Tribal casino would not allocate zero percent of its revenue to the Commonwealth if it were built and operating. Those communities never had an opportunity to vote on their respective host community agreements with the information that there could be 4 casinos including a tribal casino contributing zero percent revenue to the Commonwealth.

As a separate matter, it is troubling that the Commission would even consider the MGE initiated and financed litigation against the Tribe as an appropriate factor in its decision here except, perhaps, to the extent that MGE's sponsorship of a lawsuit to advance its own agenda at the cost of the Commission following the Act and the Compact speaks to its suitability as a licensee. Further, if the potential impact of litigation is deemed to have any relevance here, and it should not, the Commission should understand that if MGE is awarded a Category 1 license in Region C, the Tribe will take legal action to protect its interests given the Commission's lack of authority to award such a license.

It is unfortunate that the Commission has proceeded with its consideration of the MGE application in Region C to this point, notwithstanding the Tribe's consistent and persistently expressed position that it lacks the authority to do so. The Tribe asks that the Commission cease its efforts in this regard.

Howard M. Cooper

HMC/ckb
Enclosures
cc: Attorney General Maura Healey
Edward Bedrosian, Executive Director
Gayle Cameron, Commissioner
Lloyd Macdonald, Commissioner
Bruce Stebbins, Commissioner
Enrique Zuniga, Commissioner
Catherine Blue, Esq.
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Mashpee Wampanoag Tribal Gaming Commission
Arlinda Locklear, Esq.

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Request For Public Comment: Region C casino licensing process

September 01, 2015 by MGC Communications 0 comments

The Massachusetts Gaming Commission is seeking comments on the request by Mass Gaming and Entertainment, LLC that the Commission make an immediate determination (prior to the Region C application date) that the Commission will issue a casino license in Region C if it determines that a Region C gaming applicant meets all of the criteria for issuance of such a license and it is in the best interest of the Commonwealth regardless of whether or not the United States Secretary of the Interior puts land into trust in Taunton for the Mashpee Wampanoag Tribe prior to the issuance of a casino license. Under the Mass Gaming and Entertainment, LLC's request, the Commission would not deny Mass Gaming and Entertainment LLC's application for a Region C license merely because such land had been taken into trust for the Tribe prior to the issuance of such license, if the below policy and criteria has been satisfied.

The Commission's current plan and policy, a policy it has applied in all licensing decisions thus far, is that it will make a determination on whether to issue a license only after its review of the full gaming application and then only if its review shows that issuance of a license would be beneficial to the Commonwealth given the totality of the then existing and foreseeable economic circumstances. For the Region C review, this totality would include the potential for competition by a Tribal casino.

Those who wish to submit written comments may do so by sending an email to mgccomments@state.ma.us with '*Region C*' in the subject line. All written comments must be received by Friday, September 11, 2015 at 5:00pm.

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participatory process for implementing the

THE COMMONWEALTH OF MASSACHUSETTS

MASSACHUSETTS GAMING COMMISSION

PUBLIC MEETING #64

CHAIRMAN

Stephen P. Crosby

COMMISSIONERS

Gayle Cameron (present via telephone)

James F. McHugh

Bruce W. Stebbins

Enrique Zuniga

April 18, 2013, 1:25 p.m.

PATHFINDER REGIONAL VOCATIONAL TECHNICAL HIGH SCHOOL

240 Sykes Street

Palmer, Massachusetts

applications and process them, the Commission will make as its third step a Region C commercial application suitability determination for each applicant, if there's more than one. Again, the Tribal Federal land in trust process and the State processes will proceed unaffected and continue as before.

And after the suitability determinations are made, the Commission would issue a site-specific Phase 2 RFP and a deadline for responses. And the Tribal processes would continue.

At some point, the deadline for the commercial responses would be received. And then the Commission, using the criteria it will use in Regions A and B, will make a decision about award of a commercial license after taking into account the economic consequences of what then appears to be the status of the Tribal State and Federal land in trust process, the contents of the Phase 2 responses, the regional and statewide gaming and other economic conditions then existing and then forecast, and other relevant considerations.

This acknowledges that this entire

The Herald News

Print Page

By George Brennan
Cape Cod Times

September 22, 2015 6:25PM

Experts: Land-in-trust decision a fatal one for region's commercial casino progress

Two casino experts who have observed the Massachusetts gambling market before and after casinos were legalized say the Mashpee Wampanoag's federal land decision should put an end to the potential licensing of a commercial venture in southeastern Massachusetts.

The state's own casino study done in 2008 cautioned a tribal casino in the same region with a commercial casino would be "disastrous."

Two casino experts who have observed the Massachusetts gambling market before and after casinos were legalized say the Mashpee Wampanoag's federal land decision should put an end to the potential licensing of a commercial venture in southeastern Massachusetts, known as Region C.

On Thursday, the Massachusetts Gaming Commission will discuss a request by Mass. Gaming & Entertainment, which hopes to build a $650 million casino in Brockton, to issue a license regardless of the tribe's status. The company is likely to argue the tribe faces a protracted legal fight, though no lawsuit has yet been filed and the tribe appears poised to move on with its Taunton casino plans while a court battle is waged.

That makes the commission's decision clear, experts say.

"It's the death knell to the one in Brockton, period," Richard McGowan, an associate professor at Boston College, said Tuesday.

"If you assume the tribe goes forward with its plans, it doesn't make sense to issue a commercial license in Region C," said Clyde Barrow, a casino expert with Nathan Associates Inc.

Rush Street Gaming, the company backing the Brockton proposal, has made it clear in statements it believes it can compete in the market and a study by Innovation Group reportedly shows the Brockton casino's market share would drop just 10 percent in head-to-head competition with the tribe.

"Innovation Group never factors in cannibalization," Barrow said. In markets where a casino comes in to an existing market, the new facility takes 20 to 30 percent of the business, Barrow said. In Massachusetts, there would be three gambling facilities in a 25-mile radius if Brockton were to join the tribal casino and Plainridge Park, which is already open.

"There's no scenario where that comes out better for the state," he said.

In the case of the Mashpee Wampanoag proposal, it would be a devastating blow to the state's coffers, he said. Under a tribal-state compact, the tribe would pay 17 percent of gross gambling revenues if there is no competition in the region. If there is competition, the tribe pays zero.

"There's an inherent natural advantage for a tribal casino versus a commercial casino," Barrow said. "That's tens of millions of dollars per year, they can give to their customers in free slot play, free rooms, free food and free tickets for entertainment. They can make their facility more lavish and attractive. There's a whole range of benefits."

Ultimately, it may be difficult for any casino to contend with the $1.7 billion investment Steve Wynn has promised in Everett, McGowan said.

"I can't imagine Brockton can compete with that," he said.

Spectrum Gaming, a consultant for the commission which did a 2008 state study before casinos were licensed, warned that a tribal casino competing with a state-licensed casino "would have potentially disastrous effects" on revenue generated for the state.

"When tribal casinos do not fall under the same regulatory and tax guidelines as commercial casinos, they often have a distinct competitive advantage," the Spectrum study stated.

Factoring in what's being talked about in Rhode Island with a facility in Tiverton near the state line and a proposal by two Indian tribes in Connecticut to join forces on an East Hartford casino, McGowan said the threat of saturation is real.

http://www.heraldnews.com/article/20150922/NEWS/150928532

Print Page

COMPREHENSIVE ANALYSIS:

Projecting and Preparing for Potential Impact of Expanded Gaming on Commonwealth of Massachusetts

Prepared for the Commonwealth of Massachusetts,
Deval L. Patrick, Governor
Timothy P. Murray, Lieutenant Governor
August 1, 2008

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Contents

Executive Summary

The Commonwealth of Massachusetts engaged Spectrum Gaming Group, an independent research and professional services firm, to analyze a legislative proposal to authorize three commercial destination casino resorts in the state, and to project its potential impacts.[1]

Four core themes resound throughout our analysis that would help ensure that gaming advances public policy in Massachusetts:

1. Public policy should be designed to maximize capital investment, a critical element that separates successful gaming markets from less-successful ones.
2. A robust, comprehensive bidding process should be established to attract the highest quality applicants and to ensure that such applicants develop policies that inure to the best interests of the Commonwealth.
3. Casino licensure, as envisioned in this legislation, is tantamount to a regional monopoly. We suggest that it should require a concomitant responsibility on the part of each licensee to operate in the public interest.
4. The interests of all stakeholders – from operators and investors, to patrons, small business owners and taxpayers – should be parallel. This means that policies and practices must be designed to ensure that all interested parties benefit, and that no interests are sacrificed.

A vigorous licensing process designed to evaluate bids based on how applicants intend to advance the public interest on a variety of fronts is required to ensure the development of a gaming industry that operates in the best interests of Massachusetts.

Many impacts can be expected that can be characterized as related to general economic trends, or that would occur in any industry that targets consumer spending – including the prospect of enhanced competition among private businesses. With that in mind, we caution that there can be no guarantees from the Commonwealth or from casinos that all impacts will be positive. The public and private sectors must maintain realistic expectations, and guide public policy where it can be guided.

Based on our research, analysis and experience, Spectrum reached the following conclusions:

Economic Impact

- Three destination casinos in Massachusetts could generate between $1.23 billion and $1.78 billion in annual gross gaming revenue in their first year of stabilized

[1] Our assumptions for each potential property include the following: 160,000 square-foot casino; 3,000 slot machines; 180 live table games (120 traditional, 60 poker); 2,000-room hotel; 100,000 square feet of convention/meeting/event space; $1 billion in actual construction costs.

operations. The likely projection is $1.5 billion in annual gaming revenue. The following table provides a range of revenue projections for one casino in each of the three regions:

Total est. gross gaming revenue (in millions)

	Region 1	Region 2	Region 3	Total
Low case	$452.3	$438.1	$ 336.4	$ 1,226.8
Moderate case	$542.1	$526.8	$ 432.7	$ 1,501.6
High case	$643.4	$623.4	$ 509.7	$ 1,776.5

- The casinos would each create an average of 4,377 direct jobs.
- Every direct job in the casino industry would yield approximately 0.5 jobs elsewhere in the local economy. The statewide employment impact of this industry would be a total of 20,000 jobs throughout Massachusetts.
- Turnover at the Massachusetts casinos would be about 25 percent, which translates into approximately 1,100 job openings annually at each casino. These will be disproportionately greater in certain job categories, such as unskilled, entry-level positions, where the turnover rate could reach as high as 40 percent.
- The Massachusetts casinos in our moderate-case, or likely, scenario would add about $1 billion to the gross regional product of the Boston area and $2 billion to the gross regional product of Massachusetts.
- This moderate scenario shows that $596.7 million in total government revenue – including indirect revenue -- would be generated, including funds that would be available for property tax relief. This amounts to 39.7 percent of projected gaming revenue.
- Each Massachusetts casino would create an estimated 3,000 direct construction jobs.
- Total annual salaries and wages would be $121 million for a Boston casino and $119.6 million for each of the two casinos in the eastern and western regions of Massachusetts. With benefits, total compensation would be $157.3 million for Boston and $155.5 million for each of the other two properties. This represents more than $468 million in annual direct compensation in Massachusetts with three casino properties. With benefits, the average compensation level for casino workers in Massachusetts would be $35,641. Without benefits, the average is $27,417.
- Lottery sales in counties near the three destination casinos in Massachusetts would decline, at least in the short term. Long-term, our view is that the Lottery will not be significantly affected by the introduction of casinos in Massachusetts, particularly with the development of cross-marketing plans and other strategies designed to protect the Lottery.
- Conventions and meetings at a destination casino would generate at least $7.2 million in annual spending at other area businesses, and also would create annual demand for more than 26,000 room nights at other lodging facilities.

- The potential for substitution away from existing entertainment, bars, restaurants, hotels and other businesses can be addressed through effective public policy. The impact of casinos on other businesses – whether a substitution or complementary effect – is likely to be felt within a relatively short distance of the casinos. Without knowing where the three Massachusetts casinos would be located, we cannot project the specific local impacts on businesses. Any adverse effects casinos may have on other industries could be significantly mitigated if the locations for the casinos are chosen wisely, with an eye for strategic placement, and if applicants for licensure affirmatively address this issue in their competitive bids.
- The agencies regulating Massachusetts casinos would have a projected combined annual budget of about $16.1 million, with most of that funding coming from the gaming operators.
- Legalizing commercial casinos could open the door to Indian tribes to also offer Class III (Las Vegas-style) gambling. However, such casinos would require tribal-state compacts, over which the Commonwealth would have significant negotiation power. Tribes could offer Class II (bingo-based) gaming without a tribal-state compact. Although a Class II tribal casino would represent competition to commercial casinos in the state, a Class III facility would pose much more of a threat.
- Unless and until the open question of a potential tribal casino in Massachusetts is resolved, that uncertainty will be perceived by capital markets and commercial operators as a heightened risk. Added risk would be reflected in a higher cost of capital – i.e., sources of capital will demand greater returns to compensate for the increased risk. This would result in less capital being invested, which would lead to fewer jobs, less gaming revenue and less overall benefit to the Commonwealth.

Social Impacts

- The social impacts of casino gambling are significantly more difficult to objectively analyze and estimate. We concur with the conclusion of prominent problem-gambling epidemiologist Dr. Rachel Volberg: "The negative impacts of gambling [which chiefly concern the social impacts] typically take much longer to emerge than the positive impacts and they're also often much harder to measure in terms of quantitative and economic terms."
- Massachusetts likely would have the largest budget among all casino states that could fund problem gambling programs. Existing programs in Massachusetts presently treat problem gamblers who visit out-of-state casinos. These out-of-state casinos presently contribute no funding for such Massachusetts programs.
- While treatment for problem gambling would be funded from state revenue, the casino licensees should have primary responsibility to develop comprehensive "responsible gaming" policies to address this issue. Such plans should be viewed as a critical element in evaluating competitive bids.
- Destination casinos – because they will drive high levels of visitation – will have a significant impact on the demand for law enforcement and related services. For

example, a significant increase in driving under the influence (DUI) arrests should be expected. Local law enforcement agencies – particularly in rural areas – could face serious demands for their services, which must be anticipated.

- Casinos located near high-volume highways that have adequate access can cause less disruption to the host and surrounding communities; casinos nestled among towns, farther from high-volume highways, can potentially fuel considerable disruption in terms of traffic, quality of life, and maintenance costs.

Casino Visitation

- Destination casinos collectively would generate an average of between 18,000 and 27,000 visits per day.
- Three Massachusetts destination casinos would draw between 43 percent and 65 percent of all Massachusetts gaming trips and spending, or between $572 million and $864 million annually.
- Massachusetts residents have been spending an estimated $1.1 billion annually on gaming alone in Connecticut and Rhode Island. Massachusetts casinos could recapture about $500 million to $700 million of that annual total.
- Complementing such recaptured spending, Massachusetts would see the importation of new gaming revenues from neighboring states ranging from about $650 million to $900 million. Overall spending on casino gambling by Massachusetts residents would increase by $125 million to $150 million over present levels.
- Casinos can complement existing attractions, add perceived value to tourists and business travelers who are considering Massachusetts as a destination, and help attract incremental capital investment for the tourism industry.

Recommendations

The public sector in Massachusetts has broad discretion and powerful leverage at the outset to ensure that the successful bidder takes whatever steps are necessary to advance the public interest on a wide variety of fronts. Such leverage would be at its zenith during the bidding phase, in which applicants would recognize that they must compete against each other in their zeal and in their creativity in developing strategies to advance the public interest. Once licenses are issued, and casinos are operational, we caution that such leverage would largely disappear.

Using that leverage to require that all bidders submit comprehensive, credible plans that are in congruence with public policies can be justified by the proposed legislation, which essentially creates up to three regional monopolies. No other private businesses that target consumer discretionary spending, from hotels to restaurants, could reasonably expect that Massachusetts would protect them from potential in-state competition. Our core recommendation is to develop a robust bidding process designed to ensure that all applicants develop financial, marketing and other plans that fully operate

in the public interest. To that end, all applicants must develop comprehensive plans that address a variety of concerns and policies, including:

  - Protecting the Lottery.
  - Targeting conventions and meetings to increase overnight visitation and increase utilization of existing convention facilities.
  - Developing cross-marketing plans with other local businesses.
  - Training local workers.
  - Promoting tourism.
  - Addressing problem gambling.

- The selection process must be developed and guided by appointed officials who possess the political ability and independence to establish rigorous standards in a variety of areas. Such officials must be vested with the ability – and willingness – to weigh applications and, if necessary, deny any and all applications, should such applications fall short of these standards.
- The Commonwealth must maintain the highest possible degree of independence from fiscal pressure to help ensure the highest-quality facilities that operate in the public interest. Fiscal pressures could enhance the appeal of proposals to allow for the relatively quick installation of slots at racetracks or other facilities, operating under a higher tax rate, but such facilities would likely have different business models than destination casinos, and would thus be less likely to advance the same public policies. Visitors to well-capitalized destinations – as opposed to, say, smaller, under-capitalized properties that target convenience-driven, local adults – will likely stay longer and spend more. The greater the level of capitalization, the less vulnerable a gaming industry would be to competition from the expansion or introduction of gaming in other states.
- The Commonwealth should use a staggered bidding process, focusing on Region I as the first license to be awarded. This would allow stronger bidders that are not successful in one region to pursue plans in another. It would also allow the most efficient operators – who would be more likely to build properties that would further public policy – more than one opportunity to participate in Massachusetts gaming. The drawback of a staggered process is that it could significantly add to the length of time in which the Commonwealth would not be realizing anticipated revenue. This could be ameliorated, however, by allowing operators to build temporary facilities.
- Regulators should be wary of any bids that attempt to win licensure by promoting higher rates beyond the 27 percent minimum. Higher rates – while they might be tempting as a means of addressing near-term budget shortfalls – would likely result in less investment, fewer jobs and potentially less overall gaming revenue in the long term. Even at a 27 percent tax rate, Massachusetts casinos would be at a material disadvantage against their most direct competitors in Connecticut, as well as against some more distant competitors in New Jersey and elsewhere.

The Commonwealth must protect the Lottery by using multiple tools:

- All bids for any future casino destinations in Massachusetts should include plans designed to minimize any negative impact on the lottery.
- The casinos should assume financial responsibility for protecting the lottery against any adverse impact from the new casino competition.
- Require casinos to develop plans to increase ticket sales to out-of-state residents.
- Require casino operators to develop and follow through on cross-marketing strategies with the lottery.
- At least one of the two gubernatorial appointees to the Massachusetts State Lottery Commission should be a representative of the casino industry to help coordinate all efforts to grow lottery revenues.
- Reconsider the proposed 3 percent guaranteed long-term growth rate, as it is perhaps too ambitious for a lottery that has proven to be so successful. (The lottery's success will make it increasingly difficult to achieve such growth over time, requiring higher per capita spending from adults who already are spending more on lottery tickets than their counterparts in other states.) Rather, we suggest that the Legislature consider a lower target growth rate, yet require applicants for casino licensure to develop plans designed to achieve that 3 percent growth rate.

- Casino applicants should be weighed, in part, on how they intend to develop cross-marketing arrangements with appropriate nearby businesses. Such arrangements must recognize, and serve the interests of both the casino and the outside business.
- Any Indian casino should, ideally, be one of the three state-issued commercial licenses. An Indian casino that operates outside of the Massachusetts regulatory system could potentially generate no gaming-tax revenue to the Commonwealth and would likely cause a significant decline in the gross gaming revenues of one or more of the commercial casinos. Any compact negotiated by the state should seek to ensure a level playing field – notably with respect to the tax on gross gaming revenue – among all gaming operators.
- Massachusetts should adopt an efficient but relatively strict approach to the regulation of its gaming industry at the start to ensure the public's trust. This regulatory scheme should:
  - Create regulations for the control of the assets that thoroughly address rules for table games and controls for slot machines.
  - Include a visible presence on the casino floor and be accessible to the public and casino employees.
  - Create a licensing structure that addresses all those that participate in the gaming industry, including operators, employees and vendors.
  - Create an investigative agency that is independent of the regulatory agency.

- Destination casinos must be fully integrated into the tourism industry. Any casinos developed in Massachusetts must coordinate their marketing efforts closely with existing tourism programs, both at the local and state levels. Such programs should be designed to increase the frequency and length of visitation and expand the visitor base.
- The Commonwealth must be sufficiently flexible when considering mitigation funding for communities. The number of communities potentially impacted by casinos cannot be ascertained in advance of knowing the location, project scope, ease of access or other factors for any of the three destination resorts. Therefore, we suggest that the bidding process should require all applicants to take a broad view when defining their local community. This includes the following provisions:
    - Applicants for licensure must demonstrate they would minimize the negative impacts, to ensure that mitigation funding stays within the proscribed 2.5 percent limit. Such steps would require the applicants to bear the burden of proof that they have selected an optimal location that offers sufficient access to both patrons and employees, and that the property is pursuing marketing and other strategies designed to minimize such impacts.
    - Law-enforcement responsibilities on the casino floor should be handled at the state level, with minimal demands on local law enforcement. This should include the cost of handling any prosecution of crimes on the casino floor, as is done in other states.
    - The public sector must recognize that not all types of communities will be impacted in the same way, so a one-size-fits-all funding formula might not prove effective once casinos are operational.
    - Given that resource allocation and political representation in Massachusetts are based on population measures, visitation must be taken into account when allocating resources for casino mitigation purposes, particularly when it comes to funding law enforcement.
- Each casino applicant should compensate the Commonwealth or the impacted area for a preliminary impact study of that area. The successful applicant would then be required to compensate the Commonwealth or the impacted area for an updated study every five years, or other appropriate interval.
- Casinos should be sited in areas that provide easy access for its workforce. Such access should be an important criterion in weighing any application.

The Commonwealth should expand its workforce development efforts to address the vital needs of the unemployed and underemployed as well as people on welfare. The public interest would be best served through private/public partnerships designed to provide basic skills and workplace training to those who need it the most. Additionally, the gaming industry's efforts to help lower-skilled, entry-level workers become part of the Massachusetts labor force will help instill public confidence in casino gaming. The Massachusetts Casino Workforce Development Partnership (CWDP) program could utilize the existing structure of the Massachusetts Workforce Development System.

COMPETITIVE ANALYSIS:

Understanding Risk Factors, Economic Impacts of Casinos in Massachusetts Gaming Region C

Prepared for the Mashpee Wampanoag Tribe
December 9, 2015

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Executive Summary and Conclusions

The Mashpee Wampanoag Tribe of Massachusetts retained Spectrum Gaming Group to provide qualitative and quantitative analyses of the economic issues that should be considered with respect to licensing of a commercial casino in Region C as defined by the Commonwealth of Massachusetts, which encompasses much of southeastern Massachusetts.

A unique situation is unfolding in Region C, where the Mashpee Wampanoag Tribe is proceeding with a casino development in Taunton that, if no other casino is developed in that region, would share 17 percent of its gaming revenue with the Commonwealth by virtue of a compact agreement; at the same time, Mass Gaming & Entertainment LLC has proposed a commercial-licensed casino in Brockton that would pay a 25 percent gaming tax, but its presence would nullify the Tribe's revenue-sharing arrangement with the Commonwealth.

The key question is this: is the Commonwealth better off with just the Taunton casino project or with both the Taunton and proposed Brockton casino projects?

Our detailed analysis leads to the conclusion that the Taunton-only scenario would:

- Provide needed certainty in a market that has long been roiled by uncertainty
- Encourage a business model with broader demographic appeal
- Generate more gaming-tax revenue for the Commonwealth

Spectrum sought to quantify the differences between the two scenarios in Massachusetts. We performed a gravity-model analysis to project the gross gaming revenue of the Taunton casino alone and the Taunton and proposed Brockton casinos together – along with their impacts on the other existing and planned casinos in Massachusetts, as well as their impacts on the Commonwealth's gaming-tax receipts. Two casinos in Region C would result in a crowded and highly competitive marketplace, with much of any increase in revenue gravitating toward the tax-free Taunton casino.

As shown in the following summary table, the Commonwealth would realize $28 million less (in Year 1) in gaming-tax receipts with both a Taunton and Brockton casino than with a Taunton casino alone because there would be no revenue-share (effectively gaming tax receipts) from the Taunton casino. The presence of the two additional casinos would also lead to further revenue declines at other, competing properties in the state.

	Taunton	Brockton	Plainridge	Other Casinos	Total
Scenario 1: Taunton only					
Gaming Revenue	$414,255,799	$0	$106,890,563	$933,154,785	$1,454,301,147
Gaming Tax Rate	17.0%	n/a	49.0%	25.0%	24.5%
Gaming Tax Revenue	$70,423,486	$0	$52,376,376	$233,288,696	$356,088,558
Scenario 2: Taunton and Brockton					
Gaming Revenue	$364,505,452	$263,375,396	$94,890,287	$862,908,910	$1,585,680,046
Gaming Tax Rate	0.0%	25.0%	49.0%	25.0%	20.7%
Gaming Tax Revenue	$0	$65,843,849	$46,496,241	$215,727,228	$328,067,317
Tax Revenue Summary					
Scenario 1: Taunton only				$356,088,558	
Scenario 2: Taunton and Brockton				$328,067,317	
Scenario 2 difference in gaming tax revenue due				($ 28,021,241)	

Source: Spectrum Gaming Group

The present situation has created uncertainty in the marketplace, which causes investment risk, which results in an increased cost of capital, which in turn typically results in less capital investment and thus a less-attractive property and lower revenue generation. This investment risk has increased for Mass Gaming & Entertainment LLC after the announcement that the Mashpee Tribe had secured approvals to have its land taken into federal trust.

The presence of two casinos operating under vastly different tax schemes – one at 25 percent and the other at 0 percent – would lead to a competitive imbalance, with one property having far greater ability to market to its customers and reinvest in its property. Similar imbalances are plainly evident in Florida and New York, where tribes and state-licensed casinos compete head to head while operating under vastly different tax rates.

Contents

Figures

Introduction

Spectrum Gaming Group ("Spectrum," "we" or "our") was retained by the Mashpee Wampanoag Tribe of Massachusetts ("Mashpee Tribe") to provide qualitative and quantitative analyses of the economic issues that need to be considered with respect to casino Region C as defined by the Commonwealth of Massachusetts, which encompasses much of southeastern Massachusetts.

Starting in 2008 and for a period of approximately six years, Spectrum was engaged by various public entities in Massachusetts:

- In 2008, the administration of Governor Deval Patrick retained Spectrum to conduct a comprehensive study that examined the potential economic and social impact of three casino resorts in the state. This study – conducted in advance of gaming legislation in the Commonwealth – examined a wide variety of areas, from projecting revenue and employment to suggesting strategies to maximize the benefit of gaming for area businesses.
- In 2010, Massachusetts House Speaker Robert A. DeLeo retained Spectrum to update its 2008 economic-impact report and to advise the Commonwealth in drafting legislation for the proposed expansion of gaming. We worked closely with the bill's authors and staff, and our collaborative work ultimately led to the statute that presently governs gaming in the Commonwealth.
- Following passage of the statute in 2011, Spectrum played a critical role in helping the newly authorized and formed Massachusetts Gaming Commission meet its obligations in licensing a new casino industry, with a slot parlor and destination resorts planned for three distinct regions, subject to an intense competitive bidding process. Spectrum's role included investigating the backgrounds of many applicants, and developing a strategic plan to help create the new agency.
- In 2012, the Massachusetts State Lottery Commission retained Spectrum to do a groundbreaking study on whether the lottery should offer online gaming, and if so, how it should do so without hurting its network of retailers, and without damaging the value of casino licenses that had not yet been issued.
- In 2012, Spectrum, with project partner Last Frontier Consulting, reviewed the state of the Massachusetts racing industry and made recommendations to the Massachusetts Gaming Commission as that agency prepared to absorb the State Racing Commission.

The issues to be analyzed in this report involve the Massachusetts Gaming Commission, which is considering and reviewing an application for a commercial Category 1 (resort) license in Region C, as well as the US Department of the Interior's recent approval of a land-in-trust application by the Mashpee Tribe.

These respective state and federal agencies are considering weighty matters that could impact the economic health of Massachusetts for generations to come. The potential scenarios can be summarized thusly:

- **Scenario 1:** One Category 1 commercial casino license in Region C, with no competing Indian casino in that region.
- **Scenario 2:** A commercial casino operating in Region C in competition with an operating Indian casino.
- **Scenario 3:** An Indian casino operating under a negotiated compact with the Commonwealth that would include no commercial competition within that region.
- **Scenario 4:** No casinos in that region at all, either commercial or tribal.

From the standpoint of a commercial operator, as well as from the standpoint of the Commonwealth, Scenario 1 is highly unlikely, since the Mashpee Wampanoag land-in-trust application has received federal approval, with the federal government committed to purchasing 170 acres in the town of Mashpee for "tribal governmental, cultural and conservation purposes" plus an additional 151 acres in Taunton for building its planned destination casino.[1] The 1988 Indian Gaming Regulatory Act ("IGRA"), as well as court decisions that led to passage of that landmark legislation, allows federally recognized tribes operating on tribal land to offer any form of gambling that is offered by the respective state, a critical provision that would lead to either Scenario 2 or Scenario 3.

The particular wrinkle in federal law that is highly relevant to this discussion is that states do not have the authority to tax tribal gaming that would otherwise be authorized. Thus, under Scenario 2, a commercial casino in Region C would be obligated to pay a tax of 25 percent of gross gaming revenue, as per the governing statute, while the competing tribal casino would pay no tax at all.

Scenario 3 would allow the Mashpee Tribe to hold the exclusive right to offer casino gaming in Region C under a negotiated compact with the Commonwealth. In return for that

[1] Associated Press, "Mashpee Wampanoag Tribe earns federal land in trust status," September 21, 2015. http://nativetimes.com/index.php/news/federal/12152-mashpee-wampanoag-tribe-earns-federal-land-in-trust-status

exclusivity, the Tribe would share 17 percent[2] of its gross gaming revenue with the Commonwealth.

Scenario 4 – which describes the status quo – is neither likely, nor is it particularly relevant to this analysis, and thus will not be discussed.

[2] While the negotiated compact, approved by the US Bureau of Indian Affairs, has a potential range of 15 percent to 21 percent, 17 percent is the agreed revenue share amount if the tribe is granted exclusivity in Region C.

Understanding Financial Risk

The issues to be examined in this section are hardly new to the debate in Massachusetts, and indeed such issues have been considered previously in the Commonwealth, as well as in other states that are considering the authorization or expansion of gaming. Spectrum's 2008 analysis for the Commonwealth – which preceded the statutory authorization of legal casino gaming in Massachusetts – anticipated this very discussion, and addressed it at length. For example, we noted at the time:

> To the extent that commercial casinos in Massachusetts face competitive disadvantages relative to a tribal casino, the citizens of Massachusetts will fail to realize some of the available economic benefits from casino gambling in the state.
>
> We add one other important consideration: Unless and until the uncertainty regarding a tribal casino in Massachusetts is resolved, that uncertainty will be perceived by capital markets and commercial operators as a heightened risk. Added risk is reflected in a higher cost of capital – i.e., sources of capital will demand greater returns to compensate for the increased risk. This will, as noted in detail earlier, result in less capital being invested, which would lead to fewer jobs, less gaming revenue and less overall benefit to the Commonwealth.[3]

We cannot over-emphasize the importance of risk, and its impact on investment decisions. From the standpoint of investors, the absence of certainty regarding any relevant factor equates to risk. Investors demand some form of compensation in exchange for assuming any level of risk, and such rewards must be commensurate with such risk. Absent such commensurate potential rewards, investors will eschew risk and gravitate toward safer investments. This point is not theoretical, and is played out every day around the world, as investors weigh potential returns against potential risk.

Effectively, this affects the cost of capital. Regardless of whether a project requires equity or debt financing, the cost of such capital will rise (or fall) in tandem with the perception of risk. If, as noted, uncertainty fuels risk, this means that projects burdened by a lack of certainty will be more expensive to finance. As financing becomes more expensive, it will likely have one of the following impacts on investment decisions:

1. Projects that might otherwise get built will not proceed.

[3] Spectrum Gaming Group, "Comprehensive Analysis: Projecting and Preparing for Potential Impact of Expanded Gaming on Commonwealth of Massachusetts," p. 287-288, August 1, 2008. http://spectrumgaming.com/dl/MA_Gaming_Analysis_Final-2008.pdf

2. Projects will get scaled back to the point where they are more affordable, and investors can secure an acceptable return.

The possibility exists that either or both of these impacts have been felt in Region C. Only one applicant for the Region C commercial license is presently seeking the license. We cannot say conclusively that the dearth of applicants willing to apply – or willing to continue with the application process – is the result of this risk factor impacting the cost of capital. However, we do note that this issue apparently contributed to at least one prospective developer abandoning its plan in Region C: "Throughout the state licensing process, the tribe has been a wild card that, at least in part, sunk a commercial casino planned for the New Bedford waterfront. KG Urban Enterprises had to abandon its plans when financing proved too difficult to obtain largely because of the competitive disadvantage it would be at if the tribe ever cleared federal hurdles to building a casino of its own."[4]

The *Taunton Daily Gazette*, based in the Massachusetts community where the Mashpee Tribe hopes to build the $500 million casino hotel, noted in a recent editorial:

> The Mashpee Wampanoag Tribe, Taunton — and the entire region — need this issue to be settled once and for all. This federal red tape has put a stranglehold on the region's economic development prospects as too many residents continue their struggle to find jobs.
>
> The uncertainty involved in this long process eventually led the Massachusetts Gaming Commission to open Region C, which had been reserved for a tribal casino under the Expanded Gaming Law, to commercial applicants as well. While three applicants — in New Bedford, Somerset and Brockton applied for the commercial license, all but the Brockton applicant dropped out — largely due to the potential over-saturation of the market should the tribal casino be authorized.[5]

The remaining commercial bidder is Mass Gaming & Entertainment LLC, a division of Rush Street Gaming, which has stated publicly that it has its financing in place, and that it intends to build irrespective of the land-in-trust issue, but that it also seeks much-needed certainty.[6] We do not know, however, whether Rush Street – or any of the other potential developers that have since dropped out of contention – would have built a project of the same size and scope if it had certainty as to the competitive landscape.

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[4] George Brennan, "Tribe's land decision imminent," *Cape Cod Times*, August 26, 2015. http://www.capecodtimes.com/article/20150826/NEWS/150829569

[5] "Our View: Region stuck in Bureau of Indian Affairs' red tape," *Taunton Daily Gazette*, August 27, 2015. http://www.tauntongazette.com/article/20150827/OPINION/150826664/?Start=1

[6] "Brockton Casino Investor Urges Mass Gaming for Quick Decision on Proposal," *Casino News Daily*, September 10, 2015. http://www.casinonewsdaily.com/2015/09/10/brockton-casino-investor-urges-massgaming-for-quick-decision-on-proposal/

That is a realistic possibility. HLT Advisory Service Inc., a Toronto-based consultancy, noted in an April 1, 2015, letter to the Massachusetts Gaming Commission: "HLT has to assume that each of the parties that have expressed interest in submitting a Region C casino application are aware of the uncertainties of the Region C Indian Casino as well as potential increased out-of-state competition and have factored this into their planning (i.e. total investment that they will commit to the project and size and scope of operations)."[7]

Our experience supports HLT's assertion that operators and investors consider risk factors in determining the level of capital that would be committed to any one project. Our experience also shows that a lower cost of capital – and the prospect of greater returns – can help generate greater levels of capital investment than would otherwise be justified. Greater capital investment leads to a variety of public-policy benefits, including but not limited to:

- More employment, in both construction and operations
- Greater purchases of goods and services from local businesses
- An enhanced ability to promote tourism
- A broader geographic and demographic reach
- Enhanced ability to withstand future competition

Risk Spills into Other Regions

Clouds of uncertainty – and the potential for increased competition, particularly from a potential competitor that would be free of any gaming-tax burden – not only have a negative impact on Region C, but potentially threaten the number and quality of offerings throughout the state and jeopardize the Commonwealth's ability to generate and maintain market share in the face of increasing competition.[8] This uncertainty will have a very real impact on other licensees in the Commonwealth, a group that includes three of the largest, most successful gaming operators in the world: MGM Resorts International, Wynn Resorts and Penn National Gaming, the latter of which is currently the only gaming operator in the state, operating Plainridge Park in Plainville, which happens to be within Region A but near the Region C border. The potential impact on other licensees – now or in the future – was crystallized in a 2013 letter from MGM to the Massachusetts Gaming Commission:

> The Commission is charged with the extraordinary responsibility to find the appropriate balance between the rights of the Mashpee Wampanoags and the economic development goals of Southeastern Mass. However, MGM feels that the Commission's

[7] April 1, 2015, letter from Rob Scarpelli of HLT Advisory to Stephen Crosby, Chair of the Massachusetts Gaming Commission, p. 3.

[8] Sean P. Murphy, "New Conn. Competition for a Springfield Casino," *Boston Globe*, October 19, 2015. http://www.bostonglobe.com/metro/2015/10/19/connecticut-tribes-move-protect-gambling-revenues-from-massachusetts-competition/jQaLrBihym4zDS94AgOUqN/story.html?event=event12

mission also includes the safeguarding of the opportunities upon which the current license applicants entered this bidding process. The potential impact of over-development will not stop at the southeastern region border. Each operator will realize the impact of an additional casino license should the MGC move forward with a commercial license process in Region C.

While each and every applicant deals with robust competition in every jurisdiction in which they operate, they also chose to compete in Massachusetts based on a statute and set of rules that provided them with the ability to maximize their investment. The potential for a fourth license in the Commonwealth was not a possibility any applicant considered when they balanced the significant capital expenditure expected from them am and the scope of the market base on the statute.

The act authorizing expended gaming was clear on the ability of the Commission to seek a commercial license for Region C under Chapter 23K and the standard that would trigger that process. Section 91(e) of Chapter 194 of 2011 mandates that if 'the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commission shall consider bids for a Category 1 license in Region C under said chapter 23K.' The definitive language in this section serves as an important benchmark that protects the spirit and the intent of the law to limit the total number of Category 1 licenses while maximizing the value of those licenses.[9]

MGM is not alone in voicing its concern about the issuance of a commercial license in Region C. Penn National Gaming stated in a letter to the Massachusetts Gaming Commission on September 18, 2015, that, "Given the terms of the Compact, a decision to license a Category 1 facility in Region C would not just provide the tribal casino with a significant competitive advantage against the other gaming facilities in Massachusetts. It also would permit the tribal casino to dramatically cannibalize revenues from tax-paying licensees. This would lead to a significant decrease in the Commonwealth's overall tax collections, a result at odds with the statutory objective of 'maximizing revenues received by the Commonwealth.'"[10]

[9] April 16, 2013, letter from William Hornbuckle of MGM Resorts International to Stephen Crosby, Chair of the Massachusetts Gaming Commission, p. 2-3.

[10] September 18, 2015, letter from Carl Sottosanti, Senior Vice President, General Counsel and Secretary for Penn National Gaming, to Massachusetts Gaming Commission.

Understanding Gaming Tax Implications

The April 2013 letter from MGM made a number of compelling points, including the central point that the issuance of a commercial license in Region C could lead to four resort licenses, whereas the legislation anticipated only three (this is essentially the same point that Spectrum made in its 2008 analysis), and the applicants in regions A and B also anticipated a maximum of three resort licenses.

The scenario laid out in the MGM letter effectively translates into our Scenario 2, as noted earlier. That scenario envisions the possibility of a tribal casino operating in competition with commercial casinos, but unburdened by the 25 percent tax rate that Category 1 licensees would be required to pay.

The MGM letter notes: "As disruptive to the market as a fourth licensee would be, enabling one of those licensees to operate without any tax payments to the Commonwealth will provide a significant competitive advantage to that facility, i.e., the Mashpees, allowing them to spend significantly more capital and marketing dollars to extend their reach into the other regions of the other Category 1 licenses."[11]

Spectrum agrees with that assessment, and we further note that the risk of a tribal operator seeking a broader geographic reach by leveraging its advantages is more than a theoretical concern. A tribal casino operating with no tax burden will have a distinct competitive advantage. Such an operation would be well-positioned to put forth more compelling promotional offers, which would overcome geographic hurdles.

In our experience around the world, convenience is an important consideration when adults seek a gaming experience. That advantage can be overcome to varying degrees if one of two factors is present: If the casino can put forth richer, more attractive promotional offerings, or if it is simply a larger, more attractive property with a wider array of offerings. We simply do not know if the planned Mashpee property in Taunton would be more attractive to adults than a Wynn or MGM property in another region, but we can state with certainty that if such a property does not have the burden of a 17 percent tax rate, that it would have the ability to spend more on its promotional offerings.

The tax differential would be particularly acute for a commercial property in the same region, and Brockton and Taunton would clearly be targeting many of the same adults, particularly those for whom convenience is a major factor. Such a competitive landscape would likely limit the Brockton proposal as to the type of business model it could offer. The tax differential would make it difficult for a Brockton operator to go beyond the convenience-based

[11] Hornbuckle letter.

market. That limiting factor is more than a lost opportunity. The entire Northeast is becoming increasingly saturated with casinos that, to varying degrees, are focusing on their close-in, convenience markets for the overwhelming majority of their revenues. As noted in the Penn National Gaming letter, any scenario that makes Massachusetts less competitive would be at direct odds with the Commonwealth's statutory objective of 'maximizing revenues received by the Commonwealth.'"[12]

Examples in Other States

Two states – Florida and New York – provide real-world examples of where tribal casinos and commercial casinos are in direct competition with each other while operating under significantly different effective gaming-tax rates. Spectrum has extensive experience in both states going back many years.

In the highly competitive South Florida gaming market, there are 11 casinos – three operated by the Seminole Tribe of Florida, one operated by the Miccosukee Tribe of Indians of Florida, and seven located at pari-mutuel facilities. The compact between the Seminole Tribe and the State of Florida guarantees the State $1 billion in revenue over a five-year period; under the formula articulated in the compact, that currently equates to a 12.2 percent tax[13] on the Seminole Tribe's gaming revenue. When compared to the rates that commercial casinos pay, the Seminole Tribe's effective gaming-tax rate is the fourth-lowest in the country (behind Nevada, New Jersey and Mississippi). Florida's racetrack casinos, meanwhile, pay a 35 percent tax on slot revenue.[14] The disparity in tax rates in Florida is manifest in both the gaming revenues and in the size and quality of physical facilities of the respective businesses.

The Seminole Tribe's flagship property, the Seminole Hard Rock Hotel & Casino in Hollywood, generated an estimated $528 million[15] in gaming revenue in FY 2014 – roughly the same as the eight other (at the time) pari-mutuels *combined* in South Florida. Across the street, the original Seminole Classic Casino – a rather pedestrian gaming facility – generated an estimated $152 million in FY 2014 gaming revenue. That is more than seven of the eight higher-taxed pari-mutuel slot operators reported for the same period and almost the same as the top-producing pari-mutuel slot operation, Isle Pompano.

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[12] Penn National letter.

[13] Nick Sortal, "Seminole Hard Rock's revenue equals 8 local racinos combined," *Sun-Sentinel*, August 31, 2014. http://articles.sun-sentinel.com/2014-08-31/news/fl-seminoles-recent-revenues-20140831_1_seminole-classic-seminole-casino-coconut-creek-tribe

[14] The Seminole Tribe operates both slot machines and table games whereas the racetrack casinos are limited to slots and poker.

[15] Sortal.

The success of the Seminole Classic cannot reasonably be attributed to its amenities (of which there are few) or physical appeal. Rather, its success is due in large part to its ability to spend more heavily than the racetrack casinos on marketing – notably on incentives for gamblers. While the amounts spent on marketing programs are not reported for either the pari-mutuels or Seminole casinos, the pari-mutuel slot operators have consistently said in public forums and to Spectrum that they simply cannot match the promotional offers and advertising volumes of the lower-taxed Seminole Tribe.

Another important component of Seminole Classic's marketing is pricing: It is able to offer a lower price – i.e., higher slot payouts – than its competitors due to the lower tax rate. The opening language on the Seminole Classic website is, "PLAY THE LOOSEST SLOTS IN AMERICA!"[16] While slots at the South Florida pari-mutuels paid out 92.4 percent (from a range 93.9 percent to 90.9 percent)[17] – better than the national average of 92.3 percent[18] – they evidently could not match the payouts[19] of their lower-tax competitor.

Meanwhile, the Miccosukee Tribe shares no revenue with the State (or pays no gaming tax) because it operates a Class II casino. As such, it has no live table games beyond poker and has slightly different slot machines than the Seminole or racetrack casinos.

The disparity in tax rates is further evident in the gaming facilities themselves. The slot operations at the pari-mutuels are housed either in modified grandstands or additions to the existing structures, with limited capital investment and little more than the requisite food and beverage outlets and small entertainment venues. On the other hand, two of the three Seminole casinos in South Florida have made substantial capital investments. Hollywood Hard Rock is a sprawling, upscale destination resort with scale and quality rivaling Las Vegas Strip resorts. The property has hundreds of millions of dollars in invested capital and regularly expands to meet demand. Seminole Casino Coconut Creek in 2012 completed a $150 million expansion that included an enlarged gaming floor and two gourmet restaurants; the tribe has plans to add a 1,000-room hotel, more retail shops, more restaurants, and a 2,500-seat showroom. The Miccosukee Resort & Gaming casino has more than 1,700 gaming machines, a 302-room hotel and other amenities that are lacking at the racetrack casinos.

In New York, the disparity among the tribal casinos and the racetrack casinos is even greater. The two most prominent (and relevant, for the purposes of this examination) tribal

[16] Seminole Classic Casino website. https://www.seminoleclassiccasino.com/ (accessed September 15, 2015)

[17] Spectrumetrix East Coast Slot Report, last 12 months through July 2015.

[18] 2014 data from US commercial jurisdictions, from the Association of Gaming Equipment Manufacturers report "Slot Market Assessment: Analysis of Industry," February 25, 2015.

[19] Seminole Tribe gaming data are not publicly reported.

gaming operators – the Oneida Indian Nation and the Seneca Nation of Indians – agreed in separate compacts to share 25 percent of their slot revenue with the State. The nine racetrack operators, meanwhile, pay an average, effective tax of 66.5 percent[20] on their video gaming machine revenue. Before its 2013 compact with the State, the Oneida Nation did not share any revenue with the State (which was a long-held point of contention) – and it was during this pre-tax period that the Oneida Nation developed virtually all of Turning Stone as it stands today.

The Oneida Nation's Turning Stone Resort Casino east of Syracuse generated an estimated $207 million in slot revenue in 2014.[21] By comparison, just seven miles away the significantly higher-taxed Vernon Downs Casino Hotel racetrack generated $46.2 million in gaming revenue.

In comparing facilities, Turning Stone is a sprawling, upscale destination resort with four hotels providing 709 total guest rooms, numerous food and beverage outlets, five golf courses, 100,000 square feet of meeting space, a spa and other amenities. On the other hand, Vernon Downs has a comparatively small casino floor, requisite food and beverage outlets, modest entertainment, and a 173-room hotel.

The Seneca Nation operates three Seneca-branded casinos in western New York that compete in-state with three racetrack casinos. Although Seneca Gaming Corp. no longer publicly reports its revenue, the company acknowledges that it has annual revenues of more than $600 million,[22] the vast majority of which Spectrum understands to be from gaming operations. In contrast, the three closest racetrack casinos – Hamburg, Batavia Downs and Finger Lakes – generated a combined $263 million in gaming revenue in 2014.

In comparing facilities, two of the three Seneca properties – in Niagara Falls and Salamanca – are upscale, full-service gaming resorts with hotels with hundreds of guest rooms, spas, gourmet restaurants and other amenities. The tribe's other casino, in downtown Buffalo, completed a $130 million expansion in 2013 and this year announced plans for a $40 million expansion. On the hand, the higher-taxed Hamburg, Batavia Downs and Finger Lakes racetrack casinos have comparatively limited capital investment, with small casino floors, requisite food and beverage outlets, and modest entertainment.

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[20] New York racetrack gaming operators are taxed at different rates; the figure cited is a statewide average for FY 2015. Based on the distribution of gaming revenue, we determine the effective tax rate to be 66.5 percent, as operators receive only the unrestricted portion of the Agent Commission, the Marketing Allowance, and the Capital Award for use in their gaming operations/facilities.

[21] Glenn Coin, "Turning Stone casino gamblers: How much do they lose on slots?" Syracuse.com, May 7, 2014. http://www.syracuse.com/news/index.ssf/2014/05/turning_stone_casino_oneida_indian_nation_andrew_cuomo.html. Turning Stone also offers table games, but that revenue is not reported.

[22] Seneca Nation website. http://www.senecagamingcorporation.com/executive_staff.cfm (accessed September 15, 2015)

Determining Optimal Economic Benefit

In all of the markets that Spectrum has studied over the years, it is clear that the economic benefits of a well-planned gaming industry can extend far beyond the money generated by the effective tax rate on gross gaming revenue. Indeed, we regularly suggest that economic benefits be viewed through a much more expansive lens.

As noted earlier, a resort property with greater investment can generate economic activity in a number of different areas, ranging from employment to purchases to tourism promotion to area development. With that in mind, the revenue generated by the tax on gross gaming revenue is only one factor, and may not be the most important factor.

In 2010, Spectrum presented a peer-reviewed white paper to the National Tax Association that made the following points:

> Capital investment, in our experience, is the lynchpin to generating revenue – for both the operator and the public sector.
>
> Capital investment essentially determines the level, type and quality of amenities that can be added. Over time, in market after market, we have seen that a casino property that adds amenities – particularly hotel rooms - can help achieve certain results:
>
> - It helps grow the market, and not simply cannibalize business from competitors.
> - It helps other area businesses by increasing the frequency of visitation, as well as the average length of stay. In turn, this helps generate further investment in such businesses, either through expansions and improvements or by attracting entirely new business development.
> - It prods both competitors and other businesses to invest more capital in their projects to ensure their attractiveness and viability.
> - It can help the local economy in other ways, by helping to attract new market segments.
> - It creates new sources of revenue, including room fees – which are then used to market the area, thus generating more overnight visitation.
> - It helps make a market more attractive to visitors, and thus makes a market less vulnerable to competition from other markets.
> - It generates additional revenue for the public sector in areas ranging from property taxes to sales taxes.

> The phenomenon of effectively using hotel rooms and other non-gaming attractions has the ability to increase operating margins and improve a market's competitive position, which has been proven in various regions, and among different types of properties.[23]

The principles enumerated in that policy paper remain in effect, and the subsequent years have only reinforced them. With that in mind, a core tenet in any such analysis is that the level of capital investment and subsequent economic impacts are far more significant factors than the prevailing tax rate.

Rush Street – parent of Mass Gaming & Entertainment – clearly understands this, which is why it is committing to invest $650+ million to build a resort complex.[24] This commitment is further noted in a March 30, 2015, letter from Mass Gaming Chairman Neil Bluhm to the Massachusetts Gaming Commission:

> Based on the studies of our outside experts as well as our own analysis, we believe that our project will be viable even with tribal gaming in Taunton. One of the reasons that we chose Brockton is the fact that our site is approximately 17 miles from the proposed casino in Taunton. In most of the markets in which we operate, we have major competitors that are less than 25 miles from our operations. Based on our analysis and real world experience, we are selected, we are committed to investing a significant amount of our own capital because we believe that we will be able to operate a successful project even with tribal gaming in Taunton.[25]

The Bluhm letter – which seeks approval of a commercial license even with the possibility of a tribal casino (our Scenario 2) – goes on to suggest that, under any scenario, the Commonwealth of Massachusetts should issue a commercial license in Region C:

> Based on our projections, we believe that the Commonwealth will receive approximately twice as much incremental tax revenue with just Brockton versus just Taunton. Further, even though a commercial casino will generate less revenue (than it otherwise would without competition from the tribal casino) and the tribal casino will not pay taxes if both the Taunton and a private casino open in Region C, our projections show that the Commonwealth still receives more tax revenue under the Taunton-plus-Brockton scenario than under the Taunton-only scenario.[26]

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[23] Spectrum Gaming Group, "Casino Tax Policy: Identifying the Issues that Will Determine the Optimal Rate," November 2010, p. 11. This publicly available report was peer-reviewed by the assistant vice president of the Federal Reserve Bank of St. Louis.

[24] The Associated Press, "Brockton Residents Approve $650 Million Casino In Special Election," May 13, 2015. http://www.wbur.org/2015/05/13/brockton-residents-approve-650-million-casino-with-vote

[25] March 30, 2015, letter from Neil Bluhm to Massachusetts Gaming Commission, p. 2,

[26] Ibid. p. 3.

Discussing the same scenarios that Spectrum has outlined above, Mass Gaming goes on to note that:

> Under every scenario, it is in the best interest of the Commonwealth that the Region C license be issued. This does not even consider the fact that two casinos will produce close to double the jobs as well as all the other benefits of gaming in the Commonwealth or the very real possibility that the opening of a tribal casino (if there is one) is delayed by litigation.[27]

Additionally, we note the opinions of some of our colleagues that were expressed following the announcement of federal approval for the land-in-trust application. That approval marks "the death knell to the one in Brockton, period," said Richard McGowan, a Boston College professor who has performed significant research in this market.[28]

The same article went on to note:

> "If you assume the tribe goes forward with its plans, it doesn't make sense to issue a commercial license in Region C," said Clyde Barrow, a casino expert with Nathan Associates Inc.
>
> Rush Street Gaming, the company backing the Brockton proposal, has made it clear in statements it believes it can compete in the market and a study by Innovation Group reportedly shows the Brockton casino's market share would drop just 10 percent in head-to-head competition with the tribe.
>
> "Innovation Group never factors in cannibalization," Barrow said. In markets where a casino comes in to an existing market, the new facility takes 20 to 30 percent of the business, Barrow said. In Massachusetts, there would be three gambling facilities in a 25-mile radius if Brockton were to join the tribal casino and Plainridge Park, which is already open.
>
> "There's no scenario where that comes out better for the state," he said.[29]

At the same time, we concur with the statement by Rush Street that two properties, by definition, would create more direct employment. Two properties would have two human resources departments, two marketing departments and two of most other divisions, and the need for such duplication would be precluded with only one operating entity.

As our experience (and as the above analysis) shows, direct employment – like the revenue generated by the tax on gross gaming revenue – is only one measure of economic impact, and not necessarily the most significant. Projects must be measured as well by their levels

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[27] Ibid.

[28] George Brennan, "Experts: Land in Trust decision a fatal one for region's commercial casino progress," *Cape Cod Times,* September 22, 2015. http://www.tauntongazette.com/article/20150922/news/150928532

[29] Ibid.

of indirect[30] and induced[31] employment, along with their expected purchases of goods and services, their impact on tourism, their ability to reach a broader demographic, their perceived strength in withstanding competition, and other critical barometers. Both the Mashpee and Mass Gaming projects have similar levels of employment.

In addition, Spectrum forecasted the performance of two potential development scenarios. The first is that the Mashpee Tribe develop a property in Taunton and pay 17 percent of their revenue per the compact. The second assumes that a commercial casino is also developed in Brockton, leading to the Tribe not making payments to the Commonwealth and the Brockton facility being taxed at 25 percent. Spectrum believes that one of these two scenarios is likely to actually occur. The results are detailed later in this report.

[30] Indirect employment refers to the number of jobs created by suppliers to the project.

[31] Induced employment refers to the jobs created as a result of the increased consumer spending generated by the project.

Gross Gaming Revenue and Gaming-Tax Projections

The Gravity Model

Spectrum used a gravity model to forecast gross gaming revenue ("GGR") in Massachusetts under the two potential development scenarios. The major components incorporated into the gravity model include the proposed size of the subject facility and its competitors, the amenities available at each facility, and the regional adult population and the distance those people live from each casino gaming alternative. In part due to its ability to include all of these elements, and due to support from empirical evidence, the gravity model is widely seen as the most accurate modeling tool available to analysts forecasting casino revenue.

In fact, as gravity models quantify the effects of both size and distance, they have enjoyed great success in a number of applications. These include international trade, migration, trip distribution (transportation planning), and retail applications. In each instance, a function of mass is directly proportional to the attractiveness of each subject element. These can include the natural resources of a region, level of economic activity, or square footage of a proposed retail development. In addition, an inversely proportional relationship exists between visitation and distance. In other words, a greater distance makes visitation from any particular region less likely. This relationship has been shown to be exponential, such that the effects of a doubling in distance is amplified through a series of non-linear equations and leads to a precipitous loss in visitation.

Gravity models have been in use in these various economic and social applications since the late 1920s and are named for Newton's law of universal gravitation, after which the model is factored. This physical law states that the attraction between two masses is directly propositional to their size and inversely proportional to the distance that separates them. Isaac Newton's law takes the form:

$$F=G * \frac{m_1 * m_2}{d^2}$$

Where:

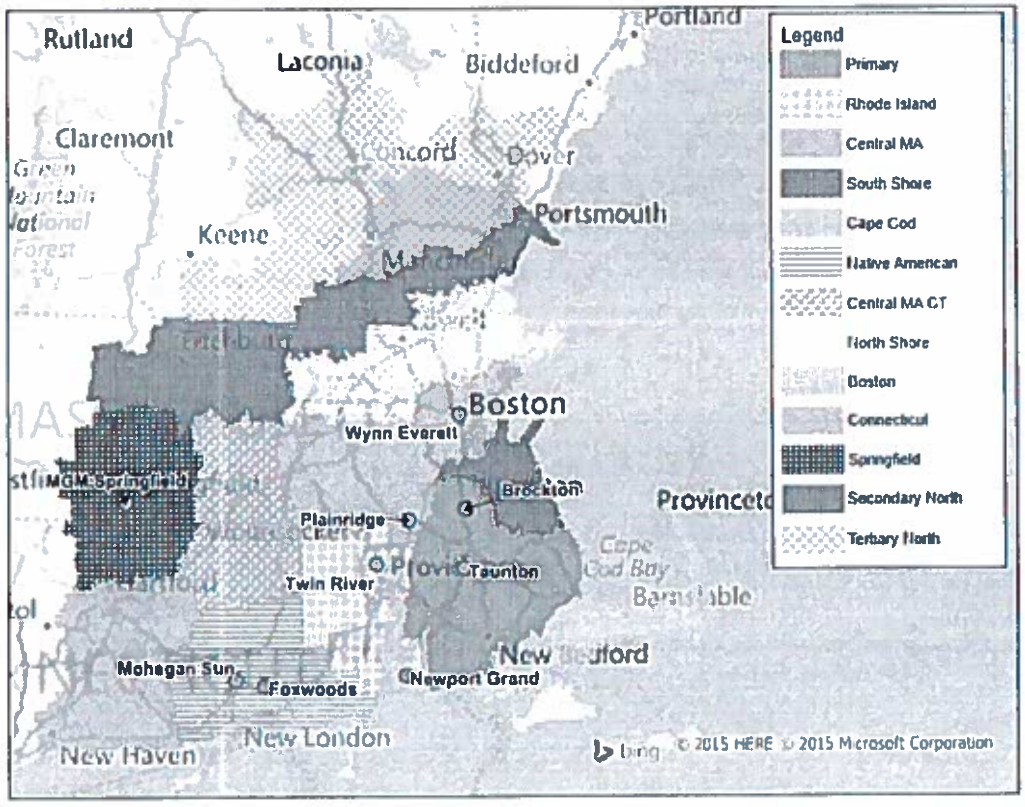
- F = the force attracting two objects
- G = the gravitational constant
- m_1 = the mass of the first object
- m_2 = the mass of the second object
- d = the distance separating the two masses

In its application to casino gambling, the force is visitation, the gravitational constant is an attractiveness factor, the two masses reflect the size of the facility and the population, and the distance between the population and the casino.

Market Areas, Assumptions

The first step in developing the gravity model is to define market areas. The catchment area of the model was designed to include the population living within a two-hour drive of the casinos in Taunton (Mashpee Tribe) and Brockton (Mass Gaming & Entertainment) and was further segmented into 13 market areas. Each market area is defined to incorporate a number of factors including competition in the region, distance, the transportation network, accessibility, income levels, and competing forms of entertainment. Each market area was defined using a geographic information system and a map is provided below to show the defined market areas.

Figure 1: Assumed market/catchment areas surrounding proposed Region C casino resort locations



Source: Microsoft, Spectrum Gaming Group

Each of these market areas is evaluated based on census classifications called "block groups." The model calculates the distance from each block group to each existing and proposed facility, enabling a specific, detailed analysis of visitation across the region. Each block group is further defined by the adult population and income levels as reflected by the US Census Bureau, with future estimates and forecasts completed by demographers. This enables a fluid capture of the originating visits for each facility based on its specific appeal to each block group. The

demographics in the block groups are aggregated into the market areas and the results are shown in the following table.

Figure 2: Southeastern Massachusetts market areas and demographics for gravity model

	Adult Population		Average Household Income	
	2014	2019	2014	2019
Primary	722,665	746,747	$87,912	$100,836
Rhode Island	730,026	736,905	$84,596	$99,435
Central MA	701,143	724,634	$121,845	$138,354
South Shore	215,298	223,450	$119,934	$136,905
Cape Cod	155,981	148,170	$90,728	$103,704
Native American	310,176	331,690	$91,055	$101,429
Central MA/CT	185,935	194,827	$89,053	$102,414
North Shore	866,485	899,830	$109,347	$122,597
Boston	1,457,565	1,496,391	$98,193	$111,951
Connecticut	1,021,860	1,083,617	$90,553	$101,853
Springfield	591,170	614,353	$81,177	$91,321
Secondary North	392,698	400,829	$98,073	$111,953
Tertiary North	500,524	509,373	$89,532	$102,389

Source: Applied Geographic Solutions

Gaming behavior is defined for each market area by propensity and frequency. **Propensity** is defined as the percentage of adults who will visit a casino over the course of a year, and that percentage and increases with the number and accessibility of facilities.

Harrah's Entertainment surveys historically indicated that approximately 25 percent of American adults (21+) had visited a casino within the past 12 months. Moreover, 44 percent of Las Vegas adults play casino games at least once per week. US participation in casino gaming is typically a function of the proximity, accessibility, and breadth of casino games available to any population, and nationwide participation in gaming has increased with the number of facilities available and the deregulation of limits on the number of games permitted, types of games permitted, wagering limits, hours of operations, and other limiting factors.

The national and Las Vegas statistics exemplify these factors. The Las Vegas market is arguably the most competitive in the world, with educated players choosing to play at facilities offering advantageous odds, player rewards, and other benefits. On a national basis, many other jurisdictions feature less-accessible options and less competition among operators, making casino gaming a less attractive entertainment alternative and leading to lower participation rates. Harrah's most recent publicly available survey indicated that 28 percent of adults in the Northeast and 33 percent of New York City Designated Market Area adults participate in casino gaming.

Frequency is the average number of times an adult will visit a casino. Like propensity, frequency is influenced by the number and accessibility of facilities available to any particular

market area. Harrah's survey indicated that nationwide players' average frequency is 6.1. In Las Vegas, average frequency appears to be approximately once per week, or 52 visits annually. When a facility is a greater distance, players in a region will make less trips to that facility over a given period. However, all other things being held constant, those individuals will have higher gaming budgets on those occasions. To some degree this dynamic offsets less frequent visitation.

The adult population, propensity, and frequency are used to calculate the number of player visits generated by each block group over a given year. This is based on these assumed averages from which any one player may deviate. These visits are then distributed throughout the market based on the distance from each area to each casino, with closer facilities receiving a greater share of visits than more distant ones, all other things being constant. In attracting player visits, facilities are distinguished from one-another by two metrics. The first is the number of **gaming positions** offered by each facility. The number of gaming positions is the number of players who can be accommodated at any one point in time and is calculated by adding the number of slot machines and the number of seats at table games. For the purposes of this model it was assumed that the average table game can accommodate six players. Thus, facilities with a greater number of gaming positions become more attractive to the players. This is reflected in surveys of players, where it is confirmed that a higher number of games is preferred, as many players will play several games during a visit.

The second element distinguishing each facility when distributing player visits is the **attraction factor**. Attraction factors are indexed and are applied to the number of gaming positions to adjust for differences in facilities. They adjust for a number of factors outside of the number of gaming positions and can account for differences in the amenities available at a facility, the appeal of the facility within the market, branding, management's effectiveness marketing to and rewarding players, the variety of games, odds, and other factors. Competing tax rates are therefore factored into the analysis. Attraction factors differentiate between the facilities in the market, and a facility with an attraction factor lower than the index is considered, overall, to be less attractive based on these factors, whereas a facility with an attraction factor greater than the index is deemed to be above average.

Each of these factors – adult population, propensity, frequency, gaming positions, and attraction factor – is used to distribute player visits originating in each postal code to each facility. The distribution of player visits therefore incorporates and quantifies information including the size of a facility, its amenities, its marketing efforts, rewards programs, and appeal to calculate and distribute player visits within the catchment area. For each market area, and specific to each facility, an **average win** is then applied. Average win (also referred to as win per visit) is the average revenue generated from each player visit and is estimated based on public reports, player surveys, and proprietary information shared by specific operators in this and other market areas. Average win tends to increase with disposable income levels and distance traveled.

Projected GGR is then calculated by multiplying the estimated number of visits and the average win.

Calibration is the initial step in preparing the model for forecasting future performance. Calibration integrates the recently observed dynamics in the catchment area by incorporating the observed performance, along with other private and public information, to form a basis for further analysis. Gaming behavior is adjusted to estimate the total number of player visits originating within each market area. Next, player visits are distributed to the existing facilities based on adjustments to attraction factors, with finer adjustments enabled by attraction factors that are specific to each market for each facility. An iterative process of adjustments is undertaken to all of these factors to hone the model's forecasts to reflect the existing visitation patterns and revenue levels. The following table demonstrates the estimated gaming behavior within the current market place.

Figure 3: Southeastern Massachusetts casino market areas – calibrated gaming behavior 2014

Market	Propensity	Frequency	Win
Primary	37%	11.5	$75
Rhode Island	38%	12.0	$70
Central MA	37%	11.5	$83
South Shore	30%	5.5	$83
Cape Cod	18%	3.5	$77
Native American	38%	12.0	$70
Central MA/CT	37%	11.5	$76
North Shore	20%	4.5	$80
Boston	25%	4.5	$75
Connecticut	30%	5.5	$75
Springfield	24%	4.5	$73
Secondary North	18%	3.5	$76
Tertiary North	18%	3.5	$72

Source: Spectrum Gaming Group

Following calibration, the model can be used for forecasting by adjusting for changes in population and increases in win due to inflation and economic growth. Then, additions to supply, including planned, announced additions at competing facilities and the opening of any new facilities, including the proposed resorts, can be added. In the first scenario, we assume that the existence of a Taunton casino in Taunton, and that in addition to that location operations are established in Springfield (MGM Springfield) and Boston (Wynn Everett). Plainridge Park Casino, which did not exist in the 2014 calibration, is also included in the analysis. Finally it is assumed that hotel rooms are added to Twin River Casino in Lincoln, RI.

As in other markets, the addition of casinos in southeastern Massachusetts is expected to lead to an increase in gaming behavior. Overall, the region demonstrates fairly high proclivity to play casino games due to the existing casinos in neighboring states. The addition of multiple facilities is expected to drive growth across all market areas. Revenue is dependent both on this

growth and on capturing market share from southern New England operators. Therefore, the overall market will grow with the addition of the new facilities and subsequent accessibility, supply, and marketing efforts. The following table shows our estimated propensity and frequency in the market area.

Figure 4: Southeastern Massachusetts casino market areas – estimated gaming behavior 2018 with Taunton alone

Market	Propensity	Frequency	Win
Primary	41%	13.2	$82
Rhode Island	40%	13.2	$77
Central MA	41%	13.2	$91
South Shore	35%	6.6	$91
Cape Cod	21%	4.2	$84
Native American	38%	12.6	$77
Central MA/CT	39%	12.7	$83
North Shore	27%	6.3	$87
Boston	34%	6.3	$82
Connecticut	35%	6.6	$82
Springfield	35%	6.8	$80
Secondary North	20%	4.0	$83
Tertiary North	18%	3.7	$79

Source: Spectrum Gaming Group

Gaming-Revenue and Gaming-Tax Forecast

The next table shows the subsequent gaming-revenue forecast for the Taunton casino as well as other revenue in Massachusetts originating in the local market. Revenue from other sources, such as tourists, is not included.[32] As the table shows, the factors discussed above, primary factors being superior facilities, branding, locations, and tax advantages should enable an experienced management team to develop a substantial business. Overall GGR projected at Taunton is $414 million and nearly $1.5 billion statewide. This drives an estimated $356 million in tax revenue.

[32] Revenue from other sources is not expected to be a substantial part of revenue aside from Wynn Resorts' projections in Boston. The tourism component of gaming revenue will not vary significantly under the proposed development scenarios. Therefore, the reader should note that incremental revenue from other sources of visitation is not included in this analysis and would not vary significantly.

Figure 5: Local market GGR with Taunton only (first full year of operations)

	Taunton	Plainridge	Other Casinos	Total
Gaming Revenue	$414,255,799	$106,890,563	$933,154,785	$1,454,301,147
Gaming Tax Rate	17.0%	49.0%	25.0%	24.5%
Gaming Tax Revenue	$70,423,486	$52,376,376	$233,288,696	$356,088,558

Source: Spectrum Gaming Group

The next scenario assumes a commercial license is awarded to the Brockton application, which would pay a 25 percent gaming-tax rate; however, under these circumstances, the Taunton casino would proceed with no revenue-share (i.e., gaming-tax) obligation. Taunton, Plainridge and Brockton would each be about 15 miles from one-another, and not much farther from Twin River, increasing the number of options and competition in the region.

The addition of the proposed Brockton casino does not impact all competitors equally. In particular, the areas south of Boston would find Brockton to be more convenient than Taunton. As Mass Gaming & Entertainment noted in its application,[33] this dynamic will attract play from the more densely populated Boston area. In addition a Brockton casino provides a closer alternative for the South Shore market, which will find the location accessible both via secondary roadways running east and west in that area as well as via Route 3, Interstate 95 and Route 24. Existing traffic patterns between Braintree and Boston will deter visitation to Boston from the South Shore market and encourage visitation to Brockton. As a result of this access and the increased marketing efforts, growth in the marketplace is assumed to be strongest in the Primary and South Shore markets with diminished growth rates in the Boston and Central MA markets.

Figure 6: Southeastern Massachusetts gaming market areas – estimated gaming behavior 2018 with Taunton and Brockton

Market	Propensity	Frequency	Win
Primary	45%	14.5	$82
Rhode Island	40%	13.2	$77
Central MA	42%	13.6	$91
South Shore	40%	7.6	$91
Cape Cod	21%	4.2	$84
Native American	38%	12.6	$77
Central MA/CT	39%	12.7	$83
North Shore	27%	6.3	$87
Boston	35%	6.5	$82
Connecticut	35%	6.6	$82
Springfield	35%	6.8	$80
Secondary North	20%	4.0	$83
Tertiary North	18%	3.7	$79

Source: Spectrum Gaming Group

[33] Mass Gaming and Entertainment LLC RFA-2 Application.
https://www.dropbox.com/sh/85n21vpmwu5o35l/AACTncaMnjuz3Jse5nLU0YTCa/MG%26E%20RFA-2%20Application.pdf?dl=0

The next table demonstrates the resulting revenue forecasts based on these changes. Gaming revenue increases in Massachusetts by approximately $130 million due to the introduction of the proposed Brockton casino. However, as Taunton will not be required to share any revenue with the Commonwealth, the effective tax rate drops to 20.7 percent and tax payments drop to $328 million.

Figure 7: Local market GGR with Taunton and Brockton (first full year of operations)

	Taunton	Brockton	Plainridge	Other Casinos	Total
Gaming Revenue	$364,505,452	$263,375,396	$94,890,287	$862,908,910	$1,585,680,046
Gaming Tax Rate	0.0%	25.0%	49.0%	25.0%	20.7%
Gaming Tax Revenue	$0	$65,843,849	$46,496,241	$215,727,228	$328,067,317

Source: Spectrum Gaming Group

The following table summarizes the two scenarios. While two casinos in Region C would generate more overall revenue, that would occur in a crowded and competitive marketplace, with much of the new revenue gravitating toward the tax-free casino (Taunton).

While the two-casino scenario drives revenue growth of $130 million, it is projected to lead to a decline of $28 million in tax revenue.

Figure 8: Summary table of gaming revenue, taxes by scenario

	Taunton	Brockton	Plainridge	Other Casinos	Total
Scenario 1: Taunton only					
Gaming Revenue	$414,255,799	$0	$106,890,563	$933,154,785	$1,454,301,147
Gaming Tax Rate	17.0%	n/a	49.0%	25.0%	24.5%
Gaming Tax Revenue	$70,423,486	$0	$52,376,376	$233,288,696	$356,088,558
Scenario 2: Taunton and Brockton					
Gaming Revenue	$364,505,452	$263,375,396	$94,890,287	$862,908,910	$1,585,680,046
Gaming Tax Rate	0.0%	25.0%	49.0%	25.0%	20.7%
Gaming Tax Revenue	$0	$65,843,849	$46,496,241	$215,727,228	$328,067,317
Tax Revenue Summary					
Scenario 1: Taunton only				$356,088,558	
Scenario 2: Taunton and Brockton				$328,067,317	
Scenario 2 difference in gaming tax revenue due				($ 28,021,241)	

Source: Spectrum Gaming Group

Looking Ahead: Key Considerations

As part of our analysis, Spectrum has revisited our 2008 study and considered some of our findings and recommendations in light of what has transpired over the intervening seven years, and how the situation in Region C has unfolded. We wrote at the time:

> In any case, it is clear that a tribal Class III casino and perhaps even a Class II casino in Massachusetts could have a significantly negative effect on commercial casinos in the state, especially if a commercial casino is located near the tribal casino. The Commonwealth would be advised to prevent this situation from happening, if at all possible. This situation would have potentially disastrous effects on commercial casinos in the Commonwealth, as a tribal casino in this case would potentially contribute no tax money to the Commonwealth, and would obviously cause a decline in the gross gaming revenues to the commercial casinos. The result could be a significant negative impact on the Commonwealth's gaming tax receipts. The ideal situation, from the Commonwealth's perspective, would be to issue three commercial casino licenses, as discussed elsewhere in this report, and encourage tribal interests to pursue one or more of these licenses, either solely or as a partner with other interested licensees, and not build its own casino.[34]

At the time, Spectrum did not contemplate a possible compact between the Commonwealth and the Mashpee Tribe that could preclude the need for a competitive bid in this region. Our recommendation was based on the perceived need to have a level playing field among all participants, and that remains an abiding concern. Clearly, a proposed 17 percent revenue-sharing arrangement falls short of parity with a 25 percent tax rate on Category 1 licensees, as well as the loss of the $85 million license fee, but it begs the question: Can that gap be overcome to the benefit of the Commonwealth?

It can, if some or all of the following factors are in place:

- If it eliminates uncertainty and the attendant risk, thus improving the investment climate and lowering the cost of capital for operators throughout the Commonwealth;
- If the tribal project is sufficiently positioned to reach deeper into more demographic groups;
- If it offers a wider variety of amenities, thus employing more individuals, and generating more economic activity; and/or
- If its business model allows it to grow the overall market for Massachusetts and thus be less of a competitive challenge to commercial licensees in the Commonwealth.

Clearly, the implementation of the compact would generate immediate benefits, including removing the significant uncertainty that has plagued Region C for years. It would also

[34] "Comprehensive Analysis," p. 281.

address the concerns of other licensees in the Commonwealth as to the fear of too many competitors operating on an un-level playing field.

The Massachusetts Gaming Commission knows full well that its decisions in such matters will not please everyone, and that predicament is particularly acute in Region C. As noted at the beginning of this report, such decisions will impact the entire Commonwealth for generations to come, and cannot be made lightly.

The Project First Light by the Mashpee Tribe would create 1,000 construction jobs and nearly 2,600 permanent jobs,[35] and would be a significant entertainment magnet for that region. From the standpoint of generating gaming-tax revenue for the Commonwealth, Massachusetts would realize $28 million more on an annual basis with a Taunton-only casino than with having casinos in both Taunton and Brockton.

With that in mind, a decision to limit Region C to a Taunton-only casino would, among other things:

- Generate more annual revenue for the region
- Provide certainty as to the future of gaming in that region

[35] "Project First Light – Taunton, MA," Mashpee Wampanoag Tribe presentation, April 26, 2012. http://www.mashpeewampanoagtribe.com/content/pages/77/MWT-Presentation.pdf

About This Report

This report was prepared by Spectrum Gaming Group, an independent research and professional services firm founded in 1993 that serves private- and public-sector clients worldwide. Our principals have backgrounds in operations, economic analysis, law enforcement, regulation and journalism.

Spectrum holds no beneficial interest in any casino operating companies or gaming equipment manufacturers or suppliers. We employ only senior-level executives and associates who have earned reputations for honesty, integrity and the highest standards of professional conduct. Our work is never influenced by the interests of past or potentially future clients.

Each Spectrum project is customized to our client's specific requirements and developed from the ground up. Our findings, conclusions and recommendations are based solely on our research, analysis and experience. Our mandate is not to tell clients what they want to hear; we tell them what they need to know. We will not accept, and have never accepted, engagements that seek a preferred result.

Our public-sector clients have included 15 US state and territory governments, six national governments, 14 Native American governments, and numerous gaming companies (national and international) of all sizes, both public and private.

In addition, our principals have testified or presented before the following government bodies:

- Florida House Select Committee on Gaming
- Florida Senate Gaming Committee
- Georgia Joint Committee on Economic Development and Tourism
- Illinois Gaming Board
- Illinois House Executive Committee
- Indiana Gaming Study Commission
- International Tribunal, The Hague
- Iowa Gaming and Racing Commission
- Massachusetts Joint Committee on Bonding, Capital Expenditures, and State Assets
- National Gambling Impact Study Commission
- New Hampshire Gaming Study Commission
- New Jersey Assembly Tourism and Gaming Committee
- New Jersey Senate Legislative Oversight Committee
- New Jersey Senate Wagering, Tourism & Historic Preservation Committee
- Ohio House Economic Development Committee
- Ohio Senate Oversight Committee
- Pennsylvania Gaming Control Board
- Pennsylvania House Gaming Oversight Committee
- Puerto Rico Horse Racing Board

- US House Congressional Gaming Caucus
- US Senate Indian Affairs Committee
- US Senate Select Committee on Indian Gaming
- US Senate Subcommittee on Organized Crime
- World Bank

Spectrum and its sister companies, Spectrum Asia and Spectrum Gaming Capital, maintain a network of leading experts in all disciplines relating to the gaming industry, and we do this through our offices in Atlantic City, Bangkok, Hong Kong, New York and Tokyo.

Disclaimer

Spectrum Gaming Group ("Spectrum," "we" or "our") has made every reasonable effort to ensure that the data and information contained in this study reflect the most accurate and timely information possible. The data are believed to be generally reliable. This study is based on estimates, assumptions, and other information developed by Spectrum from its independent research effort, general knowledge of the gaming industry, and consultations with the Client and its representatives. Spectrum shall not be responsible for any inaccuracies in reporting by the Client or its agents and representatives, or any other data source used in preparing or presenting this study. The data presented in this study were collected through the cover date of this report. Spectrum has not undertaken any effort to update this information since this time.

Some significant factors that are unquantifiable and unpredictable – including, but not limited to, economic, governmental, managerial and regulatory changes; and acts of nature – are qualitative by nature, and cannot be readily used in any quantitative projections.

No warranty or representation is made by Spectrum that any of the projected values or results contained in this study will actually be achieved. We shall not be responsible for any deviations in the project's actual performance from any predictions, estimates, or conclusions contained in this study.

Possession of this study does not carry with it the right of publication thereof, or the right to use the name of Spectrum Gaming Group in any manner without first obtaining the prior written consent of Spectrum. No abstracting, excerpting, or summarizing of this study may be made without first obtaining the prior written consent of Spectrum.

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This study is qualified in its entirety by, and should be considered in light of, these limitations, conditions and considerations.

April 16, 2013

Mr. Stephen Crosby, Chairman
Massachusetts Gaming Commission
84 State Street
Boston, MA 02109

Re: Expanded gaming in Southeastern Massachusetts

Dear Chairman Crosby:

MGM Resorts International (MGM) wanted to take this opportunity to provide feedback to your recent message on April 14, 2013 discussing the ongoing deliberations of expanded gaming in Southeastern Massachusetts.

MGM is concerned at the distinct and real possibility that opening Region C to the commercial license process may result in a fourth category 1 license. This would significantly alter the Massachusetts gaming market and may impact the overall value of each of the three individual Category 1 licenses originally contemplated by the legislature following years of detailed studies of the market.

The Massachusetts Legislature thoughtfully and deliberately put in safeguards to protect the gaming market and maximize the value of each of the three Category 1 casino licenses it contemplated. Legislators were sensitive to the vagaries of this unique industry and wanted to provide an incentive for world class gaming operators to compete for the privilege to operate in Massachusetts. The Commission's consideration of opening up Region C to a commercial Category 1 license is a significant decision that will create instability in this market with many direct and indirect adverse impacts on the remaining licenses.

The Commission is charged with the extraordinary responsibility to find the appropriate balance between the rights of the Mashpee Wampanoags and the economic development goals of Southeastern Mass. However, MGM feels that the Commission's mission also includes the safeguarding of the opportunities upon which the current license applicants entered this bidding process. The potential impact of over development will not stop at the southeastern region border. Each operator will realize the impact of an additional casino license should the MGC move forward with a commercial license process in Region C.

While each and every applicant deals with robust competition in every jurisdiction in which they operate they also chose to compete in Massachusetts based on a statute and set of rules that provided them with the ability to maximize their investment. The potential for a fourth license in the Commonwealth was not a possibility any applicant considered when they balanced the significant capital expenditure expected from them and the scope of the market based on the statute.

The act authorizing expanded gaming was clear on the ability of the Commission to seek a commercial license for Region C under Chapter 23K and the standard that would trigger that process. Section 91 (e) of Chapter 194 of 2011 mandates that if "the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commission shall consider bids for a category 1 license in Region C under said chapter 23K." The definitive language in this section serves as important benchmark that protects the spirit and the intent of the law to limit the total number of category 1 licenses while maximizing the value of those licenses.

Chairman Crosby in his message regarding the status of expanded gaming in Southeastern Massachusetts identified a concern of the Commission is "Region C being left in a state of extended uncertainty while the other regions moved forward." Respectfully, the speed at which the Mashpees can complete their land in trust process is not a basis on which to risk the entry of a fourth Category 1 license into this market.

At this point we do not believe it is reasonable to determine "that the tribe will not have land taken into trust", and that is the standard that the Commission is required to apply. Indeed, today the Mashpees put the Commonwealth on notice that they intend to continue to pursue their federally protected right to operate a Category 1 facility, and that if the Commonwealth proceeds with allowing a potential fourth Category 1 license, that the tribe will withhold all revenue payments otherwise payable to the Commonwealth under its compact. Because of this fact, and the issues addressed above, MGM does not believe the Commission should compromise the Massachusetts gaming market or limit the value of an individual license solely based on an effort to keep Region C on the same timetable as Regions A & B.

Additionally, as disruptive to the market as a fourth licensee would be, enabling one of those licensees to operate without any tax payments to the Commonwealth, will provide a significant competitive advantage to that facility, i.e., the Mashpees, allowing them to spend significantly more capital and marketing dollars to extend their reach into the regions of the other Category 1 licenses.

There is an additional potential adverse impact that opening up Region C would cause to the other licensees. If such an opportunity were made available, and the threat of a neighboring Mashpee facility exists (which based on the Mashpee's statements today, is very real), MGM is concerned that the new commercial license that is made available may not result in robust competition, i.e., the threat of a neighboring facility entering the market will dissuade most quality applicants from participating. For example, with the threat of a future Mashpee facility, will the Commission be able to provide such a licensee with the minimum mandatory 15 year exclusive period in that region as contemplated by the gaming act? If that new license opportunity results in little or no activity, the financial and credit markets could take a negative view on the quality of the Commonwealth market in general, which could

have adverse impacts on the ability of the Region A and B operators to access that same capital, or at a minimum, the cost of that capital may increase based upon a perceived weakness in the market.

For these reasons, MGM respectfully requests that the Commission resist the temptation to bypass the statutory question at hand, in which it is clear that the legislature wanted the burden on the Commonwealth, that is: can the Commission reasonably determine "that the tribe will not have land taken into trust". The question is not whether the Mashpees will have that process completed in a timeline that applies to the other commercial licenses.

If the Commission believes it must retain some further control on the timing of a Region C operator, MGM respectfully requests that the Commission provide the Region A & B operators at least 5 years post-opening before allowing what could be a potential fourth operator in the market to open its facility. If the Commission can provide the other operators with that window to operate under a stable environment, it will allow the Commission to better determine the progress, or lack thereof, of the Mashpees to complete their regulatory process, and to make the requisite determination of whether the Mashpees are capable of completing that process.

Thank you again for the opportunity to provide comments.

Sincerely,

Bill Hornbuckle
President and Chief Marketing Officer, MGM Resorts International
President and Chief Operating Officer, MGM Springfield

Cc: Commissioner Gayle Cameron
Commissioner James F. McHugh
Commissioner Bruce Stebbins
Commissioner Enrique Zuniga
Rick Day, Executive Director
Catherine Blue, General Counsel
John Ziemba, Ombudsman

MacLachlan, Amy (MGC)

From: Charlie <ckelly1618@comcast.net>
Sent: Saturday, February 27, 2016 12:52 PM
To: MGCcomments (MGC)
Subject: "MG&E Brockton"

Follow Up Flag: Follow up
Flag Status: Flagged

My one concern about putting this casino on the fairgrounds would be the number of schools in the vicinity of the fairgrounds. There are hundreds of students using the surrounding streets to get to and from school. In the winter of 2014-15 these students had to walk in the streets because sidewalks were clogged with snow for days.
I'm sure the casino will be serving alcohol all hours of the day and night. Casinos are notorious for not having clocks so people will keep gambling and not realize the time.
So all we need is a drunk gambler driving and a blizzard. This could create the situation for the "Perfect Storm". I wouldn't want the injury or death of children on my conscience, would you?
Also, is the city of Brockton ready to defend itself when the lawsuits start coming? 10 million may cover the injury or death of one person. Are they ready for multiple suits?
Where would that money come from, taxes?
I'm sure that in southeastern Massachusetts there must be a rural area to built this casino. Somewhere like Foxwoods, deep in the country.
Please make the right decision and find somewhere else to build a casino.

Charles Kelly
Brockton, Ma.

Sent from my iPad

Mr. Stephen Crosby
Chairman of Gaming Commission
mgccomments@state,Ma.us

Dear Sir;

In Response to the five key evaluation criteria for the gaming proposals in Region C.

- **Overview / General** – What about this license applicant's project will make the project unique in the industry, make it a unique destination, reinforce the Massachusetts-brand and positively impact the Commonwealth?
-
- 1) The applicant's project does not show any uniqueness in the industry. It has a modern design. It is lacking in appreciation of the history of the area.
- The Brockton fairground and historic convention building has been neglected. Before the City of Champions got its name Brockton was known for its agricultural fair and the manufacturing of shoes. The positive impact is of a short term at best and in the long run detrimental to both the City of Brockton and the State. If the 1-3% of local residents become addicted to the Games of Chance, then the City with the 4th highest foreclosures rate will add at least 1,000 more families.

Finance – Will the project meet the estimated revenue projections, does the proponent have suitable financing to complete the project and will they spend the required minimum investment??

1. This project will have difficulty reaching revenue projections given:

A) A casino in Taunton is on the horizon. The Native American tribe has official Federal recognition.
B) Rhode Island - has a casino proposed in Tiverton that is just over the Border of Southern Massachusetts
C) Direct competition with Plainville slots. Many of our gambling neighbor already go there.
D) In summary the South Region C is saturated.

2. Does the proponent have suitable financing to complete the project and will they spend the required minimum investment?

The proponent seems to have deep pocket and can financially develop and complete the project. They spent over 1.5 to 2 million dollars to pass a narrow vote in the election. They out spent the opposition mere $3,000. to 1.4 million. It should be noted that some of the road work vital to the program has been approved by the State but being held up due to the budget shortfall. Weather the State will be able to complete and fund its proposals is in question. There are four unsafe intersections that are on the State unsafe list. There was a recent high school student struck as well as the owner of the Fairground himself being involved in a motor vehicle accident coming out of the facility. There have even been fatalities not far from the high school.

- **Economic Development** – How the project maximizes a positive impact on area visitor attractions, supports small business in the region and creates viable and meaningful pathways for employment?

1. This project cited the Shaw Center as a linking entertainment center yet the City asked for $25,000 for a feasibility study. Some community leaders question if the Center can stay afloat given poor financial status already. The direct competition of the Casino's entertainment and five proposed restaurants will hurt this City sponsored enterprise. The impact on the area visitor attractions will be minimal. Once people visit the congested Route123 corridor and unsafe 4 lanes on Belmont Street they will not want to stay and certainly not want to return.
2. The supports small business in the region and creates viable and meaningful pathways for employment?

   This large development will not support many small business and may actually harm the small businesses in the area. The small convenience stores, the sandwich and pizza establishment will lose customer to the five restaurants located in the Casino or hotels.

   As to having a meaningful pathways for employment seems to be a ploy that the industry uses to gain local support. They even held a work fair to encourage voters before the project has State approval. The number of high paying jobs is minimal and the cited 50K is quite an exaggeration. With the number of out of state casinos closing the experienced dealers will be more likely to be hired before the untrained. In addition, many of the Casinos have initially hired full time staff and then make the position part time to lower cost. The construction jobs although nice are only temporary. The Casino is not a long term solution to our City financial problems.

Building and Site Design – Does the building meet requirements for energy efficiency, have a design that integrates itself into the community and meet permitting requirements??

1. Does the building meet requirements for energy efficiency? The site plans to not reveal any solar energy utilization.
2. The design integration into the community is questionable. The site has been a fairground many centuries. It historic convention building has been let to fall in disrepair as well as the stands. The design does nothing to portray the significates of this agriculture landmark or the unique character of our history
3. Meeting permits requirements will certainly be no problem given the Mayor overwhelming support of this project. The question many resident care about is it closeness to the three schools and the roadway safety.

Mitigation – How does the proponent solve traffic problems, address problem gambling, minimize its impact on the Lottery and mitigate any problems with the host and surrounding communities?

1) Does the proponent solve traffic problems? Timed lights and wider sidewalks will help minimally. The rotary may divert some traffic but how much? The traffic report does depend on state funding improvements that may continue to be on hold due the States financial shortfall. We could have a traffic nightmare waiting for the State moneys. It should be noted that the traffic study cite in the report is faulty and admitted to being underestimated by 3% and corrected for the earlier study. Four major faults of the study are: A) It was conduct in February which as we all know is the month with the least days. B) In addition, this a month with School vacation and family trips C) there are inconsistences between projected traffic with and out expanded growth. There are places that with growth that traffic numbers dropped and that seems to be impossible. The study did not mention any input from the Veterans Affairs as to expected increase in number of veteran attend the Belmont street facility. On Linwood avenue a new housing development has begun plus this area has other potential for growth that would add to the already congested area. Linwood is also one of the States worse accident site. D)The study's peek time study was 4-6 pm and is too narrow of time span. The nearby schools get out before 3pm and the Veteran appointment time vary with the day shifts ending at 3-4 pm. What about lunch time errands and

2. Addressing problem gambling was not addressed and during the Hearing at West Junior High Mr. Bloom himself admitted they had a problem with underage gamblers 'as do all Casino but we have taken care of it. that was two years ago'. Such revealing statement in light of the High School and Junior High schools being so close not to mention a Community College and Stonehill College not far away is scary. Problem gambler can become disruptive and add free drinking to the mix make for increase behavioral problems plus increase in drunk driver accidents. Preventative gambling and drinking programs need to be begun at the Junior high school level. No mention of funding for this important preventative step were mentioned.
3. The question of its impact on minimizing the Lottery impact was not discussed in any of the information sessions or in the media. Brockton has a high participation in the Lottery. One would rationally image that money spent in the Casino would not allow people of limited incomes to be able to play the Lottery. This resulting lowering of Lottery revenue would drop reimbursements to community's educational needs and the State income.

Respectfully Submitted,

Dana Boardman

Dana & Kathleen Boardman
28 Oakdale Street
Brockton, Ma.02301
508-586-3076

P.S.
Would like To Speak on March 1st
@ Brockton.

MacLachlan, Amy (MGC)

From: MGC Website <website@massgaming.com>
Sent: Sunday, February 28, 2016 6:22 PM
To: MGCcomments (MGC)
Subject: Contact the Commissioner Form Submission

Follow Up Flag: Follow up
Flag Status: Flagged

Name

BETTE GOLD

Email

BETTEGOLD99@GMAIL.COM

Phone

(508) 584-3056

Subject

MG&E Brockton

Questions or Comments

As a 38 year resident of Brockton, I strongly oppose the building of a casino on property known as the fairgrounds. With Brockton High School in close proximity, many residential neighborhoods, congested Belmont Street with a multitude of businesses, increasing traffic would put the safety of our citizens and visitors at risk. There have been pedestrian deaths and injuries over the recent years. Increasing traffic and making it even more difficult to negotiate the area surrounding a proposed casino is not good for the public.

MacLachlan, Amy (MGC)

From: Rhonda Whitcomb <whitcombf@aol.com>
Sent: Saturday, February 27, 2016 7:52 PM
To: MGCcomments (MGC)
Subject: MG&E

Follow Up Flag: Follow up
Flag Status: Flagged

To whom it may concern ,

My husband and I are totally against having a casino in our town. Don't we have it bad enough here as it is? We don't need more crime, accidents , traffic here! As it is parents, senior citizens, children are losing their homes, no food and finances to gambling, drugs and alcohol . Many of them spend their checks on lottery tickets or go to other towns with casinos. We will end up with more traffic, accidents being caused with drunk driving, and the lust goes on. I am originally from Northern Michigan and we had two or more casinos brought into area towns and we have seen marriages break up, people lose their homes and so many addicted to it and senior citizens spend their pay checks and not take care of themselves. Don't we have enough of all of that here? It brings nothing but trouble! Do we need that here? No!!!!!! We need something for families. Put in a fun park or something like that! We should be a city known for family fun, not crime! What do you say?

The Whitcombs

Sent from my iPad

Mass Gaming Commission

To whom it may concern;

RE: Proposed Brockton Casino

I wish to submit the following in exception to the proposed casino in Brockton.

Brockton is a city that is in disrepair at this time and is sincerely looking to rebuild but a casino is not the answer. A casino in the close proximity of two schools (Brockton High School and West Junior High School) is not the ideal place. This is a neighborhood and a casino does not belong in a neighborhood. It is also close to the Veterans Hospital and Stonehill College and again not an ideal location. The people who live in this neighborhood feel invaded every year when the Fair comes to town and they are forced to deal with the intrusion on their lives and I would assume that they placate themselves with the knowledge that it is for only 10 days. Yes it is close to Route 24 but once again it is still a neighborhood.

A Casino should be in a stand-alone location such as the Plainridge Slots Parlor. A Casino proposal for the City of Brockton is not meant to rebuild our city but to attempt in a very shallow way to benefit certain individuals who may invest and certain politicians who stand to benefit. I have close information regarding such businesses and the promise of jobs for Brockton is also shallow promise as the dealer jobs will go to the professionals and not the citizens of Brockton. The citizens of Brockton will only get the menial jobs. The citizens of Brockton are being led astray by these promises. It is my understanding that an addiction facility will be housed within the limits of the Casino and I realize that is for the benefit of the patrons who may feel the need of such services and if that be the case it is apparent that there is an anticipation of this being a toxic problem so in that case I suggest that perhaps we should consider Alcoholics Anonymous facilities in every bar and ever liquor store within our Commonwealth. Perhaps the proposers of this facility might consider that land would better serve as a Community Center with perhaps a swimming pool, a bowling alley and other after school enrichment programs for all of our youth. Imagine with the closeness of the High School and Junior High School the opportunities for our youth and positive influence that it would have on them. I am sure that it would also add to the problems of working mothers who have to find care for their children after school. This would afford many single Moms to be gainfully employed knowing that their children are in adequate care and would also provide meaningful jobs for the staff needed to man such a wonderful facility.

It would certainly provide a much more positive effect on our children than a part time job in a gambling environment. When our young children apply for jobs at a pizza place or a McDonalds they are at least being afforded an environment to learn. Yes, to learn business management, food preparation and restaurant management including the requirement of the health administration and rules in any given municipality and the importance of these issues. A part time job for our youth should be a positive learning experience that may guide them in a positive direction for their future and certainly not an environment that would suggest that there is a "Pie in the Sky" in a gambling establishment.

I did attend the meeting in Holbrook and I heard the speakers representing both Holbrook and Abington express acceptance of this Casino and I say of course since it will have no actual ill effect on their lifestyle. As far as commerce for either Holbrook or Abington I say to them what do you have to offer for people who come to the Casino to be so inclined to come to your town. Neither community has anything to offer in the line of tourist attractions, high end restaurants or even a museum that could be considered an attraction. The other host towns are pretty much in the same situation too. So I feel that it is very easy for them to say that they don't have a problem with this Casino because it will not affect their neighborhood or the quality of their lives and last but not least the value of their real estate.

I realize that the vote taken in Brockton was in favor of the Casino but only by a close margin. Do you honestly believe that there are only 14,000 registered voters in Brockton? Of course that isn't the case and for the vote to be as close as it was is an indicator of not having overwhelming support unlike what the proponents like to profess. I heard someone express a history of close votes in Brockton and to that I say that is not important with this issue. When a politician is voted in on a close vote we the citizens have to live with that person for a given amount of time and then afforded the opportunity of casting a vote that might oust that individual. However, if this abomination goes through we have to live with it ad infinitum.

Is someone going to guarantee us that five or ten years from the establishing of this casino we will be in a better place? Of course no one will do so and in time when this area of our city is blighted due to this casino where will we the citizens be then. Are the backers of this proposed casino willing to do as what most leases require and that is to return the area to what is was prior to their descending upon our city or will it be left as is when they have made their money on the backs of the citizens and then depart?

That is hardly a possibility either. No this area will be left as is and the benefiters will have taken their money and moved on.

Please reconsider this carefully before awarding this license to my city.

MacLachlan, Amy (MGC)

From: Linda Morales <lesm1025@yahoo.com>
Sent: Friday, February 26, 2016 1:40 PM
To: MGCcomments (MGC)
Subject: MG&E BROCKTON

Good afternoon-
I appreciate the opportunity to voice my opinion on the proposed casino in Brockton.

While I will be the first to admit that I have not been following the articles in the paper or comments that are being made, I feel as a resident and tax payer of Brockton, this proposal is something that the city needs and many of us will benefit from in the long run. It doesn't matter if you put a casino there, a Walmart , more retail space there (which Brockton does not need any more of!)-everyone will have an opinion.

I support the casino 110% and feel that it is something that Brockton can and will benefit from. The job opportunity, income for additional services that this city can benefit from-police & firemen. While the Brockton Fair is a staple event for the city, it is getting old and the time has come to turn that area into something that the fair was at one time. Brockton isn't the only community that will benefit from the casino-surrounding towns will benefit from it as well, which will improve their communities.

Everyone feels that the proximity to the school is not good. You can't make everyone happy, you have to go through the motions and give everyone their opportunity to voice their opinion. MG&E is giving Brockton an opportunity to improve in so many ways-and also traffic wise as well. That whole area will be built up, and will benefit from the improvements but right now everyone is just hearing one work-casino. They envision gambling, trouble, violence, the wrong "crowd". What does Brockton have now? Here is an opportunity to bring something to this city that can change that....but no one want to teach the old dog new tricks.

I look forward to hearing what the final decision of MG&E will be, and hope that for Brockton-it will be the right one. If not, we might have another Walmart on that corner, more empty stores and taxes that keep going up. Here is our opportunity to make a change.....

L. E. Morales

MacLachlan, Amy (MGC)

From: Rebecca Stang <stan0391@umn.edu>
Sent: Monday, February 22, 2016 9:38 PM
To: MGCcomments (MGC)
Subject: Request to Address the Commission/MG&E Brockton

Hi,

I am a Brockton resident, and though I cannot attend the meeting on March 1st in person, nor may my voice mean much, I wanted to write to you about the decision you face on whether or not to allow a casino to be built in my city.

I'm sure you're quite familiar with the facts. That in spite of a massive campaign, in which the gambling company spent upwards of a million dollars on their campaign versus just a couple thousand in citizens' donations, they were barely able to squeak past the finish line by a hundred votes, an absolutely pitiful margin given the asymmetry in power and organization between the two sides and a margin that says far more about how uninterested Brockton is than about how interested it is. That with the Mashpee now sure to build a casino in Taunton, and on much more accessible land with no community protesters outside, any casino built in Brockton will not pull off the profit margins its backers promised, and is destined to take half as long to turn into an urban eyesore and further blight in a city already impoverished and stricken with more than its fair share of addiction.

Not that it was going to be any kind of savior for Brockton even before the vote demonstrated that we don't want it and the Mashpee double-ensured that we won't profit from it. It was always wildly inappropriate to plan to build a casino so close to the High School. Searching for the words "gambling" or "casinos" on Google is banned in the school, yet they'll be battling casino traffic to get to school in the morning? And all they have to do to get into the casino is cross the road? And of all things, for that casino to be owned and operated by a company that has already paid hundreds of thousands of dollars in fines at its other casinos for repeated underage gambling offenses. I can hardly fathom a worse place to build it than immediately adjacent to the vulnerable group of people who are most likely to go gamble illegally and get away with it. What further burdens could we possibly dream up to heap upon children of color in Massachusetts? Would the Massachusetts Gaming Commission ever, in anyone's wildest dreams, even think of building a casino right next door to a school for wealthy white students? The answer obviously being "no," do you really think that your tenure will be seen as anything but having not just allowed injustice, but having actively encouraged and perpetuated it?

For another, even had the Mashpee not been able to build yet another casino, it wasn't going to be of any net economic benefit to Brockton residents. A few million paid to the city upfront may be attractive from where the council is sitting, but let's be honest, this is not going to be attracting tourism to Brockton. This is a relatively small casino built in an urban area, in a region that is already heavily populated with casinos. The market is saturated, and in an era when gambling is increasingly shifting online too. Dollars will not be flowing into Brockton from this project. The primary gambling clientele would BE Brockton, would be our vulnerable population, money flowing from the pockets of desperate Brockton residents into the coffers of developers whose mansions are a thousand miles away. Crime and poverty are already among our city's greatest challenges, yet we're inviting the one investment known to increase crime and destitution when introduced into urban areas.

I am not one of those who think that gambling is inherently immoral. I'm not opposed to the concept of

casinos. That's not why I'm urging you to award no license. I'm writing because, in this particular case, I can see that putting a casino here, on that specific piece of land and amongst our specific population, would be unjust. It would be exploitation. It would arouse further resentment, anger, and unrest in a time when racial and economic inequality is a powder keg just waiting to go off. All that this casino will accomplish is to become an eyesore hole-in-the-wall by 3 years after it's opened, if that, having gifted us with accessible addiction, social services strain, and urban blight, sharing the block with our high school.

I strongly, strongly oppose this proposal, as has every neighbor I've spoken to. Surely, even if building a casino nextdoor to a school never gave you pause, building a competitor in Taunton could. I urge you not to award the license, which is well within your power. And we will remember whether the Massachusetts Gaming Commission sided with wealthy out of state developers, or with the people who actually live here.

Yours sincerely,
Rebecca Stang

SIGNATURE HEALTHCARE

680 Centre Street
Brockton, MA 02302-3395

Phone: 508.941.7004
www.signature-healthcare.org

Kim Hollon, FACHE
President/CEO

February 4, 2016

Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Dear Commissioners:

Please accept this letter in support for licensing the proposed resort casino in Brockton, in Region C. We believe that locating a casino in this city would be a great boost to the economy of the people who live in Brockton and surrounding towns. As the area's largest non-municipal employer, providing 2,500 jobs, we feel the jobs and opportunities created by this casino are of utmost importance to the resurgence of Brockton to its days of financial prowess when it was the shoe manufacturing capital of the world.

Mr. George Carney has been an outstanding citizen in this area for many years. He is always responsive to the needs of the community and is a generous supporter of many charities in the Greater Brockton area. He has used financial resources that he has attained through his hard work to make this a better place for citizens of the area.

In addition to our hospital, located on Centre Street in Brockton, a couple of miles east of the proposed casino location, we also own and operate a large, three-story outpatient center located a mile or so from the proposed location, just off Rte. 24 in Brockton. We believe that access to both facilities would be enhanced by having a casino in its proposed location at the Brockton Fair grounds. As we invest in new programs and services, including a new cancer center on the campus of our hospital, better roads and infrastructure would ultimately benefit the patients who travel through Brockton from Rt. 24 to utilize our services.

I am in full support of Mr. Carney in his efforts to bring a casino to Brockton. Our patients and their families, many of whom have struggled with employment opportunities, will have the opportunity to benefit from some of the 1,500 job openings the casino will create.

Thank you for considering the proposal put forward by Mr. Carney and the Mass Gaming & Entertainment group.

Sincerely,

Kim Hollon
President/CEO

PLEA TO PROTECT THE GOOD LEGACY OF BROCKTON

My name is Isaiah Anifowose, father of 4; 3boys, 1girl, and pastor of The Overcomers Ministries International located in Brockton MA. My late wife and I moved to Brockton from Roslindale in December 2001 for larger space and play yard for our four children ages 8 to 14 when were to join us from Nigeria.

We almost regret buying a house in Brockton then, when many people described the City of Brockton as a danger zone, not appropriate for raising children. Thank God for a family friend who convinced us otherwise, saying Brockton has good schools for children, identifying Brockton High as one of the best High schools in the United States. All 4 went to Brockton High and did good. My 1st is now an Engineer with GE Aviation, 2nd is a manager with ATT, 3rd graduated last year from Brown and now in Elevator industry, and the 4th is graduating this May in Marketing from UMASS Lowell.

Sorry for using this language; I hate to see any pollution in or around Brockton High School. My plea is to protect the good legacy and what made Brockton my home. Thank you and God bless you.

Isaiah Anifowose

MacLachlan, Amy (MGC)

From: loveterechris@comcast.net
Sent: Wednesday, January 27, 2016 3:08 PM
To: MGCcomments (MGC)
Subject: Holbrook meeting
Attachments: casiNO arguments.odt

Christopher Lovetere
25 Prince St
Brockton MA 02302

Dear Gaming Commission,

Please allow me to introduce myself. My name is Christopher Lovetere. I have called Brockton home for most of my life, with the exception of my four year enlistment in the Air Force. I married a fellow Brocktonian and together we have put three adult children through college and are currently raising our twin 14 year old sons, who will be attending BHS next year.

Brockton has always been a healthy environment, in which to raise a family with the same dangers as most American cities. In recent years Brockton seems to have taken a turn for the worse. The gun violence being at the top of my list of problems that didn't exist, when I grew up here. Second would have to be the drug epidemic. Specifically prescription drugs (Oxycontin), Heroin, Meth etc...These drugs were not readily available, if at all, when I grew up here.

Gambling was a crime, save for para-mutual wagering. Lotteries were banned, in 1833, based on a study that showed Massachusetts residents were wasting $250,000 per year on gambling, which has always been considered a vice. Then the state decided in 1972, when I was 12, that there was much profit to be made by having a lottery. They turned a blind eye to any and all negative implications, such as how this would disproportionately affect low income families (wealthy people rarely play the lottery), the gambling addictions that would be created and enabled, nor the increased dependence the state would have on gambling as a source of revenue.

Today, Massachusetts ranks the highest in terms of annual lottery spending per adult with an average $860.70 dropped on lottery tickets during a year. Our residents waste $1.3 billion dollars per year and that's after all the prizes won have been deducted. That's how much is lost by our residents.

Now we have gone into the casino business. This brings us to the decision before you. Should you approve a casino in Brockton?

My answer is an emphatic, "NO!" and here is my list of reasons why:

1) The corruption of the Democratic voting process that allowed an out of State billionaire to spend millions to alter the results of our city's election, which he did by outspending the opposition 600 to 1 with the stroke of a pen! That happens in an Oligarchy, or a Plutocracy, not a Democracy.

2) Another addiction would enter the heart of the city
Brockton is currently under seige by gun and drugs. Gambling would bring a whole new element of negativity to a city struggling to maintain it's image of a healthy, wholesome place to raise a family.

3) Underage local children WILL gamble at this casino. The casino's response? "That happens at EVERY casino". Is that the price of doing business with the casino, some children will violate gambling laws?
4) The location point is across the street from the BHS. Is that the price of doing busines with the casino, our children's educational environment is comprimised ?
5) The traffic will worsen throughout the city, but especially around BHS. The wear and tear on our roads will be greater.
6) The casino business produces nothing useful to society. The State portion of the proceeds, regardless of how it is spent, does not outweigh the harm that it will cause.
7) This casino would compete directly with the Taunton casino. We should favor our Massachusetts natives the Wampanoags, not some billionaire from Chicago, who doesn't have to live near the casino.
8) The casino will be a burden on the local sewage and our water reserves. This could be a huge problem in the future, should there be a water shortage.
9) The town of Brockton would become dependent on the casino revenue and thus be subject to their future demands.
10) It will result in an increase of gambling addicts
I know the pain it can cause a family. My Father was a gambler.

In Conclusion, for all the reasons listed, I pray that you will vote NO for the Brockton Casino.

CasiNO!

Please allow me to introduce myself. My name is Christopher Lovetere. I have called Brockton home for most of my life with the exception of my four year enlistment in the Air Force. I married a fellow Brocktonian and together we have put three adult children through college and are currently raising our twin 14 year old sons, who will be attending BHS next year.

Brockton has always been a healthy environment, in which to raise a family with the same dangers as most American cities. In recent years Brockton seems to have taken a turn for the worse. The gun violence being at the top of my list of problems that didn't exist, when I grew up here. Second would have to be the drug epidemic. Specifically prescription drugs (Oxycontin), Heroin, Meth etc...These drugs were not readily available, if at all, when I grew up here.

Gambling was a crime, save for paramutual wagering. Lotteries were banned, in 1833, based on a study that showed Massachusetts residents were wasting $250,000 per year on gambling, which has always been considered a vice. Then the state decided in 1972, when I was 12, that there was much profit to be made by having a lottery. They turned a blind eye to any and all negative implications, such as how this would disproportionately affect low income families (wealthy people rarely play the lottery), the gambling addictions that would be created and enabled, nor the increased dependence the state would have on gambling as a source of revenue.

Today, Massachusetts ranks the highest in terms of annual lottery spending per adult with an average $860.70 dropped on lottery tickets during a year. Our residents waste $1.3 billion dollars per year and that's after all the prizes won have been deducted. That's how much is lost by our residents.

Now we have gone into the casino business. This brings us to the momentus decision that now resides on the Gaming Commission's shoulders. Should you approve a casino in Brockton? My answer is an emphatic, "NO!" and here is my list of reasons why:

1) The corruption of the Democratic voting process that allowed an out of State billionaire to spend millions to alter the results of our city's election, which he did by outspending the opposition 600 to 1 with the stroke of a pen! That happens in an Oligarchy, or a Plutocracy, not a Democracy.

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5) The traffic will worsen throughout the city, but especially around BHS. The wear and tear on our roads will be greater.

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7) This casino would compete directly with the Taunton casino. We should favor our Massachusetts natives the Wampanoags, not some billionaire from Chicago, who doesn't have to live near the casino.

8) The casino will be a burden on the local sewage and our water reserves. This could be a huge problem in the future, should there be a water shortage.
9) The town of Brockton would become dependent on the casino revenue and thus be subject to their future demands.
10) It will result in an increase of gambling addicts
I know the pain it can cause a family. My Father was a gambler.

In Conclusion, for all the reasons listed, I pray that you will vote NO for the Brockton Casino.

MacLachlan, Amy (MGC)

From: John Green <greenbasket@verizon.net>
Sent: Wednesday, January 27, 2016 4:22 PM
To: MGCcomments (MGC)
Subject: Casino in Brockton

Please note that as residents of Brockton we strongly oppose the siting in Brockton of the proposed Casino. Our reasons for opposing this casino are:

> The negative impact of introducing crime, noise and traffic into the adjacent residential neighborhoods.
> The risk that promised economic rewards will not materialize and will fall short of the increased demands for city services.
> The propsed casino would be directly across the street from the campus of Brockion High School.

Respectfully,

John H.Green
Gail A. Green

142 Woodard Ave
Brockton MA 02301

MacLachlan, Amy (MGC)

From: rolly tiberii <rtibgoat@yahoo.com>
Sent: Wednesday, January 27, 2016 6:22 PM
To: MGCcomments (MGC)
Subject: NO Casino

No, no & NO CASINO!! - Already too many

MacLachlan, Amy (MGC)

From: apull@comcast.net
Sent: Wednesday, January 27, 2016 10:30 PM
To: MGCcomments (MGC)
Cc: info@brocktonsaysno.info
Subject: Brockton Casino

To whom it may concern:
I think that only a careless, heartless person/organization would consider allowing a casino to be built across the street from a high school. Have you considered the two mile walk zone, which means many students will have to walk in front of, behind, or besides every side of the building. Have you given thought to having your daughter of granddaughter being a student at a school located across the street from a casino and having to walk pass it every day?
As for a Resort, do you really think people are going to "vacation" in Brockton? Look at the revenue in Plainville; is it what it was projected to be?
Brockton has enough crime and financial issues now. We don't need false hopes of million of dollars that will not come to fruition. Feel free to share this email with Mayor Carpenter and the other politicians that he has intimidated to thinking this is a great idea.

Concerned Brockton Resident

MacLachlan, Amy (MGC)

From: Steve <sfinn1776@verizon.net>
Sent: Tuesday, January 26, 2016 10:14 PM
To: MGCcomments (MGC)
Subject: Casino Brockton

The Plainville location is not meeting projections. The Taunton location will probably be running soon. The state has been without sites like these for hundreds of years. Please explain coherently what is the rush for Brockton? Let's see how Plainville an Taunton performs over time and understand why Fall River pulled out and then decide. Outside of political pressure I do not understand the rush to get it done.
Sent from my iPhone

MacLachlan, Amy (MGC)

From: DianeTig@aol.com
Sent: Tuesday, January 26, 2016 7:17 PM
To: MGCcomments (MGC)
Subject: (no subject)

First off, I would like to say, Thank you for giving people the opportunity to voice their opinion on this casino issue. Brockton does not need a casino here and the area they are hoping to build it could not be a worse location. I have lived in this city since 1977 and have seen it downslide since then. It needs positive things that will help not hurt our community. With Plainridge slot parlor and Twin Rivers less than an hours drive away, people living in this area can get there easily. Also with the planned casino in E. Taunton in the future, there is no logical reason to put one here and impact our city in such a negative way.

Thank You

Diane F. Hollis

MacLachlan, Amy (MGC)

From: bbnmillien <bbnmillien@yahoo.com>
Sent: Tuesday, January 26, 2016 6:55 PM
To: MGCcomments (MGC)
Subject: No casino

Yes please no casino In Brockto, Brockton have enough crime to bring a casino that cause even crime on top of what already there. Please No Casino In BROCKTON

Sent from my T-Mobile 4G LTE Device

MacLachlan, Amy (MGC)

From: Kathleen Hanshaw <ilvmygy@gmail.com>
Sent: Tuesday, January 26, 2016 5:26 PM
To: MGCcomments (MGC)
Subject: No Casino!

Bad idea for a poverty low income high crime rate community. Greed is going to trump common sense!
Kathleen Hanshaw

MacLachlan, Amy (MGC)

From: MGC Website <website@massgaming.com>
Sent: Wednesday, January 13, 2016 4:13 PM
To: MGCcomments (MGC)
Subject: Contact the Commissioner Form Submission

Name

DAVID FARRELL

Email

dfarrell@cobma.us

Phone

(508) 580-7850

Subject

Brockton Casino

Questions or Comments

In speaking with veterans of every walk of life in Brockton and living at the VA, there is nothing short of a Super PX that could exceed veterans' dreams for new construction in Brockton than the current proposed Casino at the Brockton Fairgrounds. Many of the hundreds of veterans I speak with would like nothing better than to visit a gambling venue that is close to their homes to relax and enjoy their time in Brockton. Many of these veterans live at the Brockton VA Hospital and could walk to the Fairgrounds for this purpose. There is also convenient public bus transportation to this area.
I hope you will give favorable consideration to this proposed Casino as it will enhance and improve the life of our deserving veterans in Brockton.

Forwarded to Amy.

bvna More than you'd expect from home care.
Brockton Visiting Nurse Association

500 Belmont Street, Suite 200, Brockton, MA 02301-4985
508-587-2121 Main | 508-584-8780 Main Fax
508-894-5272 Referral Line | 508-559-0105 Referral Fax
www.brocktonvna.org

January 7, 2016

Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Dear Commissioners:

It is my pleasure to write a letter of support for licensing the proposed resort casino in Region C, to be located in Brockton. I have come to this conclusion through working in this area for over 35 years, seeing many changes throughout the region and knowing that the Brockton area needs a boost to regain its full potential as the City of Champions. The proposal put forward by Mr. George Carney and the Mass Gaming & Entertainment, LLC. (MGE) would provide the much needed improvements to this area.

I have known Mr. George Carney for many years in my role as President of the Brockton Visiting Nurse Association (BVNA). The Brockton Visiting Nurse Association is 111 years old, one of the oldest not-for-profit businesses in Brockton. Our geographical service area encompasses over 31 towns in Southeastern, MA, where we deliver care to a wide range of patients by providing comprehensive home health care through highly skilled, hands-on nursing care and sophisticated treatments and therapies. The BVNA's Corporate Office is located on the edge of the fairgrounds on Belmont Street, in space leased from Mr. Carney, adjacent to the land where the proposed casino is to be located.

Mr. Carney is a very community-minded businessman and leader, who has always been there for the BVNA and all in our community as a generous supporter of efforts to help make Brockton a better place. As a tenant of Mr. Carney's, the BVNA sees firsthand his attentiveness to community needs and his hard work to help Brockton and the surrounding communities.

The casino approval would initially bring in many improvements to traffic, transportation, and utility infrastructure as well as public safety with increased security. In addition, hiring preferences for construction and permanent jobs, first to Brockton residents and then to qualified residents of surrounding communities, will help jump start the local economy with an infusion of 1,500 promised jobs. Once the casino is opened, the annual payments to the city should help greatly by providing enhanced community services for education, police, fire, and other municipal services.

United Way

Every day I drive up to the BVNA office and see the empty Fairgrounds as a sad testament to what was in the past. For two weeks every year, the Brockton Fair bursts open with vibrant activity as local residents flock here for entertainment. Imagine if this vitality could become a permanent year-round activity with the opening of the casino. This would be a vast improvement over the current use of this land and would indeed give Brockton the much needed infusion of positive energy we all desire. This is the future we need!

In conclusion, I fully support the efforts to bring a casino to Brockton, as I feel the benefits to all in our community would outweigh any potential issues. A majority of the voters of the city have endorsed the plan and the Mayor is ready to go forward. The same people the BVNA serves every day to better their health would also benefit from this proposal. It would be a win/win for all. Thank you for your time and consideration.

Most sincerely,

Beverly Pavasaris

Beverly Pavasaris
President and CEO

Brockton Casino Opposition Growing — Pastors And Faith Community Speak Out
NEWS RELEASE
BROCKTON INTERFAITH COMMUNITY
STAND UP FOR BROCKTON

BROCKTON CASINO OPPOSITION GROWING
PASTORS AND FAITH COMMUNITY SPEAK OUT

BROCKTON — The Brockton Interfaith Community and Stand Up For Brockton call on the Massachusetts Gaming Commission to honor the agreement the Commonwealth made with the Mashpee Wampanoag Tribe.

"Once again, Native Americans are being subjected to the bait and switch: now you see it, now you don't," said Pastor Richard Reid of Stand Up For Brockton.

The Mashpee Wampanoag Tribe has met all of the conditions set for it to have exclusive rights to a casino in Southeastern Massachusetts, known as Region C, under the compact reached with the Commonwealth and the casino gambling enabling legislation.

The U.S. Department of Interior has taken Taunton land in federal trust for the tribe, paving the way for a Native American resort casino, but the Gaming Commission appears to be throwing snake eyes at them, by continuing its consideration of awarding a commercial casino license in Brockton to Rush Street Gaming.

"It is clear to us that, regardless of our moral objections to gambling, Massachusetts must honor its commitment to the Mashpee Tribe," said Pastor Reid. "It is equally clear that hard, pragmatic reasons exist for the gaming commission to halt the proposed Brockton Fairgrounds casino."

First off, the three — not four — casinos that Massachusetts voters believed they were authorizing are supposed to be destination resorts, not the convenience gambling proposed for Brockton and its surrounding residents. Second, the region will be saturated with gambling halls if a casino is allowed in Brockton, along with the Mashpee Wampanoag casino in Taunton, the Plainridge casino in Plainville, and two more in nearby Rhode Island. (Plus the Everett and Springfield casinos already licensed.)

The Region C casino license was supposed to be a competitive process, but only one applicant completed a filing (Rush Street Gaming, which was fined. And the only casino yet to open in Massachusetts, the Plainville slots casino, is already taking a financial hit as the novelty of gambling fades and revenues drop below the rosy projections pitched when this whole, sorry process started.

"The state's bet on casino riches already is going bust," said Tom McDonnell of Brockton Interfaith Community, representing more than 4,000 parishioners in Brockton. "Opposition to the casino in Brockton is strong and growing. Saturation casino gambling in Southeastern Massachusetts will create a disaster—economically, morally and with traffic tie-ups on Route 24 that will render the highway a parking lot. We respectfully call on the Gaming Commission to honor the Commonwealth's agreement with the Mashpee Wampanoag Tribe and not award a commercial license for the proposed Brockton Fairgrounds casino. This time, Massachusetts must honor its commitment."

RUSH STREET GAMING IN MASSACHUSETTS AND RECENT VIOLATIONS

According to The Enterprise of Brockton, efforts by Rush Street Gaming to build gaming facilities elsewhere in Massachusetts were stymied by vocal opposition, which criticized the company's past performance. Casinos operated by Rush Street in Philadelphia and Pittsburgh were fined more than a dozen times from 2010 to 2012 by state gambling regulators for various offenses, including underage gambling, The Enterprise reported. The underage fines – totaling $316,000 for 31 instances – were originally reported two years ago by the Telegram and Gazette, when Rush Street sought a slots license in Worcester but later withdrew its bid. The company also abandoned its pursuit of a slots license in Millbury. In September, Rush Street Gaming's casino in Des Plaines, Illinois, was hit with a $2 million fine and two of its officers were ordered suspended after a complaint from the Illinois Gaming Board lambasted the casino's parent company for failure to follow internal procedures in hiring a security and maintenance vendor, and for lax control over gaming promotions, according to reports by numerous media, including nbcchicago.com. The proposed Brockton casino would be located directly across Forest Avenue from Brockton High School and just a short distance away from West Middle School.

BROCKTON INTERFAITH COMMUNITY

BIC is a faith organization with 14 congregational and institutional members representing more than 4,000 families. Created in 1990 by area clergy and lay leaders driven to action by the troubles facing the city of Brockton, BIC has been working in the community for more than 25 years.

CONTACT:

Brockton Interfaith Community
Tom McDonnell
508-587-9550
Email: brockton.interfaith@gmail.com

STAND UP FOR BROCKTON

Stand UP for Brockton is a grassroots coalition of clergy and community members opposed to building a proposed casino across from Brockton High School.

CONTACT:

Stand Up For Brockton
Rev. Richard Reid
508-580-1400
Email: standupforbrockton@gmail.com

MICHAEL J. SCHALLER

DIRECT: (312) 836-4005
FACSIMILE: (312) 275-7599
E-MAIL: mschaller@taftlaw.com

Shefsky & Froelich has joined Taft/

111 East Wacker, Suite 2800
Chicago, Illinois 60601
Tel 312.527.4000 / Fax 312.527.4011
www.taftlaw.com

September 18, 2015

Via Email: mgccomments@state.ma.us
Mr. Stephen Crosby, Chairman
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

RE: Massachusetts Gaming Commission Policy Decisions

Dear Chairman Crosby:

The Massachusetts Gaming Commission ("**MGC**") has published its Request for Public Comment pertaining to Region C resort-casino award. Specifically, the MGC is seeking comments on the request by Mass Gaming and Entertainment, LLC ("**Mass Gaming**") that the MGC make an immediate determination (prior to the Region C application date) that the MGC will issue a casino license in Region C if it determines that a Region C gaming applicant meets all of the criteria for issuance of such a license and it is in the best interest of the Commonwealth regardless of whether or not the United States Secretary of the Interior puts land into trust in Taunton for the Mashpee Wampanoag Tribe (the "**Tribe**") prior to the issuance of a casino license. We appreciate the MGC's desire to open this process to the public and to allow our participation and input.

Our firm is gaming counsel to the City of Taunton, Massachusetts (the "**City**"). The City entered into an Intergovernmental Agreement (the "**IGA**") with the Tribe in May, 2012. The IGA was approved overwhelmingly by 63% of the City's voters in a referendum held in June, 2012. Pursuant to the IGA, the City has agreed to act as the host city for the Tribe's "First Light" casino resort project. Since entering into the IGA the City has expressed its strong support for the Tribe's land-into-trust application.

If our comments below sound familiar, it is because we submitted similar comments to the MGC on November 27, 2012 in response to the MGC's request for public comments on policy decisions under its November 7 2012 Framework for Addressing Policy Questions (the "**Framework**"). Under item 32 of the Framework, the MGC asked whether it should set a time limit or other rules addressing the Tribal compact/land-in-trust issue in Region C. The City's position as set forth in its response was "no".

In the almost three years that have elapsed since the Framework was published, the MGC has proceeded cautiously, but deliberately, with respect to the issuance of a Category 1 license in Region C and has followed the dictates of Section 91(c) of Chapter 194 of the Acts of 2011 (the "**Act**") while acting in the best interest of the Commonwealth by encouraging applications for a Category 1 license in Region C. As a result of the MGC's balanced approach to Region C, the

Tribe has been allowed to continue to pursue its goal of developing a resort casino in the City and the Commonwealth has received what appears to be a viable initial application for a Category 1 license in Region C.

At the September 3, 2015 MGC public meeting, Mr. John Donnelly, legal counsel to Mass Gaming, addressed the MGC on behalf of his client. We have attempted to summarize Attorney Donnelly's statements to the MGC and provide our responses as follows:

1. The ability of the Tribe to have the U.S. Secretary of the Interior accept the Tribe's land into trust is very uncertain and will result in litigation.

Response:

Although the process of having the Tribe's land taken into trust has been slow, there is no basis for Mr. Donnelly to conclude that the ability of the Tribe to be successful in its endeavor is uncertain. To our knowledge, there has been no indication from either the Bureau of Indian Affairs or the U. S. Department of the Interior that the Tribe's application is deficient or that the consideration process is not proceeding according to its customary pace. To the contrary, the facts show that the Tribe has successfully met each and every milestone in the approval process from entering into a compact with the Commonwealth to final approval of its environmental impact statement. The letters the City recently received from the Bureau of Indian Affairs ("**BIA**"), although confusing, do indicate that the BIA continues to actively be working on the Tribe's request for a reservation proclamation in connection with its land-in-trust application.

Whether or not litigation will ensue as a consequence of the Tribe's land being taken into trust is speculation by Mr. Donnelly. Even if litigation does occur, whether or not such litigation will prevent the Tribe from proceeding with its project cannot be predicted.

2. The intent of the Massachusetts legislature was to give the Tribe a fair shot at having its land taken into trust.

Response:

Section 91(e) of the Act does more than give the Tribe a "fair shot" at having its land-in-trust application approved. Section 91(e) requires that the MGC determine that the Tribe will not have land taken into trust before it considers bids for a Category 1 license in Region C. Basic due process would require the MGC to first gather and then review all pertinent facts on this issue before reaching such a determination.

3. Mass Gaming has spent a lot of time, money, resources and energy pursuing a casino resort project in Region C.

Response:

Mass Gaming elected to pursue an application for a Category 1 license in Region C with full knowledge that the MGC was balancing the interest of the Tribe and the best interest of the Commonwealth and had given no assurances at any time that it would issue a Category 1 license to a Region C applicant. Mass Gamming proceeded in the face of such risk.

4. It is only fair to Mass Gaming that it receive the MGC's assurance that if MGC determines that Mass Gaming is a suitable and qualified candidate for a Category 1 license, the MGC will issue it a license.

Response:

Mass Gaming claims it is seeking fairness for itself but ignores the fact that the MGC did not provide assurances to applicants in any region that it would issue a license. Granting Mass Gaming's request would result in preferential treatment for Mass Gaming.

5. Region C can support two casino resorts.

Response:

Whether Region C can support two resort casinos would require the MGC to speculate on exactly what Mass Gaming would construct if the Tribe has its land taken into trust and whether the Tribe would alter its development plans if Mass Gaming were issued a license. Further, it would appear that the Legislature, in enacting the Act after commissioning a market study, intended for there to be no more than three full-scale casinos in the Commonwealth, and no more than one in each of the three regions.

In short, we believe that the MGC has been fair to all parties and should continue to allow the process to play out.

We thank you for the opportunity to provide our comment and input. To the extent, the MGC is inclined to proceed in a manner that is inconsistent with our response provided above, we respectfully request an opportunity to further discuss this policy question with the MGC before the MGC reaches a conclusion on the topic. Should you have any questions on any matter or need additional information, please feel free to contact us.

Very truly yours,

TAFT STETTINIUS & HOLLISTER LLP

Michael J. Schaller

MJS/dja/7202541.7

Cc: Hon. Thomas C. Hoye, Jr., Mayor, City of Taunton
Cedric Cromwell, Chair, Mashpee Wampanoag Tribe

The Commonwealth of Massachusetts
House of Representatives
State House, Boston 02133-1054

SHAWN C. DOOLEY
STATE REPRESENTATIVE

COMMITTEES:
WAYS AND MEANS
FINANCIAL SERVICES
REVENUE
REDISTRICTING

9th NORFOLK DISTRICT
MEDFIELD • MILLIS • NORFOLK
PLAINVILLE • WALPOLE • WRENTHAM
ROOM 167
TEL. (617) 722-2810
Shawn.Dooley@MAhouse.gov

September 14, 2015

The Massachusetts Gaming Commission
101 Federal St., Suite
Boston, MA. 02110

Re: Region C Request for Comments

Dear Commissioners,

Thank you for taking the time to read this letter and for your tireless work to ensure the successful and ethical establishment of expanded gaming in the Commonwealth. It is in no small measure due to your efforts that Massachusetts is adding jobs and revenue today with the opening of our first facility in Plainville.

We also know that at least two facilities, licensed by you, in Springfield and Everett, will be opening for business in the next several years.

We, however, have no idea what the landscape near or around southeastern Massachusetts might look like over that time frame. Questions relative to potential Indian gaming in the area are sure to continue not withstanding federal land in trust determination for at least one tribe later this month, for example.

The Expanded Gaming Act, wisely in our view, provided you with many tools and great discretion in the issuance of licenses, their timing and whether to issue them at all.

With so much unclear as to the complete picture in Southeastern Massachusetts we urge you to be robust in the exercise of your discretion and be in no haste to move forward aggressively in the issuance of a Region C gaming license at this time.

In addition, I believe that it makes strong business sense to pause and learn from the gaming operations as they come on line. I'm sure there will be an unanticipated issue or two that will arise and we can make corrections accordingly on future gaming operations. I don't think there is any urgency for the citizens of the Commonwealth to have the fourth operation opening sooner than necessary. Let's not act in haste and repent in leisure. We are off to a good start in the Commonwealth. That is because you have been purposeful, methodical and careful. Now is no time to potentially saturate one of our regions as so many variables remain unknown.

Sincerely,

Shawn C. Dooley
State Representative, 9th Norfolk

MacLachlan, Amy (MGC)

From: salvatricev@aol.com
Sent: Wednesday, September 30, 2015 12:54 PM
To: MGCcomments (MGC)
Subject: Gambling on Brockton's Future

I agree with many points raised by Elijah in his piece "Gambling on Brockton's future", regarding the proposal for a casino in Brockton. Many residents I've spoke to from Brockton raise concerns about which moral dilemmas this casino can potentially bring to Brockton---not just to seniors but to the huge population of homeless residing in the city.

The Commission has received 11 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

RE: MG&E Brockton

Dear Gaming Commission members,

The CEO of Rush Street Gaming told you that rejecting his Brockton casino will — quote — "crush a town."

I would like to point out that Brockton is the same *"town"* where half the voters said they don't want his casino.

He also told you that he would get on his jet and leave if he doesn't get the license. But he spent $1.6 million dollars just on the election in Brockton.

His words and promises are meaningless. Please show him the way to the airport by voting not to issue a license in Region C.

Thank you. David M. Damon

629 North Main St
Brockton, 02301

The Commission has received 9 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Feb 23, 2016

RE: MG&E Brockton
Massachusetts Gaming Commission

Commission Members,

The Mashpee Wampanoag Tribe's federal status is now official and its land has been placed into trust by the federal government.

The tribe also has an approved compact with the Commonwealth of Massachusetts.

Those are the two requirements that are supposed to allow the Tribe exclusive rights to develop a resort casino in Region C.

I understand that the commission felt obligated to consider the Rush Street Gaming proposal before the land and tribal recognition issues were settled.

But now they are final. The Tribe has met its conditions.

The commission should honor the state's promises, which require you to reject the proposal for a casino in Brockton. It is that plain and simple — even if Mass Gaming and Entertainment is shamelessly funding a suit and providing its lawyer to try to take away the legally gained commitments Massachusetts made to the Tribe.

Thank you,

Brockton, MA 02301
94 Lenox St

The Commission has received 12 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

RE: MG&E Brockton

Massachusetts Gaming Commission,

I wish to draw to the commission's attention a history of violations and fines against Rush Street Gaming, the actual applicant for the commercial casino license in Region C (Mass Gaming & Entertainment LLC).

Just this past fall, Rush Street Gaming's casino in Des Plaines, Illinois, was fined $2 million dollars and two of its officers were ordered suspended after a complaint from the Illinois Gaming Board.

Part of the violation involved lax control over gaming promotions.

A $2 million dollar fine is not a minor violation.

Also, casinos operated by Rush Street in Philadelphia and Pittsburgh were fined more than a dozen times from 2010 to 2012 by state gambling regulators for various offenses, including underage gambling – totaling $316,000 for 31 instances

This is the same gaming company reported to have invested millions of dollars into an online gambling game called "Cats and Dogs Slots" that uses cartoon characters of kittens and puppies to teach young children how much fun a slot machine can be.

A senior executive said they are bridging the gap to the next generation of gamblers.

This applicant should not be licensed to run a casino next to a high school.

Thank you for your consideration,

Claire M. Sheehan

The Commission has received 23 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Feb 23, 2016

Massachusetts Gaming Commission

RE: MG&E Brockton – Region C

To the Gaming Commission:

I will use Commission Chairman Crosby's own words in asking that the gaming commission <u>not approve the Brockton license</u>.

In October, Chairman Crosby told WGBH's "Greater Boston" radio show that, "Nobody wants four casinos. Nobody wants two in southeastern Mass."

Since then, it is now certain that the Mashpee Wampanoag Tribe can build its casino in Taunton. Licensing a casino in Brockton on top of that would create the very situation that Chairman Crosby warned against.

Mr. Crosby also stated: "They would cannibalize one another. Neither one of them would do as well."

The argument against licensing a casino in Brockton is clear. Vote NO on the Mass Gaming and Entertainment license.

Thank you.

36 Lincoln St
Abington MA 02351

The Commission has received 23 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Massachusetts Gaming Commission

RE: MG&E Brockton – Region C

Dear Commissioners,

Granting a commercial casino license for the Rush Street Gaming/Mass Gaming & Entertainment, LLC application would in create the very situation the Expanded Gaming Act was supposed to prevent. Allowing a casino in Brockton, plus the Tribal casino authorized in Taunton will mean FOUR CASINOS within a 45-minute drive — and a fifth casino just 10 minutes further.

That is Plainridge, Twin River, the Tribal Casino in Taunton, another casino just over the border in Tiverton, Rhode Island — and Brockton. Plus, even another casino in Everett.

This would be a disastrous situation. There is NO WAY all of these casinos would survive. They will be asking for tax breaks, rebates and other give-backs to be able to continue providing the (fewer) jobs and tax revenue they promised. Just look at what is happening in Maine and Atlantic City.

Licensing a commercial casino in Brockton would be first big step on a ruinous road to casino saturation. That is not what Massachusetts voters were promised or what they approved.

Please do not license this casino in Brockton.

Yours truly,

Jean V. Fogliano

The Commission has received 35 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Massachusetts Gaming Commission

RE: Mass Gaming & Entertainment Brockton

Dear Gaming Commission Members,

The residents in surrounding communities did not have the opportunity to cast votes on the proposed casino in Brockton. But the voters in Brockton did.

Rush Street Gaming spent $1.6 million dollars and had the city's most powerful politician and paid supporters running a slick, professional campaign. Those who believe it is harmful and a threat to their children's futures to allow a gambling casino across the street from Brockton High School had no money or political machine to make their voices heard in a campaign.

The result?

The election was basically a tie, with the million-dollar-plus campaign attracting only 148 more votes. The people of Brockton do not want this casino.

Please consider this when you judge this application. (The sole application even filed for this commercial casino license.)

Please do NOT award a license to build a casino in Brockton. It will damage not only the city, but also all the surrounding towns.

Regards,

The Commission has received 28 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Massachusetts Gaming Commission

RE: MG&E Brockton – Region C

I have read that since the state's one casino opened in Plainville, more than 1,097 underage people have attempted to enter to gamble.

How many more will be drawn to a so-called destination resort casino in Brockton — located directly across Forest Avenue from Brockton High School?

While 23- and 24-year-olds are just beginning to use their fully matured brains to evaluate emotions and make decisions, children and teenagers aren't prepared to consider all the consequences of any one decision. This makes them ripe for addictions and predation of all kinds: opiates, gambling, alcohol.

As gambling becomes normalized, as our governments operate gambling through state lotteries and promote casino gambling, as the state considers legalizing online gambling and sports betting, the risk that children and young people will become addicted to gambling increases.

With a casino nearby, that danger is compounded, even if they are stopped at the door.

To make matters worse, I have read that Brockton's mayor hopes to create an 'entertainment district' around the casino. That is not appropriate, but I must note that the city does already have a so-called gentlemen's club located next to a hospital.

I ask the Massachusetts Gaming Commission to save us from this proposed disaster.
The proposal for this casino in Brockton should not be approved.

Sincerely,

Marie Caliber

The Commission has received 18 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Massachusetts Gaming Commission

RE: MG&E Brockton – Region C

Dear Gaming Commission Members,

I am writing to pose a simple question: If there is so much market demand and so much money to be made and benefits to be produced by this proposed casino, why do you have just a single application for a commercial casino license in Region C?

When voters were sold on the idea of three casinos and a slots parlor, we were fed the idea that the world's greatest resort developers would be competing fiercely to win the rights to build.

But, what do we have here? Just one applicant. No competition at all.

What happened?

It is obvious that Region C cannot support a Brockton casino, another in Taunton, another in Plainville and the Rhode Island casinos.

Brockton is not a wise choice for a so-called resort casino. Aside from some token mitigation payments, the surrounding communities will get nothing but trouble.

We should have higher aspirations for our communities and our children than allowing a gambling casino across from a high school, near residential neighborhoods. Mayor Carpenter is talking about an "entertainment district" around the casino. I ask you, what types of 'entertainment' businesses go next to a casino?

The Rush Street Gaming proposal in no way resembles the destination resort that the voters were sold. The fact that nobody except Rush Street Gaming has even bothered to file an application should tell the gaming commission all it needs to know.

Please, no license in Region C.

Yours truly,

Donna Widener

The Commission has received 27 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Massachusetts Gaming Commission

RE: MG&E Brockton – Region C

The actions by Rush Street Gaming to pay for a trumped-up "citizens group" lawsuit to stop the Mashpee Tribe from proceeding with its Taunton casino are despicable, and should disqualify the Mass Gaming application for Brockton.

I would like to point out that this Brockton casino is the third try by Rush Street Gaming to get a gambling license in Massachusetts. First, Rush Street withdrew its bid for a slots license in Worcester. Then it abandoned its pursuit of a slots license in Millbury. Now, they are trying to build an alleged 'resort' casino in Brockton.

They have gone from slots parlors to a casino in Brockton—and will stop at nothing to get it, even misleading the Massachusetts Gaming Commission in public, to your faces.

You certainly remember what Rush Street CEO Neil Bluhm said when Commission Chairman Steve Crosby asked him point-blank if Rush Street would file suit to stop the Taunton casino?

After that, how can the commission ever trust what Rush Street Gaming promises? This application to put a casino in Brockton should be rejected. Mr. Bluhm and his casino company are not deserved of a commercial casino license in Massachusetts.

Thank you for your consideration,

Mark C Thomas
47 Blaine St
Brockton MA 02201

The Commission has received 212 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

To The Massachusetts Gaming Commission

RE: MG&E Brockton

Dear Commissioners,

I am opposed to a casino in the City of Brockton, Massachusetts. Here's why...

The Mass Gaming & Entertainment LLC application that is now before you would be nothing more than predatory convenience gambling, essentially targeting the residents of Brockton and nearby communities – communities that can least afford it.

Putting a casino directly across the street from one of the country's largest high schools is absurd and irresponsible.

The application itself fails to meet the requirements of the Casino Gaming Act approved by voters, namely: The MG&E proposal is NOT a destination resort! Brockton is NOT a resort community! A casino targeting residents of a troubled city struggling with crime and drugs and its neighbors in surrounding towns is NOT what Massachusetts voters were promised!

High-rolling gamblers with plenty of money to spend are NOT going to travel to Brockton.

This casino, proposed by Rush Street Gaming for Brockton, will saturate Southeastern Massachusetts with casinos.

The proposal will NOT benefit the people of Brockton, the residents of surrounding communities, or the Commonwealth of Massachusetts.

Please do NOT issue a commercial casino license in Region C.

Thank you.

Respectfully,

Signature Shannon L Tompkins

Printed Name Shannon L Tompkins

Address 20 Neubert st Brockton Ma.

The Commission has received 21 of the following form letters of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The form letter appears as follows:

Feb 23, 2016

Massachusetts Gaming Commission

RE: MG&E Brockton

Dear Commissioners,

The Mass Gaming & Entertainment LLC application before you would build nothing more than Predatory Convenience Gambling to target the residents of Brockton and nearby communities who can least afford it.

Putting a casino directly across the street from one of the country's largest high schools is absurd.

This application fails to meet the requirements of the casino gaming act approved by voters: The MG&E proposal is NOT a destination resort. Brockton is NOT a resort community. A casino targeting residents of a troubled city struggling with crime and drugs and its neighbors in surrounding towns is NOT what Massachusetts voters were promised.

High-rolling gamblers with plenty of money to spend are NOT traveling to Brockton.

This casino proposed by Rush Street Gaming in Brockton will saturate Southeastern Massachusetts with casinos.

It will NOT benefit the people of Brockton, the residents of surrounding communities or the Commonwealth of Massachusetts.

Please do NOT issue a commercial casino license in Region C.

Sincerely,

Edsie Sieber

The Commission has received 176 of the following post cards of opposition to awarding a Category 1 License to Mass Gaming & Entertainment in Region C. The post cards appear as follows:

Attention: Stephen Crosby, Massachusetts Gaming Commission Chair

Gayle Cameron, Commissioner — Bruce Stebbins, Commissioner

James F. McHugh, Commissioner — Enrique Zuniga, Commissioner

As a resident of Brockton I am against the proposed Brockton Fairgrounds Casino in Region C because:

I have lived here for over 50 yrs
I do not think a casino would be good
because of traffic increase - more crime
wrong type of people - schools in area
we do not need a casino

PLEASE DO NOT ISSUE BROCKTON A CASINO LICENSE

Signature: Sarkis Bogosian

Print Name: SARKIS Bogosian

Print Address: 108 West ST
Brockton MA. 02301

Attention: Stephen Crosby, Massachusetts Gaming Commission Chair

Gayle Cameron, Commissioner — Bruce Stebbins, Commissioner

James F. McHugh, Commissioner — Enrique Zuniga, Commissioner

As a resident of Brockton I am against the proposed Brockton Fairgrounds Casino in Region C because:

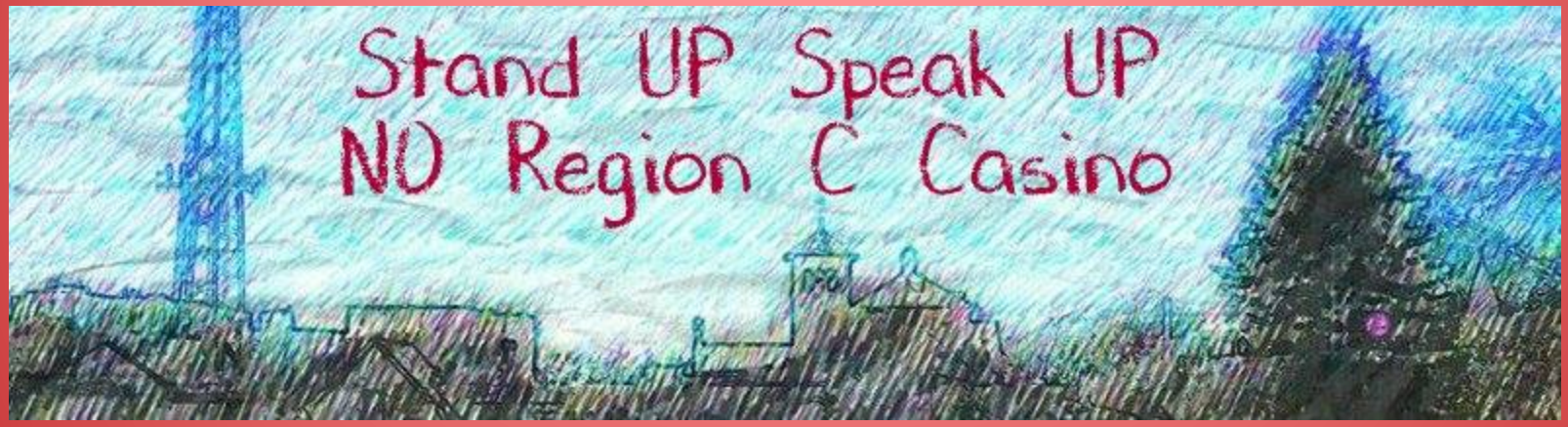
WE WANT PEOPLE TO MOVE TO
BROCKTON AND BUY HOUSES
AN AMUSEMENT CENTER OR
WATER PARK MOVIES, THINGS LIKE
THAT WOULD BE BETTER SUITED

PLEASE DO NOT ISSUE BROCKTON A CASINO LICENSE

Signature: John Saville

Print Name: John Saville

Print Address: 105 Kathleen Road
Brockton



The Future of Brockton

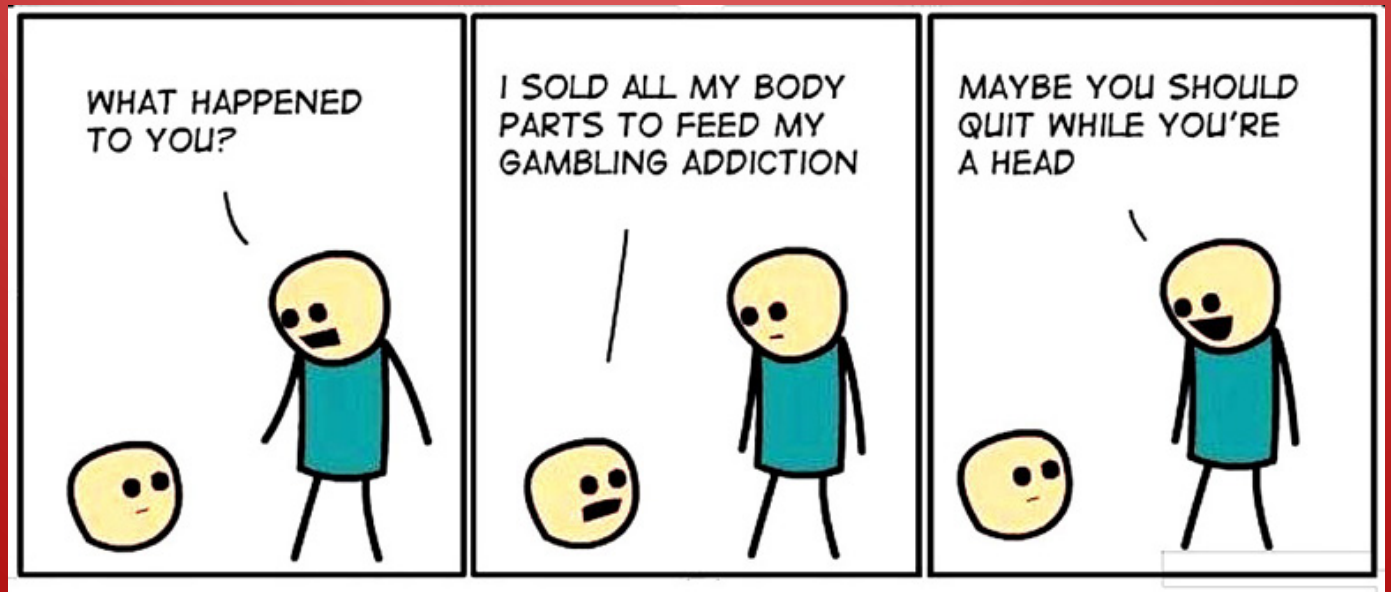
Stand UP for Brockton

http://www.nocasinoinregionc.info

Is a Casino the Answer?

The May 12th Results

- The vote on May 12, 2015 was close.
- A 148 vote margin for the Yes vote reveals a great divide in the city, not an overwhelming victory, certainly not a concensus.
- $1,600,000 vs $3,627



How Much is $10 Million?

- The promised $10 million dollars is a lot of money for most of us. But to the City of Brockton it is just enough to cover 10 days of the current operating expenses.
- The reality is that it will not provide any relief to the current budget as every cent of it will be spent on policing and other issues in the immediate neighborhood of the proposed casino.

Show Me the Money

- • 80% as a PILOT (Payment In Lieu of Taxes) for all Real and Personal Property Taxes – Reality, this means no real property taxes on the casino and no excise taxes on their vehicles. Brockton receives nothing for a room tax, the Commonwealth gets 5.7%.
- • 15% as a Community Impact Fee
- • 5% as a contribution to the Brockton Community Foundation

Infrastructure Problems

- The City of Brockton is currently under State order to get a new reliable water supply.
- Adding an enterprise the size of the proposed casino will further tax the water system of Brockton. Projected demand of water is 120,000 GPD, generating 110,000 GPD of wastewater.
- A real current problem is Burkeside Ave, the northern most street in Brockton has low water pressure. It could be reduced to a trickle with a casino in the middle of town.

Taunton River Desalination Plant - Technical and Financial Review Summary

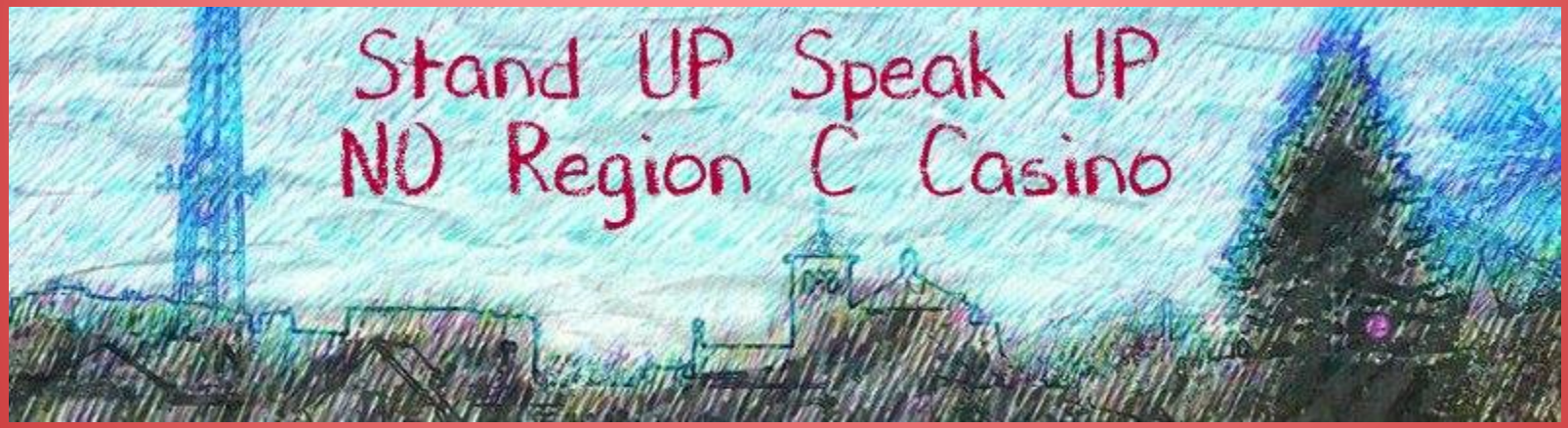
- Not ready to solve Brockton's water crisis
- Major repairs and upgrades required
- Not cost effective
- Brockton still has a water infrastructure problem and needs millions to repair and replace the existing water pipes.

Addiction Crisis

- The best quote I heard on this was by Peter Kadzis on the WGBH radio, who said 'we would never negotiate with a heroin provider how much addiction he can bring into a community, why we would negotiate the same with a casino?'

Basic Math

- The Mass Gaming Law allows for three Category 1 casinos in MA.
- Everett, Springfield and **Taunton**
  - The Mashpee tribe has met the two conditions set forth in the 2013 Indian Accord
  - They already have the third casino in MA
  - Regardless of lawsuits they can build “at risk”
- The law says “Three” not “Four”. Brockton is not eligible for a casino



Just the Facts Please

A Failed Government Policy

- Government sponsored gambling is dishonest, financially damaging to citizens and is a major contributor to the unfairness and inequality in American life. It's a policy experiment that has failed.

It has failed because it has proven itself to be blatantly dishonest

- The dishonesty starts with the forms of gambling that government sponsors and promotes to the public. These games, especially electronic gambling machines, are designed mathematically so users are certain to lose their money the longer they play. At the same time, the machines are literally designed so citizens cannot stop using them, exploiting aspects of human psychology and inducing irrational and irresponsible behavior.

Gambling Has Failed to Deliver

- Another part of the dishonesty of this public policy is it hasn't delivered on what the predatory gambling promoters promised. It hasn't improved the financial condition of states….it's worsened it. It hasn't helped the economy, locally or nationally…it's been drag on it. It hasn't expanded the middle class…it's shrunk the middle class. It was supposed to be harmless for citizens…it definitely hasn't been harmless, evidenced by the millions of Americans who have suffered because of it.

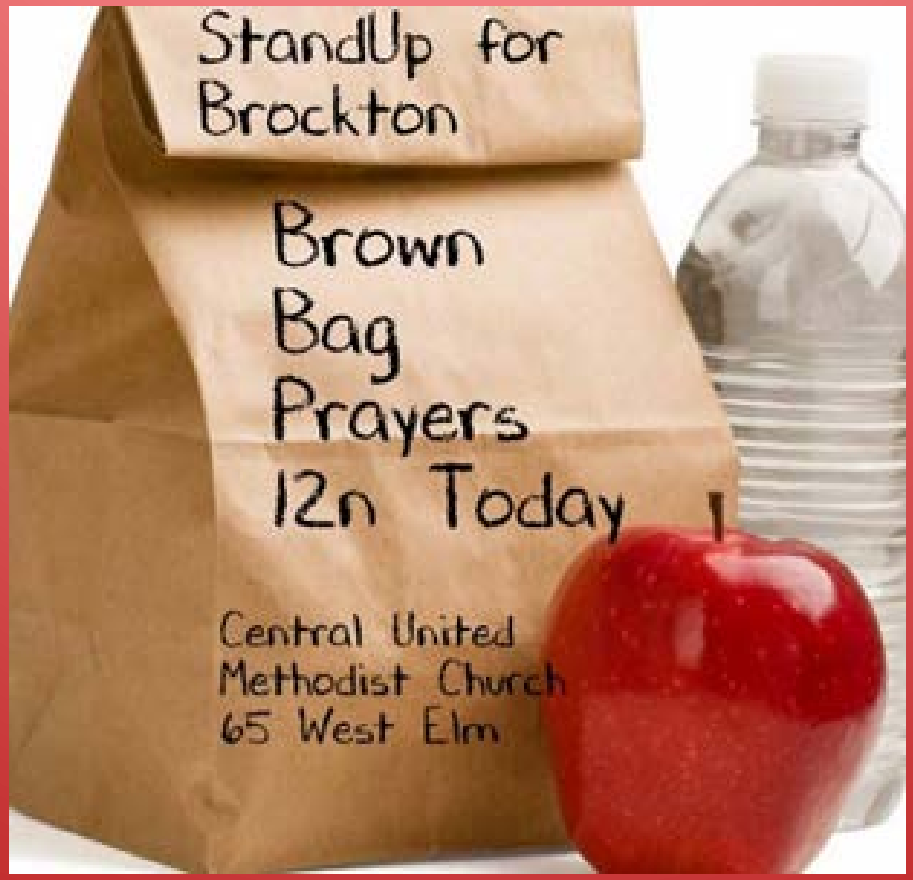
It has failed because it's financially damaging to citizens, increasing the divide between the powerful few and everyone else

- As predatory gambling has spread into economically-distressed communities, first with lotteries then with casinos, the evidence shows it has lured far more citizens from the lower rungs of the income ladder.

Targets on Their Wallets

- Low-income workers, retirees, minorities, and the disabled comprise a disproportionately large share of lottery and regional casino users. By targeting the least advantaged, government-sponsored gambling adds to the increasingly separate and unequal life patterns in education, marriage, work, and play that now are dividing America into haves and have-nots.
- Instead of expanding the middle class, it has driven citizens deeper into America's debt culture. Predatory gambling has created a Lottery Class in America. While most of us save and invest money in retirement accounts and college funds for our kids, government is turning hundreds of thousands of people who are small earners with the potential to be small savers into a new class of habitual bettors – the Lottery Class.

Lies That Have Been Told



Or a Real Solution to the Issues Facing Brockton

Lie: “Commercial Gambling Creates Jobs”

- No great nation or state has ever built prosperity on the foundations of personal debt, addiction, and the steady expansion of businesses that milk existing wealth instead of producing new wealth. Relying on gambling as an economic development strategy exemplifies the attitudes and practices– short-term is more important than sustainable, wealth can come from ever-growing debt, something can come from nothing –that led us to where we are now.
- The infamous subprime mortgage lender Countrywide Mortgage employed a lot of people and made a lot of money but they did it by selling bad loans to people who could not afford them. It was phony prosperity. No one believes their kind of business practices are the right direction for any state. Casinos are the ultimate example of phony prosperity.

Lie: “Casinos and State Lotteries Will Improve Government Budgets”

- There is overwhelming, irrefutable evidence proving that government’s gambling program has failed as a long-term revenue source because it is anti-economic growth, unsustainable and inadequate. States that use gambling revenues as a “quick fix” to avoid politically difficult structural tax reforms in the short run have nearly always been forced to confront the same difficult tax policy decisions in the future. States with lotteries and casinos have not lowered their taxes and according to the recent national report by The Rockefeller Institute, it has made their budget problems even worse. California’s story is typical. Despite promising it would fund public education, the California Lottery provides only 1.3% of the state’s entire education budget.

Lie: “People Will Gamble Anyway and They’re Already Doing It Out-of-State”

- **Many public officials rationalize promoting casinos and state lotteries by saying people will gamble anyway and they’re already traveling to a neighboring state to do it**. Yet state lotteries and casino operators openly discuss in the media and in their own marketing research that they are aggressively working to lure new gamblers and create **“new markets.”**
- During the Pennsylvania Gaming Congress & Mid-Atlantic Racing Forum in early 2011, state gambling operators confessed that their most lucrative players were local citizens losing money at the casino five times a week. Prior to sponsoring their own state casinos, there was virtually no one in eastern Pennsylvania traveling 1 1/2 hours to Atlantic City, NJ five times a week.

Out of State Evidence

- The “going-out-of-state” message is a deliberate public relations tactic to avoid intense scrutiny about how government’s experiment has failed as well as the predatory and deceitful business practices used by gambling operators.
- The evidence is clear that when less government-sponsored gambling is available, citizens lose a lot less money and gambling problems are far less. One of the best examples of this reality is when South Dakota outlawed video slot machines for 100 days, the number of gambling addicts treated each month dropped by 93.5%.

Lie: “Slot Machines Don’t Addict People”

- Electronic gambling machines like slots and video poker represent the purest form of predatory gambling and, not surprisingly, are the most profitable. According to the research findings of Natasha Schull, associate professor in MIT’s Program in Science, Technology, and Society, the machines are designed to get every user “to play to extinction’’ — until all their money is gone — by using technology described as a “high-tech version of loaded dice.” Schull writes:
- “… its (the gambling business) efforts to make slot machines so effective at extracting money from people yields a product that, for all intents and purposes, approaches every player as a potential addict — in other words, someone who won’t stop playing until his or her means are depleted.”

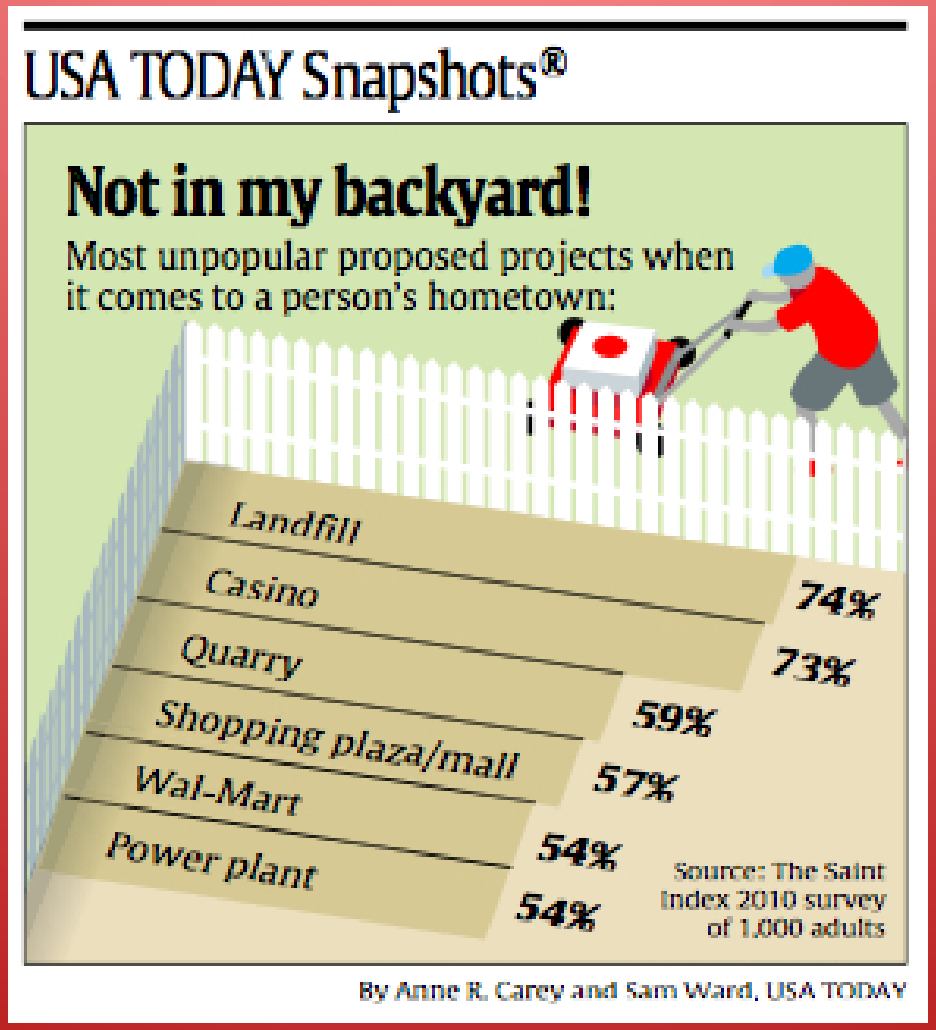
Lie: “Casinos and Lotteries Are Just Like Any Other Business”

- Advocates of the predatory gambling trade say they are no different than other businesses. They describe it the same as “drinking wine, going out to a restaurant or going to the movies.” Yet the owner of the vineyard drinks the wine he makes. The owner of the restaurant eats the food he serves. The movie actress watches the movies she makes. This is the only product or service where most of the people who own it and promote it, including public officials, don’t use it and don’t want to live near it.

Lie: “Government-Sponsored Gambling Diminishes Organized Crime”

- No jurisdiction has EVER documented a decline in illegal gambling following the introduction of legalized gambling. In fact, illegal gambling tends to increase for a number of reasons. “We loved legalized gambling,” said former Chicago mob casino boss William Jahoda. “It created more customers for us.” Untaxed illegal operators can offer better odds, bigger payoffs and loans that legal operations cannot. Once gamblers start betting legally, they become less averse to gambling in unlicensed establishments. Law enforcement in gambling states see illegal gambling as a state revenue issue rather than a criminal activity, making enforcement less of a priority. Lastly, when commercial interests gained control of the casino business from organized crime, they obtained the ability and the license to abuse and destroy customers to an extent that was not possible when casinos were run by criminals.

Lie: “Public Opinion Supports Predatory Gambling”



The Brockton Reality

- The promise is 1400 construction jobs. Sounds impressive but these will be “union” jobs and those that need the jobs most in Brockton are not union members.
- These jobs will go primarily to those outside of Brockton, some will go to workers in the South Shore and Greater Boston Region, however many workers will be imported for the short term to get the casino built.

The Brockton Reality

- The promise is 1500 long term jobs working in the casino. Many of these jobs are on the lower end of the pay scale and not the “average” promised salary of $50,000.
- These jobs will be filled first by those already working in those types of jobs in other businesses in the area, but will create some new jobs for the short term until the casino runs those other businesses out of business. Net gain – zero!

The Brockton Reality

- The promise is that this will be a destination resort.
- The reality is with other casinos built like this proposed one in areas that are currently economically challenged, they become a convenience casino and prey upon the local residents to make their profits and in turn damage the local economy and the lives of the citizens of the host community.

The Brockton Reality

- Location for any business is important. The location proposed in Brockton defies what every other casino built has done. No one has dared put a casino next to a high school. Should this casino project be approved, the “City of Champions” will become “Casino High”, the only city in America with a casino next to a high school.

The Brockton Reality

- Is there real economic recovery with a casino?
- NO! As the current economic theme is the softening of the promises -- Plainridge in their first five months lost about 1/3 of their projected revenue, the state has lowered their expectation of tax revenue by about 40%

The Brockton Reality

- Will what is voted on be delivered?
- The evidence says, NO! MGM Springfield scaled back their hotel from a 25 story glass building to a 6 story building - but claims they are paying the same amount of money on the construction project.

The Brockton Reality

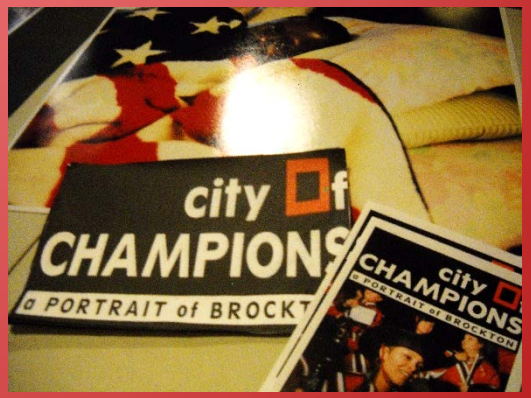
- The Taunton casino will it happen?
- The predicted law suit has become a reality and interestingly it is partially funded by Mr. Neil Bluhm
- Does this lawsuit have a chance? NO! It is not against a casino, it is against a federal government decision in recognizing the first Indian tribe to meet the new immigrants to this country.

Brockton Alternative Solutions

- Enhance business opportunities to flourish by making Main St. two-way again.
- Enhance academic opportunities by expanding college and technical training facilities.
- Convert part of the fairgrounds property into an indoor sporting facility.

Brockton Alternative Solutions

- Convert part of the fairgrounds into affordable housing units for starter families and senior housing.
- Convert part of the fairgrounds into a sporting museum for the “City of Champions”.
- Convert a part of the fairgrounds into a ethnic restaurant and family entertainment center.



Brockton Alternative Solutions

- Search for regional or national companies to relocate to Brockton for manufacturing and wholesale distribution.
- Partner with Boston and other regional healthcare facilities to expand what is already available in Brockton.

The Time is Now to…!

The Future of Brockton is in Our Hands

- **The choice is:**
- A short term solution with a casino that comes with long term problems and major disruption of family life and the community.

OR

- A new course with original and fiscally sound and beneficial to the community ideas and efforts.

No Casino

Region C

www.nocasinoinregionc.info

NEJB
UNITEHERE!

The North East's Textile, Garment, Manufacturing, Laundry, Distribution, Disability Services, and Food Service Workers Union.

Warren Pepicelli
Joint Board Manager
International Executive V.P.

Andy Press
Secretary-Treasurer

Joe Ziemba
Ombudsman
Massachusetts Gaming Commission
101 Federal Street 12th floor
Boston, MA 02110

Dear Ombudsman Ziemba,

Included in this packet is a sample of articles, statements of community support, and other documents for your review showing the poor job quality at the casinos run by the Chicago-based casino group that would control the proposed Brockton casino.

This is the reason for our opposition to the Brockton casino and the Chicago group that would control it.

Every one of the Chicago group's existing casinos is embroiled in a long and ongoing labor conflict. Casino workers are seeking a fair process to end the conflict, but the operator ("Rush Street Gaming") has so far refused to respect their wishes.

This is a sampling of the activities and controversies that have arisen from the dispute. We stand ready to provide any additional documentation you may request.

Sincerely,

Ethan Snow
Chief of Staff / Political Director
New England Joint Board
UNITE HERE

Attachments

Table of Contents

We are standing up for respect at Rivers!

We are loyal, hard-working employees of Rivers Casino in Pittsburgh, PA. We value the casino, our co-workers, and our customers. We believe that we should be a part of the future of the casino.

We deserve job security, economic stability, and to be treated with respect every day. We demand that the owner and management of Rivers Casino respect our signatures and agree to a fair process for us to decide whether to have union representation without management interference or intimidation.

STEEL CITY CASINO WORKERS COUNCIL
SCCWC

OFFICE OF CITY COUNCIL

510 City-County Building 414 Grant Street Pittsburgh, Pennsylvania 15219
412-255-2142 Fax: 412-255-2821

WHEREAS, the Council of the City of Pittsburgh has continually supported workers' rights to organize for fair wages, fair working conditions, and a union; and

WHEREAS, the City of Pittsburgh, through the city code and community engagement, works to ensure that major developments directly benefit the neighborhoods in which they are located; and

WHEREAS, Rivers Casino was welcomed to Pittsburgh on the promise that its casino jobs would be good quality jobs that build the community, and the community seeks to work with management to deliver on that promise; and

WHEREAS, a two-thirds majority of the workers at Rivers Casino signed a petition demanding job security, economic stability, and to be treated with respect every day; and

WHEREAS, the City of Pittsburgh, its residents, and families of Casino workers will stand stronger when the employees and management of Rivers Casino work together to achieve these goals; and

NOW, THEREFORE BE IT RESOLVED, that the Council of the City of Pittsburgh does hereby stand with the Rivers Casino workers' in their campaign to organize a union.

Sponsored by Councilmember Natalia Rudiak

Co-Sponsored by Council President Bruce Kraus and Councilmembers Rev. Ricky V. Burgess,Daniel Gilman, Deborah L. Gross, Darlene M. Harris, Theresa Kail-Smith, R. Daniel Lavelle, and Corey O'Connor

Union Supporters Rally Outside Rivers Casino License Renewal Hearing

By LIZ REID (/PEOPLE/LIZ-REID) • 2 MINUTES AGO

"Stand up, get down, Pittsburgh is a union town!"

That was one of the chants shouted by protesters who circled the Allegheny County Courthouse Tuesday ahead of a Pennsylvania Gaming Control Board hearing for the Rivers Casino, which is operated by Rush Street Gaming, LLC.

The board is considering whether to renew the North Shore casino's license, a process undertaken every three years.

Pittsburgh City Councilwoman Natalia Rudiak stopped by the rally to offer support for the ongoing unionization effort. She said city leaders welcomed the casino into the community amid the promise of good jobs.

"So our communities are stronger, so our neighborhoods are better, because you know what? When we all do better, we all do better," Rudiak said to cheers and applause.

Rudiak said just hours earlier, Council had passed a resolution official supporting the workers' right to unionize.

Inside the hearing, the majority of seats were taken up by people wearing neon green t-shirts emblazoned with the Rivers Casino logo on the front and the slogan "I've got the best job in the 'Burgh" on the back.

Rivers Casino spokesman Jack Horner said the t-shirts were made and distributed by the casino. Several workers said they were there to support the casino's license renewal and that they were invited to attend the hearing by management.

One worker who said she was not invited by management was Hannah Taleb, a slot machine maintenance worker who spoke during the public comment period of the hearing.

According to Jonathan Scolnik of the labor union Unite Here, which represents hospitality workers across the United States and Canada, Taleb was named in a recent National Labor Relations Board Settlement with Rivers Casino, after being disciplined for discussing working conditions with a co-worker.

But Taleb said she was there not to talk about her own situation, but that of a co-worker who had to miss work to take her daughter to the hospital after an instance of domestic abuse.

"When she called they said everything was going to be OK, just come on into work. And they fired her, because they made her make the decision between being a mother and being a worker at Rivers Casino," Taleb said. "I do think these jobs could be great jobs, but until they're good jobs for mothers, for fathers, and for families, and we have stability and we don't have to fear losing our job, then they'll never be great jobs."

Taleb said she likes her job and that she is making more money working at Rivers than in previous positions, but that job security is still an issue.

During the hearing, Rush Street Gaming CEO David Patent pointed to Rivers' competitive wages and benefits as evidence of its commitment to providing good jobs. He said management would support workers' right to unionize if that was what they wanted.

"Frankly, Unite Here doesn't like our labor policy because we respect our team members' right to choose for themselves whether to be represented by a union or not, and since day one, we've honored and respected a fair process for our team members," Patent said.

Scolnik pushed back against such a statement, pointing to a 2011 NLRB ruling which found that the casino violated federal labor laws during a 2009 union election, by prohibiting the distribution of pro-union materials and surveilling employees.

Scolnik said there are currently no immediate plans for a union election, and that Tuesday's rally was all about raising awareness.

"We want Rivers Casino to stop intimidating and harassing workers when they stand up for their rights," Scolnik said.

Pro-union supporters circle the fountain in the courtyard at the Allegheny County Courthouse Tuesday afternoon.

Pittsburgh City Councilwoman Natalia Rudiak reads a Will of Council resolution, stating the body's support for unionization efforts among Rivers Casino workers.

LIZ REID 90 5 WESA

Rivers Casino employees sport t-shirts reading "I've got the best job in the 'Burgh" during a Gaming Control Board hearing Tuesday afternoon.

LIZ REID 90 5 WESA

The Enterprise

By Joseph Markman

April 30. 2015 6:30AM

Union protest roils Brockton casino developer's Pittsburgh property

Meanwhile, New Bedford's casino partner, Foxwoods, has recently settled a grievance with its union amidst significant labor cutbacks in recent years.

Also by Mike Lawrence of the New Bedford Standard-Times

PHOTO/ KLAI JUBA WALD ARCHITECTS PHOTO

Architect's rendering of the proposed casino on the Brockton Fairgrounds.

BROCKTON – Promises of drastically needed jobs amid high unemployment rates are major talking points for backers of casino proposals in Brockton and New Bedford, but the potential operators of those casinos are dealing with labor-related issues elsewhere this month that indicate the cards don't always play out as workers might like.

The Pittsburgh Tribune-Review and other media outlets in the Steel City reported last week that scores of casino workers marched Thursday outside of Rivers Casino on the city's North Shore, seeking better job security and rights to unionize. The casino is operated by Rush Street Gaming, which through subsidiary Mass Gaming & Entertainment is seeking to operate a $650 million casino proposed for the Brockton Fairgrounds.

"We've been in this fight for a while – the promise of good jobs has not been fulfilled," Jon Scolnik told The Standard-Times.

Scolnik is a spokesman for UNITE HERE, a national casino workers' group involved in the petition effort by Rivers Casino workers.

Brittany Swiger, a 23-year-old banquet server who said she's worked at Rivers for three years, told The Standard-Times that she participated in last Thursday's march.

"We marched because we're trying to receive a fair process from the casino — they've been saying for a long time that there's only a handful of workers who want the union there, and that's definitely not true," she said.

David Patent, president and chief operating officer of Rush Street Gaming, told The Enterprise this week that his company respects the rights of his workers to unionize, and follows federal rules that lay out how it can be done. He added that Rivers Casino was voted one of Pittsburgh's 'Best Places to Work' by its workers.

Patent said the same will hold true if a Brockton casino is approved by city voters and the state.

"We have been very consistent from day one on this," Patent said. "We absolutely respect the right of team members to choose if they want to be represented by a union or not. And we absolutely will continue to respect that."

Meanwhile, Connecticut media reported earlier this month that Foxwoods Resort Casino had settled a grievance with its union, Local 2121 of the United Auto Workers. The union had claimed the firing of its former president, 22-year Foxwoods worker William Shea, was "unjust," according to the union's website and New London, Connecticut, newspaper The Day.

Foxwoods has made significant labor cutbacks in recent years. Clyde Barrow, former director of the Center for Policy Analysis at the UMass Dartmouth, said in March that, "Foxwoods Resort Casino employed 12,800 persons at its 2006 peak, but currently employs 7,558 persons," a decline of more than 40 percent.

Barrow is now chairman of the political science department at the University of Texas-Rio Grande Valley and continues to analyze the gaming industry through his Massachusetts-based analysis and consulting company, Pyramid Associates.

A Foxwoods representative reached Tuesday afternoon did not provide a comment about Foxwoods' labor environment by press time.

New Bedford city officials have said the $650 million casino and hotel development proposed for the city's waterfront, to be developed by KG Urban Enterprises of New York, would create 2,164 construction jobs and 3,831 permanent jobs, citing figures from consultant Global Market Advisors.

Backers of the Brockton proposal have said it would bring more than 1,500 permanent jobs to that city.

The turbulent labor market could present questions for voters in both cities. Brockton's casino vote is scheduled for May 12. New Bedford's is scheduled for June 23. KG Urban must first meet a Monday deadline to show sufficient equity investment for the project to the Massachusetts Gaming Commission.

post-gazette.com
Pittsburgh Post-Gazette

Labor board files complaint over action by Rivers Casino involving workers trying to unionize

April 7, 2015 3:11 PM

By Mark Belko / Pittsburgh Post-Gazette

Rivers Casino is facing a complaint filed by the National Labor Relations Board over allegations that some employees were interrogated about their union activities and in one case threatened with "unspecified reprisals" as a result of them.

The complaint, dated March 31, relates to an incident in the casino's Wheelhouse Sports Bar on Nov. 21, 2014, during which a supervisor and an assistant manager questioned employees about "their union membership, activities and sympathies," according to the complaint.

The supervisor "disparaged the union" to employees "by referring to gang membership," the complaint stated. He also threatened employees "with unspecified reprisals because they engaged in union activities," it said.

Jon Scolnik, spokesman for Steel City Casino Workers Council, a coalition of unions helping workers at the casino in their bid to unionize, said at the time of the incident, the affected workers were wearing wristbands with a message supporting a fair attendance policy. The complaint was based on an unfair labor practice charge filed by Unite Here, Local 57, one of the unions helping workers to organize.

In a statement responding to the complaint, Jack Horner, casino spokesman, said, "We cannot comment on matters pending before the NLRB. Rivers Casino is proud to have been voted one of Pittsburgh's 'Best Places to Work' by our team members, and we respect their rights to choose whether to be represented by a union."

The casino has until next week to formally answer the complaint. It faces a labor relations board hearing on the allegations May 19.

timesunion
http://www.timesunion.com/local/article/Casino-workers-union-raps-gaming-firm-5747155.php

Casino workers union raps gaming firm

Labor group claims harassment by Rush Street managers

By James M. Odato Published 10:19 pm, Wednesday, September 10, 2014

Albany

A large casino workers union has written to the state **Gaming Commission** complaining about Rush Street Gaming, the company trying to obtain licenses to run gambling houses in Schenectady and Newburgh.

The letter from **Chris Margoulas**, assistant to the president of Unite HERE, says that ongoing labor disputes with Rush Street's three domestic casinos, in Philadelphia, Pittsburgh and Des Plaines, Ill., are unresolved despite settlements made between the company and the **National Labor Relations Board**.

The letter asserts that workers at casinos run by the Chicago-based firm have reported "illegal harassment by casino managers including threats, surveillance and other intimidation."

Unite HERE has been trying to unionize Rush Street properties for years. Efforts began in Philadelphia in August 2011, at Pittsburgh in April 2011 and in Des Plaines in October 2013. The letter says workers have encountered several roadblocks considered improper, including firing some who spoke publicly about desiring better working conditions and fair process.

Lee Park, a gaming commission spokesman, confirmed receiving the letter. Unite HERE sent copies to members of the **Gaming Facility Location Board**, which will recommend projects for licensing this fall.

Rush Street is partners with **Galesi Group** in Schenectady on a proposed $330 million hotel and casino along the Mohawk River at the former **American Locomotive** plant site. It is partnering with Saratoga Harness on a much bigger project proposed for Newburgh.

In an unusual situation, **Peter Ward**, the head of the large New York City local of Unite HERE, appears in a video touting another Saratoga Harness project, a casino planned for East Greenbush.

A principal of Saratoga Harness extolled Rush Street on Tuesday, citing the "extraordinary reviews" the firm receives in the markets where it operates.

Asked about the union's complaints, Rush Street Chairman **Neil Bluhm** and CEO **Greg Carlin** said the company's record speaks for itself. During two days of presentations to the siting board earlier this week, the company emphasized it has won repeated best-employer awards at its three casinos for years.

"We certainly have disputes with companies all the time, but there is nothing like this anywhere else," said **Martin Leary**, gaming research director for Unite HERE. The union has 275,000 members in hospitality and food service jobs, including about 100,000 casino workers.

In a statement, Rush Street Gaming said:

"In upstate New York, Capital Region Gaming and **Hudson Valley Casino & Resort** have both entered into labor peace agreements with the **New York Hotel and Motel Trades Council**. Rush Street Gaming has a proven track record of honoring its commitments; and if selected for a gaming license in New York state, looks forward to working with the Hotel and Motel Trades Council."

jodato@timesunion.com • *518-454-5083* • *@JamesMOdato*

If you are attending the Walton Street Capital investor meeting in Chicago on June 2-3, 2014, please join us immediately across the street for a Walton Street Capital limited partner briefing:

Is labor harmony a possibility at Walton Street Capital investments?

For the past few years, multiple Walton Street Capital-owned properties including the Rivers Casino in Pittsburgh, PA (Walton Street Real Estate Fund VI) and the Knickerbocker Hotel in New York City (Fund VI) have seen labor disputes that have created headline risk for Walton Street Capital and limited partners.

A panel of employees from the Rivers Casino will discuss operations at the property, recent federal Unfair Labor Practice complaints, and their view of the prospect of labor harmony at that and other Walton Street Capital investments.

7:30am-9am, Tuesday, June 3, 2014

Gratz Center, Fourth Presbyterian Church

121 E Delaware Place, immediately across the street from the Four Seasons Hotel entrance

Coffee and light breakfast will be served

To RSVP please contact Jim Baker at jbaker@unitehere.org or 312-933-0230.

UNITE HERE!

June 3, 2014

Dear Mr. Bluhm,

We are members of the organizing committee at Rivers Casino in Pittsburgh.

We are proud to have made Rivers Casino a success with over $1 billion in revenue. Some of us have worked at Rivers since the day it opened. As you know, we want a fair process to organize our union so we can have a voice on the job to ensure fair treatment, respect, and a seat at the table.

Our General Manager told us that we'd have to explain to him what "fair" means. Meanwhile, the casino has waged an aggressive anti-union campaign of intimidation, retaliation, and pressure tactics.

We know what fair is and what it is not. It is not intimidation. It is not violating federal labor law, which is what the National Labor Relations Board found Rivers had done during a 2009 union organizing drive.

More recently, we helped workers file 52 unfair labor practice charges in the weeks after we went public with our request for fair play. The NLRB authorized a complaint for more than half of those charges.

Fair is not firing workers who speak out for fair play, which is what happened to several workers at your Sugarhouse Casino in Philadelphia in 2011 after they spoke out publicly about their desire for good working conditions and a fair process.

Mr. Bluhm, our managers answer to Rush Street Gaming, which you and your family's trust funds wholly own. Only you can end managers' attacks against us.

You can sign a labor peace agreement guaranteeing real neutrality – the very same agreements under which thousands of casino workers in Pennsylvania, Ohio, New Jersey, and across the country have exercised their rights without fear of reprisal.

We will never stop standing up for our rights. This means that as long as our rights at Rivers Casino are denied, this dispute will not go away.

Now is the time for you to end this dispute. Continuing to resist our right to have a voice and a fair process is not fair to workers, customers, or Walton Street limited partners.

Signed

AFL-CIO President Richard Trumka Leads Organizing Roundtable At PA AFL-CIO Convention

April 11, 2014 | Filed under: Labor In Action, PA AFL-CIO 2014 Convention, Top News Stories and tagged with: 2014 Convention, IUOE, Organizing, Richard Trumka, SEIU, Teamsters, UNITE-HERE, USW

On the final day of the Pennsylvania AFL-CIO Convention in Pittsburgh on Thursday, AFL-CIO President Richard Trumka led an inspiring roundtable discussion with four workers who are fighting for union representation on the job. Speaking to the disconnect that all too often exists between workers' legal rights, and the experiences that workers have when trying to form a union, President Trumka framed the discussion and encouraged the panelists to share their personal stories.

Rebecca Taksel, Adjunct Professor at Point Park University; Meredith Maloney, a Banquet Server at Rivers Casino; Fred Lapka, a Server at Rivers Casino; and Lou Berry, a worker at UPMC; all shared their own experiences, being followed, intimidated, or threatened because they are looking to exercise their right to have a voice on the job.

UPMC, the Commonwealth's largest private employer, and the beneficiary of hundreds of millions of dollars in tax exemptions each year, even broadcasts anti-union propaganda on computer monitors throughout their hospital, in view of both employees and patients.

While the conditions that drive the strong organizing campaigns at these different workplaces are unique, the common thread is the demand for respect on the job.

We would like to thank President Trumka for leading this unique event, and we would like to applaud the bravery and determination of the workers who participated, and the thousands more who are fighting every day all across Pennsylvania for dignity at work!

PCN-TV will be broadcasting many of the proceedings from this week's convention, please refer to **PCN's Broadcast Schedule** to see the broadcast times.

Comments

comments

Written by PA AFL-CIO

[PHILADELPHIA] citypaper
PHILADELPHIA'S INDEPENDENT WEEKLY NEWSPAPER
Jan. 30 - Feb. 5, 2014 #1496 | www.citypaper.net

SugarHouse contracts radical anti-union consultant

By Daniel Denvir

Published: 01/30/2014

SugarHouse Casino contracted with the anti-union firm Kulture, beginning in 2010, in an effort to dissuade workers from organizing, according to documents filed by the firm and casino owners with the U.S. Department of Labor.

Kulture has "met with employees to discuss union card-signing activity," helped run a "new-hire orientation," and "presented informational meetings to company employees relative to the process of unionization," the disclosures, relating to work performed through 2013, state.

The casino has employed the firm to fight union-organizing activity by Unite Here Local 54, which represents workers in textiles, hotels, restaurants and casinos.

But unlike other anti-union firms, Kulture is not run by buttoned-down lawyers, but is instead the brainchild of right-wing activist Peter List.

List publishes under the pseudonym Labor Union Report on his own website, and on the popular right-wing blog RedState.com, where he makes arguments that are far to the right of what one normally encounters in Philly politics: List contends that unions are part of a communist-aligned "organized war to destroy America," that people in the White House seem to be "hoping that … someone somewhere will die" because of the sequestration, and that 47 percent of Americans "believe

that they belong to the government."

List's avatar has also advised readers to "abandon California" and "let the socialist hordes have the state. To those parasites who believe that entitlements, high taxes, strangling labor laws, environmental regulations, unending illegal immigration and tax-the-rich schemes will somehow lead them into the promised land of prosperity, give them California."

SugarHouse declined to discuss precisely what it has paid Kulture to do.

"We occasionally use consultants on various matters," says spokesperson Leigh Whitaker. "We have nothing further to add."

But High Penn Oversight, a company connected to SugarHouse ownership, has paid Kulture at least $429,964 since 2011.

List likewise did not respond to requests for an interview. But in a 2004 *Fortune* profile, he warned a reporter against publicly revealing his whereabouts. "Don't even write what state I'm in," he said. "I don't need the Teamsters picketing out front."

That may be bluster. Three years later, he signed a letter to *Bloomberg Businessweek* from New Jersey, where public documents show his business is based.

List, in a rare media interview, told *Fortune* his life story, explaining that he is a disaffected product of the labor movement. He worked at an AT&T factory represented by the Communications Workers of America, becoming chief shop steward. But then, everything changed. His job got outsourced to Mexico, so he went to college. He then became extremely interested in Ayn Rand, the novelist revered as an iconic philosopher on the libertarian right.

List has also been active in a right-wing strategy group called Groundswell that is planning a self-described "30 front war seeking to fundamentally transform the nation" toward conservative ends, according to *Mother Jones* magazine.

Candace Chewning, 31, who has worked as a server at SugarHouse's Refinery restaurant for about a year, says she was shown a strongly anti-union video during her new-employee orientation.

The video, entitled "Little Card, Big Trouble," re-enacts scenes from a fictional organizing drive featuring a scarere-mongering, money-hungry union organizer who manipulates hapless and confused workers.

"Signing a union-authorization card can be like signing a blank check," says the narrator. "You won't know what the real cost will be until it's too late."

After the screening, management opened the floor for comments, Chewning said.

"I wouldn't feel comfortable in that situation saying, 'Well I'm for a union, actually.' I'm sitting in a room with three managers standing there. They just showed me this video that was very biased against unions," she said.

List told *Fortune* that he was not a union buster but an "educator" and "communication specialist," and that his job was to instruct management in how to stop a union without violating federal law. SugarHouse's majority owner is Chicago billionaire and major Democratic fundraiser Neil Bluhm, who owns casinos in Pittsburgh and Des Plaines, Ill., where Unite Here is also organizing workers.

"We're dismayed [that] such a prominent Democrat as Neil Bluhm would slap Philadelphia in the face by bringing in an outfit headed by an Obama-basher like this," says Unite Here spokesperson Jon Scolnik.

Nothing, it seems, unites people like class conflict. SugarHouse Casino promised to create a lot of jobs when it defeated spirited local opposition and opened in 2010. Now, workers, management and a mysterious right-wing blogger are having a fight over what kind of jobs those will be.

Daniel Denvir Dan Denvir is senior staff writer at Philadelphia City Paper.

All articles by Daniel Denvir

daniel.denvir@citypaper.net
@DanielDenvir

LOCALISM

Rivers Casino employees march for right to unionize

Posted by Rebecca Nuttall on Tue, Nov 19, 2013 at 1:55 PM

Protesting outside the Rivers Casino

As snow began to fall earlier today, nearly 100 Rivers Casino employees marched from the Carnegie Science Center to their place of employment on the North Shore. The employees have been trying to start a union at the casino since April but claim they are being met with anti-union intimidation from management.

"I think what we've been doing the past seven months is showing them we have the power and we're going to make the changes," said Meredith Maloney, a two-year casino employee.

The march was part of a nationwide campaign calling for unionization at the Rivers Casino and two other casinos in Chicago and Philadelphia, all owned by Chicago billionaire Neil Bluhm. In Pittsburgh there have been nearly 30 complaints filed against the casino with the National Labor Relations Board.

"We're hitting them on all three fronts and we're going to keep hitting them until we get a fair process," said Matt Arling, a casino bartender.

As the employees approached the casino, a group of valet workers wearing anti-union hoodies looked on.

"Don't be intimidated," said Dorthy Hall, who has worked at the casino for two-and-a-half-years.

After showing their IDs in the lobby, the employees made their way upstairs to the executive offices in hopes of talking to Craig Clark, the casino's general manager. But they were only able to leave a message with his receptionist.

"We know when we come here. They hide because they're afraid of our power," said Matt Fred Lapka, who works as a waiter. "Today the victory was the fact we all showed up."

The march was organized by the Steel City Casino Workers Council, which is comprised of workers from UNITE HERE Local 57, Teamsters Local 211, Operating Engineers Local 95, and the United Steelworkers. UNITE HERE is an international union representing employees in the hotel, gaming, food service, manufacturing, textile, distribution, laundry, and airport industries.

We've reached out to River's Casino and will update with a response.

UPDATE

Rivers Casino issued the following statement:

"We take great pride in our team and respect the rights of our Team Members to choose. So far, the overwhelming majority of our Team Members have consistently chosen to remain independent," said Mike Gross, Rivers Casino spokesperson.

We Stand With Workers at SugarHouse Casino

Neil Bluhm
Chairman
SugarHouse HSP Gaming, LP
1080 N. Delaware Avenue, Suite 800
Philadelphia, PA 19125

Chairman Bluhm:

Workers at SugarHouse Casino have stood up to demand a fair process to form a Union. We stand with them.

We welcomed Sugarhouse to Philadelphia on the promise of good quality jobs for our community. We are convinced the best way to ensure good quality jobs is for Sugarhouse workers to have a fair process to form their Union.

Workers at Harrah's Casino in nearby Chester have improved their jobs by forming a union, and their employer honored their choice by agreeing to a free, fair and quick process to form a Union. SugarHouse workers deserve the same fair process.

But workers at Sugarhouse have been met by an intimidation campaign which has included your Company paying over $425,000 to an anti-union consultant to run forced attendance meetings. We are outraged.

Now is the opportunity for SugarHouse Casino to choose the right path forward to become the neighbor your company promised to be. As elected leaders of the Philadelphia region, we therefore call on SugarHouse to:

1) End its relationship with anti-union consultants, requiring workers to attend mandatory anti-union meetings, and using firings, suspensions, and intimidation as tactics to stall unionization, and
2) Agree in advance that SugarHouse will respect the will of the majority of its workers by recognizing the workers' union if 50% plus one sign union cards authorizing a union to represent them.

We understand that our counterparts in Pittsburgh have called on you to make the same commitments at your casino in that city as well. We will continue to stand with workers at SugarHouse in Philadelphia and Rivers Casino in Pittsburgh until your casino companies respect workers' demands for a free and fair process to form a Union and fulfill the promise of good jobs for our communities.

Sincerely,

Rep. Brendan F. Boyle
170th Legislative District

Rep. Kevin J. Boyle
172nd Legislative District

Rep. Louise W. Bishop
192nd Legislative District

Rep. Michelle Brownlee
195th Legislative District

Rep. James Clay, Jr.
179th Legislative District

Rep. Mark B. Cohen
202nd Legislative District

Rep. Angel Cruz
180th Legislative District

Rep. Maria P. Donatucci
185th Legislative District

Rep. Jordan A. Harris
186th Legislative District

Rep. William F. Keller
184th Legislative District

Rep. Stephen Kinsey
201st Legislative District

Rep. Mike McGeehan
173rd Legislative District

Rep. J.P. Miranda
197th Legislative District

Rep. Edward J. Neilson
169th Legislative District

Rep. Cherelle L. Parker
200th Legislative District

Senator Mike Stack
5th Senatorial District

Rep. James R. Roebuck
188th Legislative District

Rep. W. Curtis Thomas
181st Legislative District

Rep. John J. Taylor
177th Legislative District

ILLINOIS STATE BOARD OF INVESTMENT
180 North LaSalle Street, Suite 2015
Chicago, Illinois 60601
(312)793-5718

May 22, 2013

Mr. Neal Bluhm
Managing Partner
Walton Street Advisors
900 North Michigan
Chicago, IL 60611

Dear Mr. Bluhm:

Yesterday afternoon I met with a number of employees of the Sugarhouse Casino in Philadelphia and the Rivers Casino in Pittsburgh. The meeting was held at their request so that they could share with the Illinois State Board of Investment (ISBI) concerns regarding their treatment as employees of those casinos.

The workers spoke of arbitrary and capricious termination of health care benefits; inadequate and improper application of Family and Medical Leave Act provisions; inadequate worker training; activities on the part of management to impede workers' efforts to organize; and a general work environment described as hostile and disrespectful.

Clearly, I am in no position to determine the veracity or validity of these issues. However, it was apparent that the individuals were sincere in their expressions of concern and disappointment. Further, it struck me that the workers who came by today, who indirectly work for ISBI and ISBI's annuitants, took these issues seriously enough to travel from Pittsburgh and Philadelphia to Chicago to meet with ISBI and other Walton Street Limited Partners.

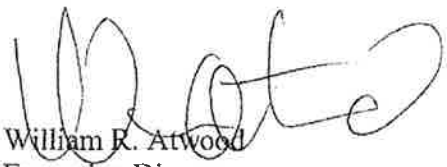
Over the years various issues have been brought to ISBI's attention regarding the difficult relationship between Walton Street and its workers as they have sought to collectively bargain wages, benefits, and work rules. As in the past, I made clear yesterday that ISBI is a limited partner so has virtually no role in the operation of Walton Street portfolio companies. Further, I respectfully submit to Walton Street that these issues do in fact fall into its portfolio, and as a limited partner, ISBI would greatly prefer for Walton Street to manage these issues so that aggrieved parties might have an alternative to directly approaching limited partners.

Finally, the issues raised by the casino employees are referenced in the Responsible Contractor Policy attached to Walton Street Fund VI, in which the firm committed to resolving such issues fairly and equitably.

Thank you for your consideration.

Sincerely,

ILLINOIS STATE BOARD OF INVESTMENT



William R. Atwood
Executive Director

City of Pittsburgh

510 City-County Building
414 Grant Street
Pittsburgh, PA 15219

Legislation Details (With Text)

File #:	2013-1540 **Version:** 1		
Type:	Will of Council	**Status:**	Adopted
File created:	5/14/2013	**In control:**	City Council
On agenda:		**Final action:**	5/14/2013
Enactment date:	5/14/2013	**Enactment #:**	357
Effective date:	5/14/2013		
Title:	NOW, THEREFORE BE IT RESOLVED, that the Council of the City of Pittsburgh does hereby stand by the Rivers workers until the Rivers Casino respects their demand for a free and fair process to form a union and fulfills its promise of good jobs for our community.		
Sponsors:	R. Daniel Lavelle, All Members		
Indexes:	PROCLAMATION - MR. LAVELLE		
Code sections:			
Attachments:	1. 2013-1540.doc		

Date	Ver.	Action By	Action	Result
5/14/2013	1	City Council	Adopted	Pass

WHEREAS , the Rivers Casino Workers are publicly standing up and demanding a fair process to form a union; and

WHEREAS , the Rivers Casino was welcome to Pittsburgh on the promise that good quality jobs would be provided to the community, and the best way to ensure good quality jobs is for the Rivers to have a fair process through which to form a union; and

WHEREAS , workers at the Meadows Racetrack and Casino, at Presque Isle Downs and Casino in Erie, and at Horseshoe Casino in Cleveland have improved their jobs by forming a union, and their employers have honored their choices by agreeing to a free, fair and quick process whereby the union was recognized once the majority of workers had signed union cards; and

WHEREAS , Rivers Workers demand a similar process for union approval, calling on the Rivers to refrain from hiring anti-union consultants, to refrain from requiring workers to attend mandatory anti-union meetings, and to refrain from using firings, suspensions and intimidation tactics to stall unionization; and

WHEREAS , Rivers Workers request the Rivers to agree in advance that it will respect the will of the majority of its workers by recognizing the workers' union if 50% plus one sign union cards authorizing the union to represent them; and,

WHEREAS , Pittsburgh's union history has proven that everyone benefits when workers have the right and the power to improve their jobs;
NOW, THEREFORE BE IT RESOLVED , that the Council of the City of Pittsburgh does hereby stand by the Rivers workers until the Rivers Casino respects their demand for a free and fair process to form a union and fulfills its promise of good jobs for our community.

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90.5 WESA Pittsburgh's NPR News Station

Organized Labor

5:07 PM TUE MAY 14, 2013

Food Workers at Rivers Casino Garner Pittsburgh Council Support for Union

By NOAH BRODE

The month-old unionization effort of food service employees at the Rivers Casino was boosted with a bit of political clout on Tuesday.

Pittsburgh City Council passed a resolution in support of the proposed union, which could band together some 800 workers at the North Shore gambling house.

The union would include waiters, banquet servers, floor workers and others spread out across the casino's five internal restaurants. The labor group Unite Here! would administer the union. A spokesman said the group has no experience organizing casino dealers or security guards.

Food service employees said they want more respect from management, as well as higher wages and better benefits.

"When I started, I was promised that I'd be making good money and would have great benefits," said Matt Fred Lapka, a waiter at the casino. "Since that time, I have struggled to make ends meet, as have many of my coworkers."

Employees said they also want more clarity on their wages through itemized lists of electronic debit tips.

"It's very frustrating that when I leave, I have no idea what I make in the tips that I get from my customers," said Brittany Swiger, a banquet server at Rivers. "We should know what we're making when we leave. We have no idea. We get our paychecks, and there you go."

Both Swiger and Lapka said they feel intimidated by casino management. They said managers have broken up conversations about the proposed organization and posted anti-union materials in the employee break room.

Councilman Daniel Lavelle said Rivers Casino promised to be a good corporate neighbor when it came to Pittsburgh in 2009.

"Being a good corporate neighbor means providing good quality jobs at good rates," Lavelle said.

The Will of Council document passed Tuesday said workers at the Meadows Racetrack and Casino in Washington County, at Presque Isle Downs and Casino in Erie County and at the Horseshoe Casino in Cleveland have all formed unions with no resistance from management.

TAGS: Pittsburgh City Council Rivers Casino

BLOGH*
*THE "H" IS SILENT

THURSDAY, APRIL 18, 2013

Employees file complaint with National Labor Relations Board against Rivers Casino

Posted by AmyJo Brown on Thu, Apr 18, 2013 at 12:30 PM

Employees at the Rivers Casino who are attempting to unionize 800 of the casino's 1,800 workers filed charges this week with the National Labor Relations Board alleging a coordinated campaign by management to intimidate them.

The employees, known as the Steel City Casino Workers' Council and represented by UNITE HERE Local 57, filed 38 separate complaints with the NLRB alleging surveillance of employees in hallways and in rooms designated for breaks, discriminatory enforcement of workplace policies against those who are promoting the union effort, threatening and unlawful comments, and in a few instances, prohibitions by management against speaking about the union.

The Council launched its campaign to organize publicly last Thursday, carrying a large sheet cake announcing the effort into the employee dining room. Since then, according to a prepared statement released by UNITE HERE Local 57, "workers report intimidation tactics including managers swarming, hovering and interrupting workers in the employee cafeteria" and "casino security agents posted in areas where they were not posted before."

Posters urging casino employees to not sign the unions' cards have also appeared, according to union organizers.

A photo taken of one of the posters that was shared with the City Paper, (see below) urges the workers to "keep their hard earned money" and lists the monthly dues of four unions supporting the workers — UNITE HERE Local 57, the Teamsters Local 211, the Operating Engineers Local and the United Steelworkers of America. It also details the unions' membership numbers and notes that union membership is plunging across the country.

"The facts about the unions behind the Steel City Casino Workers Council, who appear to be calling the shots, do not paint a pretty picture," the poster reads.

The union effort is targeting non-salaried personnel, excluding security workers and dealers.

Nineteen supervisors are named in the NLRB complaints, including General Manager Craig Clark, Head of Security Jim Cahill and Senior Counsel Danielle Cisneros. Other named supervisors include chefs, food and beverage department managers, and the valet director.

Bob Chester, NLRB regional director of the Pittsburgh office, says casino management has not yet been sent a copy of the complaints. That will happen in the next few days, he says, followed by interviews with the workers and a review of the evidence behind the allegations.

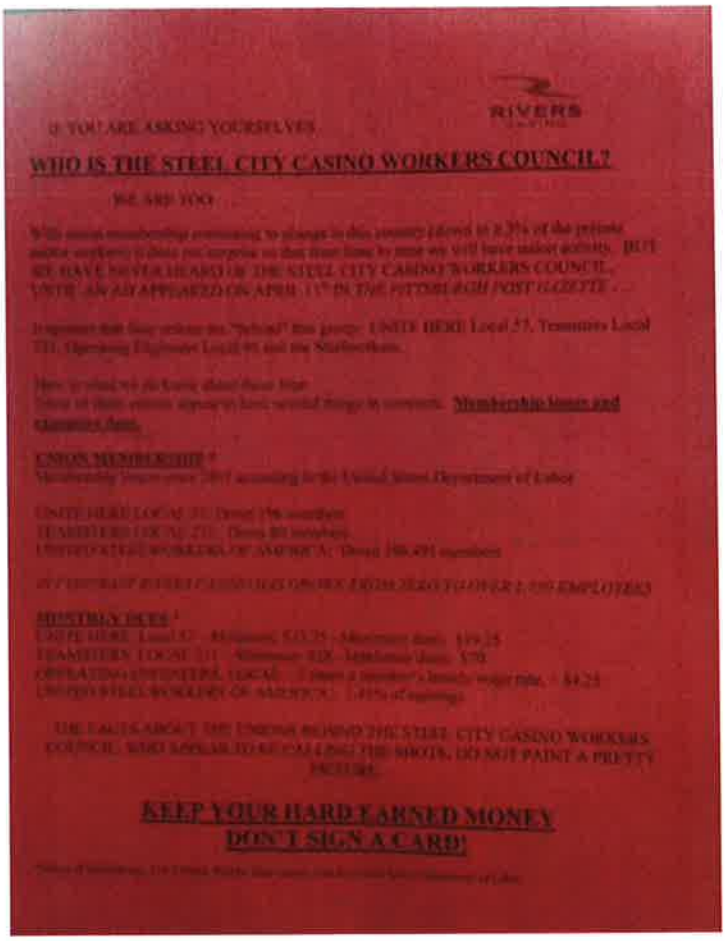
"Once we have a better idea of the evidence against them, we'll contact the employer" for its side of the story, Chester says.

A spokeswoman for Rivers Casino did not immediately respond to a request for comment. We'll update this post as soon as she does respond.

In a statement released after the launch of the organizing effort last week, management noted that "so far, the majority of our employees have consistently chosen to remain independent. That is their choice and their right."

This is not the first time the casino's management has faced the NLRB. The NLRB ruled in 2011 that the casino's parent company, the Holdings Acquisition Co., violated fair labor practices by restricting employees' right to engage in union activity at the workplace, surveilling union activity and granting a benefit to employees on the day of the election (an extra break for only one shift of workers to vote), after security workers attempted to unionize shortly after the casino opened in 2009.

Rivers Casino management also made a headline in the Post-Gazette today, after they announced that they would not extend or renew three-year community funding agreements that have expired. The $3 million in community funding, offered as part of the competitive bid process for the license to operate the casino, was divided between the Northside Leadership Conference and the Hill District.



A sign Rivers Casino employees say was posted Tuesday in their workplace.

Tags: Rivers Casino, union, National Labor Relations Board, UNITE HERE, Image

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COMMENTS (0)

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IF YOU ARE ASKING YOURSELVES . . .

RIVERS CASINO

WHO IS THE STEEL CITY CASINO WORKERS COUNCIL?

WE ARE TOO . . .

With union membership continuing to plunge in this country (down to 6.3% of the private sector workers) it does not surprise us that from time to time we will have union activity. BUT WE HAVE NEVER HEARD OF THE STEEL CITY CASINO WORKERS COUNCIL, UNTIL AN AD APPEARED ON APRIL 11th IN *THE PITTSBURGH POST GAZETTE* . . .

It appears that four unions are "behind" this group: UNITE HERE Local 57, Teamsters Local 211, Operating Engineers Local 95 and the Steelworkers.

Here is what we do know about these four:
Some of these unions appear to have several things in common: **Membership losses and expensive dues.**

UNION MEMBERSHIP:*
Membership losses since 2007 according to the United States Department of Labor

UNITE HERE LOCAL 57: Down 196 members
TEAMSTERS LOCAL 221: Down 80 members
UNITED STEELWORKERS OF AMERICA: Down 108,491 members

IN CONTRAST RIVERS CASINO HAS GROWN FROM ZERO TO OVER 1,750 EMPLOYEES

MONTHLY DUES:*
UNITE HERE, Local 57 – Minimum: $33.25 - Maximum dues: $39.25
TEAMSTERS, LOCAL 211 – Minimum: $28 - Maximum dues: $70
OPERATING ENGINEERS, LOCAL – 2 times a member's hourly wage rate, + $4.25
UNITED STEELWORKERS OF AMERICA – 1.45% of earnings

THE FACTS ABOUT THE UNIONS BEHIND THE STEEL CITY CASINO WORKERS COUNCIL, WHO APPEAR TO BE CALLING THE SHOTS, DO NOT PAINT A PRETTY PICTURE.

KEEP YOUR HARD EARNED MONEY
DON'T SIGN A CARD!

*Source of Information: LM-2 Forms filed by these unions with the United States Department of Labor.

BLOGH*
*THE "H" IS SILENT

THURSDAY, APRIL 11, 2013

Rivers Casino workers renew union effort, deliver a petition and a cake

Posted by AmyJo Brown on Thu, Apr 11, 2013 at 3:29 PM

AmyJo Brown

Rivers Casino employees deliver a sheet cake announcing union effort to employee dining room.

Employees of the Rivers Casino on the North Shore renewed an effort this morning to unionize every casino worker except security personnel and dealers.

Carrying a large sheet cake announcing the organizing effort, a dozen members of a committee calling itself the Steel City Casino Workers Council delivered it to the employee dining room at about 11 a.m. They also held tightly to packets of documents that defended their right to engage in unionizing activity.

Dorothy Hall, a players' club representative who has worked for the casino for two years, says the workers want "fairness" from management.

In January, the the Post-Gazette reported that, according to figures releases by the Pennsylvania Gaming Control Boardm Pennsylvania casinos profits are second only to those in Nevada. The paper noted that the Rivers Casino generated $282.1 million in 2012, up 2.3 percent from 2011.

Hall says the casino is the heart of the community and made a lot of promises to Pittsburgh residents. "We want to be the model casino," she says.

And that means "there are some changes that need to be made," such as better wages and more opportunities to get ahead for the casino's workers, Hall says.

"A lot of team members here have to work two to three jobs to raise their families," she says.

Earlier unionizing efforts have met resistance from management. The National Labor Relations Board ruled in 2011 that the casino's parent company, the Holdings Acquisition Co., violated fair labor practices by restricting employees' right to engage in union activity at the workplace, surveilling union activity and granting a benefit to employees on the day of the election (an extra break for only one shift of workers to vote), after security workers attempted to unionize shortly after the casino opened in 2009.

Local union activists also point to what they consider other bad behavior by the casino owners, such as the attempt to convince a judge that the casino should pay millions less in taxes because it was "a terrible investment."

The workers were joined this morning by state Sen. Jim Ferlo, Pittsburgh City Councilors Dan Lavelle and Natalia Rudiak, and long-time labor leaders such as Allegheny County Councilor and United Steelworkers' representative John DeFazio; Ppesident of the Allegheny County Labor Council, Jack Shea; and the Teamsters' Joe Molinero.

The local leaders walked alongside casino employees when they entered the casino to present General Manager Craig Clark a petition urging his cooperation in their union effort.

As the workers and labor activists walked in, one cautioned them not to chant or otherwise disrupt the business. "Take the high road," she said. Security guards guided the group to an open side area where they stood quietly for about 10 to 15 minutes. They were then told Clark was not available to meet with them.

The group moved outside, and in front of the casino began speeches to the press. But members of Unite Here, a union representing gaming, food service and hospitality employees across the country, interrupted them and urged them to move off the casino property, to the Riverwalk behind the casino, to make their speeches.

Ferlo, addressing the casino employees, said they have his full support.

"My natural inclination is to confront those security guards," he said, adding that he'd be back if needed and wouldn't "leave those doors so easily" a second time.

Molinero said that other union members were ready to help, too.

"This casino makes too much money to not give you a fair share," he said. "Go in there and get a lot of workers to sign cards. The sooner, the better."

A message left for Clark by the City Paper this afternoon was not immediately returned. But in an e-mailed statement, Rivers spokesperson Emily Watts said, "We take great pride in our team and respect the rights of our employees to choose. So far, the majority of our employees have consistently chosen to remain independent. That is their choice and their right."

AmyJo Brown

Teamster Joe Molinero and Allegheny County Councilor John DeFazio, and other city and county leaders, walked alongside Rivers Casino employees this morning.

AmyJo Brown

Dorothy Hall, a Rivers Casino employee, addresses her colleagues and local elected leaders outside the casino this morning.

AmyJo Brown

Rivers Casino employees and local elected leaders gathered in lobby of the Rivers Casino this morning to deliver a petition to casino management.

AmyJo Brown

State Sen. Jim Ferlo says Rivers Casino employees have his support in their effort to create a union.

« Pitt Theater Legend Bows Before Ret...

COMMENTS (0)

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We Stand With Workers at Rivers Casino

Today Rivers Casino workers are publicly standing up and demanding a fair process to form a union. We are proudly standing with them.

We welcomed the Rivers Casino to Pittsburgh on the promise of good quality jobs for our community. We are convinced the best way to ensure these are good quality jobs is for Rivers workers to have a fair process through which to form a union.

Workers at the Meadows Racetrack and Casino, at Presque Isle Downs and Casino in Erie, and at Horseshoe Casino Cleveland have improved their jobs by forming a union, and their employers have honored their choices. These employers agreed to a free, fair and quick process whereby the union was recognized once the majority of workers had signed union cards. Rivers workers want and deserve the same fair process.

As leaders of this community, we therefore call on Rivers to:

1. Refrain from hiring anti-union consultants, requiring workers to attend mandatory anti-union meetings, and using firings, suspensions and intimidation as tactics to stall unionization, and

2. Agree in advance that it will respect the will of the majority of its workers by recognizing the workers' union if 50% plus one sign union cards authorizing a union to represent them.

Pittsburgh's union history has proven that we all benefit when workers have the right and the power to improve their jobs. For these reasons, we will continue to stand with Rivers workers until the Rivers Casino respects their demand for a free and fair process to form a union and fulfills its promise of good jobs for our community.

Bill Bartlett
ACTION United Western PA Regional Council

Jim Brewster
State Senate, 45th District

Ricky Burgess
Pittsburgh City Council District 9

Jeanne Clark
Candidate for Pittsburgh City Council, District 8

Dom Costa
State House of Representatives, 21st District

Jay Costa
State Senate, 43rd District

Paul Costa
State House of Representatives, 34th District

Dan Deasy
State House of Representatives, 27th District

John DeFazio
Allegheny County Council at Large, USW District 10 Director

Anthony DeLuca
State House of Representatives, 32nd District

Frank Dermody
State House of Representatives, 33rd District

Patrick Dowd
Pittsburgh City Council, District 7

Mike Doyle
U.S. House of Representatives PA-District 14

Jim Ferlo
State Senate, 38th District

Wayne D. Fontana
State Senate, 42nd District

Lisa Frank
Coordinator, One Pittsburgh

Dan B. Frankel
State House of Representatives, 23rd District

Ed Gainey
State House of Representatives, 24th District

Helen Gerhardt
Pittsburghers for Public Transit

Dan Gilman
Candidate for Pittsburgh City Council, District 8

Darlene M. Harris
President, Pittsburgh City Council, District 1

William C. Kortz
State House of Representatives, 38th District

Nick Kotik
State House of Representatives, 45th District

Bruce A. Kraus
Pittsburgh City Council, District 3

R. Daniel Lavelle
Pittsburgh City Council, District 6

Antonio Lodico
Co-Director, Mon Valley Unemployed Committee

Pittsburgh United
Action United
Clean Water Action
Group Against Smog and Pollution (GASP)
Hill District Consensus Group
Iron Workers Local 3
Mon Valley Unemployed Committee
Pennsylvania Interfaith Impact Network (PIIN)
Pittsburgh Branch NAACP
SEIU 32BJ
Sierra Club
UFCW Local 23

Barney Oursler
Executive Director, Pittsburgh United

Joseph F. Markosek
State House of Representatives, 25th District

Robert Matzie
State House of Representatives,16th District

Dr. Charles J. McCollester
President, Battle of Homestead Foundation

Erin C. Molchany
State House of Representatives, 22nd District

Corey O'Connor
Pittsburgh City Council, District 5

William Peduto
Pittsburgh City Council, District 8

Adam Ravenstahl
State House of Representatives, 20th District

Luke Ravenstahl
Mayor of Pittsburgh

Harry Readshaw
State House of Representatives, 36th District

Natalia Rudiak
Pittsburgh City Council, District 4

Jack Shea, President
Allegheny County Labor Council

Matthew Smith
State Senate District 37

Theresa Smith
Pittsburgh City Council, District 6

Richard Stanizzo
Business Manager, Pittsburgh Building Trades Council

Jake Wheatley Jr.
State House of Representatives, 19th District

Jesse White
State House of Representatives, 46th District

STEEL CITY CASINO WORKERS COUNCIL
SCCWC

UNITE HERE Local 57 • Teamsters Local 211 • Operating Engineers Local 95 • United Steelworkers

DONNELLY CLARK attorneys at law

Donnelly & Clark, a professional LLC

JOHN M. DONNELLY
jdonnelly@donnellyclark.com
609-347-1199

February 17, 2016

VIA EMAIL
Karen Wells
Director, Investigations and Enforcement Bureau
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

RE: Littlefield, et al. v. United States Department of Interior, et al.

Dear Director Wells:

Attached are the Complaint and exhibits in the above cited litigation and a memorandum by David Tennant of Nixon Peabody outlining the issues addressed in the Complaint.

Also attached is a letter to the Commission from Neil Bluhm, Chairman of Mass Gaming & Entertainment, LLC, addressing the Company's request that it be issued a Region C license.

Please contact me if you have any questions.

Respectfully submitted,

JOHN M. DONNELLY

JMD/lat
Cc: Neil Bluhm (Via email)
David Tennant (Via email)

NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

MEMORANDUM

TO:	Massachusetts Gaming Commission	FROM:	David H. Tennant
RE:	Taunton Citizens Lawsuit	DATE:	February 17, 2016

On February 4, 2016, a group of Taunton citizens sued the Secretary of the Department of the Interior ("Secretary") and other federal defendants to set aside the Secretary's September 15, 2015 Record of Decision ("ROD") which benefits the Mashpees. In the ROD, the Secretary took into trust 151 acres of land in Taunton, owned in fee by the Mashpees, and proclaimed those lands an Indian reservation eligible for casino gaming under the Indian Gaming Regulatory Act (IGRA). Copies of the complaint and ROD are submitted as enclosures to the letter from Mass Gaming & Entertainment submitted contemporaneously herewith.

The citizens' lawsuit, filed in federal court in Boston, is the start of protracted litigation that will consume many years in the federal district court and the U.S. Circuit Court for the First Circuit, and may well end up before the Supreme Court given the unprecedented—indeed extreme and extraordinary—novel analysis employed by the Secretary in the ROD to find the Mashpee eligible to have lands taken into trust. The Secretary took seven years to explain its unprecedented position in a document that runs to 137 pages and contains 442 footnotes. In the process, the ROD violates controlling Supreme Court authority (*Carcieri v Salazar,* 555 U.S. 379 (2009)), and contradicts the plain language of the statute in question (the Indian Reorganization Act of 1934 (IRA)) as well as that statute's legislative history and its construction by courts and federal agencies over the past 80 years.

The unprecedented nature of the ROD caught the attention of the media, both locally and nationally, with headlines reading, "The big Indian gamble: Is legal action next over Mashpee tribal land"[1] and "BIA Blazes Bold Path In Mashpee Casino Site Ruling,"[2] with both articles

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1 Commonwealth Magazine, September 24, 2015 ("The bureau concluded it did have the legal authority, but there were a lot of suppositions and interpretations in those 40 pages" and noting that "[t]he big unknown for the state Gaming Commission is whether the Mashpee Wampanoag casino will ever get built."), available at http://commonwealthmagazine.org/back-story/the-big-indian-gamble/.

2 Law360, October 6, 2015 (noting the "the agency's inventiveness in working around [*Carcieri*]restrictions on such acquisitions and lays out a novel approach the agency looks ready to defend"), available at http://www.law360.com/articles/710778/bia-blazes-bold-path-in-mashpee-casino-site-ruling.

focused on the Secretary's novel approach to evading *Carcieri* to benefit the Mashpee. While tribal advocates praise the ROD as "exciting" and "creative," and a decision that will open up doors for tribes across the country, it is precisely those game-changing features of the ROD that guarantee many years of litigation. The *Carcieri* case itself took nearly twenty years to work through the courts. Even a relatively straight-forward challenge to a land-into-trust decision—one in which the court is asked to apply *Carcieri* to a record of decision that is without such novel and untested arguments—can take the better part of a decade. This is demonstrated by the 2008 lawsuit challenging the record of decision taking lands into trust for the Oneida Indian Nation of New York. That case remains on appeal in the Second Circuit in 2016. Here the new and untested theories and arguments employed by the Secretary will only lengthen that already long process.[3]

This memorandum summarizes the key contentions set out in the Plaintiffs' 30-page federal complaint, organized under the following headings:

1. The Secretary's Ungrammatical and Illiterate Reading of the IRA—to Circumvent the Supreme Court's Construction of the IRA in *Carcieri*
    a. *Unprecedented Definition of "Indian" under the IRA*
    b. *Unprecedented Definition of "Reservation" under the IRA*
2. The Secretary's Contradictory Pronouncements About Whether The Mashpees Had a Reservation in the Town of Mashpee in 1934
3. The Secretary's Contradictory Pronouncements About Whether The Mashpees Are A Tribe—Saying in Federal Court That The Mashpees Lost Tribal Identify No later than 1869 To Avoid Liability for Land Claims by The Mashpees, But Later Saying in An Administrative Proceeding That the Mashpees Never Lost Tribal Identity
4. The Secretary's Unprecedented Determination that Two Physically Distant Land Acquisitions Could Both Count as an Initial Reservation Under IGRA
5. The Absence of Evidence Tying The Mashpees to Taunton

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3 The major litigation steps in the district court are: (1) production by the federal defendants of the administrative record supporting the ROD, a process that in and of itself can take up to a year; (2) motions to address the adequacy of the record and/or to supplement the record; (3) pre-answer motions to dismiss the complaint; and (4) cross-motions for summary judgment. These district court proceedings are likely to last three to five years. An appeal to the First Circuit will likely add two years (at least). A petition for review by the Supreme Court will add six months to two years. Thus, a final non-appealable order likely will not be secured from the courts for another 6 to 10 years.

COMPLAINT SUMMARY

1. The Secretary's Ungrammatical and Illiterate Reading of the IRA—to Circumvent the Supreme Court's Construction of the IRA in *Carcieri*

a. Unprecedented Reading of "Indian" Under the IRA

The ROD claims the Secretary acted to take land into trust for the Mashpees under authority granted to her under the Indian Reorganization Act of 1934 (IRA). The IRA was enacted by Congress during the Great Depression and represents an emergency relief bill designed to help destitute Indians. Congress did not want to create broad new federal funding and support obligations for Indians throughout the United States, but rather to target the federal government's limited resources to needy Indians who were living tribally and apart from mainstream society. Congress was keenly aware of its meager funding and did not want to extend benefits to Indians who were living as citizens within states and who were otherwise assimilated into the dominant non-Indian society. The task for Congress was to craft a definition of "Indian" that would pull in needy Indians while excluding these others. Congress adopted the following definition of "Indian," identifying three categories or classes of "Indian" who would be eligible to receive benefits under the IRA:

> The term "Indian" as used in the Act shall include (1) all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction; (2) and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and (3) shall further include all other persons of one-half or more Indian blood.
>
> 25 U.S.C. § 479 (emphasis added).

Scant attention was paid to the IRA's definitions of "Indian" until the Supreme Court's 2009 ruling in *Carcieri v. Salazar*, which analyzed the eligibility of the Narragansett Tribe in Rhode Island to have lands taken into trust under the IRA. The Supreme Court in *Carcieri* held that the word "now" in "any recognized tribe now under Federal jurisdiction"(in the first definition) imposed a temporal restriction on who is an eligible "Indian" under the IRA. The Supreme Court held that when Congress used the word "now," it meant the date of enactment of IRA, June 1, 1934, and not when the Secretary chooses to take the land into trust. The Supreme Court made clear that when Congress added the phrase "now under federal jurisdiction" to the definition of "Indian" it intended to impose a temporal restriction that would limit eligibility. The Supreme Court further concluded that the Narragansetts were not eligible. The Narragansetts (like many eastern tribes) were under state jurisdiction—not federal jurisdiction—throughout their history and therefore did not meet the IRA's definition of

"Indian." The *Carcieri* ruling thus stands as a barrier to the Secretary taking lands into trust for any tribe that was not federally recognized and under federal jurisdiction in 1934. The holding applies to all eastern tribes that were exclusively under state jurisdiction in 1934, including the Mashpees, who were under the jurisdiction of the Commonwealth of Massachusetts and not under federal jurisdiction in 1934.

The Secretary believes the Supreme Court's decision in *Carcieri* was wrongly decided; unsuccessfully spearheaded efforts in Congress to overturn the Supreme Court's decision; and now presents administrative rulings that conflict with and largely gut the *Carcieri* decision. In the case of the Mashpees, the Secretary could not fit them under the first definition of "Indian" no matter how liberally she construed it. Instead, for the first time ever, the Secretary dispenses with the first definition of Indian under the IRA and instead relies exclusively on the second definition. The Secretary does so hoping she can construct a reading of the IRA that breaks off the "now under Federal jurisdiction" temporal limitation from the second definition and thereby free the Mashpees from having to show they were under Federal jurisdiction in 1934. And the ROD does just that—in what can only be described as a tortured, unprecedented, ungrammatical and illiterate reading.

The IRA's first two definitions of "Indian" are reproduced below for ease of reference:

> The term "Indian" as used in the Act shall include (1) all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction; (2) and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation,

The second definition of "Indian" is clear on its face. The words "such members" in the second definition means the "members of any recognized tribe now under Federal jurisdiction" in the first definition. That reading is required by the plain language employed by Congress. It is also required by the canons of statutory construction, including the "last antecedent" rule. The last antecedent rule necessarily pulls in the *entire antecedent clause* (*i.e.* "members of any recognized tribe now under Federal jurisdiction") into the second definition. Thus a straight-forward reading of the plain text leads to only one rational conclusion: "such members" means the "members of any recognized tribe now under Federal jurisdiction."

The Secretary in the ROD nonetheless falsely proclaims an ambiguity where none exists, and in the guise of "interpretation" offers an artificial, ungrammatical, result-oriented reading of the IRA that: (a) splits the single unitary antecedent clause into two parts; and then (b) declares, by Secretarial fiat, that "such members" (in the second definition) refers only to "members of any recognized tribe" (in the first definition)—abruptly stopping her reading before reaching the "now under Federal jurisdiction" portion of that same antecedent phrase. In doing so, the Secretary artificially cleaves in two a single antecedent phrase without any basis in grammar rules, law, or logic. The Secretary's result-oriented reading—jettisoning the critical temporal limitation under the IRA—does violence to English grammar, syntax and sentence structure.

The result is that the Secretary completely re-writes the IRA's second definition of "Indian" to eliminate "now under Federal jurisdiction." The Secretary even goes to the length of inserting language in brackets to alter the actual wording of the statute:

> The IRA applies to "Indians," including "descendants of *[members of any recognized Indian tribe]* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.
>
> ROD at 120.

The Secretary's rewriting of the IRA flies in the face of *Carcieri*—it does exactly what the Supreme Court said the Secretary cannot do when interpreting the IRA—violates canons of statutory construction and rules of grammar, and is affirmatively refuted by:

- the IRA's legislative history
- contemporaneous interpretations by the Department of Interior
- numerous agency interpretations of the IRA's definition of "Indian" for purposes of determining who is an Indian for purposes of federal hiring preferences
- the Department's fee-to-trust regulations in 25 CFR Part 151 (e.g., 25 CFR § 151.2(c)(2)); and
- positions taken by the Department of Justice and Department of the Interior in prior litigation.

The language of Section 479 is not ambiguous. For more than 80 years the Department and other federal agencies have correctly interpreted the IRA's second definition of "Indian" as a subset of the first category, naturally reading it as being subject to the "now under Federal jurisdiction" requirement in the first definition.

Of particular note, the legislative history directly refutes the Secretary's position. Indian Commissioner John Collier, who was the principal author of the IRA and was recognized by the Supreme Court in *Carcieri* as an authority on the IRA's legislative history, explained why the second definition of "Indian" was included in the IRA. He did so in a 1936 Circular that he sent to Indian Offices throughout the country. See Circular No. 3134 (March 7, 1936). In that Circular, Commissioner Collier explained that the second definition largely overlaps with the first definition and was intended to cover only a few individuals then living, in certain unusual circumstances. Collier expressly stated "[t]here will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of a tribe ...." He explained that this second definition was needed to cover tribal members' children who were not yet enrolled members of a tribe, and other "unenrolled members residing on a reservation June 1, 1934 (Class 2)." *Id.*

Thus, the reading proffered by the Secretary to justify taking lands into trust is refuted by the IRA's plain language, rules of English grammar, cannons of construction, legislative history and the Supreme Court's decision in *Carcieri*. If accepted by a court, the Secretary's

reading of the IRA would eviscerate the *Carcieri* decision and Congressional intent while giving the Secretary unlimited authority to take lands into trust for Indians, free of any temporal limitations.

b. Unprecedented Definition of "Reservation" Under the IRA

The Secretary's reliance on the second definition of Indian means the Secretary also had to find that Mashpees resided on a "reservation" in 1934, since that is an element of the second definition (i.e., "residing within the present boundaries of any Indian reservation"). The ROD concluded that the Mashpees' "plantation" "settlement" or "village," which was located within the borders of the incorporated Town of Mashpee and subject to the laws of the Commonwealth, constituted a "reservation" in 1934. That determination is inconsistent with federal statutes and decisional law that define an Indian reservation as lands over which the tribe exercises governmental authority, and directly contradicts the Department's land-into-trust regulations which expressly incorporate that prevailing definition. The Secretary purports to do this by applying a liberal rule of construction favoring Indians, but in the process of doing so reads out of the IRA's definition of "reservation" the key requirement that a tribe must exercise tribal governmental authority over some or all of the "reservation."

The ROD does not cite any federal statute (or any decision) that supports the Secretary's novel and loose construction of "reservation" here. The ROD cites no authority for giving "reservation" under the IRA a different and broader meaning than "reservation" in any other federal statute. And there is no basis in law to expand the IRA's definition of reservation to include ambiguous parcels such as the Mashpee "plantation," "native settlement," or "Indian Village."

When Congress used the term "reservation" in the IRA in 1934 it necessarily incorporated the prevailing understanding of a reservation, with the tribe exercising its tribal governmental authority over all lands within the reservation's boundaries that were then not allotted. *See generally Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d 967, 973-974 (10th Cir. 1987) (historically the term "reservation" was coextensive with tribal ownership") (citing *Solemn v. Bartlett*, 465 US 463, 468-69 (1984)); 25 U.S.C. §1151 (defining "Indian Country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" whether or not tribally owned). In keeping with the basic principle that tribal sovereignty and governance extends over reservation lands, the Department itself adopted land-into-trust regulations that expressly recognize this core feature of any reservation under the IRA. *See Citizens Exposing Truth About Casinos*, 492 F.3d at 462 (citing 25 CFR § 151.2(f)).

2. Secretary's Contradictory Pronouncements About Whether The Mashpees Had a Reservation in the Town of Mashpee in 1934

The Secretary declared the Taunton lands eligible for gaming under the Indian Gaming Regulatory Act (IGRA) including making a specific finding the lands in question constitute the Mashpees' "initial reservation" under the federal gaming statute. Without that specific finding, a federally-authorized casino could not be built. This is because, as a general rule, IGRA prohibits tribes from acquiring land for purposes of gaming after 1988, the date of IGRA's enactment. One exception to that general prohibition allows tribes that are federally recognized after 1988, and have no existing reservation, to apply to have lands taken into trust and have those lands declared a reservation and treated as an "initial reservation" under IGRA.

The ROD's reliance on this IGRA exception to the general IGRA prohibition for land acquisitions occurring after 1988 would appear to be straight-forward were it not for the Secretary's simultaneous reliance on the second definition of "Indian" under the IRA, which expressly requires the tribal members to demonstrate that they resided on a reservation on June 1, 1934. That reservation residency requirement is peculiar to the second definition of "Indian" under the IRA. Accordingly, by employing the second definition to try to evade the *Carcieri* decision, the Secretary had to find that the Mashpees' resided on a reservation in 1934—but all they had then was their so-called "Plantation" in the Town of Mashpee. As set out above, those lands did not meet the accepted definition of a reservation in 1934; those lands would have been unrecognizable to Congress as a reservation; and the lands were never federally set aside or superintended and thus do not meet the definition of a reservation under the IRA's second definition.

But the point here is that the Secretary in the ROD adopted two inherently conflicting conclusions about the existence of a Mashpee reservation on 1934. If the Secretary is correct that the Mashpees had a reservation in 1934 for purposes of the IRA, then the Mashpees also had an existing reservation for purpose of IGRA, such that the 2015 land-into-trust acquisition could not be declared their "initial reservation." Conversely, if the Secretary is correct that the 2015 land acquisition constitutes the Mashpees' first reservation, then that determination precludes the Secretary from relying on the second definition of Indians under the IRA and its necessary finding that the "Plantation" was a "reservation."

The ROD's "heads-I-win, tails-you-lose" analysis under the IRA and IGRA is unsupported by any authority, and contradicts the Department's position taken in other cases where the Secretary advocated for and applied a single definition of "reservation" under both the IRA and IGRA. Under that single definition the "Plantation" is not a reservation.

3. The Secretary's Contradictory Pronouncements About The Mashpees as a Tribe, Saying in Federal Court that the Mashpees Lost Their Tribal Identify by 1869 But Saying in An Administrative Ruling that the Mashpees Never Lost Their Tribal Identity

The Mashpee filed a series of unsuccessful lawsuits in federal court, starting in the 1970s, seeking to recover historic lands. The initial lawsuit in 1975 was filed against the Commonwealth and the Town of Mashpee. Later land claim lawsuits were brought against the federal government, including the Secretary of the Department of the Interior. From the outset of their lawsuits, the Mashpees put their tribal identity and status in issue because they had to establish standing, and they could only sue on behalf of the tribe if they established they were a tribe both at the commencement of the lawsuit and also when the allegedly unlawful land takings occurred. After a 40-day jury trial in the 1975 lawsuit, with extensive testimony and written reports provided by ethno-historians concerning the history of the tribe, the jury determined the Mashpees had ceased to exist as a tribe by 1869. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 942 (D. Mass. 1978) (special interrogatory "d").

That seminal ruling on the Mashpees' failed claim to be judicially recognized as a tribe was affirmed on appeal by the First Circuit and that decision later became the basis for the federal government—the Secretary of the Interior—to argue that the Mashpees' lands claims against the United States were barred under principles of res judicata. *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482-483 (1st Cir. 1987). By successfully invoking the defense of res judicata based on the jury's determination that Mashpees lost their tribal identity by 1869, the Secretary should not be able to argue here that the Mashpees never lost their tribal identity and were properly recognized as a tribe in 2007.

4. The Secretary's Unprecedented Determination that Two Physically Distant Land Acquisitions Could Both Count as Initial Reservation

The ROD declares the two physically separate trust acquisitions—151 acres in Taunton and 170 in Mashpee—as a single "initial reservation" for purposes of IGRA. The ROD's treatment of the two acquisitions as a single reservation, despite being fifty miles distant from one other, is unprecedented. While the ROD recites other cases where the Secretary has declared noncontiguous parcels to be a single "initial reservation," it appears that the Secretary has done so only upon finding that both parcels fall within the boundaries of a previously recognized treaty reservation. The Mashpees did not have a treaty reservation; no such reservation boundaries unite the two parcels in question here. The ROD's conclusion that the two Mashpee land acquisitions, fifty miles apart, constitute a single "initial reservation" under IGRA is unprecedented, unsupported and flawed.

5. Absence of Evidence Tying The Mashpees to Taunton

The ROD speculates that the Mashpees have significant historical connections to the lands in Taunton. The record shows the Mashpees maintained a consistent presence in the Town of Mashpee some fifty miles away, and the Secretary relies on ambiguous evidence eleven miles outside Taunton to connect the Mashpees to the surrounding area. Other tribes have claimed the Taunton lands are not and never have been Mashpee. On the record presented, the Secretary's finding of significant historical ties is unfounded.

Conclusion

The ROD's legally and factually unsupported (and often self-contradictory) findings are united in one recognizable goal: to give land to the Mashpees despite the *Carcieri* bar. It will take many years of litigation to determine the lawfulness of the Secretary's unprecedented actions. The Secretary's decision for the Mashpees greatly expands the Secretary's authority to take land into trust, with dramatic consequences for both tribes and nontribal interests. Every land-into-trust acquisition divests the taxing and regulatory authority possessed by the state, county and town in which the federal land acquisition occurs, across the United States. This high stakes case has the earmarks of one destined for review by the high court.

JJ

February 17, 2016

The Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

RE: Complaint to Overturn Department of Interior's Decision to Take Land Into Trust in Taunton for the Benefit of the Mashpee Wampanoags

Dear Commissioners:

A group of residents of East Taunton, long opposed to the creation of an Indian reservation in their community, filed a lawsuit in federal court on February 4, 2016, seeking to overturn the decision of the U.S. Department of the Interior ("DOI") to take land into trust for the benefit of the Mashpees. Among several important assertions, the citizens' lawsuit alleges that the DOI has attempted to exercise powers not granted to it by Congress in violation of the Supreme Court's decision in *Salazar v. Carcieri*. Please refer to the attached complaint together with a memorandum prepared by Nixon Peabody summarizing the 30-page complaint.

The citizens group, which is associated with Preserving Taunton's Future, asked if we would help to fund its lawsuit to overturn the DOI's land-in-trust decision, and as we have openly stated to the Commission and the press, we agreed to participate in funding the lawsuit.

In light of the citizens group's lawsuit, we want to explain:

1) Why we believe the DOI's decision to take land into trust in Taunton for the benefit of the Mashpees will be overturned;
2) The implications of the lawsuit filed by the citizens group – namely that the litigation will last many years and that we believe it will not be possible to finance and build the casino in Taunton during that time, if ever; and
3) The economic consequences for the Commonwealth – in particular, that the Commonwealth will collect more gaming tax revenue with our proposed Brockton casino resort (with or without a Taunton casino), and in fact, will collect the most gaming tax revenue with our proposed Brockton casino resort and without a Taunton casino.

The DOI's Indefensible Statutory Interpretation

While there are many legal and factual errors in the DOI's Record of Decision to take lands into trust for the Mashpees, we wish to highlight one error of law in particular—one that demonstrates that the DOI's decision violates both the holding in *Carcieri* and a plain reading of the definition of "Indian" in the Indian Reorganization Act of 1934 ("IRA"). That definition determines who is eligible to have lands taken into trust under the IRA and was at the heart of the Supreme Court's decision in *Carcieri* and its specific holding that the DOI can take land into trust only for tribes that were under federal jurisdiction in 1934. In making its decision, the Supreme Court analyzed Section 479 of the IRA, which establishes three eligible classes of Indians (referred to as Class 1, Class 2, and Class 3):

> The term "Indian" as used in the Act shall include (1) all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction; (2) and all persons who are descendants of *such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and (3) shall further include all other persons of one-half or more Indian blood.
>
> 25 U.S.C. § 479 (emphasis added).

The Supreme Court ruled that "now" as in "now under Federal jurisdiction" (in Class 1) meant when the IRA was enacted in 1934 and not—as the DOI argued—whenever the DOI decided to take lands into trust. The Supreme Court specifically rejected the DOI's argument that "now" should be read as "now or hereafter." The Supreme Court determined that the DOI cannot change the wording of the IRA to give itself powers not granted to it by Congress.

The legislative history shows the phrase "now under Federal jurisdiction" was added by Congress to narrow the scope of the DOI's authority to act. At the time of the IRA's enactment, Congress considered Indians to be under federal jurisdiction if they were members of a tribe registered with the federal Office of Indian Affairs. Each registered tribe submitted its membership rolls and received services through that office, including oversight of tribal lands.

Seventy-five years later, when *Carcieri* was decided, most observers thought that the only tribes that would fall "under Federal jurisdiction" for purposes of the IRA were those federally recognized tribes listed in the so-called "Haas Report," a 1947 DOI publication that listed each tribe that had voted to adopt the IRA.

However, since the *Carcieri* decision, the DOI has worked tirelessly to evade *Carcieri*. The DOI has adopted a very broad interpretation of "under Federal jurisdiction", contending that certain historical facts (e.g., a discussion between a federal agent and a tribe concerning a possible treaty, even though no treaty was ever signed) would be sufficient to satisfy the "under Federal jurisdiction" requirement. The DOI's liberal interpretation of "under Federal Jurisdiction" currently is the subject of an appeal before the D.C. Circuit in a case commonly referred to as *Cowlitz*.

What is remarkable here—and altogether unprecedented in the history of DOI's land-into-trust decisions—is that, notwithstanding the DOI's already very broad interpretation of "under Federal jurisdiction," the DOI felt it necessary to abandon the Class 1 treatment for the Mashpees, which it used with all other Indian groups. The DOI abandoned that approach with respect to the Mashpees because the DOI seemingly knows the Mashpees were exclusively under state jurisdiction (not federal jurisdiction) in 1934, just as the Narragansetts were in Rhode Island in the *Carcieri* case, and thus the Mashpees would necessarily be declared ineligible under *Carcieri* for land-in-trust, just as the Narragansetts were in the *Carcieri* case.

As a result, to evade the reach of *Carcieri* here, the DOI for the first time ever eschewed the Class 1 definition and relied exclusively on the Class 2 definition of "Indian," and furthermore, to make the Class 2 definition work, the DOI fabricated an unprecedented interpretation of the definition. As explained below, the DOI's result- oriented reading of the IRA violates the rules of grammar, the statute's plain meaning, and *Carcieri*.

By way of background, Congress included Class 2 for a very limited purpose—to serve as a safety net to catch Indians who belonged in Class 1 (i.e., were members of a recognized tribe under federal jurisdiction in 1934) but were not carried on the tribal membership rolls and therefore would not be included in the official headcount for that group. The narrow purpose of Class 2 was explained by the principal author of the IRA, Indian Affairs Commissioner John Collier, in an official DOI Circular (Circular No. 3134, March 7, 1936). Commissioner Collier's role in drafting and presenting the IRA bill to Congress puts him in a unique position to speak to the bill's legislative history and meaning, as the Supreme Court recognized in *Carcieri.* In his Circular, Collier explained that "[t]here will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of a tribe ...." He further explained that Class 2 was needed to cover tribal members' children who were not yet enrolled members of a tribe and other "unenrolled members residing on a reservation June 1, 1934 (Class 2)." By establishing the narrow intended scope for Class 2, to serve as a subset of Class 1, the legislative history disproves the expansive reading adopted by the Secretary just as much as the plain text precludes it.

The DOI's reliance on the second definition founders on the statute's plain language. The language used by Congress in Class 1 and Class 2 is straight-forward and can be read in only one grammatical way. When Class 2 says "such members," it means the members identified in Class 1 (i.e., "members of any recognized tribe now under Federal jurisdiction"). The DOI recognizes that the plain reading of the text chosen by Congress leads to that conclusion, but claims a literal reading of the statute renders Class 2 redundant and duplicative of Class 1. But as Commissioner Collier explained, only a few people would be picked up through Class 2, such as children who were not technically enrolled members of the tribe. The DOI's current expansive reading of Class 2 is a transparent attempt to rewrite history and circumvent the *Carcieri* decision.

Due to this reason and the other significant errors in the DOI's Record of Decision (see Nixon Peabody memorandum), we are confident that the courts ultimately will overturn the DOI's decision.

Implications of the Citizens Group's Law

The citizens' lawsuit in federal court presents an objectively strong case for invalidating and overturning the DOI's Record of Decision. We expect litigation to be protracted and take many years to work through the court system. By way of example, the *Carcieri* case itself took nearly twenty years; a *Carcieri* challenge to land acquisitions for the Oneida Indian Nation of New York is now in its eighth year with the case on appeal in the Second Circuit and further review by the Supreme Court still to be pursued; and the *Carcieri* challenge in the *Cowlitz* case is in its fifth year with briefing just completed in the D.C. Circuit and further review likely. By all objective measures, the present challenge to the Mashpees' ROD – given its unprecedented indeed tortured reading of the IRA –will consume many years. A final non-appealable decision is unlikely to be obtained in under six years and could easily take ten years or more. During this period, it will be virtually impossible for a casino in Taunton to be constructed. We are not aware of any circumstances where a tribe has financed and built a casino before a federal court ruled on a pending lawsuit challenging the legality of the underlying land-into-trust decision by the federal government. We believe that any source of capital or construction financing will consult with counsel before investing and that knowledgeable legal counsel will advise that DOI's decision is unprecedented, conflicts with *Carcieri*, and is likely to be rejected. No one would risk dollars on building a casino which will be found not to be legal.

To the best of our knowledge, the Mashpees' reported financial backer, the Genting Group, has never constructed a casino without debt financing. We believe debt financing will not be available for this project since the project's right to exist is in serious question. Under the circumstances, we believe Genting would need to guarantee the cost of the entire project. Notwithstanding Genting's significant financial resources, it would be reckless to finance and construct a casino in Taunton at this time. We do not believe Genting will act so irrationally. Genting, which already has a limited financial interest in the economic performance of the proposed tribal casino, would face a binary outcome. If the courts rule that land must be taken out of trust, Genting would lose its entire investment.

Consequently, it is likely that a casino in Taunton will not be built for many years to come, if ever.

Economic Consequences for the Commonwealth

Based on the analysis of the Innovation Group, the Commonwealth will collect more gaming tax revenue if a commercial casino is operating in Brockton. This is true whether or not a tribal casino ever opens in Region C. The Innovation Group's analysis further indicates that the Commonwealth would be expected to collect significantly more incremental gaming tax revenue without a tribal casino opening in Taunton if our proposed casino resort is operating in Brockton. This is because the tribal casino would cannibalize revenue from our proposed Brockton casino resort and the other gaming establishments in Massachusetts, and the tribal casino itself would not generate gaming tax revenue Thus, from a tax revenue perspective, the single best scenario for the Commonwealth is to award the Region C license to Mass Gaming & Entertainment, LLC for its proposed casino resort in Brockton and for the DOI's decision with respect to the Mashpee land-in-trust case to be overturned. The next best scenario would be for both a commercial and tribal casino to be licensed to operate in Region C. The worst licensing scenario for generating gaming tax revenue would be for the Commission to license only the tribal casino, even if the Mashpees can prevail in litigation many years from now.

The Innovation Group projects that our proposed casino resort in Brockton will earn over $400 million per year in gaming revenue, generating over $100 million per year in gaming taxes. Consistent with our presentation to the Commission on November 5, 2015, due to forecasted cannibalization of Massachusetts gaming establishments in Plainville, Everett and Springfield, The Innovation Group projects that the net incremental gaming taxes to the Commonwealth will be approximately $71 million per year. This is in addition to the $85 million license fee Mass Gaming & Entertainment, LLC would pay.

If the proposed tribal casino in Taunton opens (and our casino resort in Brockton also is open), The Innovation Group projects that the incremental annual gaming taxes for the Commonwealth would decrease from approximately $71 million per year to $40 million per year. The Taunton casino would cannibalize not only our business but the businesses of the other gaming establishments in Massachusetts. Yet the Taunton casino would not pay any gaming taxes. As a consequence, the incremental gaming tax revenue for the Commonwealth would significantly decrease.

If a Taunton casino opens without our proposed casino in Brockton open, the incremental revenue to the Commonwealth would further decrease to an estimated $33 million per year. The Taunton casino is expected to generate less gaming revenues than our proposed Brockton casino resort (due to its location further away from the major Massachusetts population area) and would only share 17% of its gaming revenues as opposed to paying a 25% tax rate.

Therefore, as shown in Exhibit A, the Commonwealth will collect more gaming tax revenue with our proposed casino resort in Brockton in any Region C scenario. The Commonwealth is expected to collect the most with Brockton alone, the next most with Brockton and Taunton, and the least with Taunton alone—and, of course, there would be no incremental revenue without any casino in Region C. And as further noted above, Mass Gaming & Entertainment, LLC would pay $85 million as a license fee and the Taunton casino would pay none.

Further, if the Commission does not award the Region C license to Mass Gaming & Entertainment, LLC, Region C likely will be deprived of the economic development benefits, including jobs, from a casino resort—at a minimum for many years while the Mashpee land-in-trust decision is litigated—and permanently if the DOI's decision is overturned, as we believe it will be. In addition, as Penn's slot facility at Plainridge has been unable to take any meaningful market share from Twin River or the Connecticut casinos, Commonwealth citizens would continue to spend gaming dollars in other states and the opportunity to capture spending from out-of-state citizens would be lost.

Lastly, if the Commission awards the Region C license to Mass Gaming & Entertainment, LLC, and in the unlikely event the courts do not overturn the DOI's decision, the award of the Region C license does not preclude the Mashpees from building their casino in Taunton. Both the Mashpee casino, which will not need to share any of its gaming revenue with the Commonwealth, and our proposed casino in Brockton are expected to be financially healthy in that scenario.

Therefore, the decision to grant the Region C license to Mass Gaming & Entertainment, LLC is risk-free and always yields a better outcome than if the Commission does not award the license.

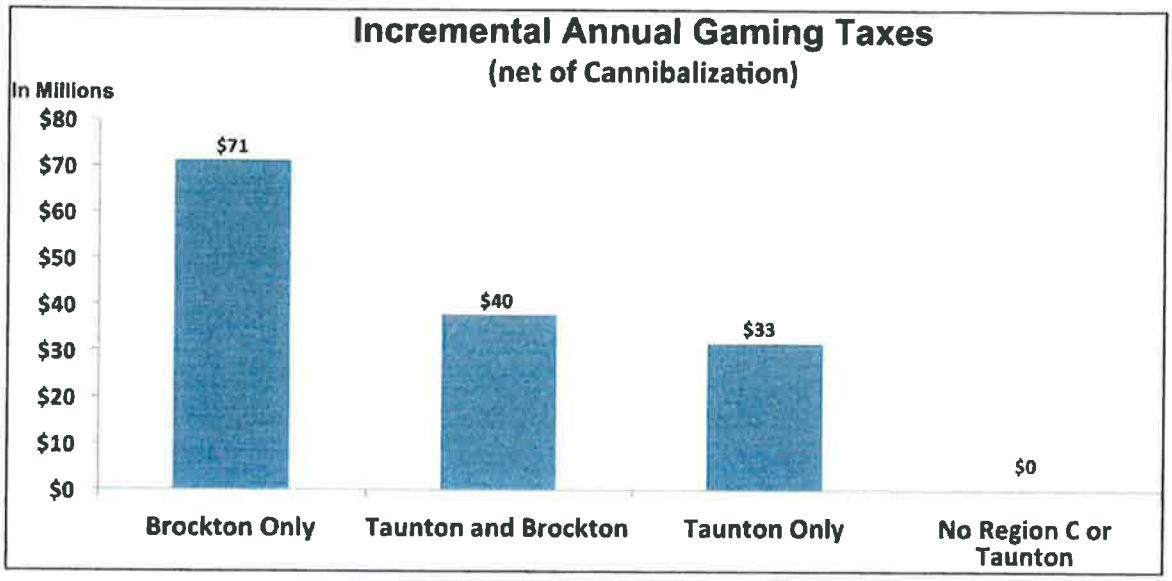
Conclusion

We respectfully urge the Commission to issue a Region C license for our proposed Brockton casino resort, creating jobs, tax revenues and tourism to the region in keeping with the fundamental goals of the Massachusetts Gaming Act. Issuing a license to Mass Gaming & Entertainment, LLC now presents a no-risk, win-win outcome for the Commonwealth, Region C and Brockton, while it also leaves the Taunton project free to rise or fall on its own merit, years from now, if at all, depending on the outcome of the litigation challenging the land-into-trust decision. The Commonwealth, Region C and Brockton should reap the intended benefits now and not be made to wait for the Taunton project's legal resolution many years down the road. The time for Brockton is now.

Respectfully submitted,

Neil Bluhm
Chairman
Mass Gaming & Entertainment, LLC

Exhibit A



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, 1849 C Street, N.W., Washington, C 20240, SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior, 1849 C Street, N.W., Washington, DC 20240, BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior, 1849 C Street, N.W., Washington, DC 20240, LAWRENCE ROBERTS, in his official capacity as Acting Assistant Secretary – Indian Affairs, U.S. Department of the Interior, 1849 C Street, N.W., Washington , DC 20240, UNITED STATES OF AMERICA.

Defendants.

Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

Challenge to Record of Decision Taking Lands into Trust for Benefit of the Mashpee Wampanoag Tribe

1. The action is brought to overturn the unprecedented and unlawful decision of the Secretary of the Interior (the "Secretary") to take into trust, for the benefit of the Mashpee Wampanoag Tribe ("Mashpees"), 151 acres of land located in the City of Taunton, Bristol

County, Commonwealth of Massachusetts, and declare that land eligible for gaming under the Indian Gaming Regulatory Act (IGRA). The Secretary's decision is set forth in a Record of Decision dated September 18, 2015 (ROD). A copy of the ROD is attached as an Exhibit.[1]

2. The purpose of the ROD is to remove forever the land, currently held in fee simple by the Mashpees, from the tax and regulatory jurisdiction of the Commonwealth of Massachusetts, the County of Bristol, and the City of Taunton, and in the process create a tax-immune, regulation-free Indian reservation on which the Tribe is authorized to build and operate a Las Vegas-style casino resort called "First Light," complete with a 15 to 17 story high main building, three hotels and parking for 6,000 vehicles. The main tower building, if constructed, will be the tallest structure for miles around, purportedly able to catch the sun's first rays and light up the night sky—a highly visible intrusion, day and night, 24 hours a day, 365 days a year.

3. The "First Light" destination resort casino will dominate the residential East Taunton neighborhood in which it will be located—*if* the land acquisition under the Indian Reorganization Act of 1934 (IRA) is allowed to stand. The proposed $500 million development is testament to the ambitions of the Mashpees and their Malaysian business partners (Genting Group), all responding to the economic incentives created by IGRA.

4. This community-altering casino development can legally happen only if the Secretary of the Interior possesses authority under the IRA to take into trust the lands in question in Taunton.

5. This lawsuit presents an inconvenient truth: The Secretary of the Interior lacks the statutory authority to take lands into trust for the Mashpees, who were not a federally recognized

[1] Plaintiffs are residents of Taunton who are directly impacted by any development of the 151 acre parcel in Taunton. The September 18, 2015 decision by the Secretary also took into trust 170 acres in the Town of Mashpee, Barnstable County, about 50 miles away. Plaintiffs seek to overturn the ROD on the ground that the Secretary lacks statutory authority to take into trust any lands for the Mashpees. The present lawsuit therefore affects parcels in the Town of Mashpee as well as in Taunton.

tribe under federal jurisdiction in 1934 (they were first federally recognized in 2007), and thus are ineligible under the Supreme Court's decision in *Carcieri v Salazar,* 555 U.S. 379 (2009). That Supreme Court decision, involving the Narragansett Tribe in Rhode Island, expressly limits IRA benefits, including its land acquisition provisions, to federally recognized tribes that were under federal jurisdiction in 1934. The *Carcieri* ruling prohibits the Secretary from acquiring lands for eastern tribes, like the Narragansetts and Mashpees, who were exclusively under state jurisdiction.

6. Section 479 of the IRA defines who qualifies as an eligible "Indian" and presents three classes or categories of eligibility:

> The term "Indian" as used in the Act shall include (1) all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction; (2) and all persons who are descendants of *such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and (3) shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (emphasis added).

7. The first category of who is an "Indian"—with its express temporal limitation of "now under Federal jurisdiction"—was construed in *Carcieri*. The high court held that Congress, when it passed the IRA in 1934, meant "now" to mean 1934. Thus, only federally recognized tribes under federal jurisdiction in 1934 are eligible to receive IRA benefits and services, including fee-to-trust land acquisitions under Section 465.

8. The Department of the Interior believes the Supreme Court's decision in *Carcieri* was wrongly decided, having advocated before the Supreme Court that "now" meant "now or hereafter." The Secretary believes the IRA gives it the authority to take lands into trust for any recognized tribe, provided that tribe is federally recognized and under federal jurisdiction at the time of the decision to take the land into trust. The Department of the Interior has spearheaded

efforts in Congress to overturn the Supreme Court's decision in *Carcieri*. Those efforts have failed.

9. The Department of the Interior has also undertaken efforts, in its administrative implementation of the IRA, to work around the *Carcieri* decision by broadly interpreting the phrase "now under Federal jurisdiction" contained in the first definition of "Indian" under IRA.[2] That administrative work-around does not impact this case, which involves the second definition of "Indian" under the IRA.

10. To circumvent the restrictions in *Carcieri,* but unable to fit the Mashpees under the first definition of "Indian" even as liberally construed by the Department, the Secretary creates for the first time here an unprecedented, ungrammatical and illogical reading as to who is an eligible "Indian" and what is a "reservation" under the IRA.

Unprecedented Reading of "Indian"

11. The ROD is the first land-into-trust decision in which the Secretary relied on the second definition of "Indian" under the IRA. In every other land-into-trust decision, the Secretary has relied on the first definition.

12. The Secretary in the ROD altogether shuns the first category of who is an "Indian" under the IRA. The Secretary did so knowing that the Mashpees, like the Narragansett Tribe in Rhode Island, were under state jurisdiction throughout their history and therefore cannot meet the definition of a federally-recognized tribe under federal jurisdiction in 1934. Instead, the Secretary purports to root her authority to acquire lands for the Mashpees in the second definition of "Indian" under the IRA, namely: "all persons who are descendants of such

[2] *See Confederated Tribes of the Grand Ronde Community of Oregon v. Sally Jewell*, Case No. 14-5326 (D.C. Circuit).

members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."

13. The second definition of "Indian" is clear on its face. A plain reading of the unambiguous text refutes the Secretary's reading. The demonstrative adjective "such" before "members" naturally and necessarily refers to the antecedent phrase "members of any recognized tribe now under Federal jurisdiction" in category one. That reading is required by the plain language employed by Congress, and is bolstered by the canons of statutory construction, including the "last antecedent" rule. The last antecedent rule necessarily pulls in the *entire antecedent clause* (*i.e.* "members of any recognized tribe now under Federal jurisdiction") into category two.

14. A straight-forward reading of the plain text leads to only one rational conclusion: "such members" means the "members of any recognized tribe now under Federal jurisdiction."

15. The Secretary nonetheless falsely proclaims an ambiguity where none exists, and in the guise of "interpretation" offers an artificial, ungrammatical, result-oriented reading of the IRA that: (a) splits the single unitary antecedent clause into two parts; and then (b) declares, by Secretarial fiat, that "such members" (in category two) refers only to "members of any recognized tribe" (in category one)—abruptly stopping her reading before reaching the "now under Federal jurisdiction" portion of that same antecedent phrase. In doing so, the Secretary cleaves in two a single antecedent phrase without any basis in grammar rules, law, or logic.

16. The result is that the ROD completely re-writes the second definition of "Indian" in the IRA, which the ROD tellingly reformulates as follows:

> The IRA applies to "Indians," including "descendants of *[members of any recognized Indian tribe]* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.

17. The ROD's newly-minted reformulation of Section 479 (inserting within brackets a partial, incomplete quote of the antecedent phrase) excises the demonstrative adjective "such" and its natural reference to "members of any recognized tribe now under Federal jurisdiction."

18. The Secretary's unnatural and ungrammatical reading of the IRA is directly belied by (a) the IRA's legislative history; (b) contemporaneous interpretations by the Department of Interior; (c) numerous agency interpretations of the IRA's definition of "Indian" for purposes of determining who is an Indian for purposes of federal hiring preferences; (d) the Department's fee-to-trust regulations in 25 CFR Part 151 (e.g., 25 CFR § 151.2(c)(2)); and (e) positions taken by the Department of Justice and Department of the Interior in prior litigation.

19. The language of Section 479 is not ambiguous. For more than 80 years the Department and other federal agencies have correctly interpreted the IRA's second definition of "Indian" as a subset of the first category, naturally reading it as being subject to the "now under Federal jurisdiction" requirement in category one.

20. The legislative history is clear as to the purpose of the second definition of "Indian" and directly confirms the plain reading of the text. Indian Secretary John Collier, who was the principal author of the IRA and was recognized by the Supreme Court in *Carcieri* as an authority on the IRA's legislative history, issued a Department Circular in 1936 that directly addressed the definition of eligible Indians under category two of the IRA. See Circular No. 3134 (March 7, 1936). In that Circular, which Collier sent to Indian Offices around the country, the second category largely overlaps with the first category and was intended to cover only a few individuals then living, in certain unusual circumstances. Collier expressly stated "[t]here will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of a tribe …." He explained that this second definition was needed to cover

tribal members' children who were not yet enrolled members of a tribe, and other "unenrolled members residing on a reservation June 1, 1934 (Class 2)." *Id.*

21. The Secretary's reading in the ROD some 80 years later ignores both the text and context of the IRA's definition of "Indian" in 1934. The Secretary takes what Congress intended to be a closed universe of potentially eligible Indians under the second definition, limited to Indians living on federal reservations in 1934 who were descended from members of tribes then under federal jurisdiction, and converts it into an open-ended eligibility standard that any tribe can meet.

Unprecedented Reading of Indian "Reservation"

22. The Secretary's finding that the Mashpees had a "reservation" within the borders of an incorporated town laid out under Massachusetts law, and subject to state and local governance, contradicts the settled meaning of an Indian reservation used in the IRA. Under prevailing legal definitions, then and now, a tribe must exercise tribal jurisdiction over tribal lands, as stated in case law and the Department's own regulations pertaining to land acquisitions under the IRA (25 CFR Part151). The lands in the Town of Mashpee did not, and do not, meet that definition.

23. The Mashpees did not exercise tribal jurisdiction over the Town of Mashpee lands in 1934.

24. The lands in the Town of Mashpee were not set aside or superintended by the federal government at any time.

25. The non-reservation lands in the Town of Mashpee were *never* under *federal* jurisdiction.

26. The Town of Mashpee lands do not constitute a reservation under the IRA.

27. The Secretary has no authority under the IRA to take the lands into trust in Taunton (or the Town of Mashpee), because the Mashpees are not eligible under the IRA. This means the acquired lands in Taunton (and Mashpee) are not Indian lands, do not constitute an Indian reservation, and cannot serve as the Mashpees' "initial reservation" under IGRA, and therefore cannot serve as the site for a tribal casino under IGRA.

Finding of Significant Historical Connection to Taunton

28. The ROD's conclusion that Taunton lands are located within an area where the Mashpees have significant historical connections (25 CFR § 292.6) lacks support in the record. While the Mashpees maintained a consistent presence in the Town of Mashpee some fifty miles away, the ROD identifies no Mashpee connection to the 151 acres in question in Taunton, and the Mashpees offered little evidence of any connection to any lands in the surrounding area. Other tribes have claimed the Taunton lands are not and never have been Mashpee. On the record presented, the Secretary's factually unsupported conclusion in this regard is arbitrary and capricious, constitutes an abuse of discretion, and is not in accordance with the Department's prior precedents construing "historical connections."

Deference to Secretary's Unprecedented Reading

29. The Secretary's unprecedented and ungrammatical reading of the IRA is not entitled to any deference under *Chevron* principles; nor can it be salvaged by the Indian canon of construction, which provides no authority to misread the plain language of a statute.

Constitutional Non-delegation Claim

30. Separate and apart from the Secretary's misreading of the IRA, the Secretary lacks constitutional authority to take land into trust for any tribe, including the Mashpees. The

purported statutory basis for the Department's land acquisition process (25 U.S.C. § 465) violates constitutional limits on the delegation of legislative power. See U.S. Const., Art. I, § 1.

The ROD's Harmful Consequences

31. The creation of an Indian reservation—a federally-created sovereign Indian enclave in the middle of Southeastern Massachusetts—complete with a tribal resort-casino, will forever change, in a unique fashion, the character and governance of the area. It will create a tax-exempt, regulation-free zone for tribal development that will impose a host of substantial negative impacts on area residents while simultaneously taking away the ability of affected property-owners to petition their elected officials to provide meaningful mitigation through local land use and zoning laws.

32. In stark contrast to a commercial operation, the residents will have no local or state recourse to address the harmful impacts resulting from the Mashpees' casino-resort development, which include but are not limited to traffic congestion and heightened exposure to motor vehicles fumes associated with 5.3 million visitors annually (ROD at 27) resulting in more than 10,000 incoming vehicle trips each day. ROD at 33 (casino operations "will increase in daily vehicle trips on local / regional roads, resulting in additional emissions of VOC, NOx, ground-level CO2 and GHGs."). Likewise, Plaintiffs have no local or state recourse to address other negative impacts from the tribal casino-resort's operations such as the facility's 24-hour operations and associated noise and light pollution (including from outdoor lighting for safety); surface water runoff; flooding due to changes in streams, dams and other water control devices on the property; groundwater depletion and pollution impacting community water wells; and aesthetic harm in the form of grossly out-of-character, high-rise buildings located in a quiet residential area.

33. The creation of an Indian reservation in Taunton, over which the Mashpees exercise sovereign authority with the right to undertake any and all commercial and industrial activity on the land free of state and local laws, will reduce residential property values.

34. Prior to the ROD, the existing commercial site was regulated by the City of Taunton and consisted of an aesthetically unobtrusive, low-density "garden-type" industrial park, which is home to several low-rise warehouses hidden below the tree line. The warehouses and warehousing operations do not visually or otherwise intrude on the residential areas next to it. This appropriately scaled commercial use will be converted into a large destination resort-casino with high-rise towers and parking structures and lots for 6,000 vehicles, and is expected to draw more than 5 million visitors each year—all beyond state and local regulation.

35. The conversion of the industrial park to an Indian reservation will also mean the loss of tax revenue from the warehouse operations on the land. This will produce a $375,000 loss in tax revenue each year for the residents of Taunton.

36. The conversion of the City-zoned industrial park to a reservation leaves nearby residents unprotected from all development of the land, as there would be no government body—local, state or federal—with jurisdiction to address their concerns.

37. Because the casino-resort development will occur on sovereign lands under the control of the Mashpee, and not subject to state, county or local laws, Plaintiffs will be deprived of any meaningful avenue to secure mitigation of the impacts from the development of the site as a tribal casino-resort.

38. Plaintiffs each will be directly harmed by the development of the site as a tribal casino-resort including by unmitigated traffic congestion, air pollution, noise pollution, water

pollution, and light pollution, and each will bear the visual and aesthetic impacts of this major alteration in the use and occupancy of the nearby property to their economic detriment.

PARTIES AND STANDING

39. Plaintiffs are each residents of the City of Taunton and live close to the casino development site.

40. Plaintiffs David Littlefield and Michelle Littlefield reside at 192 Erin Road, East Taunton, Massachusetts.

41. Plaintiff Tracey Acord resides at 106 Sagamore Road, East Taunton, Massachusetts.

42. Plaintiffs Deborah Canary and Francis Canary, Jr. reside at 1059 Middleboro Avenue, East Taunton, Massachusetts.

43. Plaintiff Veronica Casey resides at 32 Stevens Street, East Taunton, Massachusetts.

44. Plaintiff Patricia Colbert resides at 148 Caswell Street, East Taunton, Massachusetts.

45. Plaintiffs Vivian Courcy and Will Courcy reside at 170 Seekell Street, East Taunton, Massachusetts.

46. Plaintiffs Donna DeFaria and Antonio DeFaria reside at 12 Middleboro Avenue, East Taunton, Massachusetts.

47. Plaintiffs Kim Dorsey and Kelly Dorsey reside at 44 Woodlawn Street, East Taunton, Massachusetts.

48. Plaintiffs Francis Lagace and Jill Lagace reside at 36 Stevens Street, East Taunton, Massachusetts.

49. Plaintiffs David Lewry and Kathleen Lewry reside at 54 Middleboro Avenue, East Taunton, Massachusetts.

50. Plaintiffs Michele Lewry and Richard Lewry reside at 76 Middleboro Avenue, East Taunton, Massachusetts.

51. Plaintiff Robert Lincoln resides at 66 Bluejay Lane, East Taunton, Massachusetts.

52. Plaintiff Christina McMahon resides at 158 Bluejay Lane, East Taunton, Massachusetts.

53. Plaintiff Carol Murphy resides at 66 Colonial Drive, East Taunton, Massachusetts.

54. Plaintiff Dorothy Peirce resides at 155 Cotley Street, East Taunton, Massachusetts.

55. Plaintiff David Purdy resides at 61 Silvia Farm Drive, East Taunton, Massachusetts.

56. Plaintiff Louise Silvia resides at 255 Hart Street, Taunton, Massachusetts.

57. Plaintiffs' injuries and grievances were caused, facilitated or made possible by the activities of the Defendants that form the basis of this Complaint, and will be redressed by a ruling in their favor.

58. Plaintiffs' interests fall within the zone of interests protected by the laws sought to be enforced in this action.

59. Defendant United States Department of the Interior is an agency of the United States; Sally Jewell is the Secretary of the Interior; Lawrence Roberts is the Acting Assistant Secretary – Indian Affairs. These defendants are responsible officers of the United States. Each bears responsibility for the decision to take into trust the land at issue.

JURISDICTION AND VENUE

60. Plaintiffs bring this action under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. (APA) and Article I, Section 1, of the Constitution of the United States. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1361 (federal question jurisdiction and suits to compel actions by federal agencies) and may issue declaratory relief under 28 U.S.C. §§ 2201 and 2202.

61. There currently exists an actual controversy between the parties.

62. Judicial review of the ROD is authorized by the APA, 5 U.S.C. § 701, et seq. The ROD is a final determination by the Department of the Interior.

63. Venue in this Court is proper under 28 U.S.C. §§ 1391(b)(2) and 1391(e)(2) and (3) and 5 U.S.C. § 703 because a substantial part of the events giving rise to the claims occurred in the District; the property that is the subject of the action is situated in the District; and Plaintiffs reside in the District.

FACTS

The 151 Acres in Taunton

64. The lands in Taunton have been under the governance of the Commonwealth (and its political subdivisions) since the formation of the Commonwealth and its entry into the United States in 1788.

65. Before 1788, the governing bodies respecting these same lands consisted of Colonial governments, British governors under authority of the Crown, and the Plymouth Colony.

66. Taunton was founded by settlers from England and officially incorporated as a town on September 3, 1639. Most of the town's settlers were originally from Taunton in Somerset, England, which led early settlers to name the settlement after that town.

67. No tribal body has exercised tribal governmental authority over these lands for over three hundred years.

68. Until the issuance of the ROD on September 18, 2015, the City of Taunton exercised taxing and regulatory authority over the lands, including subjecting the lands to the City's zoning and land use laws.

69. In or about 2002, the Taunton Development Corporation (TDC), a non-profit private corporation organized to promote economic development in Taunton, acquired fee title to the lands.

70. The City of Taunton zoned the Taunton lands for economic development and approved a garden-type warehouse development in 2003. The low-rise of the warehouse buildings, together with tree lines and buffers, provided visual separation between the warehouse complex and nearby homes.

71. On October 30, 2015, the TDC conveyed the subject lands to the Mashpees.

72. On November 10, 2015 the Mashpees conveyed the subject lands to the United States to be held in trust.

The 170 Acres in the Town of Mashpee

73. The Town of Mashpee was incorporated as a Town under the laws of the Commonwealth in 1870.

74. For the past 145 years the Mashpees' landholdings in the Town of Mashpee have been under the regulatory authority of the Commonwealth and its political subdivisions.

75. Unlike Taunton, the Town of Mashpee has had a significant Indian character, and constitutes the Mashpees' home, with tribal offices, historic buildings, and burial grounds located there.

76. The Mashpees' so-called "Plantation" located within the Town of Mashpee does not meet the legal definition of an Indian reservation.

77. The Town of Mashpee was founded in the 17th Century as a Christian "praying town"—a religious community for Indians—where evangelical Christians invited Indians to reside and learn about Christianity and convert to the same, and were subject to the Christian settlers' oversight.

78. The Mashpees did not exercise plenary tribal jurisdiction over the lands in the Town of Mashpee. Any purported exercise of governance by the Mashpees within the Town of Mashpee was subject to the control of Christian overseers, Colonial governments, the British Crown, and the Commonwealth.

79. The federal government never set aside any lands as a reservation for the Mashpees.

80. The federal government never superintended any lands held by the Mashpees.

81. The Mashpees have been under state jurisdiction since the United States was established.

The Mashpees' Prior Unsuccessful Lawsuits to Obtain Tribal Recognition and Recover Possession of Tribal Lands

82. A group claiming to be the "Mashpee Tribe of Indians" filed suit in federal district court in Massachusetts in 1975 seeking to recover possession of tribal lands in Southeastern Massachusetts, purportedly taken unlawfully by the Commonwealth in the 19th Century. The so-called "Mashpee Tribe of Indians" named as defendants the Town of Mashpee

and the Commonwealth. After a 40-day jury trial, with extensive testimony and written reports provided by ethno-historians concerning the history of the tribe, the jury determined the Mashpees had ceased to exist as a tribe by 1869. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 942 (D. Mass. 1978) (special interrogatory "d").

83. The federal court trial record included evidence that the Mashpees desired to become citizens of the Commonwealth, petitioned for the right to secure such status, and in fact voted to become state citizens after passage of an act on June 23, 1869, which granted "citizenship to the Indians, removing their legal disabilities, and released the restraints on alienation . . . ." *Id.*

84. The federal district court judge overseeing the trial concluded that "from all the evidence, the jury was entitled to find that tribal identity had been abandoned at some time between 1842 and 1869." *Id.* at 946.

85. The district court dismissed the related land claims which required the Mashpees to prove (among other things) that it was a tribe at that time of filing the land claim lawsuit.

86. The jury's findings and the district court's dismissal of the land claims were affirmed on appeal. *Mashpee Tribe v. Town of Mashpee,* 592 F.2d 575 (1st Cir. 1979).

87. The same group of Indians commenced a series of follow-on lawsuits also claiming to be the Mashpee Tribe, including bringing land claims against the federal government. These claims were rejected by both the district court and circuit court as improper efforts to re-litigate matters resolved against the group by the jury's finding in 1978 that they were not a tribe. *See Mashpee v. Wolff*, 542 F. Supp. 797 (D. Mass. 1982); *aff'd* 707 F.2d 23 (1st Cir. 1983); *see also Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482-483 (1st Cir. 1987) (affirming dismissal of further lawsuit by Mashpee Tribe on res judicata grounds and

holding that the other plaintiff-tribes (Christiantowns, Chappaquiddicks, Herring Ponds and Troys) lost tribal identity in late 1800s just like the Mashpees).

88. The Department of the Interior in *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d at 482, successfully invoked the defense of res judicata citing the 1978 jury determination adverse to the Mashpees' claim to be a tribe, and thereby established a complete defense to the Mashpees' land claims against the federal government.

89. The Department of the Interior's successful invocation of res judicata in *Mashpee Tribe v. Secretary of the Interior* creates an impossible conflict for the Secretary: On the one hand, the Secretary argued in this Court that the Mashpees lost their tribal identity no later than 1869 and were not a tribe in 1975, but on the other hand, the Secretary is now claiming that the Mashpees never lost their tribal identity and were properly recognized as a tribe in 2007.

90. While judicial estoppel is not typically available against the federal government, such an equitable bar should be recognized here to prevent the Secretary from taking such conflicting positions in litigation before the very same court.

The Department of the Interior's Administrative Recognition of the Mashpee Wampanoag Tribe in 2007

91. The same group of Indians who failed to prove in federal court that they were tribal Mashpees for purposes of bringing tribal claims to recover possession of tribal lands, nonetheless successfully applied for federal recognition as a tribe through the Office of Federal Acknowledgement (OFA) within the Department of the Interior. The Mashpees' administrative recognition came in 2007, after a period of agency examination by the OFA that is notable for the lack of transparency, limited opportunity for public comment, absence of a balanced presentation of evidence, rejection of settled criteria for determining tribal status, and creating a

"modern" test for tribal existence that has no bearing on what Congress intended in 1934 when it used the term "tribe" in the IRA.

92. The OFA's administrative recognition of the Mashpee Wampanoag Tribe in 2007 contradicted the expert ethno-historian who testified, on behalf of the Town of Mashpee in the 40-day trial, that the Mashpees had long ago abandoned their tribal identity—and directly contradicted the jury's express factual finding (affirmed by this Court and First Circuit) that the tribe abandoned its tribal identity in1869.

93. The Department's administrative determination recognizing the Mashpees as a tribe, issued in 2007, stands in direct conflict with the prior judicial determination that the Mashpees abandoned their tribal identity somewhere between 1842 and 1869, and were not an existing tribe in 1975 when several Mashpees filed a land claim lawsuit in this Court, as expressly determined by this Court and affirmed on appeal.

94. The Department's 2007 administrative determination addresses the Mashpees' unsuccessful federal court litigation and in essence concludes that the federal court applied different legal standards as they relate to tribal recognition. According to the Department, the administrative test set out in 25 CFR Part 83 is intended to be less restrictive and dispenses with such traditional criteria as political independence, economic autonomy, and cultural distinctiveness.

95. The administrative test adopted by the Department through its rulemaking procedures establishes a liberal threshold for recognition, which permits federal acknowledgment of tribes whose members are fully assimilated into mainstream society as measured by economic, social, political and cultural integration.

96. The Department's administrative test under 25 CFR Part 83, adopted in 1978, does not provide the controlling legal standard for determining who is a "tribe" within the meaning of the IRA; rather, it is what the Seventy-Third Congress and the Department of the Interior in 1934 understood constituted an Indian tribe, and whose members would be eligible under Section 479 of the IRA. The legislative history demonstrates that assimilated Indians who were citizens of states and adopted the clothing, education, social, economic and cultural standards of the dominant society were not intended to be brought under the IRA. The IRA was designed to help impoverished tribal Indians living on reservations provided they were members of a federally recognized tribe then under federal jurisdiction, as well as Indians who had 50% or more Indian blood (whether or not living tribally). Other Indians—including assimilated Indians living as citizens of states—were beyond the scope of the IRA according to both the drafters and adopters of that bill.

The Mashpees' 2007 Fee-to-Trust Application and Reservation Shopping

97. As soon as a group of Mashpee Indians obtained administrative recognition as a federal tribe in 2007, they submitted an application to the Department of the Interior seeking to establish an initial reservation within the meaning of IGRA to support a casino (hereafter "casino reservation").

98. The Mashpees first applied for a casino reservation in Middleboro by application dated August 20, 2007.

99. The Mashpees amended their application to switch the casino reservation to Fall River, by amended application dated July 13, 2010. That application was removed from review by the BIA in January 2012.

100. The Mashpees then reapplied for a casino reservation in Taunton on June 5, 2012.

101. In each application and amended application, the Mashpees requested that the Secretary take into trust 170 acres located in the Town of Mashpee, with each application identifying those lands as the tribe's home base where tribal offices, tribal museum, tribal Meeting House, tribal parsonage, and other tribal resources were based.

102. Middleboro is located 42 miles from the Town of Mashpee.

103. Fall River is located 53 miles from the Town of Mashpee

104. The City of Taunton is located 50 miles from the Town of Mashpee.

105. The Mashpees' serial applications show the Tribe engaging in "reservation shopping," looking for the best economic deal without any concern for what evidence might connect the tribe to any particular location.

The Record of Decision

106. On September 18, 2015, the Secretary issued the ROD setting forth her decision to take 321 acres of Mashpee-owned fee lands in trust: 151 acres in the City of Taunton and 170 acres in the Town of Mashpee.

107. The ROD purports to find in the IRA (25 U.S.C. § 465) statutory authority for the Secretary to take into trust the Mashpees' fee lands, specifically citing the second category of "Indian" under IRA Section 479—and disavowing the first definition. No such authority exists under a plain reading of the statute. The Secretary resorts to a tortured, ungrammatical reading to manufacture an ambiguity that does not exist, and then wrongly concludes that the Mashpees are eligible for land acquisitions under the IRA because the tribe's members are the descendants of Indians who lived on tribally-governed lands in the Town of Mashpee in 1934. The ROD rests on a gross misreading of the statutory language (violating the first antecedent rule) by eliminating an essential temporal restriction on who is an eligible "Indian" under the IRA for

purposes of both categories one and two—and also by treating the tribe's fee lands in the Town of Mashpee, allotted under Massachusetts law, owned by individuals living within the borders of an incorporated town created under Massachusetts law, and governed by a local town government, as an Indian "reservation" for purposes of the IRA, when those lands bear none of the indicia of an Indian reservation under the law. The Secretary's flawed interpretations of "Indian" and "reservation" under the IRA, to evade the statutory requirements explained in *Carcieri*, is unprecedented as well as ungrammatical, illogical, and contrary to law. The Secretary's resulting conclusion that she possesses authority under the IRA to take lands into trust for the benefit of the Mashpees is arbitrary, capricious, constitutes an abuse of discretion, and is not in accordance with law.

108. The ROD takes as a given that the Department's 2007 decision to recognize the Mashpee as a tribe puts an end to any question about the Mashpees' tribal status for purpose of the IRA. The Secretary does not explain in any meaningful way how the Mashpees can be viewed as a tribe under federal jurisdiction in 1934 for purposes of the IRA when they were first recognized by the OFA in 2007, and when this Court expressly determined that the Mashpees stopped being a tribe sometime between 1842 and 1869.

109. The Secretary's failure to explain (or at least to try to distinguish) the record in the federal trial, and failure to justify (or at least to attempt to explain) the Department's opposite decision in 2007, leaves these two opposite pronouncements on Mashpee tribal status in 1934—judicial and administrative—unresolved, and with judicial estoppel preventing the Secretary from contradicting the Department's prior judicial pronouncement.

110. The ROD fails to support the Department's conclusion that the Mashpees qualify as a federally recognized tribe under the IRA. The Mashpees did not meet their burden to prove

that they were tribally organized and exercised tribal jurisdiction over their lands and people in 1934, much less that they were recognized by the federal government for doing so and fell under federal jurisdiction in 1934. The ROD's conclusory administrative findings in support of tribal existence and identity in 1934—contradicted by judicial determinations by this Court that rest on contrary Secretarial contentions presented to this Court—are arbitrary and capricious, constitute an abuse of discretion, and are not in accordance with law.

FIRST CAUSE OF ACTION

(A Declaration that the Department of the Interior Lacks Statutory Authority to Take Land into Trust for the Mashpees Because the Mashpees Are Not Eligible Under the IRA)

111. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 110 as if fully set forth herein.

112. The Mashpees have been under the jurisdiction of the Commonwealth since 1788, and before that, Colonial governments.

113. The Mashpees never entered into a treaty with the federal government.

114. The Mashpees were not organized as a tribe in 1934.

115. The Mashpees abandoned their tribal identity between 1842 and 1869, as expressly determined by this Court in 1978 and affirmed by the First Circuit.

116. Whatever Mashpees (tribal or non-tribal) were living in Massachusetts in 1934, they were under state jurisdiction and not under federal jurisdiction.

117. The Mashpees were not registered as a tribe with the federal Office of Indian Affairs in 1934.

118. The federal government provided no oversight over the Mashpees' lands in Massachusetts.

119. The federal government did not consider the Mashpees eligible for benefits under the IRA in 1934, and specifically did not give the Mashpees the opportunity to organize as a tribe under the IRA in 1934.

120. The Mashpees never asked for, and never received, the right to cast a vote under the IRA, to organize as a tribe and to obtain IRA benefits.

121. Before, during and after the passage of the IRA, the Department of the Interior disclaimed federal jurisdiction over Massachusetts Indians, including the Mashpees, determining these Indians were under state jurisdiction.

122. The Mashpees' "Plantation" was not a reservation within the meaning of the IRA, inasmuch as the lands were not federally set aside or superintended.

123. The Mashpees did not reside on a reservation within the meaning of the IRA in 1934.

124. The Mashpees did not exercise tribal jurisdiction over the at-issue lands in 1934.

125. The ROD applies a legally incorrect definition of "Indian" under the IRA.

126. The ROD applies a legally incorrect definition of Indian "reservation" under the IRA.

127. The ROD applies a legally incorrect definition of "tribe" under the IRA.

128. The ROD fails to apply the Department's own definition of "reservation" contained in its fee-to-trust regulations (25 CFR Part 151) which states the requirement that the tribe must exercise tribal jurisdiction over the lands.

129. The ROD evaluated the Mashpees' fee-to-trust application under the "off-reservation" provisions under 25 CFR Part 151, which further acknowledges the Department's awareness that the lands in the Town of Mashpee do not qualify as a reservation under the IRA.

130. The Mashpees were not a federally recognized tribe under federal jurisdiction in 1934.

131. The ROD violates the Supreme Court's decision in *Carcieri*.

132. The ROD's conclusion that the Mashpees are eligible for fee-to-trust land acquisitions under the IRA is legally flawed and not in accordance with law, is arbitrary and capricious, and constitutes an abuse of discretion.

SECOND CAUSE OF ACTION

(A Declaration that the Record of Decision Is Arbitrary, Capricious, Constitutes an Abuse of Discretion, and Is Not in Accordance with Law in Concluding that the Mashpees Demonstrated a Significant Historical Connection to Taunton)

133. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 132 as if fully set forth herein.

134. Under the Secretary's regulations pertaining to gaming on newly acquired lands (25 CFR Part 292), a tribe must demonstrate a "significant historical connection" to the acquired lands before the tribe is eligible to use the land for gaming—to avoid "reservation shopping."

135. The Mashpees' application demonstrated a significant historical connection to the Town of Mashpee, 50 miles distant from the City of Taunton.

136. The Mashpees produced no evidence of a significant historical connection to the 151-acre parcel taken into trust by the Secretary in the City of Taunton.

137. The Mashpees produced no physical evidence (burial site, artifacts or other evidence) demonstrating any connection to lands located within the boundaries of the City of Taunton.

138. The ROD's conclusion that the Mashpees used lands located near Taunton for subsistence purposes rests on speculation and an improper legal standard.

139. The artifacts collected from eleven miles away in the Town of Bridgewater are ambiguous as to tribal affiliation and are insufficient to establish the Mashpees' historical use of the lands in or near Taunton, as opposed to use by other Algonquin–speaking tribes in the area.

140. In evaluating the historical connections of the Mashpees to the Taunton parcel, the ROD embraces a legally incorrect standard that relieves tribes of having to make a meaningful showing that the tribe (and not other Indians who occupied the area) had a significant historical connection to the area.

141. The ROD misrepresents the historical record as to how the Mashpees fit within the larger group of Algonquin–speaking tribes.

142. The Secretary appears to reason that since the Mashpees spoke the Algonquin language and were united with other Algonquin-speaking tribes in a larger affiliation of Algonquin-speaking Indians known as the Wampanoag, historical findings of any one tribe inure to the benefit of any other tribe within that larger group for purposes of satisfying the requirement of a significant historical connection. That approach is inconsistent with how the federal government recognizes tribes; how ethno-historians classify tribes; and how the Department has analyzed "significant historical connections" for other tribes.

143. The analysis employed in the ROD, and the conclusion reached in it with respect to the Mashpees' connection to Taunton, are unprecedented.

144. The ROD's conclusion that the Mashpees demonstrated a significant historical connection to the acquired lands in Taunton is arbitrary, capricious, constitutes an abuse of discretion, and is not in accordance with law.

THIRD CAUSE OF ACTION

(A Declaration that the Record of Decision Is Arbitrary, Capricious, Constitutes an Abuse of Discretion, and Is Contrary to Law in Concluding that the Two Physically Distant Acquisitions Represent the Mashpee's "Initial Reservation" for Purposes of the Indian Gaming Regulatory Act)

145. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 144 as if fully set forth herein.

146. The ROD declares the two physically separate trust acquisitions—151 acres in Taunton and 170 in Mashpee—as a single "initial reservation" for purposes of IGRA. That designation purports to bring both fee-to-trust acquisitions within an exception that permits Indian gaming on acquired lands notwithstanding IGRA's general prohibition against gaming on lands acquired after 1988.

147. The ROD's treatment of the two physically separate trust acquisitions as a single reservation, despite being 50 miles distant from one other, is unprecedented.

148. The ROD recites other cases where the Secretary has declared noncontiguous parcels to be a single "initial reservation" but the Secretary has done so only upon finding that both parcels fall within the boundaries of a previously recognized treaty reservation.

149. The Mashpees did not have a treaty reservation; no such reservation boundaries unite the two parcels in question here.

150. The ROD's conclusion that the two Mashpee land acquisitions, 50 miles apart, constitute a single "initial reservation" under IGRA, is arbitrary and capricious, constitutes an abuse of discretion, and is not in accordance with law.

FOURTH CAUSE OF ACTION

(A Declaration that the Record of Decision Is Arbitrary, Capricious, Constitutes an Abuse of Discretion, and Is Contrary to Law in Reaching Contradictory Findings About Whether the Mashpees Had a Reservation Before the Secretary Acquired the Subject Lands)

151. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 150 as if fully set forth herein.

152. The ROD claims the Mashpees' "Plantation" in the Town of Mashpee was a "reservation" for purposes of the IRA, but then concludes that the lands taken into trust under the ROD, including lands within the Town of Mashpee that made up the "Plantation," constitute the Mashpee's "initial reservation" under IGRA.

153. The Secretary claims the two conceptions of "reservation" are different under the two federal statutes such that the Secretary's findings do not contradict each other.

154. As a matter of historical fact, and under governing principles of Indian law, the Mashpees' landholdings in the incorporated Town of Mashpee, whether called a "plantation" or something else, never met the definition of an Indian reservation. The Mashpees did not exercise tribal jurisdiction over the lands in 1934, which were subject to the general laws of the Commonwealth, County and Town since the late 1800s.

155. The 2015 fee-to-trust acquisitions, if authorized under the IRA, would constitute the initial reservation under IGRA, because the Mashpees' lands within the Town of Mashpee never held the legal status of an Indian reservation—and specifically did not have that status in 1934. But that means the Mashpees were not living on a reservation in 1934, such that the second category of "Indian" under the IRA does not apply at all to them, since that definition requires residence on a reservation as of June 1, 1934. The Mashpees are not eligible under the IRA for that reason alone. On the other hand, if the Mashpees had a reservation in the Town of

Mashpee on June 1, 1934 under the IRA, as the Secretary claims, then the newly acquired lands cannot be their initial reservation under IGRA.

156. The ROD's "heads-I-win, tails-you-lose" analysis under the IRA is unsupported by any authority, contradicts the Department's position taken in other cases where the Secretary advocated for and applied a single definition of "reservation" under both the IRA and IGRA, and is arbitrary and capricious, constitutes an abuse of discretion, and is not in accordance with law.

FIFTH CAUSE OF ACTION

(A Declaration That 25 U.S.C. § 465 Is An Unconstitutional Delegation Of Legislative Authority)

157. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 156 as if fully set forth herein.

158. It is fundamental that Congress may not delegate its policymaking functions to an administrative agency in the absence of an "intelligible principle" that limits the agency's exercise of that authority.

159. Section 465 violates these precepts by giving the Secretary of the Interior unbounded discretion to acquire land "for the purpose of providing land for Indians." The statute contains no limiting standards. The Department's regulations, which cannot in any event provide a standard when the statute contains none, are similarly lacking in any meaningful standard. Those regulations list factors that the Secretary should consider when taking land into trust, but place no boundaries on that authority.

160. The delegation of unbounded discretion to the Department is particularly offensive to the Constitution because the Department is a federally mandated trustee of Indian lands. The lack of any statutory limits on the Secretary's discretion when deciding to take land

into trust, when considered with the Department's institutional bias in favor of Indians, creates a decision-making process that is unbalanced and unfair.

161. As a result, Section 465 is an unconstitutional delegation of legislative authority, is in violation of the separation of powers principles contained in the Constitution, and is invalid.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

1. Declaring Defendants' actions in taking the subject lands into trust to be arbitrary and capricious, to constitute an abuse of discretion, and to be in excess of the Secretary's authority, unconstitutional, and otherwise not in accordance with law;

2. Invalidating, annulling and declaring illegal the September 18, 2015 ROD which purports to: (a) acquire 151 acres of land, located in the City of Taunton, to be held in trust for the Mashpees under the IRA; and (b) declare such lands eligible for gaming as an "initial reservation" under IGRA—including expressly voiding its determinations that the land is held in trust for the Mashpees; constitutes an Indian reservation; constitutes an "initial reservation" for the Mashpees under IGRA; and is eligible for gaming under IGRA; and

3. A declaratory judgment affirmatively "unwinding" all of the steps taken by the Defendants to change the status of the lands in Taunton, including requiring the Defendants to return the declared trust land to its non-trust, fee title status prior to the issuance of the ROD, and to rescind the Secretary's reservation proclamation; rescind the Secretary's "initial reservation" determination under IGRA, and otherwise rescind all determinations and directives in the ROD respecting both how title to the land is held and what uses the land may be put to under IGRA; and

4. A declaratory judgment that the lands in Taunton are subject to state and local taxation and regulation just as they were prior to issuance of the ROD; and

5. A declaratory judgment that the statutory authority relied on by Defendants to acquire the proposed casino site violates the nondelegation doctrine; and

6. Awarding Plaintiffs their costs and disbursements, together with reasonable attorney's fees to the extent permitted by law, including, but not limited to the Equal Access to Justice Act; and

7. Granting Plaintiffs such other and further relief as this Court deems just, equitable and proper.

Dated: February 4, 2016

Respectfully submitted,

/s/ Matthew J. Frankel

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EXHIBIT

To Complaint for Declaratory and Injunctive Relief

RECORD OF DECISION

Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe

September 2015

Agency: Bureau of Indian Affairs

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

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

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

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

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

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

For Further Information Contact:

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Eastern Region Office
545 Marriott Drive, Suite 700
Nashville, Tennessee 37214

Table of Contents

Attachments

1.0 INTRODUCTION

1.1 Summary

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

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

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

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

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

[2] Consolidated and Restated Application of the Mashpee Wampanoag Tribe to Acquire 146 Acres+/- in Taunton, Massachusetts and 170 Acres+/- in Mashpee, Massachusetts for Gaming and Non-gaming Purposes Pursuant to 25 U.S.C. Section 465 & 25 C.F.R. Part 151 (June 5, 2012)[hereinafter Tribe's Restated 2012 Application] at 7, in Regional Director's Recommendation, Vol. I, on file with the Office of Indian Gaming..

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

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

The Tribe considered different locations in the region for economic development before finalizing its application for the Taunton Site. On August 30, 2007, the Tribe submitted an application requesting that 539 acres in Middleborough, Massachusetts, and 140 acres in Mashpee, Massachusetts, be acquired in trust. On July 13, 2010, the Tribe submitted an amendment requesting that the Department no longer acquire land in Middleborough and instead acquire a 300-acre parcel in Fall River, Massachusetts. On March 7, 2012, the Tribe amended its application to remove the request to take lands in trust in Fall River and add parcels in Taunton. On April 5, 2012, and April 30, 2012, the Tribe further amended its application to add additional parcels in Taunton. On June 5, 2012, the Tribe submitted a Consolidated and Restated Application. On November 7, 2012, the Tribe amended the application to add 4 additional parcels in Taunton for a total of approximately 151 acres.

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

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

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

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

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

1.2 Legal Descriptions

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

Table 1
Mashpee Parcels Proposed To Be Taken Into Trust

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

Table 2
Taunton Parcels Proposed To Be Taken Into Trust

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

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

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

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

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

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

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

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

1.4 Authorities

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

The IGRA was enacted to provide express statutory authority for the operation of tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming. Section 20 of IGRA generally prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. Such land is referred to as "newly acquired land." There are several exceptions to this general prohibition, including when lands are taken into trust as part of the "initial reservation" of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process. 25 U.S.C. § 2719(b)(1)(B). Lands taken into trust as a tribe's initial reservation are excepted from IGRA's general prohibition of gaming on newly acquired land. Congress provided this exception in order to place recently-recognized tribes on equal footing with those recognized when IGRA was enacted in 1988. The regulations found at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20.

1.5 Procedural Background

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

1.5.1 Scoping

The BIA published a Notice of Intent (NOI) to prepare an EIS in the *Federal Register* on May 31, 2012, describing the proposed action of acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation, and announcing the intent to prepare an EIS (77 Fed. Reg. 32,123 (May 31, 2012)). The NOI commenced a public comment period, open through July 2, 2012, by providing an address and deadline for comments. It also announced two public scoping meetings held on June 20 and 21, 2012, at the Taunton High School and Mashpee High School auditoriums, respectively. The comments presented at the scoping meetings supplemented the 78 comment letters that were submitted to BIA during the public comment period. A Scoping Report, titled *Mashpee Wampanoag Tribe, Fee-to-Trust Acquisition and Destination Resort Casino, Mashpee and Taunton, Massachusetts* was made available by BIA in November 2012. The Scoping Report outlined the relevant issues of public concern to be addressed in the EIS.

1.5.2 Draft EIS

On November 15, 2013, BIA published a Notice of Availability (NOA) in the *Federal Register* that provided information on local public hearings and how to request or view copies of the Draft EIS (78 Fed. Reg. 68,859 (Nov. 15, 2013)). The U.S. Environmental Protection Agency (EPA) published a Notice of Filing in the *Federal Register* on November 22, 2013, that commenced the 45-day review and comment period lasting until January 6, 2014 (78 Fed. Reg. 70,041 (Nov. 22, 2013)). The BIA voluntarily extended the comment period an additional 11 days through January 17, 2014, to allow additional review time. The BIA

sent hard copies of the Draft EIS to the government offices of the City of Taunton, Town of Mashpee, and their local libraries for public access. The BIA also sent letters describing options for obtaining and commenting on the Draft EIS to Federal, state, tribal, and local agencies, as well as all interested parties who offered comments during the scoping period. The BIA published notice of upcoming public hearings on the City of Taunton's and Town of Mashpee's municipal websites on November 15, 2013, and in two local newspapers, the *Taunton Daily Gazette* and *Cape Cod Times*, on November 16, 2013. The BIA held public hearings on December 2, 2013, and December 3, 2013, at the Mashpee High School and Taunton High School auditoriums, respectively. The 20 statements presented at the hearings supplemented the 44 comment letters that were submitted to BIA during the public comment period.

1.5.3 Final EIS

The BIA published an NOA for the Final EIS in the *Federal Register* on September 5, 2014 (79 Fed. Reg. 53,077 (Sept. 5, 2014)). The BIA also published the NOA in local and regional newspapers, including the *Taunton Daily Gazette* on September 10, 2014, and the *Cape Code Times*
on September 12, 2014. The 30-day waiting period ended on October 6, 2014. The comments and responses to each of the substantive comments received during this period that were not previously raised and responded to in the EIS process are included in **Attachment IV** of this ROD.

2.0 ANALYSIS OF ALTERNATIVES

2.1 Screening Process

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

2.2 Alternatives Sites Considered but Rejected

Route 44 Middleborough Alternative

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

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

Fall River Executive Park Alternative

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

2.3 Reasonable Alternatives Considered in Detail

Selection of the Current Site in Taunton

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

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

2.3.1 Alternative A: Preferred Alternative

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

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

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

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

2.3.2 Alternative B: Reduced Intensity I

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

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

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

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

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

2.3.3 Alternative C: Reduced Intensity II

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

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

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

2.3.4 Alternative D: No Action

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

3.0 ENVIRONMENTAL IMPACTS

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

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

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

3.1 Potential Impacts in the Town of Mashpee

3.1.1 Environmental Impacts

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

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

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

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

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

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

3.1.2 Socioeconomic Effects

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

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

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

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

3.1.3 Environmental Justice

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

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

3.1.4 Indirect and Growth Inducing Effects

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

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

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

3.1.5 Cumulative Effects

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

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

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

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

3.2 Potential Impacts in the City of Taunton

3.2.1 Transportation

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

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

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

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

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

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

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

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

3.2.3 Stormwater

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

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

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

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

3.2.4 Geology and Soils

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

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

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

3.2.5 Rare Species and Wildlife Habitat

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

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

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

3.2.6 Hazardous Materials

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

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

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

3.2.7 Water Supply

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

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

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

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

3.2.8 Wastewater

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

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

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

3.2.9 Utilities

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

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

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

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

3.2.10 Solid Waste

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

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

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

3.2.11 Air Quality

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

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

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

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

3.2.12 Greenhouse Gas Emissions

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

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

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

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

3.2.13 Cultural Resources

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

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

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

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

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

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

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

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

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

3.2.14 Noise

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

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

3.2.15 Visual

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

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

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

3.2.16 Socioeconomic Effects

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

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

Impacts:

Preferred Alternative A

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

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

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

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

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

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

Alternative B: Reduced Intensity I

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

Alternative C: Reduced Intensity II

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

Services:

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

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

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

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

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

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

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

3.2.17 Environmental Justice

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

3.2.18 Sustainability

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

3.2.19 Construction Impacts

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

3.2.20 Indirect and Growth Inducing Effects

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

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

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

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

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

3.2.21 Cumulative Effects

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

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

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

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

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

3.2.22 Unavoidable Adverse Effects

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

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

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

4.0 ENVIRONMENTALLY PREFERRED ALTERNATIVE

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

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

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

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

5.0 PREFERRED ALTERNATIVE

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

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

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

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

6.0 MITIGATION MEASURES

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

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

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

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

6.1 Transportation

Construction Impacts

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

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

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

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

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

Operational Impacts

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

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

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

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

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

G. Route 140 NB between Exits 11 and 12:

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

H. O'Connell Way/Stevens Street Improvements:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U. Stevens Street/Middleboro Avenue Improvements:

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

V. Stevens Street/Pinehill Street Improvements:

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

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

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

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

The following mitigation measures shall be implemented under Alternative B:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Direct Impacts

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

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

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

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

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

Secondary Effects

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

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

6.3 Stormwater

On-site Impacts

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

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

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

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

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

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

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

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

Off-site Impacts

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

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

6.4 Geology and Soils

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

6.5 Hazardous Materials

Risk of Encounter

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

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

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

Risk of Release

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

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

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

6.6 Water Supply

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

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

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

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

6.7 Wastewater

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

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

The following mitigation measure shall be implemented under Alternative B:

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

The following mitigation measure shall be implemented under Alternative C:

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

6.8 Utilities

Impacts to Electric Utility

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

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

Impacts to Gas Utility

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

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

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

6.9 Solid Waste

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

Construction and Demolition

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

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

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

Operation

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

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

6.10 Air Quality

Construction Impacts

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

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

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

Regional Mesoscale Emissions

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

Stationary Sources

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

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

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

6.11 Greenhouse Gas Emissions

Direct and Indirect GHG Emissions

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

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

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

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

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

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

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

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

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

H. Green roofing will provide insulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transportation-Related GHG Emissions

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

6.12 Cultural Resources

On-Site Impacts

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

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

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

Off-Site Impacts

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

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

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

6.13 Noise

Construction Impacts

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

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

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

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

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

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

Operational Impacts

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

6.14 Visual Effects

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

6.15 Socioeconomic Effects

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

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

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

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

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

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

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

6.16 Environmental Justice

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

6.17 Sustainability

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

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

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

6.18 Construction

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

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

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

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

7.0 ELIGIBILTY FOR GAMING PURSUANT TO THE INDIAN GAMING REGULATORY ACT

7.1 Introduction

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

7.2 Legal Framework

The question of whether the Mashpee and Taunton Sites qualify as the Tribe's initial reservation for gaming purposes is governed by IGRA and the Department's implementing regulations at 25 C.F.R. Part 292. We are also guided by prior Indian lands determinations made by the Department. The relevant provisions of IGRA, Part 292 and prior Indian lands determinations are outlined below.

1. The Indian Gaming Regulatory Act

The IGRA was enacted "to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming."[7] Section 20 of IGRA generally prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. Such land is referred to as "newly acquired land." There are several exceptions to this general prohibition, including when lands are taken into trust as part of the "initial reservation" of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process. 25 U.S.C. § 2719(b)(1)(B).

Lands taken into trust as a tribe's initial reservation are excepted from IGRA's general prohibition of gaming on newly acquired land. Congress provided this exception in order to place recently recognized tribes on equal footing with those recognized when IGRA was enacted in 1988.[8]

2. The Department's Part 292 Regulations

The Department's regulations at 25 C.F.R. Part 292 implement Section 20 of IGRA. The initial reservation exception, 25 C.F.R. § 292.6, allows for gaming on newly acquired lands if the following conditions are met:

(a) The tribe has been acknowledged (federally recognized) through the administrative process under Part 83 of this chapter.
(b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.
(c) The land has been proclaimed to be a reservation under 25 U.S.C. § 467 and is the first proclaimed reservation of the tribe following acknowledgment.

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[7] *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002). *See also* 25 U.S.C. § 2702(1) (stating that one purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

[8] *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003) ("Indeed, the exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.").

(d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has significant historical connections and one or more of the following modern connections to the land:

(1) The land is near where a significant number of tribal members reside; or
(2) The land is within a 25-mile radius of the tribe's headquarters or other tribal government facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or
(3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

Because the Tribe had no proclaimed reservation on the effective date of Part 292, August 25, 2008, the Tribe must meet the requirements of section 292.6(d). Under paragraph (d), three criteria must be satisfied: (1) the land must be located in the state or states where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population; (2) the land must be within an area where the tribe has significant historical connections; and (3) the tribe must demonstrate one or more modern connections to the land. Part 292 defines "significant historical connection" to mean either "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty" or the tribe has "demonstrate[d] by historical documentation the existence of the tribe's villages, burial grounds, occupancy[,] or subsistence use in the vicinity of the land."[9]

3. Prior Departmental Indian Lands Determinations

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

a. Guidiville Band of Pomo Indians Determination

In its September 1, 2011, letter to the Guidiville Band of Pomo Indians (Guidiville Band Indian lands determination), the Department considered whether the Guidiville Band established that a parcel of land located 100 miles south of the Band's Rancheria in Richmond, California, and across San Pablo Bay qualified as "restored land" pursuant to IGRA's restored land exception.[10]

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[9] *Id.* § 292.2.

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

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

Much of the Guidiville Band's historical documentation of a significant historical connection to the land relied on the common history of the Pomo-speaking Indians, a larger group of which the Guidiville Band was a subset or subgroup, who had various connections to land in the San Francisco Bay area. As this documentation was not specific to the Guidiville Band, the Department found it insufficient.[12] Further, the documentation put forward by the Guidiville Band consisted of activities concentrated heavily on the north side of San Pablo Bay, while the parcel was located on the south side. The Department found that such documentation did not establish a significant historical connection to the parcel or land in its vicinity.[13] Some of the documentation also tended only to prove a mere presence on or traverse through the land, and the Department stated that such evidence does not establish subsistence use or occupancy.[14] Last, some of the Guidiville Band's documentation related to individuals' activities, which the Department found failed to establish that the band itself established subsistence use or occupancy.[15] The Department determined that the Guidiville Band had not "provided documentation sufficient to demonstrate that its ancestors, as opposed to other Pomo Indians or Indian peoples in the area, engaged in subsistence use or occupancy upon or in the vicinity of the [parcel]."[16] Without more, the Department explained, "such vague and speculative evidence [could not] support the arguments and claims advanced in the Band's voluminous submissions."[17]

In the Guidiville Indian lands determination, the Department further defined "subsistence use" and "occupancy." It explained that "[s]ubsistence use and occupancy requires something more than a transient presence in an area."[18] It defined "subsistence" as "a means of subsisting as the

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[11] 25 C.F.R. § 292.12(b).

[12] *See, e.g.,* Guidiville Band Indian lands determination at 13 ("The Band relies on the common history of Pomo-speaking Indians . . . . It is important to note that evidence of Pomo use and occupancy does not, without more, indicate use or occupancy by this particular band of Pomo, the Guidiville Band.").

[13] *See, e.g., id.* at 14 ("[H]istorical evidence of a general connection to any land located in any of those counties is not the equivalent of documentation of the Band's own historical connection to Point Molate, or parcels in its vicinity.").

[14] *Id.* at 15 ("[E]vidence of the Band's passing through a trade route to the Pacific coast or even the north shores of San Pablo Bay does not demonstrate the Band's subsistence use or occupancy within the vicinity of the [p]arcel."); *id.* at 17 ("[E]vidence of the presence of indigenous peoples and Pomos, generally, on ranchos in the Bay Area, by itself, does not demonstrate the Band's occupancy or subsistence use on or in the vicinity of the [p]arcel.").

[15] *Id.* at 18 ("[E]vidence that individual tribal members were born at various locales in the Bay Area is not necessarily indicative of *tribal* occupation or subsistence use of a parcel located fifty miles away."); *id* at. 19 ("[R]elocation of some of the Band's members to various locales throughout the Bay Area does not equate to the Band itself establishing subsistence use or occupancy in the region apart from its Rancheria in Ukiah.")

[16] *Id.* at 19.

[17] *Id.*

[18] *Id.* at 14. Use and occupancy does not, however, require exclusive use by the tribe. 73 Fed. Reg. 29,354, 29,360 (May 20, 2008) (stating in response to a comment that the significant historical connection requirement should call

minimum (as of food and shelter) necessary to support life" and listed "sowing, tending, harvesting, gathering[,] and hunting on lands and waters" as activities that tend to show a tribe used land for subsistence purposes.[19] The Department explained that "occupancy" can be demonstrated by a tribe's "consistent presence in a region supported by the existence of dwellings, villages[,] or burial grounds."[20] These definitions were important to the Department's analysis of the significance of an aboriginal trade route.[21] The Department found that the Guidiville Band's evidence regarding its ancestors' travels to various locations to trade and interact with other peoples only to return home did not qualify as subsistence use or occupancy.[22]

b. Scotts Valley Band of Pomo Indians Determination

In its May 25, 2012, letter to the Scotts Valley Band of Pomo Indians (Scotts Valley Band Indian lands determination), the Department considered whether the Scotts Valley Band had established that parcels near Richmond, California, that were approximately 78 miles south of the Band's current tribal headquarters and located across San Pablo Bay qualified as restored land.[23] Again, the analysis emphasized whether the Scotts Valley Band had established a "significant historical connection to the land."

The Scotts Valley Band presented five categories of claimed historic subsistence use and occupancy, all of which fell short of establishing the Band's significant historical connection to the parcels. First, the Band asserted that the Ca-la-na-po, a tribe the Scotts Valley Band claimed to succeed from, were taken to work on the parcels. The Department found that the historical documentation the Band put forward was insufficient because the Band had not established with the necessary degree of certainty that it referred to the Ca-la-na-po specifically.[24] Second, the

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for historically exclusive use, the Department said such a requirement "would create too large a barrier to tribes in acquiring lands and [is] beyond the scope of the regulations and inconsistent with IGRA"); Letter from Tracie Stevens, Chairwoman of the Nat'l Indian Gaming Comm'n, U.S. Dep't of the Interior, to Russell Atterbery, Chairman, Karuk Tribe of California 12 (April 9, 2012) (finding that the applicant tribe need not show historical exclusive use in the vicinity of the parcel at issue, and noting that "IGRA's restored lands exception does not require the Karuk Tribe to demonstrate that it was the only tribe with historical connections to the area, or that the subject area was the only place where the Karuk Tribe has historical connections"), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fKaruk4912.pdf&tabid=120&mid=957.

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

[20] *Id.*

[21] *Id.* at 14–15.

[22] *Id.* at 14. The Department also found the Guidiville Band's trade route evidence insufficient to establish a significant historical connection because the Band failed to prove that the traders were in fact the ancestors of the Guidiville Band, as opposed to Pomo-speaking Indians in general. *Id.* at 15.

[23] Letter from Donald E. Laverdure, Acting Assistant Sec'y - Indian Affairs, U.S. Dep't of Interior, to Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians (May 25, 2012) [hereinafter Scotts Valley Band Indian lands determination], *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-018517.pdf.

[24] *Id.* at 9–10.

Band alleged that the Suisin Patwin, a second tribe the Band claimed to descend from, historically used and occupied land in the vicinity of the parcels. The Department found, however, that the Band had not established the Suisin Patwin Tribe was its tribal predecessor and, therefore, could not rely on its historical activities.[25] Third, the Band claimed Ca-la-na-po historic use and occupancy north of the San Pablo Bay. The Department found that such activity was not in the vicinity of the parcels.[26] The Band's fourth claimed historical connection relied on Suisin Patwin evidence, which the Department determined it could not use.[27] Last, the Band presented documentation related to individuals' relocation to the San Francisco Bay area. The Department found that such evidence did not constitute the Scotts Valley Band's relocation or a significant activity of the Band itself, that the Band had not established activity took place in the vicinity of the parcels, and that individual movement in the 1960s may not constitute a historic-era activity.[28]

The Department explicitly stated that tribes may rely on historical documentation related to activities of their tribal predecessors, stating that a "tribe's history of use and occupancy inherently includes the use and occupancy of its tribal predecessors, even if those tribes had different political structures and were known under different names."[29] The Department acknowledged that, "[d]ue to the reality that tribal names and political structures change over time, an applicant tribe is not limited to the historical sources that bear its current name."[30] However, because Part 292 requires a tribe to establish a significant historical connection to newly acquired land based on evidence of "the tribe's" historic use and occupancy, the applicant tribe must demonstrate that a particular historical reference is part of the applicant tribe's history.[31] The Department put forward two methods by which a tribe can establish the requisite nexus to a tribal predecessor: (1) through a line of political succession or (2) through significant genealogical descent.[32] Once an appropriate nexus is established, a tribe may rely on the historic use and occupancy of a predecessor tribe to establish a significant historical connection to newly acquired land.[33]

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[25] *Id.* at 11–13.

[26] *Id.* 14–17.

[27] *Id.* at 17.

[28] *Id.* at 18.

[29] *Id.* at 7.

[30] *Id.*

[31] *Id.* at 7–8.

[32] *Id.* at 8. In the Scotts Valley Band Indian lands determination, the Department found that the Band could not claim succession from the Suisin Patwin based on significant genealogical descent alone because of the Band's "countervailing evidence of political succession" from the Ca-la-na-po. *Id.* at 11–12. The Department explained that, in situations where a tribe politically succeeds from a tribal predecessor, the tribe must provide more than evidence of significant genealogical descent to claim succession from a second tribal predecessor, stating "there [was] no evidence in the record to suggest that the marriage of [an individual the Band claimed was Suisin Patwin] into the Ca-la-na-po Band created any political union between the Ca-la-na-po and the Suisin Patwin, or that the two tribes combined." *Id.* at 11.

[33] *Id.* at 8.

In the Scotts Valley Indian lands determination, the Department further defined "vicinity" for purposes of establishing that direct evidence of historic use and occupancy is within the vicinity of newly acquired land. It explained that Part 292's inclusion of the word "vicinity" "permit[s] a finding of restored land on parcels where a tribe lacks any direct evidence of actual use or ownership of the parcel itself, but where the particular location and circumstances of available direct evidence on other lands cause a natural inference that the tribe historically used or occupied the subject parcel as well."[34] The Department explained that "whether a particular site with direct evidence of historic use or occupancy is within the vicinity of newly acquired land depends on the nature of the tribe's historic use and occupancy, and whether those circumstances lead to the natural inference that the tribe also used or occupied the newly acquired land."[35] The Department stated that this analysis is fact-intensive and will vary based on the unique history and circumstances of any particular tribe.[36] As the Scotts Valley Band's evidence indicated that the Band worked on ranchos located opposite a large body of water from the parcels in question, and the Band did not present evidence that its ancestors traversed the bay for subsistence use and occupancy purposes, the evidence of rancho work was not within the vicinity of the parcels.[37]

7.3 Initial Reservation Analysis

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

7.3.1 Section 292.6(a): Federal Acknowledgment

When applying the criteria of the initial reservation exception, we first determine whether a tribe was acknowledged through the administrative process prescribed in 25 C.F.R. Part 83.[39] Part 83 establishes the procedures by which groups may seek Federal acknowledgment as Indian tribes entitled to government-to-government relationships with the United States.[40]

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[34] *Id.* at 15.

[35] *Id.*

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

[37] *Id.* at 16–17.

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

[39] 25 C.F.R. § 292.6(a). The Department recently published amended federal acknowledgment regulations on June 29, 2105, that amended the administrative process of 25 C.F.R. Part 83. The Department issued its final acknowledgement decision for the Tribe in 2007 pursuant to the previous version of the regulations in place at that time. The amended regulations can be viewed at: http://bia.gov/WhoWeAre/AS-IA/ORM/83revise/index.htm.

[40] *Id.* §§ 83.1–83.13.

The Tribe achieved federal acknowledgment in 2007. The Department, through the Assistant Secretary, published a Proposed Finding regarding the Tribe's petition on April 6, 2006,[41] and a Final Determination on February 17, 2007.[42] The Assistant Secretary – Indian Affairs, based on a review by the Office of Federal Acknowledgment (OFA), concluded that the Tribe had satisfied all the required Federal criteria for acknowledgement. On May 23, 2007, the Tribe's acknowledgment became effective.

The OFA, formerly called the Branch of Acknowledgment and Research, conducted an in-depth review of the Tribe's history utilizing historians, anthropologists, and genealogists and issued its conclusions. The findings contained in the OFA materials, accepted and relied on by the Assistant Secretary – Indian Affairs, are entitled to deference.[43] In reviewing the Department's determinations concerning Federal recognition of tribes, courts commonly defer to the Department's expertise on tribal recognition and associated issues. As explained by the D.C. Circuit Court of Appeals in *James v. United States Department of Health and Human Services*:

> The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition . . . . [T]he Department has been implementing its regulations for eight years and, as noted, it employs experts in the fields of history, anthropology[,] and genealogy [sic], to aid in determining tribal recognition.
>
> This . . . weighs in favor of giving deference to the agency by providing it with the opportunity to apply its expertise.[44]

We rely on the Department's findings from the acknowledgment process in making our findings about whether the Mashpee and Taunton Sites are located within an area where the Tribe has significant historical connections.

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

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

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

[43] *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000) (applying the highly deferential *Chevron* standard to the Department's final determination regarding acknowledgment).

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

7.3.2 Section 292.6(b): No Gaming Facility under the Restored Land Exception

Section 292.6(b) requires that a tribe has no gaming facility on newly acquired lands under the restored land exception.[45] The Tribe satisfies section 292.6(b) because it has no trust land and no gaming operation and, therefore, no gaming facility authorized under the restored land exception.

7.3.3 Section 292.6(c): First Proclaimed Reservation

Under Section 292.6(c), the particular land at issue must be proclaimed a reservation under section 7 of the IRA, and must be the first proclaimed reservation of the tribe following its federal acknowledgment.[46] Section 7 provides:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.[47]

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

7.3.4 Section 292.6(d): Requirements for Tribes with No Proclaimed Reservation

Since the Tribe had no proclaimed reservation on the effective date of Part 292, August 25, 2008, we must apply Section 292.6(d). In order to meet the requirements set forth under subparagraph (d), three criteria must be satisfied: (1) the land must be located in the state or states where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population; (2) the land must be within an area where the tribe has significant historical connections; and

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[45] 25 C.F.R. § 292.6(b).

[46] *Id.* § 292.6(c).

[47] 25 U.S.C. § 467.

[48] The Department found in the Nottawaseppi Indian lands opinion that noncontiguous parcels could qualify as a tribe's initial reservation for purposes of IGRA. Memorandum from Acting Associate Solicitor of the Division of Indian Affairs, U.S. Dep't of Interior, to Reg'l Dir. of the Midwest Reg'l Office, Bureau of Indian Affairs, U.S. Department of Interior 3 (Dec. 13, 2000), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f33_nottawaseppihuronpotawatomibnd.pdf&tabid=120&mid=957.

[49] 25 C.F.R. § 151.11.

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

1. Section 292.6(d): In-State Requirement

Section 292.6(d) requires that a tribe demonstrate its newly acquired land is located within the state or states where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population.[51] The Taunton Site is located in Bristol County, Massachusetts, and the Mashpee Sites are located in Barnstable County, Massachusetts. The Tribe's headquarters is located in Mashpee, Massachusetts. Therefore, the Tribe's governmental presence is located in the same state as the parcels.

The Tribe has 2,647 members.[52] Of these, 65 percent live within Massachusetts, 40 percent live in Mashpee where tribal headquarters are located, and over 60 percent live within 50 miles of the Taunton parcel.[53] Therefore, a large portion of the Tribe's population is located in the same state as the parcels. Accordingly, the Tribe satisfies the in-state requirement of Section 292.6(d).

2. Section 292.6(d): Significant Historical Connection

Section 292.6(d) requires that a tribe demonstrate its newly acquired land is "within an area where the tribe has significant historical connections."[54] Part 292 defines "significant historical connection" to mean either: (1) "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty" or (2) the tribe has "demonstrate[d] by historical documentation the existence of the tribe's villages, burial grounds, occupancy[,] or subsistence use in the vicinity of the land."[55]

The first method for establishing a significant historical connection is to show that such land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty. Neither the Taunton nor Mashpee Sites are located within the Tribe's last reservation under a ratified or unratified treaty. Therefore, this provision is unavailable to the Tribe, and the Tribe may not establish a significant historical connection using the last reservation method.

We find, however, that the Tribe has established that the Mashpee and Taunton Sites are within an area where the Tribe has significant historical connections pursuant to the second method for finding a significant historical connection: the use or occupancy method.

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[50] *Id.* § 292.6(d).

[51] *Id.*

[52] Regional Director's Recommendation at 7.

[53] *Id.*

[54] 25 C.F.R. § 292.6(d).

[55] *Id.* § 292.2.

a. The Wampanoag have a long history in southeastern Massachusetts

European Contact

The Wampanoag, who were previously known as the Pokanoket, have a long history in southeastern Massachusetts reaching back before European contact in the early 17th century.[56] At the time of contact, the Pokanoket people were organized into a coalition of loosely confederated chiefdoms, or "sachemdoms," each with its own subordinate leader, a "sachem," but recognizing a wider allegiance to the supreme or paramount sachem, the massasoit.[57] In the early 17th century, the massasoit was the great sachem Ousamequin, who was often referred to simply as Massasoit.[58] The region around current-day Taunton was under the direct control of Massasoit.[59] The Mashpee area had a number of its own sachems.[60]

At the time of European contact, the Pokanoket territory stretched widely. Salwen notes:

> About 1620, the Pokanoket comprised a group of allied villages in eastern Rhode Island and in southeastern Massachusetts, south of Marshfield and Brocton …

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[56] Scholar Bert Salwen noted:

> Pakanokick, as first published in 1616 by John Smith . . . , refers, narrowly, to the village of the chief sachem Massasoit, near Bristol. Rhode Island. . . . In this context, it is sometimes used interchangeably with Sowaams . . . , though this term refers, more precisely, to Massasoit's home district on the east side of Narragansett Bay. However, by the last half of the seventeenth century, English writers had expanded the meaning of the name to include all the territory allied under the leadership of Massasoit and his successors.

Bert Salwen, *Indians of Southern New England and Long Island: Early Period, in* 15 HANDBOOK OF NORTH AMERICAN INDIANS 160, 175 (1978) [hereinafter Salwen 1978].

[57] The OFA Proposed Finding at 32 ("During the 1620s, the Wampanoag of southeastern Massachusetts on Cape Cod along Nantucket Sound, called 'South Sea Indians' by the Pilgrims and Puritans, had a number of local leaders, or sachems, in charge of one or more villages joined in a loose alliance under one chief sachem."). *See also* OFA Final Determination at 18 ("[A] hereditary sachem provided leadership among the Wampanoag from the 1620s to the 1660s.").

[58] *See* Susan G. Gibson, Burr's Hill: A 17th century Wampanoag Burial Ground in Warren, Rhode Island 9 (1980) (discussing "the Wampanoag sachem Ousamequin, known to the Pilgrims as Massasoit") [hereinafter Gibson 1980]. *See also* Salwen 1978 at 171 (referring to "the chief sachem, Massasoit" and recognizing that he appeared to have had "considerable personal authority"); *see also* Warren F. Gookin, *Massasoit's Domain: Is "Wampanoag" the Correct Designation?"* 20 BULL. OF THE MASS. ARCHAEOLOGICAL SOC'Y (1), 13 (1958) ("…Massasoit was not only the great chief of his Sachemship, Pokanoket, but was also the head of an extensive confederacy.") [hereinafter Gookin] .

[59] *See* Maurice Robbins, *Historical Approach to Titicut*, 11 BULL. OF THE MASS. ARCHAEOLOGICAL SOC'Y (3), 53–58 (1950) (detailing the series of land cessions made by Massasoit in the region, including the cession of Cohannet) [hereinafter Robbins 1950]; *see generally* Frank G. Speck *Territorial Subdivisions and Boundaries of the Wampanoag* INDIAN NOTES AN MONOGRAPHS NO. 44, 53 – 58 (1928) [hereinafter Speck] for discussion of lands deeded by Massasoit and his son and locations of residences of Massasoit and his two sons.

[60] *See* OFA Proposed Finding at 32 (noting that the praying town of Mashpee was established after the acquisition of 25-square miles of tribal land in Mashpee from two local Wampanoag sachems, Wequish and Tookenchosen).

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

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

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[61] Salwen at 171 and citing Gookin (1972); Salwen map; *see also* Eulalie Bonar, The Burr's Hill Collection: Research Report at 7 (Feb. 14, 1995) (prepared for the National Museum of the American Indian) [hereinafter NMAI Report]. Salwen also notes that Swanton (1952), following Speck (1928), assigns the Cape Cod subgroups a separate "Nauset" tribal identity, which he states "may in reality, reflect only the post colonization situation." Salwen at 176. Salwen later notes that "[a]mong anthropologists, Frank G. Speck has made outstanding contributions to the study of southern New England Indians as they lived in the nineteenth and early twentieth centuries. However, Speck's efforts to reconstruct precontact social structure and territorial boundaries were strongly influenced by his conviction that precontact political unites were quite rigidly organized "feudal tribes and his belief that Indian land 'ownership' as expressed in early colonial land deeds truly reflects the aboriginal pattern; both views are no longer universally accepted." *Id.*

[62] Christine Grabowski wrote extensively on the history of the Mashpee Tribe, its relation to historic Pokanoket territory, and its historical connections to the Mashpee and Taunton Sites in three reports prepared on behalf of the Tribe. *See* Christine Grabowski, The Mashpee Wampanoag Tribe's Historical Ties to Fall River, Massachusetts Area (July 13, 2010) [hereinafter Grabowski 2010]; Christine Grabowski, Indian Land Tenure in Middleborough, Massachusetts (Jan. 25, 2008) [hereinafter Grabowski 2008]; Christine Grabowski, Mashpee Wampanoag Tribal Identity in Ethno-historical Perspective (Aug. 27, 2007) [hereinafter Grabowski 2007].

[63] Salwen 1978 at 171–72.

[64] *See id.*

[65] *Id.* at 171 ("[C]rosscultural misunderstandings often resulted in conflict before the European explorers departed."). The Wampanoag Tisquantum, or Squanto, who was instrumental in assisting the Pilgrims upon their arrival, was able to speak to them in English because he had been enslaved in England. Maurice Robbins, *The Rescue of Tisquantum along the Nemasket-Plimouth Path, in* A SERIES OF PATHWAYS TO THE PAST 1, 1-2 (1984) [hereinafter Robbins 1984].

[66] Salwen 1978 at 171.

[67] Robbins 1950 at 50.

[68] *Id.* It has been suggested that Massasoit, whose population had been decimated by disease and whose territorial boundaries were under threat from the Narragansett Tribe that lived on the western shore of Narragansett Bay, established friendly relations with the Pilgrims as a politically astute defensive move. *See id.*; Robbins 1950 at 67 (discussing Massasoit's intentions in allying himself with the English).

Between 1621 and 1670, Massasoit and one of his sons, Wamsutta (Alexander), sold or gave large tracts of land in what is now Bristol, Barnstable, and Plymouth counties to the Plymouth settlers.[69] At the location of current-day Taunton, Massasoit conveyed lands in the Pokanoket village of Cohannet through a series of deeds.[70] Numerous conveyances followed, and the English settlers rapidly began to occupy the region and displace Pokanoket people to other regions of Pokanoket territory.[71]

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

King Philip's War

Following Massasoit's death around 1660, his son Metacom, also known as King Philip, was increasingly angered by the usurpation of his people's rights. In 1675 and 1676, Metacom united tribes in New England in a war against the colonists, an effort that is referred to as King Philip's War.[74] Metacom's efforts were unsuccessful and resulted in Metacom's death and large losses of life among the Pokanoket.[75]

After the war, most of the mainland Pokanoket were dispersed, while others were either sold into slavery in the West Indies or into local servitude.[76] The Mashpee praying town, which had already been organized in 1665, and other Pokanoket communities that had already converted to Christianity did not join Metacom against the English.[77]

It was during this time period that the Pokanoket began to coalesce into a number of settlements in old Pokanoket territory and came to be known more generally as the Wampanoag.[78] These

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

[70] Robbins 1950 at 54-55

[71] Robbins 1950 at 53–57; *see also* Laurie Weinstein, *"We're Still Living on our Traditional Homeland": The Wampanoag Legacy in New England, in* STRATEGIES FOR SURVIVAL: THE WAMPANOAG IN NEW ENGLAND 87(1997) [hereinafter Weinstein 1997] at 87; the OFA findings also note how the arrival of English settlers and the resulting disease and war quickly reduced the Wampanoag settlements' populations. OFA Proposed Finding at 32.

[72] Robbins 1950 at 52–53.

[73] *Id.* at 52–53.

[74] Salwen at 172.

[75] *Id.*

[76] Weinstein at 87.

[77] The OFA Proposed Finding at 92.

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

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

b. The Pokanoket nation/ Wampanoag coalition of confederated chiefdoms is the Mashpee Tribe's tribal predecessor

While a tribe must use history that is its own to establish a significant historical connection to newly acquired land, it may rely on the historical documentation of its tribal predecessors.[80] There are two methods by which a tribe can establish the requisite nexus to a tribal predecessor: (1) through a line of political succession or (2) through significant genealogical descent.[81] Once an appropriate nexus is established, a tribe may rely on the historic use and occupancy of a predecessor tribe to establish a significant historical connection to newly acquired land.[82]

The Tribe succeeds politically from the Pokanoket nation/Wampanoag coalition of confederated chiefdoms sufficient to establish the requisite nexus to qualify the Pokanoket/Wampanoag as the Tribe's tribal predecessor for purposes of establishing a significant historical connection. In the Guidiville Indian lands determination, the Department stated that the Guidiville Band's reliance "on the common history of Pomo-speaking Indians" rather than band-specific evidence was insufficient for establishing a significant historical connection to the Band's parcel.[83] The Mashpee Tribe's relationship with the Pokanoket/Wampanoag is different and distinguishable from the Guidiville Band's relationship with the Pomo. The Pomo were a language or dialect group not tied together as a sovereign political entity, whereas the Pokanoket/Wampanoag were organized into a coalition of loosely confederated chiefdoms, or "sachemdoms," each with its own subordinate leader, a "sachem," but recognizing a wider allegiance to the supreme or paramount sachem, the massasoit.[84] Further, Massasoit and his sons, Wamsutta (Alexander) and Metacom (Philip), provided unified leadership for the Wampanoag/Pokanoket during the important period in time when tribes were dealing with colonist encroachment on land.[85] Because the Pokanoket/Wampanoag were a single sovereign political entity from which the Mashpee Tribe is able to succeed politically, the Mashpee Tribe's situation is different than that of the Guidiville Band's.

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[79] OFA Proposed Finding at 32.

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

[81] *Id.* at 8.

[82] *Id.* at 8.

[83] Guidiville Band Indian lands determination at 13.

[84] The OFA Proposed Finding at 32 ("During the 1620s, the Wampanoag of southeastern Massachusetts on Cape Cod along Nantucket Sound, called 'South Sea Indians' by the Pilgrims and Puritans, had a number of local leaders, or sachems, in charge of one or more villages joined in a loose alliance under one chief sachem."). *See also* OFA Final Determination at 18 ("[A] hereditary sachem provided leadership among the Wampanoag from the 1620s to the 1660s.").

[85] *See generally* Robbins 1950 (discussing Massasoit's relations with the English and subsequent land cessions); Salwen at 171 (noting that Massasoit appeared to have "considerable personal authority, and in spite of occasional threats from individual sachems, the peace was maintained until his death.").

The Tribe also significantly descends genealogically from the Pokanoket/Wampanoag, unlike the Guidiville Band from the Pomo. Despite the fact that Mashpee became a praying town in 1665, creating the environment for formation of the historical Mashpee tribe defined by the 1861 Earle Report,[86] many displaced Pokanoket/Wampanoag continued to join the Mashpee community.[87] Following King Philip's War, the diminishment of Pokanoket/Wampanoag territory, and the dispersal and enslavement of most of the mainland Pokanoket/Wampanoag, Mashpee became a place of refuge for Pokanoket/Wampanoag people generally.[88] Scholar Laurie Weinstein, noted with favor in the OFA findings, stated:

> The Cape and island-dwelling Indians were left relatively unscathed since these areas were on the periphery of the battles . . . . The Cape, particularly the Mashpee area, became both a 'dumping ground' and a refuge area for the Wampanoag during and after King Philip's War. Indians who had surrendered to the English were moved to Mashpee and [nearby] Sandwich.[89]

The OFA materials discuss at length the continuation of Pokanoket/Wampanoag traditions and culture from contact into the 20th century.[90] Weinstein noted that "Mashpee's significance as a cultural center for many of the Wampanoag grew throughout the centuries."[91] The influx of displaced Pokanoket/Wampanoag people to Mashpee provides a significant genealogical link to the wider Pokanoket nation/Wampanoag coalition of confederated chiefdoms.

There are, however, differing views regarding whether the Pokanoket/Wampanoag is a tribal predecessor of the Mashpee Tribe for purposes of establishing a significant historical connection.

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[86] The OFA Final Determination at 28 (finding that almost all of the Mashpee Tribe's citizens descend genealogically from the historical tribe known as "the Wampanoag Indians residing at Mashpee, Barnstable County, Massachusetts, at the time of first sustained historical contact in the 1620s," as defined by the 1861 Earle Report).

[87] The OFA Proposed Finding at 94 ("Diseases brought by the English colonists early in the 17th century and war killed many [Cape Cod] leaders and the inhabitants of their communities. As their numbers dwindled, the Wampanoags in southeastern Massachusetts on Cape Cod … lost land to the newcomers, although the area around the town of Mashpee remained a center of tribal activity.").

[88] The OFA Proposed Finding at 33 ("after King Philip's War in the early 1670s, some other Wampanoag Indians and a few Narragansett and long Island Indians were also absorbed into the town."); *see also* Weinstein at 87 ("Most of the mainland Wampanoag were dispersed; others were either sold into slavery in the West Indies or into local servitude.").

[89] Weinstein 1997 at 87.

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

[91] Weinstein 1997 at 87.

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

We will first address the Lynch report's assertion that the ancestors of the Mashpee Tribe were not Wampanoag. In his report, Lynch claimed that "Wampanoag" was first used in an historical/political sense to identify those Pokanoket bands and tribes who allied themselves with Metacom against the English in King Philip's War.[94] As the Mashpee, already organized into a praying town, did not join Metacom, Lynch concluded that the Mashpee were not Wampanoag.[95] He provided minimal references to support his conclusion that the Wampanoag were limited to those Pokanoket bands that joined Metacom. One such reference is a vague statement written in 1676. Lynch in his report stated:

> Increase Mather (1676) wrote the following,
>
> > . . . Especially that there have been jealousies concerning the Narragansetts and Womponoags . . . . Now it appears that Squaw-Sachem of Pocasset her men were conjoined with the Wompanoags (that is Philips men) in this rebellion . . . . But when the time prefixed for the surrendry of the Womponoags and Squaw-Sachems Indians had lapsed, they pretended that they could not do as the had ingaged . . . .
>
> We see on the basis of a contemporaneous observation (1676) that the application of Wampanoag had expanded beyond Pokanoket to include all Indians who joined King Philip [one name for Metacom] in his war.[96]

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

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

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

[93] Letter from Lesley S. Rich, to Kevin K. Washburn Assistant Secretary – Indian Affairs, and Franklin Keel, Regional Director, Eastern Region, *submitting* James Lynch, "The Mashpee Tribe of Cape Cod and the Aquinnah Tribe of Martha's Vineyard, Massachusetts and their Historical Claims to Lands within Southeastern Massachusetts: An Ethnohistorical Evaluation of the Tribe's Claims" (2012) [hereinafter Lynch Report]. .

[94] Lynch Report at 39-41.

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

[96] *Id.* at 40.

[97] Lynch Report at 9 ("The Pokanoket tribe, as the historical facts will demonstrate, is the historic 'Wampanoag' tribe who demonstrable maintained and exclusive historic land occupation are in southeastern Massachusetts that they occupied, utilized, and over which asserted tribal political control prior to the time of first sustained contact with Europeans, which extended from the base of Cape Cod to Narragansett Bay." Citing Salwen map 1).

King Philip's War and coincides with declining use of the name Pokanoket.[98] The record does not show, however, that the Pokanoket and the Wampanoag became two different tribes that occupied two different territories or that the Wampanoag name was applied only to groups that fought with Metacom against the English. The record indicates that, after King Philip's War, the Pokanoket began to coalesce into a number of settlements in old Pokanoket territory and came to be known more generally as the Wampanoag people.[99] Therefore, we conclude that the Wampanoag encompass more than those Pokanoket who fought for Metacom and that Wampanoag is a later-used name for the Pokanoket. Therefore, the Mashpee Tribe can rely on historical documentation referencing both the Pokanoket and the Wampanoag.

Next we will address the Lynch report's argument that Mashpee was a distinct Christian community rather than a Pokanoket/Wampanoag community.[100] Mashpee's adoption of Christian characteristics at the urging of the English in no way diminishes its ability to rely on the historical documentation of its tribal predecessor, the Pokanoket/Wampanoag. Further, the adoption of Christianity by Mashpee does not lead to the conclusion that the Pokanoket/Wampanoag people of Mashpee no longer shared a cultural connection with the larger Pokanoket/Wampanoag culture. In fact, the OFA materials discuss at length the continuation of Pokanoket/Wampanoag traditions and culture from the 17th century into the 20th century.[101] Mashpee's ability to maintain its relative independence enabled it to survive and thrive, while other Pokanoket/Wampanoag praying towns vanished. Because of its survival, Mashpee was able to maintain its Pokanoket/Wampanoag culture into the present.

c. The Taunton parcel is located within an area where the Tribe has significant historical connections

Burial Grounds

Significant cultural and archeological evidence of the Mashpee Tribe's historical use and occupancy exists in the vicinity of the Taunton parcel, establishing that the Taunton parcel is located within an area where the Tribe has significant historical connections. Recent

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

[99] Gookin reports that, "The earliest mention of "the Wampanoag" that I have been able to find …, is in Cotton Mathers' *Magnalia*, published in London in 1702." At 14. Gookin then speculates that, "… it seems likely that 'Wampanoag' could have been chosen by Philip as the name of the new pan-Indian nation which he hoped to form." *Id.*

[100] Lynch Report at 77 ("The initial Mashpee Christian population, as did many other Indians residing upon Cape Cod, shed their previous ideology and adopted that of the Christian colonists. They were groups of converts scattered, as noted earlier, amongst villages throughout the area, including the village of Mashpee and those surrounding it. They were not an historic tribe, merely family groups and individuals under the Reverend Bourne's tutelage who, having shed their traditional tribal relations, adopted a new ideology as a means of adapting to, or accommodating the socio-cultural changes occurring around them.").

[101] *See e.g.,* The OFA Proposed Finding at 28 (citing Weinstein for the importance of Mashpee and its "growing importance as a 'cultural center' for the Wampanoag from the colonial era to the 1980s); at 21 - 30 (citing numerous sources for continuation of continuous existence of Mashpee on a substantially continuous basis since 1990).

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

The National Park Service (NPS), in its designated role under NAGPRA, issued a Notice in 1995 in the *Federal Register* stating that a detailed inventory and assessment of human remains had been conducted of artifacts from the historic Wampanoag Titicut site in Bridgewater, located just 11 miles from the Taunton parcel.[103] The Notice stated that the Titicut Site is believed to have been occupied for several thousand years prior to European contact and is located within the aboriginal territory of the Wampanoag at the time of European contact:

> A detailed inventory and assessment of these human remains has been made by the Robert S. Peabody Museum of Archeology. Human remains of one individual, a ten to twelve year old female, were recovered in 1947 from the Titicut site. This site is believed to have been occupied for several thousand years prior to European Contact. The human remains were recovered with glass and shell beads, a felsite biface, an iron axe, awl, and knife handle, a large ceramic vessel, several antler spoons and hafts, and several whelk shells. The burial can be dated between 1600 and 1620, based on the European trade items recovered with the individual. This site is located within the aboriginal territory of the Wampanoag Tribe at the time of European contact.[104]

The NPS concluded that the Wampanoag people in Mashpee should be the recipient of the remains:

> Based on the available archeological and ethnohistorical evidence, as well as the geographical and oral tradition of the Wampanoag people, officials of the [Peabody Museum] have determined that pursuant to [NAGPRA], there is a relationship of shared group identity which can be reasonably traced between these human remains and associated funerary objects from the Titicut Site and the Wampanoag people. The nearest group of identifiable Wampanoag people are located in Mashpee, MA. The Federally recognized Gay Head Wampanoag concur that Mashpee is the closest community of Wampanoag people to be identified with the Titicut Site. However, the Mashpee Wampanoag are not recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[105]

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[102] 25 U.S.C. §§ 3001–3013. NAGPRA establishes rights of tribes and their lineal descendents to obtain repatriation of certain human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal agencies and museums owned or funded by the federal government. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 20.02[1][a] (2012).

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

[104] *Id.*

[105] *Id.*

Only federally recognized tribes were entitled to claims for repatriation, making the Mashpee Tribe ineligible for receipt of the items.[106] The Aquinnah Tribe was the only federally recognized tribe in Massachusetts. In a letter to the Department, the Aquinnah Tribe wrote: "[T]hese so called 'culturally unidentifiable' remains [should] be acknowledged for what they are, as culturally affiliated with the Mashpee Wampanoag Tribe."[107]

According to the definition of "occupancy," the Department put forth in the Guidiville Band Indian lands determination,[108] historical documentation of the burial ground at the Titicut site evidences the Mashpee Tribe's historical occupation of the land. Further, relying on the Department's definition of "vicinity" outlined in the Scotts Valley Band Indian lands determination,[109] the direct evidence of historical use and occupancy at the Titicut site is within the vicinity of the Taunton parcel. Unlike the Scotts Valley Band's direct evidence, which dealt with Rancho work located on the opposite side of a body of water,[110] the Mashpee Tribe's evidence leads to the natural inference that the Mashpee Tribe also used and occupied the Taunton parcel located only 11 miles away. Last, although the Mashpee Tribe could rely on historical documentation related to more general Wampanoag use and occupancy, it is helpful that the NPS and Aquinnah Tribe agreed the remains belonged specifically to the Mashpee Tribe. Therefore, the NPS finding provides conclusive archeological evidence of the Mashpee Tribe's historic use and occupancy of land within the vicinity of the Taunton parcel, indicating that the Taunton parcel is located within an area where the Tribe has significant historical connections.

In addition to items found in Titicut, numerous cultural items have been found at Burr's Hill, near Warren, Rhode Island, and approximately 20 miles from the Taunton parcel.[111] Gibson

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[106] Subsequently, the Wampanoag Confederation was formed in 1996 by tribes in Massachusetts to specifically address repatriation issues of the non-federally recognized tribes. It included the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts, the Assonet Band of the Wampanoag Nation (a non-federally recognized Indian group), and the Mashpee Wampanoag Indian Tribe. *See* Wampanoag Confederation Repatriation Project: Information Packet (September 16, 1997). Following formation of the confederation, NAGRPA notices identified the Wampanoag Confederation as the proper recipient for repatriated items. For example, a notice for cultural items retrieved in Bridgewater, near Taunton, read:

> Oral tradition and historical documentation indicate that Bridgewater, MA, is within the aboriginal and historic homeland of the Wampanoag Nation. The present-day Indian tribe and groups that are most closely affiliated with the Wampanoag Nation are the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts, Assonet Band of the Wampanoag Nation (a non-federally recognized Indian group), and Mashpee Wampanoag Indian Tribe (a non-federally recognized Indian group).

71 Fed. Reg. 70,981, 70,981–82 (Dec. 7, 2006).

[107] Letter from Matthew J. Vanderhoop, Natural Res. Dir., Wampanoag Tribe of Gay Head (Aquinnah), to Timothy McKeown, U.S. Dep't of Interior, Nat'l Park Serv. (Nov. 3, 1994).

[108] Guidiville Band Indian lands determination at 14.

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

[110] *Id.* at 16–17.

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

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

> Burr's Hill is believed to be located on the southern border of Sowams, a Wampanoag village. Sowams is identified in historic documents of the 17th and 18th centuries as a Wampanoag village, and was ceded to the English in 1653 by Massasoit and his eldest son Wamsutta (Alexander). Based on the presence of European trade goods and types of cultural items, these cultural items have been dated to A.D. 1600-1710.[113]

A 1995 report prepared by the Office of Repatriation within the National Museum of the American Indian, which is part of the Smithsonian Institution, discussed the appropriate recipients for the Burr's Hill cultural items.[114] The report cited discussions with a representative of the Haffenreffer Museum of Anthropology who believed that the Mashpee Tribe was the likely claimant of the Burr's Hill materials.[115] The Office of Repatriation's report recommended repatriation to the Mashpee Tribe for reasons of geographical proximity and the community's importance to the Wampanoag Nation as a cultural center.[116]

In addition to the items at the Titicut and Burr's Hill sites, there are numerous other cultural items linked to the Mashpee tribe that have been recovered in the surrounding area of the Taunton parcel. These items have been found in Fall River, located 20 miles from the Taunton parcel, and in the town of Swansea, Bristol County, located 14 miles from the Taunton parcel.[117] In these cases, NPS found that there was a relationship of shared group identity that could be

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[112] *Id.* at 9;

[113] 65 Fed. Reg. 50,001 (Aug. 16, 2000) (listing a small, double-layered textile fragment as the cultural item to be repatriated in this notice). This notice stated that officials of the Robert S. Peabody Museum of Archaeology determined that there was a shared group identity between the item and the Wampanoag Repatriation Confederation, which includes the Mashpee Tribe. *Id.*

[114] The NMAI Report.

[115] *Id.* at 9. Despite concluding that the Mashpee should receive the cultural items, the representative found that its status as not federally recognized made repatriation to the group problematic. *Id.*

[116] *Id.* at 10–11. The report concluded that the items should be repatriated to the wider Wampanoag Nation but that, if that organization did not believe it was the appropriate entity, the items should be repatriated to the specific Mashpee community. *Id.* at 10.

[117] For example, the NPS put out a notice in 2006 pertaining to two brass tubes found in Fall River, as well as a string of shell beads recovered at Bridgewater, Bristol County, and a perforated copper point recovered at Fairhaven, Bristol County. 71 Fed. Reg. 70,982 (Dec. 7, 2006). Officials of the Peabody Museum of Archaeology and Ethnology determined that the items had a cultural relationship with the Mashpee Tribe, as well as two other Wampanoag tribes. *Id.* Another example is a 2005 NPS notice related to the repatriation of 21 copper and 2 brass beads collected from Swansea, Bristol County, and a whale bone spoon and clay pipe fragment removed from the Slocum River site in Dartmouth, Bristol County. 70 Fed. Reg. 16,840, 16,841 (April 1, 2005). Officials of the Robert S. Peabody Museum of Archaeology determined that there was a cultural relationship between the objects and the Mashpee Tribe, as well as two other Wampanoag tribes. *Id.*

reasonably traced between the items and the Mashpee Tribe. Recovery of cultural items from Burr's Hill, Fall River, and Swansea add to the natural inference created by the Titicut site burial grounds that the Mashpee Tribe used and occupied the Taunton parcel.

Villages and travel networks

Historical documentation of Pokanoket/Wampanoag communities interwoven by travel networks and located within the vicinity of the Taunton parcel also establish that the Taunton parcel is located within an area where the Tribe has significant historical connections.

Before the British purchased the land from Massasoit, and before incorporation as the town of Taunton in 1639 by the Plymouth Colony, Taunton was called by its native name: Cohannet.[118] The Massachusetts Historical Commission issued a report discussing core historic Wampanoag areas and major settlements within the core areas located near Taunton and in the Taunton River drainage area.[119] The report discussed the following settlements in the vicinity of Taunton: Titicut, located 8 miles from the Taunton parcel; Wapanucket, located on the northern shore of Lake Assawompsett and 6 miles from the Taunton parcel; and Nemasket, located in Middleborough and 10 miles from the Taunton parcel.[120]

The Massachusetts Historical Commission found that, at the time of contact, these Wampanoag settlements were established along major river drainages, such as the Taunton River, and were relied on permanently and seasonally for freshwater and marine resources, proximity to good agricultural land, and accessible water routes for transportation.[121]

According to the Department, "occupancy" can be demonstrated by a tribe's dwellings and villages.[122] These core Wampanoag areas served as communities and, therefore, demonstrate occupancy. The sites also contain evidence of subsistence use. Further, their scattered locations between six and 11 miles from the Taunton parcel fall within the Department's definition of "vicinity."[123] Last, we have already established that the Tribe may rely on historical documentation related to the Wampanoag. Therefore, the Wampanoag core areas located in the Taunton area serve as evidence of historical subsistence use and occupancy in the vicinity of the Taunton parcel.

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

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

[120] *Id.* at 34–36, 34 map 2.

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

[122] Guidiville Band Indian lands determination at 14.

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

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

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

> The Buzzards Bay region was particularly well suited for water travel because of its well protected coastline. Cape Cod, the Elizabeth Islands[,] and Martha's Vineyard sheltered the Bay from off-shore storms and may have permitted water travel as far west as Narragansett Bay. In turn, the heavily convoluted coastline and associated river drainages permitted water access into the interior.[131]

Scholar Bert Salwen noted that trading networks, which utilized both overland and water routes, linked southern New England groups, of which Wampanoag was one, to one another and to different groups in adjacent regions, including Europeans.[132]

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

[125] Massachusetts Historical Commission 1982 at 36. *See also* Bragdon 2012 at 30 fig.7 (identifying transportation routes in the 1600s that included an overland route connecting Mashpee to northern areas).

[126] Massachusetts Historical Commission 1982 at 36.

[127] *Id.* at 37. Captain Myles Standish, the Pilgrims' military leader, took this path to attack the settlement of Nemasket. *See generally* Robbins 1984 (discussing events along the Nemasket Path from Plymouth to Middleborough involving Myles Standish and Tisquantum); Maurice Robbins, *The Path to Pokanoket. Winslow and Hopkins Visit the Great Chief, in* A SERIES OF PATHWAYS TO THE PAST 2, 1-2 (1984-1985) [hereinafter Robbins 1984 - 1985]; Gibson *supra* note 24.

[128] Massachusetts Historical Commission 1982 at 37. A number of these trails and water routes have been adapted for use by major highways including, Routes 44, 123, and 138, and most of the sites used as river fords have been used as bridge sites. *Id.* at 40.

[129] *Id.* at 38. The modern Wampanoag Commemorative Canoe Passage, established in 1977, runs from Plymouth through Taunton and along the Taunton River, near the Wampanucket site. Bragdon 2012 at 114-15.

[130] Massachusetts Historical Commission at 38.

[131] *Id.* at 38; *see also id.* at 35 (noting that natives of Nemasket were observed travelling to the Buzzard's Bay coast in the spring to harvest lobster).

[132] Salwen at 166.

The Guidiville Band Indian lands determination found that the Guidiville Band's historical documentation related to a trade route did not qualify as evidence of subsistence use and occupancy. The Department determined that evidence of travels to various locations to trade and interact with other peoples, simply to return back home, did not qualify as subsistence use and occupancy. It stressed that evidence of subsistence use and occupancy requires something more than a tribe merely passing through a particular area. Here, archeological evidence and the existence of core Wampanoag areas establish historic subsistence use and occupancy within the vicinity of the Taunton parcel. The Mashpee Tribe's evidence of major travel routes, when viewed in conjunction with direct evidence related to historical occupation at multiple sites, only furthers the natural inference that the Mashpee Tribe used and occupied the Taunton parcel.

Conclusion: The Taunton parcel is located within an area where the Tribe has significant historical connections.

Based on the evidence discussed above, the Mashpee Tribe has established evidence of historical subsistence use and occupancy within the vicinity of the Taunton parcel. Therefore, we find that the Taunton parcel is located within an area where the Tribe has significant historical connections, and, thus, satisfies the historical connection requirement of Section 292.6(d).

d. The Mashpee parcel is located within an area where the Tribe has significant historical connections

The record is replete with conclusive evidence of the Tribe's historical use and occupancy of the Mashpee parcel. For our analysis, we will rely on specific factual findings OFA made in the Tribe's federal acknowledgment determination. Much of OFA's analysis dealt with the Mashpee Tribe's activities in the town of Mashpee, where the Mashpee parcel is located.

Like other Wampanoag settlements, the area around Mashpee at the time of contact had a number of its own sachems who ruled by consensus and controlled several villages joined in a loose confederacy.[133] In 1665, Puritan minister Richard Bourne established a praying town in Mashpee, and established the town on 25 square miles of tribal land he had acquired from two local Wampanoag sachems, Wequish and Tookenchosen.[134] In 1685, the General Court of Plymouth Colony officially recognized these grants of land in perpetuity.[135] Until the 1690s, the praying town was governed by a six-member council of Mashpee.[136]

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[133] The OFA Proposed Finding at 32 ("During the 1620s, the Wampanoag of southeastern Massachusetts on Cape Cod along Nantucket Sound, called 'South Sea Indians' by the Pilgrims and Puritans, had a number of local leaders, or sachems, in charge of one or more villages joined in a loose alliance under one chief sachem."). *See also* OFA Final Determination at 18 ("[A] hereditary sachem provided leadership among the Wampanoag from the 1620s to the 1660s.").

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

[135] *Id.*

[136] *Id.* at 33.

From 1665 to 1720, the Mashpee community was organized as a praying town.[137] In 1720, the town became a proprietorship in which Mashpee citizens elected local officers, held regular town meetings, maintained public records, and owned their land in common as proprietors.[138]

Section 83.7(b) of the Federal acknowledgement regulations requires that a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present."[139] The OFA Preliminary Finding concluded that "a predominant portion of the petitioner's members or claimed ancestors have maintained consistent interaction and significant social relationships throughout history."[140] In reaching this conclusion, the OFA Proposed Finding discussed at length the Tribe's historic presence in the vicinity of Mashpee, stating "[t]he Mashpee maintained a distinct Indian community in and around the town of Mashpee, Massachusetts, during the contact, colonial, and revolutionary periods."[141]

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

Conclusion: The Mashpee parcel is located within an area where the Tribe has significant historical connections

Based on the evidence discussed above, the Mashpee Tribe has established evidence of historical subsistence use and occupancy of the Mashpee parcel. Therefore, we find that the Mashpee parcel is located within an area where the Tribe has significant historical connections and, thus, satisfies the historical connection requirement of Section 292.6(d).

3. Section 292.6(d): Modern Connections

Section 292.6(d) requires that a tribe demonstrate a modern connection to the newly acquired land. In order to establish a modern connection, the tribe must prove one or more of the following:

(1) The land is near where a significant number of tribal members reside; or
(2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

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

[138] *Id.*at 32.

[139] 25 C.F.R. § 83.7(b).

[140] The OFA Proposed Finding at 31.

[141] *Id.* at 32.

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

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

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

The Tribe has 2,647 members. Of these, 65 percent live within Massachusetts, 40 percent live in Mashpee where tribal headquarters are located, and over 60 percent live within 50 miles of the Taunton parcel.[143] Dispersion of membership is common among tribes without a designated land base and does not weigh against finding that the tribal population near the Mashpee and Taunton Sites is significant.[144] The preamble to Part 292 acknowledged that modern tribal populations are subject to wide dispersion and specifically noted today's mobile work-related environment.[145]

Further, the 50-mile radius used to evaluate the tribal population in reference to the Taunton parcel falls within the range of distances the Department intended to qualify as "near." In its proposed rule, the Department would have required a tribe to demonstrate a modern connection to land for purposes of the initial reservation exception by proving that "[a] majority of the tribe's members reside within 50 miles of the location of the land."[146] In response to concerns about this difficult-to-meet standard, the Department eliminated the 50-mile majority requirement and amended the language to require only that a significant number of tribal members reside near the land.[147] As the Department amended its 50-mile majority membership requirement to create a more lenient standard, it is clear that 50 miles qualifies as "near" for

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[142] 25 C.F.R. § 292.6(d).

[143] Regional Director's Recommendation at 7.

[144] *See* Letter from Philip Hogen, Chairman of the Nat'l Indian Gaming Comm'n, U.S. Dep't of Interior, to John Barnett, Chairman of the Cowlitz Indian Tribe 15 (Nov. 23 2005) (applying pre-Part 292 standards and stating that, although "[t]he Tribe's Clark County population figure does not amount to a large percentage of the Tribe's total enrollment," "in cases of high tribal dispersion, a relatively low percentage of tribal members who live in the subject county should not weigh against a tribe if, as in this case, the actual number of tribal members living in the county is not insignificant."), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f09_cowlitztribe.pdf&tabid=120&mid=957.

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

[146] 71 Fed. Reg. 58,769, 58,773 (Oct. 5, 2006). In its proposed rule, the Department also allowed a tribe to prove a modern connection to land by demonstrating that "the tribe's government headquarters are located within 25 miles of the location of the land." *Id.*

[147] 73 Fed. Reg. 29,354, 29,360 (May 20, 2008). The Department also added the option for tribes to establish a modern connection by proving other factors that demonstrate the tribe's current connection to the land. *Id.*

purposes of establishing that a significant number of tribal members reside near newly acquired land.

Further, the Department intended the modern connection requirement to provide a "mechanism to balance legitimate local concerns with the goals of promoting tribal economic development and tribal self-sufficiency."[148] The surrounding community's interests are protected when it has notice of tribal presence in or near the community.[149] A large portion of the Tribe's population residing within 50 miles of the Taunton Site puts residents of that community on notice of the tribe's governmental presence.

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

b. Section 292.6(d)(2): The Mashpee parcel is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust

The Tribe's headquarters is located in Mashpee, Massachusetts. It has been located there for at least 2 years before the Tribe's initial application in 2007. The Mashpee parcel is located within a 25-mile radius of the Tribe's headquarters.

Initial Reservation Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[152] *Id.* at 13.

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

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

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

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

a. Statutory Ambiguities

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

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

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

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

[157] *Id.* at 843.

[158] *Id.* at 840.

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

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

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

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

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

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

b. Legislative History

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

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

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

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

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

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

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

[162] *See* To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., at 241 (May 17, 1934) (discussing the procurement of new Indian reservations for wandering bands of Indians).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[172] To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., at 264 (May 17, 1934).

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

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

c. Implementation of IRA

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

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[173] *Id.*

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

[175] *Id.*

[176] *Id.*

[177] Section 18 provides that the IRA "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." IRA Section 18, codified at 25 U.S.C. § 478.

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

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

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

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

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

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

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

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

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

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

[181] *Id.*

[182] *Id.*

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

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

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

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

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

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

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

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

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

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

[188] *Id.* at 4–8.

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

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

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

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

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[189] *Id.* at 4.

[190] *Id.* at 8.

[191] *Id.*

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

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

[194] *Id.* at 1, 2–3, 7.

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

[196] *Id.* at 10–12.

[197] *Id.* at 11.

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

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

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

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

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

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

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* at 3.

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

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

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

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

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[206] *See* To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., at 265–66 (May 17, 1934) (debate between Senator Thomas and Senator Wheeler regarding whether the Catawbas should be subject to IRA since they were "living on a reservation" and "descendants of Indians" but "[t]he Government has not found out they live yet, apparently"); Solicitor's Opinion, Catawba Tribe – Recognition Under IRA, March 20, 1944, reprinted in 11 Op. on Indian Affairs 1255 (U.S.D.I. 1979).

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

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

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

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

[211] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[220] 25 C.F.R. § 151.2(c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. *Such Members*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. *"Indian reservation"*

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

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

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

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

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

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

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

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

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

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

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

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

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

[250] *Id.* at 404.

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

[252] *Id.* at 390.

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

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

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

[256] *Id.* at 294, Ch. 15 § 5(a).

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

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

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

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

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

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

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

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

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

[263] *Id.* at 1378.

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

[265] *Id.*

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

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

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

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

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

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

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

b. "Present boundaries"

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

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

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

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

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

iv. *Descendants Versus Members Residing on the Reservation*

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

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[272] *See, e.g.*, To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., at 264 (May 17, 1934) (Commissioner Collier's explanation that descendants qualify under the second definition only "[i]f they are actually residing within the present boundaries of an Indian reservation at the present time").

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

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

v. *Full Interpretation of the Second Definition*

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

II. BACKGROUND OF THE MASHPEE WAMPANOAG TRIBE

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

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

i. *The Colonial Period*

The Mashpee Tribe is a subcomponent of the broader Wampanoag Indians, also referred to as the Pokanoket, who have a long history in southeastern Massachusetts dating before European contact in the early 17th century. At the time of contact, the Pokanoket people were organized into a coalition of loosely confederated chiefdoms, or "sachemdoms," each with its own subordinate leader, a "sachem," but recognizing a wider allegiance to the supreme or paramount sachem, the massasoit.[276] The Pokanoket territory extended from Cape Cod in the east to the eastern shore of Narragansett Bay in the west, and from the islands of Martha's Vineyard and Nantucket in the south to the towns of Marshfield and Brockton in the north.[277] These lands

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

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

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

include all of modern-day Bristol, Barnstable, and Plymouth Counties. The town of Taunton is in Bristol County, and the town of Mashpee is in Barnstable County.[278]

The Mashpee Tribe had early contact with British colonizers beginning in the 17th century. There is a long and substantial history with respect to the entwined relationship among the Tribe, the British Crown and the colonies before formation of the United States. The original colonies were generally left with day to day management of Indian relations, while the British Crown reserved ultimate authority.[279] Early English colonists followed the general principle that land could only be obtained from Indians with their consent.[280] Indeed, the Massachusetts Bay Colony required colonists to acquire lands claims by the Indians by purchase and the Massachusetts General Court declared only it could grant the right to purchase land in the colony.[281] In 1665, two local Wampanoag sachems donated land to the Mashpee Indians, at the behest of Puritan minister, Richard Bourne, to establish a praying town in what is now the Town of Mashpee.[282] Another sachem confirmed this land grant, and granted additional lands, by deed in 1666.[283] Pursuant to these deeds, the land was held in common by the Mashpee Indians and could not be alienated to outsiders without the consent of all other tribal members.[284] The 1666 deed also expressly provided for "all the Privileges & Immunities belonging to the Indians with all Meadows, Necks, Creeks, Timber wood, hunting, fishing, fowling or whatever Privileges belong unto these lands … ."[285] Significantly, the colonial court confirmed the Mashpee's deeds in 1685 and guaranteed that the lands belonged to "said Indians, to be perpetually to them and their children, as that no part of them shall be granted to or purchased by any English,

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

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

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

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

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

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

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

[285] 1666 Deed.

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

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

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

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[286] 1665 Deed at 350 (providing the court's confirmation of "said land to the said Indians, to be perpetually to them & their children, as that no part of them shall be granted to or purchased by any English whatsoever, by the Courts allowance, without the consent of all the said Indians").

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

[288] Salwen 1978 at 172.

[289] Bragdon Report at vii–viii.

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

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

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

[293] *Id.* at 96.

[294] *Id.* at 96.

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

and a desire to centralize Indian affairs. The Continental Congress attempted to address these issues,[296] but in the subsequent Articles of Confederation, the States continued to debate their authority and oversight over Indian affairs within their boundaries.[297]

ii. *The Early Period Following the Formation of the United States*

In 1788, the year after the U.S. Constitution was adopted (which removed references to state powers over Indian affairs), the Commonwealth terminated Mashpee control and the overseer system by installing three non-Indian guardians.[298] In response to strong Mashpee resistance to this system, the Commonwealth removed the guardians and converted the settlement back to a self-governing Indian district in 1834.[299] Thus, despite adoption of the Constitution, the Commonwealth chose to continue regulating Mashpee affairs by determining the governance system and legal status of the Town. And under the Indian district system, the Mashpee was again able to exercise political and regulatory control over the Town.

Near this time, the Federal Government considered the Mashpee "reservation" in developing its policy on removal. In 1822, the Reverend Jedidiah Morse assisted President James Monroe in making a recommendation to Congress on establishing a national policy concerning the forcible removal of Indian tribes from their aboriginal territories (Morse Report).[300] Reverend Morse, a reputable geographer, was commissioned by the Secretary of War, John C. Calhoun, to visit various tribes in the country "in order to acquire a more accurate knowledge of their actual condition, and to devise the most suitable plan to advance their civilization and happiness."[301] In the introduction to his report, Reverend Morse voiced his commitment to fulfilling the mission's underlying objective: "lay[ing] before the Government, as full and correct a view of the numbers and actual situation of the *whole* Indian population within their jurisdiction, as [his] information and materials would admit."[302]

As part of his report, Reverend Morse set forth a statistical table enumerating "the names and numbers of all the tribes within the jurisdiction of the United States."[303] The Mashpee Tribe

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[296] *See* 2 J. Continental Cong. 175, 183 (1775).

[297] *See* U.S. Articles of Confederation art. ix (1777); *see also* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02[1], 15.06[1] (2012 ed.) (discussing how the Articles of the Confederation provided the federal government and state governments with a degree of shared authority over Indian Affairs that was "obscure and contradictory" in nature, and how this practice persisted following the Constitution and enactment of the Non-Intercourse Act).

[298] Department's Proposed Finding at 97.

[299] *Id.* at 98.

[300] A REPORT TO THE SECRETARY OF WAR ON INDIAN AFFAIRS (New Haven 1822) [hereinafter Morse Report].

[301] *Id.* at 1.

[302] *Id.* at 22 (emphasis in original).

[303] *Id.* at 23.

is listed and the Town of Mashpee is listed as the Tribe's "place of residence."[304] Reverend Morse also included narratives for each state describing the status of tribes residing therein. In discussing the Mashpee Tribe, Reverend Morse determined that there were 320 members living on the "reservation." He ultimately concluded that the Federal Government would be ill advised to remove the Mashpee and other Massachusetts tribes from their current territory as the tribes' whaling and manufacturing skills were of public utility there. He also reasoned that the tribes felt strongly attached to the location.[305] This report and statistical table were relied upon by President Monroe and Congress in the formation of the removal policy and the decision not to impose relocation on the Tribe.[306] They also appear to have been relied upon by the Office of Indian Affairs throughout the 1820s in response to congressional requests for demographic information on tribes within the States and territories.[307]

In 1842, the Commonwealth of Massachusetts ordered the allotment of most of the Tribe's common lands in severalty to Mashpee members.[308] An area amounting to 10,171 acres were reported to have been allotted to individual Mashpee members.[309] The Commonwealth retained the restrictions on alienation prohibiting land transfers to non-Mashpee members and also preserved approximately 3,150 acres of commonly held land.[310] In 1869, the Commonwealth terminated these long-standing restrictions on land alienation and, in 1870, incorporated the Town of Mashpee.[311] The Town boundaries were defined by the boundaries of the prior Indian district.[312] Even though the Town no longer maintained its official designation as a self-governing Indian district, as it had under the prior forms of government, historical evidence demonstrates that the Mashpee continued to dominate the Town's population, as well as control

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[304] *Id.* at 46.

[305] *Id.* at 70.

[306] *See* Plan for Removing the Several Indian Tribes West of the Mississippi River, 18th Cong., 2d. Sess., at 541-45 (Jan. 27, 1825). Congress also relied on Morse's data concerning the Mashpee in its development of Indian trade policy. *See* History of Congress, 17th Cong., 1st Sess., at 1794– 95 (May 1822).

[307] *See, e.g.*, Letter from Thomas McKenney, Director of the Office of Indian Affairs, to the Secretary of War (Dec. 23, 1824); Letter from Thomas McKenney, Director of the Office of Indian Affairs, to the Secretary of War (Jan. 10, 1825); Report from the Secretary of War: a Detailed Statement of the Several Tribes of Indians Within the U.S., and the Extent and Location of Certain Lands to which the Indian Title has been Extinguished (Jan. 3, 1829).

[308] *See* An Act Concerning the District of Marshpee, Mass. Acts. Ch. 72 (1849); *see also* Department's Proposed Finding at 99. As explained *infra* Section II.c, the Commonwealth's allotment of the Tribe's common lands was in violation of the Non-Intercourse Act.

[309] Department's Proposed Finding at 99.

[310] *Id.* A more contemporaneous report places the estimated number of preserved common lands at 5,000 acres. *See* HISTORY OF BARNSTABLE COUNTY, MASSACHUSETTS, ed. Simeon L. Deyo at 710 (1890).

[311] *See* An Act to Enfranchise the Indians of the Commonwealth, Mass. Acts ch. 463, § 2 (1869); An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293 (1870); *see also* Department's Proposed Finding at 100.

[312] An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 1 (1870) ("The district of Marshpee is hereby abolished, and the territory comprised therein is hereby incorporated into a town by the name of Mashpee.")

the Town's government and culture up until the 1970s.[313] This occupation and control persisted even though individual tracts of Mashpee land gradually fell into the ownership of absentee landlords or seasonal residents.[314] Certain politically and religiously important tracts of land, specifically the Old Indian Meeting House, the tribal cemetery, the parsonage, and the Baptist church/school house lot, continued to be held in common by the Mashpee community via deeds issued to the Town government.[315] The communal fishing rights were also transferred to the Town pursuant to the 1870 Act.[316]

In 1885, Congress tasked the Department of the Interior with compiling comprehensive information on the status of Indian education across the country. In response to this request, the Department commissioned ethnologist Alice Fletcher to conduct the necessary research. The final report, published in 1888, includes in the background chapters a section on the history and current status of the Mashpee.[317] The report referenced the existence of the "Mashpee Plantation" and explained the history of its creation stemming from the 1660s deeds and confirmation by the General Court in Plymouth, and evolving through the various forms of governance and Indian versus non-Indian oversight.[318]

In 1890, the Commissioner of Indian Affairs issued his annual report on the status of tribes and federal Indian policy, which included a discussion of the Mashpee. The report found that "no Indians within the limits of the thirteen original States retained their original title of occupancy, and only in Massachusetts, New York, and North Carolina are they found holding a tribal relation and in possession of specific tracts."[319] Regarding the Mashpee, the report stated that "[t]he Marshpee Indians occupy a tract of land in Barnstable County, Mass., have a board of overseers appointed by the State, who by acts of 1789, 1808, and 1819, govern all their internal affairs and hold their lands in trust."[320] The report failed to mention the Commonwealth's more

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[313] *Id.* at 100-07 (describing how Mashpee members formed the majority of year-round residents and monopolized the town's elected and appointed positions until changing demography in the 1970s led to a shift in the population majority favoring non-Mashpee residents).

[314] Department's Proposed Finding at 47-48.

[315] Registered Deed, located in the Barnstable County Registry of Deeds, Book 121, pp. 139–141 (Nov. 17, 1874); *see also* An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 2 (1870) (All common lands, common funds, and all fishing and other rights held by the district of Marshpee, are hereby transferred to the town of Mashpee."). The deed does not cover the Baptist church/school house property and the support for its continued status as common lands held by the Town originates from the Tribe's title work, which has not been independently verified by the Department. *See* Mashpee Wampanoag Tribe Memorandum on *Carcieri v. Salazar* Supplement 2 at 4–5 (submitted to the Department on Nov. 29, 2012).

[316] An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 2 (1870).

[317] Alice C. Fletcher, under the Direction of the Commissioner of Education, INDIAN EDUCATION AND CIVILIZATION: A REPORT PREPARED IN ANSWER TO SENATE RESOLUTION OF FEBRUARY 23, 1885, at 59–60 (1888).

[318] *Id.*

[319] ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at xxvi (1890).

[320] *Id.*

recent efforts to allot the communal landholdings, remove the restrictions against alienation, and incorporate the former Indian district.

iii. *The 20th Century*

During the early 1900s, the Tribe continued to form the majority of the Town's citizenry and control the Town's political and religious institutions.[321] Even though many individual allotments within the Town gradually left Mashpee member ownership,[322] the Tribe maintained ownership over fundamental community parcels vis- à-vis its control of the Town government.[323] Additionally, some individual allotments were deeded back to the Town for common use, such as the Public Hall and the Samual G. Davis School, or were continuously owned by tribal allottees who permitted tribal uses of the land, such as fishing at the herring run site.[324] Some allotted lands had deeds that reserved access to usufructary rights, such as the right to gather seaweed and marsh hay, to tribal members.[325] The Tribe also "continued to regulate access to and use of common resources by regulating fishing and hunting, harvesting trees, and maintaining streams, rivers, and harbors."[326]

Indeed, many outside entities highlighted the continued "Indian" character of the Town.[327] For example, a 1915 travel essay published in *Cape Code Magazine* identified Mashpee as an "Indian settlement."[328] In the 1920s, anthropologist Frank Speck completed a study of the Tribe and referred to the Town as "the last stronghold of the Cape Cod tribes" and a "native

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[321] *See, e.g.*, Department's Proposed Finding at 100-101 (finding that the Tribe "monopolized the town's elected and appointed positions," where from 1870 to 1968, 85 percent of the town's selectmen and 88 percent of the town clerks, treasurers, and tax collectors were Mashpee).

[322] Not every allotment passed from Mashpee hands. While a complete chain of title search for all allotments has not been conducted, the Tribe has identified at least three parcels that have been continuously held by Mashpee members. *See* Mashpee Wampanoag Tribe Memorandum on *Carcieri v. Salazar* Supplement 2 at 7-8 (submitted to the Department on Nov. 29, 2012).

[323] Namely, the Old Indian Meeting House, the tribal cemetery, the parsonage, and the Baptist church/school house.

[324] This is according to the title work conducted by the Tribe and has not been independently verified by the Department. *See* Mashpee Wampanoag Tribe Memorandum on *Carcieri v. Salazar* Supplement 2 at 5-7 (submitted to the Department on Nov. 29, 2012); *see also* Lopez Affidavit ¶ 17 (discussing the public hall); *id.* ¶¶ 15-16 (discussing the herring run site). Reliance on title work done by the applicant is appropriate and consistent with Departmental prior practice.

[325] *See* Frederick D. Nichols , Title Report re Condemnation Proceedings U.S. District Court No. 7359, Civil, 229 acres, South Mashpee, Mass., at 1-2 (Aug. 10, 1949) (describing a deed to a 33 acre beachfront lot that "reserved the right of the Proprietors of Mashpee to go over [the] land to gather seaweed and marsh hay"); *see id.* at 3 (describing allotted marsh lots that had deeds reserving "for the benefit of the Proprietors of Mashpee, the right to cross the several lots for the purpose of gathering haw and seaweed"). These deeds refer to the "Proprietors of Mashpee," who were, as explained *supra*, tribal members.

[326] *Id.* at 101.

[327] *Id.* at 21-22.

[328] *See* Department's Proposed Finding at 22 (citing *Cape Cod Magazine* 1915.12.00).

settlement."[329] Dr. Speck found that in 1920, Mashpee Indians comprised 230 out of the Town's total population of 252.[330]

The BIA also referenced the Mashpee reservation in keeping records concerning Mashpee children at BIA schools. Between 1904 and 1916, Mashpee children were enrolled at the Carlisle Indian Industrial School, a BIA-run residential school in Carlisle, Pennsylvania.[331] Many of the Federal school records for these students listed their home "agency" or "reservation" as "Mashpee."[332]

By the 1930s, there were about 300 Mashpee members, almost all of whom lived in the Town.[333] The southern part of the Town, however, had become less concentrated with Mashpee residents as an increasing number of non-Indian seasonal inhabitants resided along the beach front, although these seasonal inhabitants lacked the right to vote or send their children to the local school.[334] The year-round population consisted almost entirely of Mashpee members and their spouses and the 1930 Federal Census recorded that, out of the 361 individuals living in the Town, 265 identified as Indian.[335]

Mashpee member Chief Vernon "Silent Drum" Lopez lived in the Town in 1934 and recounts that it "stayed almost completely Indian territory until after World War II" because it was largely isolated from white outsiders.[336] Chief Lopez also describes how there was no cash economy during this time; rather, members lived off the land by growing gardens on their allotments, engaging in group hunting expeditions, or fishing in the Mashpee River.[337] The Tribe held meetings in the public hall, as well as powwows on an allotment referred to as Douglas field.[338] During this time period, tribal members generally disregarded the notion of private property when it came to subsistence activities and tribal gatherings.[339]

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[329] *See id.*

[330] *Id.* at 45.

[331] *See* Carlisle School Records for Alfred De Grasse, Daisy Mingo, Charles Peters, Lizette Pocknett, Eva Simons, Lillian Simons, Zepheniah Simons, and George Thompson (collected from NARA RG75, Entry 1327).

[332] *See, e.g.*, Carlise School Records for Alfred De Grasse ("agency"), Daisy Mingo ("agency"), Charles Peter ("agency" and "reservation"), Eva Simons ("agency" and "reservation"), Lillian Simons ("agency" and "reservation") (collected from NARA RG75, Entry 1327).

[333] *Id.* at 15.

[334] Department's Proposed Finding at 48–49.

[335] *Id.* at 49-50, 152; *see also* 1930 Mashpee Heads of Households map, prepared by the Tribe using as a base map the Massachusetts State Planning Board Roads and Waterways Map of the Town of Mashpee from July 1939.

[336] Affidavit of Chief Vernon "Silent Drum" Lopez ¶¶ 2, 3, 5 (executed on Nov. 28, 2012), Exhibit 3 of Mashpee Wampanoag Tribe Memo on *Carcieri v. Salazar*: Supplement 2 (Nov. 29, 2012).

[337] *Id.* ¶¶ 4, 6-16.

[338] *Id.* ¶ 17.

[339] *Id.* ¶ 18.

Chief Lopez's account of the Town in 1934 comports with the contemporaneous study conducted by Gladys Tantaquidgeon, a University of Pennsylvania student and Mohegan Indian, who was commissioned by BIA to conduct a comprehensive survey of the New England tribes (Tantaquidgeon Report).[340] The Tantaquidgeon Report specifically addressed the Mashpee Indians and provided details on their "reservation,"[341] subsistence practices, education facilities, health needs, arts and language, and governance.[342] The Tantaquidgeon Report explained that the Town "has always been known as an Indian town and the town officials for the most part have been and still are persons of Indian extraction." [343] This conclusion was reinforced by the 1938 study by Harvard sociologist Carle Zimmerman, who found that certain Mashpee families dominated the town politics and effectuated a "tribal" government.[344] As the OFA Proposed Finding notes, the Mashpee "continued their dominance of the town government through the 1930's and1940's, with mostly members or a few of their spouses holding all the elected and appointed positions that managed the social, legal, and economic spheres of the town."[345] Moreover, there was a "close social connection between the town government and the Mashpee 'tribal' council."[346]

Following World War II, the Mashpee dominance over the Town diminished as the summer population continued to grow and the opening of the Cape Cod Air Force Base attracted additional non-Indian permanent residents.[347] By the 1970s, the Tribe no longer exerted political control over the Town and there was no longer external recognition of the Town as an Indian

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[340] Although Tantaquidgeon's report was never officially published by the BIA, there are several versions of the draft manuscript. For citation purposes, these manuscripts will be referred to as the Dec. 6, 1934 Tantaquidgeon Manuscript or the Jan. 4, 1935 Tantaquidgeon Manuscript.

[341] Shortly after the Tantaquidgeon report was compiled, a news article was published describing state efforts to create a reservation near Fall River for "the Wampanoag Tribes." *See* "Old CCC Camp is Proposed as Reservation for Indians" newspaper unidentified (June 14, 1939). Although the article first references the Wampanoag Tribes broadly, it never expressly refers to the Mashpee and likely concerned only the state-recognized Pocasset Wampanoag band. The article refers to the tribe's formerly held "Wattupa Reservation" and efforts to create a new reservation near Fall River, and the Pocassets are currently based in Fall River and claim historical ties to the "Wattupa reservation." *See* The History of the Pocassets, http://www.pocassetwampanoagofstandingwolfinc.com/the-history-of-the-pocassets/ (last accessed Aug. 23, 2015).

[342] Dec. 6, 1934 Tantaquidgeon Manuscript at 10–17; *see generally* Jan. 4, 1935 Tantaquidgeon Manuscript (providing a detailed narrative of the Mashpee Tribe's history, language, government, social regulations, economic life, education, and so forth).

[343] *See* Jan. 4, 1935 Tantaquidgeon Manuscript at 3 (the manuscript is not paginated but this information is located on the third page of substantive text); *see also* Dec. 6, 1934 Tantaquidgeon Manuscript at 10 (referring to Mashpee as a "recognized [] Indian town")

[344] *See* Department's Proposed Finding at 53, 103 (citing Carle C. Zimmerman, THE CHANGING COMMUNITY (1938)). Zimmerman also referred to the Town as a "reservation" at one point in his study. *See* Carle C. Zimmerman, THE CHANGING COMMUNITY at 173.

[345] *Id.* at 54.

[346] *Id.*

[347] Department's Proposed Finding at 105.

settlement or reservation. The Tribe has continued to maintain a strong presence, however, existing as an incorporated council from 1974 until 2007 when it was formally recognized by the Federal Government.[348] In 2008, the Town government conveyed to the Tribe the land parcels that had been traditionally held in common for tribal purposes, specifically the Old Indian Meeting House, the tribal cemetery, and the parsonage.[349]

b. The Non-Intercourse Act and Its Application to the Town of Mashpee

An important backdrop to the history of the Tribe and its occupation of the Town is the legal framework of the Non-Intercourse Act. This act codified aspects of the common law rule that the United States, as the sovereign successor to the British Crown, assumed the rights and obligations of the Crown regarding existing property ownership, including the exclusive right to alienate Indian title.[350] The act broadly provides that:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.[351]

As evidenced by the statutory language and accompanying case law,[352] the Non-Intercourse Act enumerates the Federal authority and duty to oversee land transactions between Indians and non-Indians. The authority and duty exist regardless of where the violation occurred in the United States and whether the federal government has chosen to implement them in a given circumstance.[353]

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[348] *See* Department's Proposed Finding at 65–66, 108; Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).

[349] *See* Town of Mashpee Resolution, Special Town Meeting (Apr. 7, 2008) (resolution authorizing conveyance of tribally significant properties).

[350] *See Johnson v. M'Intosh*, 21 U.S. 543, 572–74 (1823) (describing the doctrine of discovery and the native right of occupancy); *Mitchell v. United States*, 34 U.S. 711, 748–49 (1835) ("[A]ccording to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws.").

[351] Act of June 30, 1834, § 14, 4 Stat, 729, now codified at 25 U.S.C. § 177.

[352] *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *United States v. Sandoval*, 231 U.S. 28, 45-46 91913); *see also United States v. Kagama,* 118 U.S. 375, 384-385 (1886).

[353] *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 ("The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the states including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State. But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.") (citation omitted); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1975).

As described *supra*, the Mashpee tribe has a longstanding relationship with the land now known as the Town of Mashpee. By 1665, this relationship was recognized and protected by the colonial government.[354] In line with Federal policy, the deeds to the lands contained alienation restrictions, similar to restrictions set forth in the Non-Intercourse Act, that prevented individual Mashpee Indians from selling land to outsiders without the consent of all other tribal members.[355] In 1685, the colonial court confirmed the Mashpee's deeds and guaranteed that "no part of them shall be granted to or purchased by any English, whatsoever, by the Courts[sic] allowance, without the consent of all the said Indians."[356] The communal, Indian character of these lands persisted for centuries, notwithstanding colonial- and state-imposed shifts in the Mashpee governing structure.[357] In 1842, the Commonwealth allotted the majority of Mashpee lands, leaving intact the prohibition against conveyance to non-members, but later terminated these restrictions in 1869 just before it incorporated the Town of Mashpee in 1870.[358] Arguably, the Commonwealth lacked the authority to allot the lands without federal consent and to subsequently incorporate the Town.[359] Despite allotment, however, the Town remained under Mashpee cultural and political control from 1870, including in 1934, until the influx of year-round non-Mashpee residents in the late 1960s.[360]

The record demonstrates that the Federal Government was aware of the arguably unauthorized state allotment action, yet chose not to assert its authority pursuant to the Non-Intercourse Act, which was typical of Federal policy regarding Northeastern tribes at this time.[361] Then in 1977,

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[354] *See* Dec. 11, 1665 Mashpee Grant, confirmed by the General Court of Plymouth Colony in 1689, located in *Indian Deeds: Land Transactions in Plymouth Colony 1620–1691*, Jeremey Dupertuis Bangs, New England Historical Genealogical Society [hereinafter 1665 Deed]; 1666 Deed.

[355] *See* 1665 Deed at 349 (securing tracts of land for the "South Sea Indians & their children for ever, soe as never to be given, sold, or alienated from them without all theire consents"); 1966 Deed at 149 (deeding lands to "the South Sea Indians and their children forever for a possession for them and their children forever not to be sold or given or alienated from them or any part of these lands").

[356] 1665 Deed at 350 (providing the court's confirmation of "said land to the said Indians, to be perpetually to them & their children, as that no part of them shall be granted to or purchased by any English whatsoever, by the Courts allowance, without the consent of all the said Indians").

[357] *See supra* Section II.a.

[358] *See* An Act Concerning the District of Marshpee, Mass. Acts 1842, ch. 72; An Act to Incorporate the Town of Mashpee, Mass. Acts 1870, ch. 293.

[359] *See supra* note 353.

[360] *See* Department's Proposed Finding at 107–08.

[361] *See* Letter from Rev. Watson Hammond to President Grover Cleveland (Dec. 1886) (describing the state's actions to allot Mashpee land); Letter from Theodore Tyndale to President Grover Cleveland (Dec. 25, 1886) (describing the state's actions to allot Mashpee lands); *see also* Letter from Commissioner of Indians Affairs to Theodore Tyndale (Feb. 17, 1887) (acknowledging receipt of Theodore Tyndale and Reverend Hammond's letters). This was not the first time the federal government chose not to intervene in Indian land transactions in the Northeast. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 205 (explaining that although the federal government was originally protective of the New York Indians and their land rights, "[t]he Federal Government's policy soon veered away from the protection of New York and other east coast reservations," and it subsequently made no effort to intervene with New York State's attempts to obtain Indian land cessions).

the Mashpee requested that the Federal Government institute land-claim litigation on its behalf but the Department declined.[362] The Mashpee proceeded to bring a suit against the Town of Mashpee, without Federal involvement, which resulted in a Federal jury determination that the Mashpee did not constitute an Indian tribe for purposes of the Non-Intercourse Act and accordingly the suit was dismissed due to lack of standing.[363] Despite the jury finding,[364] the district court noted that the Town retained its Indian character through the 1940s.[365] Moreover, the court's determination did not preclude the Department from acknowledging the Mashpee Tribe in 2007, as the Department employed different standards and a broader evidentiary record in its acknowledgement proceeding.[366] Furthermore, the district court case did not make any determinations regarding the Mashpee's title to the land. Accordingly, the issue of whether the Mashpee have viable land claims under the Non-Intercourse Act remains an open question.

III. THE TRIBE'S ELIGIBILITY FOR TRUST LAND

In order for the Mashpee Tribe to be eligible to receive land into trust under the IRA pursuant to the second definition, we must determine that: (1) the Tribe is composed of descendants of members of a recognized Indian tribe; and (2) the Tribe's members resided within the boundaries of an Indian reservation as of June 1, 1934.[367]

Our evaluation of the factual circumstances surrounding the Town's origins as land set aside for the Mashpee Indians, and the Tribe's continued control and occupation of the Town leads to the conclusion that the Mashpee Tribe qualifies under the second definition of "Indian."

a. The Mashpee are Descendants of Members of a Recognized Indian Tribe

There is no question that the Mashpee are composed of descendants of members of a recognized Indian tribe. The Tribe received formal Federal recognition through the acknowledgement process at 25 C.F.R. Part 83 in 2007.[368] As part of this process, the Tribe had to demonstrate its genealogical relationships stemming back to 1934 and earlier. One piece of evidence considered was an 1859 report created by John Milton Earle setting forth a complete list of the Tribe's membership at that time and indicating that the vast majority of members lived in the Town.[369] The BIA relied on the Earle report in making its acknowledgment determination, and ultimately concluded that 90 percent of the Tribe's current members are descendants from individuals listed

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[362] *See* Department's Proposed Finding at 6.

[363] *Mashpee Tribe v. Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

[364] The jury finding was based on jury instructions setting forth a standard of "tribe" that was contested by the Mashpee and, as admitted by the court, that created "a difficult factual question for the jury" given the courts usual reliance on federal recognition of tribal existence. *See id.* at 581-52.

[365] *See* 447 F. Supp. at 946 ("Up through the 1930's and early 1940's, however, the area remained substantially as it had been from the 1870's on.").

[366] *See* Department's Proposed Finding at 7.

in the Earle report.[370] Additionally, the Tribe submits that 35 of its current members were alive and residing in the Town in 1934 and by law and fact, these members were descendants from previous members.[371] Accordingly, the Tribe satisfies this portion of the second definition.

b. The Tribe's Members Resided Within the Boundaries of the Mashpee Indian Reservation

The historical record demonstrates that a reservation was set aside for the Mashpee Indians via colonial land deeds that were under the protection of the colonial court and government. The record further shows that the reservation continued to exist in 1934 and at that time, Mashpee members were residing within its boundaries.

i. *The Existence of the Mashpee Indian Reservation*

1. *Creation of the reservation in the 1660s*

The historical development of the Town, including its unique status as an Indian district, its continued occupation and sociopolitical control by Mashpee members, and its acknowledgement by outside parties as an "Indian town" all support the existence of a Mashpee Indian reservation in 1934 for IRA purposes. The original territory was specifically set aside for the Mashpee Indians to hold and regulate in common as a praying town, and included usufructory rights such as hunting and fishing.[372] The governing sovereign at the time, the British Crown, recognized and protected the communal land deeds and the concomitant rights of the Mashpee Indians.[373] The colonial court guaranteed that the lands belonged to "said Indians, to be perpetually to them and their children, as that no part of them shall be granted to or purchased by any English,

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[367] As explained *supra*, due to the particular circumstances of the Mashpee, I do not need to determine whether living Mashpee members must have resided on the reservation in 1934 or whether ancestral residence in 1934 is legally sufficient.

[368] *See* Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).

[369] Department's Proposed Finding at 49, 132-33.

[370] *Id.* at 158.

[371] *See* Letter from Chairman Cedric Cromwell re February 3, 2015, submission by Tribe on eligibility of the Indian Reorganization Act ("IRA") (Mar. 18, 2015); Department's Proposed Finding at 132–56 (providing genealogical data demonstrating tribal membership through descendancy).

[372] *See* 1665 Deed at 349 (securing tracts of land for the "South Sea Indians & their children for ever, so as never to be given, sold, or alienated from them without all their consents"); 1666 Deed at 149 (deeding lands to "the South Sea Indians and their children forever for a possession for them and their children forever not to be sold or given or alienated from them or any part of these lands"); *see id.* (providing for "all the Privileges & Immunities belonging to the Indians with all Meadows, Necks, Creeks, Timber wood, hunting, *fishing*, fowling or whatever Privileges belong unto these lands").

[373] *See* 1665 Deed at 350 (providing the court's confirmation of "said land to the said Indians, to be perpetually to them & their children, as that no part of them shall be granted to or purchased by any English whatsoever, by the Courts allowance, without the consent of all the said Indians").

whatsoever, by the Courts[sic] allowance, without the consent of all the said Indians."[374] Although the term "reservation" was not employed in these early land grants and colonial court confirmation, no "magic words" are required for the creation of a reservation. Furthermore, even though this set-aside was not established through traditional mechanisms, such as treaties, legislation, or executive order, the Supreme Court has stated that "in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract." [375] Rather, "it is enough that from what has been done there results a certain defined tract appropriated to certain purposes."[376] The communal land deeds and subsequent recognition and protection by the colonial government constitute the initial set aside appropriating the Mashpee tracts for the use of and occupation by the Mashpee Indians.

For the next several hundred years, the Town continued to be used and occupied by the Tribe. In addition to tribal regulatory control, there existed non-tribal superintendence that was tied to the evolving legal status of the land and governance structure, beginning as a praying town, and shifting through a proprietary system, overseer system, Indian district, guardianship system, then returning again to an Indian district.[377] Despite the changing nature of the town, several factors persisted that demonstrate the continuing reservation status of the land. First, the Tribe held the land in common with restraints against alienation to non-tribal members. This status protected the lands from non-Indian intrusion and allowed the tribal government to effectively manage its natural resources. This tribal occupation and regulation alone would have qualified as a "town, settlement or territory belonging to any nation or tribe of Indians," for purposes of the original Trade and Intercourse Act. [378]

Second, the Tribe's political and cultural control over the Town contributed to the widespread external recognition of the Town's reservation-like character. The 1885 Alice Fletcher report on Indian education, commissioned by the Department of the Interior, recognized the existence of the "Mashpee Plantation" and its extensive history of Indian oversight, often coupled with competing non-Indian oversight.[379] The 1890 Annual Report of the Commissioner of Indian Affairs similarly recognized the Tribe's settlement, finding that while "no Indians within the limits of the thirteen original States retained their original title of occupancy," *i.e.* Indian title, the Mashpee continue to maintain a tribal relation and have their land held in trust.[380]

Lastly, the Tribe and its land were subject to oversight and control by several other governmental entities, including the federal government. As with any typical Indian reservation, however,

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[374] *Id.*

[375] *Minnesota v. Hitchcock*, 185 U.S. at 390.

[376] *Id.*

[377] *See supra* Section II.a(i), (ii).

[378] Act of July 22, 1790, 1 Stat. 137 § 5.

[379] Alice C. Fletcher, under the Direction of the Commissioner of Education, INDIAN EDUCATION AND CIVILIZATION: A REPORT PREPARED IN ANSWER TO SENATE RESOLUTION OF FEBRUARY 23, 1885, at 59–60 (1888).

[380] ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at xxvi (1890).

there were varying degrees of outside superintendence and control that fluctuated in reflection of changing British Colonial, Commonwealth, and Federal policies. Yet a clear pattern of supervision existed that influenced both the overarching structure of governance at Mashpee and the everyday affairs of the Town. For example, in 1746, the colonial court diminished Mashpee control by assigning three non-Mashpee overseers to the Town;[381] in 1763, at the behest of the Mashpee Indians, the colonial legislature converted the Town of Mashpee into a unique self-governing "Indian district."[382] Even in this self-governing status, however, the Tribe was subject to the oversight of two elected non-member overseers.[383]

Following the Revolutionary War and the adoption of the U.S. Constitution, the newly formed Commonwealth terminated Mashpee control and the overseer system by installing three non-Indian guardians.[384] In response to strong Mashpee resistance to this system – resistance that was sparked in part by the state guardian attempts to regulate intimate and everyday aspects of Mashpee life, such as sexual behavior and liquor sales – the Commonwealth removed the guardians and converted the settlement back to a self-governing Indian district in 1834.[385]

Shortly before the Commonwealth converted it to an Indian district, the Town was also subject to federal oversight as part of the Federal Government's larger agenda to remove Indians from their aboriginal territories. As detailed *supra*, the Federal Government sent its agent, Reverend Jedidiah Morse, to visit the Town, among other Indian territories.[386] Reverend Morse described the Tribe's "reservation" and recommended against the Tribe's removal due to its particular utility in that region and due to its members' strong attachments to their home.[387] The Federal Government agreed and ultimately declined to remove the Tribe from its native reservation.[388]

2. *Continuation of the Reservation following allotment and into 1934*

In 1849, the Commonwealth imposed its policy of allotment and, in 1869 and 1870, respectively, enacted legislation to lift the restrictions on alienation and incorporate the Town of Mashpee. As a threshold matter, an Indian reservation does not lose its reservation status simply because individual tracts of land fall out of Indian ownership.[389] Rather, "only Congress can divest a

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[381] Department's Proposed Finding at 96.

[382] *Id.*

[383] The two non-member overseers were in addition to three elected Mashpee overseers. *See id.*

[384] *Id.* at 97.

[385] *Id.* at 98.

[386] *See supra* Section II.a(ii).

[387] Morse Report at 70.

[388] *See* Plan for Removing the Several Indian Tribes West of the Mississippi River, 18th Cong., 2d. Sess., at 541–45 (Jan. 27, 1825).

[389] *Solem v. Bartlett*, 465 U.S. 463 (1984).

reservation of its land and diminish its boundaries," and it must do so explicitly.[390] In the case of the Mashpee, it is evident that the 1849, 1869, and 1870 Acts did not change the status of the Reservation and it continued to exist as such in 1934. First, the Commonwealth authorized the allotment of tribal landholdings to individuals without Congressional approval.[391]

Second, on a more practical note, while title to many individual allotments eventually passed into non-Indian hands, the Tribe, through the Town, still owned and controlled important communal parcels of land, namely the Old Indian Meeting House, the cemetery, the parsonage, and the Baptist church/school house.[392] Furthermore, some individual allotments were deeded back to the Town for common use, others were continuously owned by tribal allottees who permitted tribal uses of the land, and yet other allotted lands had deeds that reserved access to usufructary rights, such as the right to gather seaweed and marsh hay, to tribal members.[393] Mashpee members continued to dominate the Town's year-round population and, on a fundamental level, the Tribe maintained its cultural and political control over the Town.[394] Therefore, the Indian character of the Reservation persevered up until and through the time in question, June 1, 1934.

Indeed, the Town was widely recognized as a Mashpee Indian settlement in the 1930s. Several academics studied the Town precisely because of its Indian nature. The BIA-commissioned Tantaquidgeon Report provided details on the Mashpee "reservation," subsistence practices, education facilities, health needs, arts and language, and governance.[395] It explained that the Town "has always been known as an Indian town and the town officials for the most part have been and still are persons of Indian extraction." In 1938, Harvard sociologist Carle Zimmerman reported that certain Mashpee families dominated the town politics and effectuated a "tribal" government.[396] And although slightly preceding the time period in question, BIA itself denominated the Town as a "reservation" or "agency" in its Carlisle school records for

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[390] *Id.* at 470; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish must be "clear and plain").

[391] *See supra* Section II.b.

[392] *See supra* Section II.a(iii).

[393] *See id.*; *see also* Lopez Affidavit ¶ 17 (discussing the public hall and Douglas field sites), ¶¶ 15–16 (discussing the herring run site); Frederick D. Nichols , Title Report re Condemnation Proceedings U.S. District Court No. 7359, Civil, 229 acres, South Mashpee, Mass., at 1–2 (Aug. 10, 1949).

[394] *See supra* Section II.a(iii); Department's Proposed Finding at 44, 49, 152; *see also generally* Affidavit of Chief Vernon "Silent Drum" Lopez.

[395] Dec. 6, 1934 Tantaquidgeon Manuscript at 10–17; *see generally* Jan. 4, 1935 Tantaquidgeon Manuscript (providing a detailed narrative of the Mashpee Tribe's history, language, government, social regulations, economic life, education, and so forth).

[396] *See* Department's Proposed Finding at 53, 103 (citing Carle C. Zimmerman, THE CHANGING COMMUNITY (1938)). Zimmerman also referred to the Town as a "reservation" at one point in his study. *See* Carle C. Zimmerman, THE CHANGING COMMUNITY at 173.

Mashpee students.[397] Additional sources from the early 1900s similarly referred to the Town as an "Indian" or "native" "settlement."[398]

Although many of these sources refer to the Mashpee Reservation as something other than a reservation, per se, and in fact, its legal status was that of an incorporated town, the Supreme Court has found the particular label of an Indian settlement to be "immaterial."[399] Moreover, the Town "constitute[s] definable territory occupied exclusively by [the Mashpee] (as distinguished from lands wandered over by many tribes)."[400] This fact would have been sufficient to protect the Town under Indian title, had it not been formally designated a Town by the Commonwealth.

3. *Federal treatment of the Reservation*

Although the Federal Government had, at various times, acknowledged the Mashpee reservation, it did not seek to implement IRA at the Town. In fact, there exists a collection of letters, written by BIA officials in the 1930s, that generally disclaimed Federal jurisdiction over the Tribe because it was allegedly governed by state authority.[401] As a preliminary matter, these letters do not consider or address the existence of the Mashpee Reservation for purposes of qualifying for the IRA's benefits under the second definition. Rather, the Federal officials assumed that because the Tribe and its Town were located in the Eastern States, they could not fall within the coverage of Federal Indian programs and monies.[402]

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[397] *See, e.g.*, Carlise School Records for Alfred De Grasse ("agency"), Daisy Mingo ("agency"), Charles Peter ("agency" and "reservation"), Eva Simons ("agency" and "reservation"), Lillian Simons ("agency" and "reservation") (collected from NARA RG75, Entry 1327).

[398] *See* Department's Proposed Finding at 22 (citing a 1915 *Cape Cod Magazine* article and the 1928 academic study conducted by anthropologist Frank Speck).

[399] *United States v. McGowan*, 302 U.S. at 538–39.

[400] *See United States v. Santa Fe P. R. Co.*, 314 U.S. at 345..

[401] *See* Letter from W. Carson Ryan, a BIA official, to James F. Peebles (Nov. 22, 1934) (stating that federal funds were not available for "Indian groups" like the "Mashpee Community" which were under state jurisdiction); Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Dec. 21, 1936) (responding to a request for federal aid by stating that the "Indians of the Mashpee Tribe are not under Federal jurisdiction or control"); Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Oct. 2, 1937) (reiterating Daiker's position that "the Indian Office can offer no assistance to Indians not members of a tribe under Federal jurisdiction," *i.e.* the Mashpee); Letter from John Herrick, Assistant to the Commissioner, to Charles L. Gifford (Oct. 28, 1937) (responding to a request for information on the Mashpee by stating that "the Federal Government does not exercise supervision over any of the eastern Indians," and therefore the Indian Office does not have information on the Mashpee).

[402] Letter from John Collier, Commissioner of Indian Affairs, to Maoel L. Avant (undated) (finding that the federal government could not offer assistance to the Mashpee unless the federal government decided to "undertake further provision for small Eastern groups under the States" but "until such time these needs will have to be met … through local and State channels"). This letter was likely written in 1935, as it refers to a study conducted "last summer" by Gladys Tantaquidgeon. As described, *supra*, this study was performed in 1934.

This situation may be analogized to the situation recognize by Justice Breyer in his concurrence in *Carcieri* where "a tribe may have been 'under Federal jurisdiction' in 1934 [for purposes of the first definition of "Indian"] even though the Federal Government did not believe so at the time."[403] As detailed *supra*, the Federal Government's application of IRA, particularly through its immediate implementation of Section 18 votes at Indian reservations and efforts to assist groups in formally organizing under Section 16, was not fully comprehensive or without error. This reality was due to the fact-intensive nature of determining the existence of a tribal group or reservation, misinformation or insufficient information about particular groups, specific policy determinations, and time and resource constraints.[404] Accordingly, certain tribes were later recognized as eligible to organize under the IRA even though a Section 18 vote had not been held at their reservations and even if the Department had not originally considered the tribe as a "Federal ward."[405]

Moreover, these letters are best understood as reflections of evolving and changing Federal policy, rather than the legal realities, of that period. They highlight the historical Federal policy of acquiescence to state jurisdiction over the New England tribes. [406] This acquiescence appeared to stem from a combination of budgetary constraints on the Federal coffers,[407]

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[403] *See* 555 U.S. at 397–98; *see also* Memorandum to the Assistant Secretary – Indian Affairs re: Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980). While the Stillaguamish memorandum addressed the tribe's qualification under the first definition of "Indian," it is illustrative of the point that the federal government may not have overlooked or misunderstood the status of a tribe or a reservation at the time the IRA was passed. The memorandum concluded that it is "irrelevant that the United States was ignorant in 1934 of the rights of the Stillaguamish and that no clear determination or redetermination of the status of the tribe was made at that time." *Id.* at 7.

[404] *See supra* Section I.c; *see also* Stillaguamish Memorandum at 7 ("It is very clear from the early administration of the Act that there was no established list of 'recognized tribes now under Federal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups.").

[405] *See, e.g.*, Memorandum from Assistant Solicitor Kenneth Meiklejohn (Jan. 10, 1940) (rejecting the assumption that the Yavapai Indians could not organize because a Section 18 vote had not been held on the tribe's reservation). *See also* To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., at 265–66 (May 17, 1934) (debate between Senator Thomas and Senator Wheeler regarding whether the Catawbas should be subject to the IRA since they were "living on a reservation" and "descendants of Indians" but "[t]he Government has not found out they live yet, apparently"); Solicitor's Opinion, Catawba Tribe – Recognition Under IRA (Mar. 20, 1944), II Op. Sol. on Indian Affairs 1255 (U.S.D.I. 1979) (finding that the Catwaba qualify for organization under the IRA, even though Commissioner Collier stated that "[t]he Federal Government has not considered these Indians as Federal wards").

[406] There are exceptions to this general trend, such as the Indians in New York. The federal government acknowledged that "[r]ightly or wrongly, from an early day, the State has exercised considerable jurisdiction over these Indians and has more or less satisfactorily performed the sovereign functions usually exercised by the Federal Government in behalf of the Indians." Letter from Commissioner John Collier to Mr. Oliver LeFarge, President of the American Association of Indian Affairs at 1 (Feb. 19, 1938). Nevertheless, the federal government expressly recognized that the New York Indians are "wards of the [Federal] Government and as such, subject to whatever legislation the Congress under its paramount authority may enact," even though "[t]hus far, Congress has enacted very little legislation dealing specifically with the Indians in New York." *Id.*

[407] *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (2012 ed.) (noting that while the IRA was intended to achieve several lofty objectives, its realization was not fully successful because "on a practical economic

traditional deference to the colonial states deriving from their shared jurisdictional authority over Indians in the early development of the United States,[408] and the assumption that these Indian populations were already being adequately provided for by the State and local governments.[409] Accordingly, evidence demonstrating that the Federal Government excluded the Mashpee from the scope of its Federal programs in the 1930s is not dispositive as to the question of whether the Town qualified as a reservation for purposes of IRA. This comports with our reasonable interpretation that Congress intended the definition of "Indian" to cover three distinct but partially overlapping classes of Indians, and therefore the qualifier "now under federal jurisdiction" contained in the first definition does not apply to the second definition.[410] It further comports with our reasonable interpretation that evidence of State exertions of authority over a reservation are not dispositive as to whether that land qualified as a "reservation" under IRA, particularly given Solicitor Margold's express opinion that IRA applied to Indians living on non-Federal reservations.[411] Moreover, this evidence is outweighed by the larger universe of documents demonstrating the existence of the reservation for the Mashpee and its treatment as such by external parties, including the federal government, from the 1660s up through the 1930s.

ii. *The Boundaries of the Historic Mashpee Indian Reservation*

For purposes of the second definition, the "present boundaries" of the historic Mashpee Indian reservation in 1934 are coterminous with the boundaries of the Town as incorporated in 1870.[412] While the land deeds of 1665 and 1666 formed the boundaries of the original Mashpee communally-held settlement, over time title to certain tracts of land fell out of Mashpee ownership.[413] The legal status of the entire community also evolved at several points following the initial issuance of these deeds. Because the statutory text requires residence within the "present boundaries" of the reservation,[414] the reservation boundaries for purposes of our inquiry are set at the time of the last change in legal status prior to 1934, *i.e.* when the Indian district was

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level the federal government was unable to respond fully to the economic condition of Indian people as described by the Meriam Report and as exacerbated by the Great Depression").

[408] *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02[1], 15.06[1] (2012 ed.) (discussing how the Articles of the Confederation provided the federal government and state governments with a degree of shared authority over Indian Affairs that was "obscure and contradictory" in nature, and how this practice persisted following the Constitution and enactment of the Non-Intercourse Act).

[409] *See, e.g.*, Morse Report at 23–24 (stating that the New England tribes "are all provided for, both as to instruction and comfort, by the governments and religious associations, of the several states in which they reside."); Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Oct. 2, 1937) ("Your people are of the same status as other citizens of the Commonwealth of Massachusetts, and you must look to the local authorities for assistance.").

[410] *See supra* Section I.d(ii).

[411] *See supra* Section I.d(iii)(a).

[412] *See* Attachment II of this ROD, 1930 Mashpee Heads of Households Map (submitted by the Tribe, modified version of Massachusetts State Planning Board map of the roads and waterways for the Town of Mashpee).

[413] *See* Department's Proposed Finding at 33–34 (discussing land sales to outsiders).

[414] *See* 25 U.S.C. § 479.

incorporated into the Town in 1870.[415] As explained *supra*, these exterior boundaries were not affected by the loss of title to individual tracts pursuant to the Commonwealth's allotment efforts, particularly since important communal lands remained in the Tribe's hands and there remains an open legal question as to whether the Commonwealth had the authority to divest the Tribe of its land.

iii. *Mashpee Members Lived on the Reservation in 1934*

As we stated previously, we need not decide whether the 1934 residency requirement attaches to "descendants" or "members." The Tribe has identified 35 "living tribal members who were resident on the reservation" as of June 1, 1934.[416] This includes the Mashpee traditional Chief Vernon "Silent Drum" Lopez, who has provided an affidavit detailing his experience living on the reservation in 1934.[417] As noted *supra*, these members were also descendants of members since membership was determined genealogically.[418] Accordingly, we find that the Tribe's members maintained residence within the boundaries of an Indian reservation as of June 1, 1934, and this aspect of the definition has been satisfied.

IV. CONCLUSION

The IRA applies to "Indians," including "descendants of [members of any recognized Indian tribe] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." The applicability of this definition is, in large part, a fact-specific inquiry into whether land was set aside for Indian use and occupation. The Town of Mashpee was specifically established as a protected tract of land for Mashpee Indians. The Tribe has a long recorded history at its Town and the Tribe's ownership and control over this land, while varying in form and degree over hundreds of years, existed in 1934. Given the extensive historical evidence concerning the Town of Mashpee, the sweeping remedial purpose of IRA, and the clear directive to interpret statutory ambiguities in favor of the Indians, we find that the Tribe had
a historic reservation for purposes of the second definition as the term was understood when the IRA was enacted.[419] The Tribe, as discussed above, has provided sufficient evidence that its members resided on such reservation on June 1, 1934. Accordingly, the Department has authority to acquire land in trust on behalf of the Tribe pursuant to the IRA.

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[415] An Act to Incorporate the Town of Mashpee, Mass. Acts ch. 293, § 1 (1870) ("The district of Marshpee is hereby abolished, and the territory comprised therein is hereby incorporated into a town by the name of Mashpee.")

[416] Letter from Chairman Cedric Cromwell re February 3, 2015, submission by Tribe on eligibility of the Indian Reorganization Act ("IRA") (Mar. 18, 2015).

[417] Affidavit of Chief Vernon "Silent Drum" Lopez (executed on Nov. 28, 2012), Exhibit 3 of Mashpee Wampanoag Tribe Memo on *Carcieri v. Salazar*: Supplement 2 (Nov. 29, 2012).

[418] *See supra* Section III.a.

[419] This opinion only addresses whether the Mashpee had a reservation in 1934 for purposes of IRA, and not for any other statutory purposes. I note, however, that the concept of a "reservation" as understood in the 1934 for purposes of applying IRA is not identical to the modern concept of a "reservation."

8.4 25 C.F.R. § 151.10(b) - The need of the individual Indian or tribe for additional land

Section 151.10(b) requires consideration of the need of the tribe for additional land. The Tribe has a need for land to establish the Tribe's initial reservation and provide the Tribe with opportunities for self-government, self-determination, and long-term, stable economic development. The Tribe was federally recognized in 2007, but does not currently have the benefit of a federally protected reservation or trust lands. The Tribe needs land to establish a homeland, develop economic development opportunities, and facilitate self-determination.

Currently, the Mashpee Sites are primarily used for tribal administration, preservation, and cultural purposes. Acquisition of these Sites in trust will protect them from the imposition of state and local zoning and taxation, and will allow the Tribe to govern itself and exercise its sovereignty.

Sections 3.2 and 5.0 of the Final EIS discuss in detail the needs of the Tribe. The median annual household income of reporting tribal members was $29,601.11 as of August 31, 2012. This represents less than half of the median household income in the Town of Mashpee, as well the median household income of $64,509 in Massachusetts and $51,914 nationally. In 2012, 50 percent of tribal members lived in poverty. In that same year, tribal members had an unemployment rate of nearly 50 percent ,compared to 8.1 percent nationally,[420] and there are few job opportunities within the Town of Mashpee where 40 percent of tribal members reside.

The Tribe also has a need for land to address tribal members' substantial housing needs. In recent years, the demand for real estate on Cape Cod, and the Town of Mashpee in particular, has increased substantially, creating a scarcity of affordable housing. In the Town of Mashpee, new home construction is aimed at high-income levels, and most tribal members cannot afford the marketing value.[421] Although a number of tribal members reside on ancestral home lots along historic Main Street, recent zoning laws prevent members from further subdividing these lots to create multi-family housing to serve relatives. Additionally, the average tribal household size is 2.73 persons greater than the average household size in either the Town of Mashpee or Barnstable County. The Tribe's 2011 Indian Housing Plan shows the following needs for the 661 families identified as comprising the tribal population: 524 (79 percent) are identified as low income; 431 (65 percent) include an elderly family member; 37 (almost 6 percent) live in substandard housing with inadequate plumbing or cooking facilities.[422] There is also an unmet rental-housing need for 100 families (15 percent of the population). Revenue from economic development will support tribal programs such as the Wampanoag Housing Program and the Low Income Home Energy Assistance Program. Acquisition of the Mashpee Sites will also allow the Tribe to construct a senior living facility and housing.

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[420] Tribe's Restated 2012 Application at 12, *citing* Bureau of Labor Statistics as of April 2012.

[421] Tribe's Restated 2012 Application at 13.

[422] *Id.*

As discussed in **Section 1.3** above, the Tribe needs land for economic development. Acquisition of the Taunton Site will provide economic development opportunities and funding to for the Tribe to rebuild its land base, strengthen its tribal community, and achieve self-determination. The Tribe seeks to preserve tribal lands, its history, and its community for future generations, as well as increase tribal services and programs. The establishment of a land base and the proposed uses on the Mashpee and Taunton Sites would support the Tribe's endeavors as they seek to self-govern and meet significant tribal needs.

The Acting Regional Director determined, and we concur, that the Tribe has adequately supported its need for additional land to facilitate economic development, Indian housing, and self-determination.

8.5 25 C.F.R. § 151.10(c) – The purposes for which the land will be used

Section 151.10(c) requires consideration of the purposes for which the land will be used. The Tribe proposes no change in use to the Mashpee Sites. The previously approved on-going construction of housing on Parcel 8 will continue. The Tribe proposes to develop a destination facility that would be approximately 400,000 sq. ft. at the Taunton Site. The gaming floor would be approximately 132,000 sq. ft. and feature an open design. It would hold 3,000 slot machines, 150 multi-game tables, and 40 poker tables for 4,400 gaming positions. Other casino features would include a 5- to 6-venue food court with seating for approximately 135 patrons, a 400-seat buffet restaurant, an entertainment bar/lounge with 200 seats, and a 24-hour restaurant with seating for 120 patrons. Other support facilities required for the casino floor and restaurants would include an employee dining room with 325 seats. Two hotels, each 15 stories tall and having 300 rooms, would be constructed adjacent to the casino.

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

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

The Acting Regional Director determined, and we concur, that the Tribe has adequately described the intended purpose of the land to be acquired.

8.6 25 C.F.R. § 151.10(e) - If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls. On May 30 and June 1, 2012, BIA sent notices of the proposed acquisition to state and local governments having regulatory jurisdiction over the Sites and requested comments on the potential impacts to regulatory jurisdiction, real property taxes, and special assessments. Notices were sent to the following:[423]

- Chair, Barnstable County Commissioners
- Barnstable County Administrator
- Chairwoman, Bristol County Commissioners
- Chairman, Town Selectmen, Town of Mashpee
- Manager, Town of Mashpee
- Assessing Director, Town of Mashpee
- President, City Council, Town of Mashpee
- Mayor, City of Taunton
- Office of the Governor, Commonwealth of Massachusetts

Responses were received from the following:

- Mayor, City of Taunton
- Assessing Director, Town of Mashpee
- Manager, Town of Mashpee
- Chairman, Town Selectmen, Town of Mashpee
- Chief Legal Counsel, Office of the Governor's Legal Counsel[424]

We analyze the tax impacts below, and note that Section 8.16 of the Final EIS fully evaluated the impact to the State and its political subdivisions from the removal of the land from the tax rolls.

Mashpee Sites

Five parcels in the Town of Mashpee were on the tax rolls in Fiscal Year (FY) 2012. In accordance with Commonwealth law, the Town has historically exempted some of the Mashpee Sites because they provided educational, cultural, religious, housing, and other civic, charitable, and/or benevolent programs and opportunities (Mass. G. L. C.59, Section 5.). The Town levied

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[423] Regional Director's Recommendation, Vol. III, Ex. 2, Items 1-8.

[424] On June 27, 2012, the Office of the Governor's requested an extension of time to respond to BIA's request for comments. The Office of the Governor's Legal Counsel submitted comments to BIA by letter dated September 4, 2012. *See* Letter to Donald Laverdure, Acting Assistant Secretary – Indian Affairs, and Franklin Keel, Regional Director, Eastern Region, from Mark A. Reilly, Chief Legal Counsel (Sept. 4, 2012) in Regional Director's Recommendation, Vol. III, Ex. 2, Item 3.

taxes on the remaining parcels which totaled $17,563.89 for fiscal year 2012.[425] This represents 0.03 percent of the total property tax revenue for the Town of Mashpee for that year.[426]

Table 3
Tax Payments in Mashpee for Fiscal Year 2012

Number	Parcel ID Number	Location	Total Taxes Paid
1	61-58A-0-R	410 Meetinghouse Road	Exempt
2	125-238-0-E	17 Mizzenmast	Exempt
3	68-13A-0-E	414 Meetinghouse Road	Exempt
4	27-42-0-R	431 Main Street	$1,384.79
5	35-30-0-R	414 Main Street	Exempt
6	95-7-0-R	483 Great Neck Road	Exempt
7	45-73-A-R	41 Hollow Road	$637.72
8	45-75-0-R	Meetinghouse Road	$6,918.42
9	99-38-0-R	Es Res Great Neck Road	Exempt
10	117-173-0-R	56 Uncle Percy's Road	$122.95
11	63-10-0-R	213 Sampsons Mill Road	$8,500.01
Total			$17,563.89
Total Property Taxes for the Town of Mashpee			$54,080,834
Percent of Total Property Taxed for the Town of Mashpee			0.03 percent

Under the IGA with the Town of Mashpee on April 28, 2008, the Town agreed to transfer parcels located within the Town for the purpose of having them conveyed to the United States in trust for the Tribe.

Taunton Site

Six Taunton Sites are exempt from taxation. The property taxes for the remaining Sites for FY 2012 were $268,190.15.[427] This represented 0.51 percent of the total property tax revenue for the City of Taunton.[428]

Table 4

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[425] FY 2012 real estate tax bills for the Mashpee Sites, on file with the Office of Indian Gaming. The Town of Mashpee responded to the Regional Director's request of June 1, 2012, with estimated taxes for FY 2012. *See* letters from Jason R. Streebel, Assessing Director, Town of Mashpee (received June 25, 2012); Joyce Mason, Manager, Town of Mashpee (received June 21, 2012); Michael R. Richardson, Chairman, Town Selectmen of Mashpee (received June 21, 2012) in Regional Director's Recommendation Vol. III, Ex. 2, Items 1-6.

[426] Final EIS, Section 6.3.

[427] FY 2012 real estate tax bills for the Taunton Sites, on file with the Office of Indian Gaming.

[428] Final EIS, Section 7.16.

Tax Payments in City Of Taunton for Fiscal Year 2012

Parcel ID Number	Location	Total Taxes Paid
North of Railroad Tracks		
94-156-0	Middleborough Avenue (Lot 14)	Exempt
95-36-0	5 Stevens Street	Exempt
108-27-0	O'Connell Way (Lot 13)	Exempt
108-26-0	O'Connell Way (Lot 9B)	Exempt
118-49-0	O'Connell Way (Lot 9A)	Exempt
NA	O'Connell Way roadway and gap	Exempt
South of Railroad Tracks		
118-50-0	50 O'Connell Way	$152,791.08
118-45-0	60 O'Connell Way	$35,947.43
109-302-0	O'Connell Way (Lot 11)	$8,388.19
119-1-0	73 Stevens Street	$14,506.02
118-51-0	O'Connell Way	$486.11
118-52-0	Stevens Street	$46.96
119-67-0	O'Connell Way	$6,010.02
109-299-0	61R Stevens Street	$13,650.40
119-66-0	71 Stevens Street	$25,642.11
119-30-0	65 Stevens Street	$2,679.29
119-2-0	67 Stevens Street	$2,862.40
109-17-0	61 Stevens Street	$5,180.14
Total		$268,190.15
Total Property Taxes for the City of Taunton		$72,783,646
Percent of Total Property Taxed for the City of Taunton		0.51 percent

On July 10, 2012, the City of Taunton and the Tribe entered into an IGA that set forth the terms for the Tribe's development of the Preferred Development in Taunton.[429] The IGA includes provisions requiring the Tribe to allocate approximately $33 million in up-front mitigation payments and approximately $13 million annually to Taunton based on slot revenues, payment in lieu of taxes, and allocations to public institutions, including police and schools.[430] Among the stipulations agreed to by the Tribe in the IGA are the following:

> *Up-front Payment*: The Tribe agreed to make a non-refundable payment to the City of Taunton in the amount of $1.5 million within 30 days of the Tribal-State Compact for the regulation of class III gaming being approved by the State Legislature. This payment occurred on August 22, 2012.

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[429] Final EIS, Volume II, Exhibit 3, Appendix A-2.

[430] Final EIS, Section 2.2.3.

Continuing Payments: The Tribe will pay the City of Taunton 2.05 percent of the casino's net revenues generated from slot machines and other electronic games. In no event can this amount be less than $8 million per year.

Payment in Lieu of Taxes (PILOTs): The Tribe will pay the City of Taunton an annual amount equal to the property tax that would be payable on the Sites, based upon an assessed value of the Site determined as of the date the Taunton Site are taken into trust or May 17, 2012, whichever value is greater, plus a 3 percent per year increase on the previous year's payment. Although this increase will be capped after year ten, the PILOT will continue indefinitely.

Infrastructure Costs: The Tribe is obligated to pay for all up-front infrastructure costs necessary to improve and upgrade the City's police, fire, water, sewer, administrative, and other facilities. The Tribe is also required to pay for the City's ongoing costs resulting from the City's hiring of additional police, fire, administrative, and other personnel, as related to the planned development.

Because the tax revenues generated by the Taunton Site represent a small proportion of total property tax revenues for the City, and the Tribe has committed to impact payments as described above, the loss of property taxes from the acquisition of the Site in trust will be offset or substantially mitigated by the impact payments and the increased economic activity from the gaming enterprise. In a letter dated September 10, 2012, the Mayor expressed support for the proposed project and stated that the proposed project will stimulate strong local and regional economic growth and provide many needed jobs.[431]

In addition to the fiscal benefits that local governments are provided under the two IGAs with The Town of Mashpee and the City of Taunton, the annual operation of the project would also have tax revenues associated with it. Although the Tribe itself is tax-exempt, the operation of the casino facility would generate tax revenues in the form of personal income taxes, corporate and business taxes from contractors and suppliers, and sales taxes on materials purchased directly by contractors and suppliers.

The Acting Regional Director found, and we concur, that removal of the Mashpee Sites and Taunton Site from the tax rolls would not have an adverse impact on the Town of Mashpee or the City of Taunton.

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[431] Letter to Donald Laverdure, Acting Assistant Secretary – Indian Affairs, and Franklin Keel, Regional Director, Eastern Region, from Thomas C, Hoye, Jr., Mayor, City of Taunton (Sept. 10, 2012).

8.7 25 C.F.R. § 151.10(f) - Jurisdictional problems and potential conflicts of land use which may arise

Trust lands are not subject to the regulatory requirements of the Commonwealth and local jurisdictions. Federal laws will, however, continue to apply on the Sites. In Taunton, Preferred Alternative A requires roadway and sewer improvements that are proposed to be constructed on land outside of the proposed trust acquisition. Any such work on non-trust lands would be fully subject to local laws and laws of the Commonwealth and regulatory permitting programs.

Mashpee Sites

No jurisdictional problems associated with the Mashpee Sites are anticipated. These Sites are zoned residential. No new development is proposed, and these Sites would be maintained as historic tribal sites, offices, housing, recreational lands, and other uses. The previously-approved on-going construction of housing on Parcel 8 will continue. In the IGA between the Tribe and the Town of Mashpee, the Town agreed to support the Tribe's application and any necessary approvals, and acknowledged that the Town may lose revenue and regulatory control over the Mashpee Sites.[432] The Town and Tribe agreed to cooperate and work together through any potential traffic issues that could arise as a result of the proposed improvements related to the trust acquisition even though no foreseeable traffic impacts or land use impacts are anticipated.

No potential conflicts of land use associated with the Mashpee Sites are anticipated. The Mashpee Sites also include several historic and cultural sites. The National Register of Historic Places includes the Old Indian Meeting House (Parcel 1), the Cemetery (Parcel 3), and the Museum (Parcel 5). The Massachusetts State Register of Historic Places includes the Old Indian Meeting House (Parcel 1), the Burial Ground (Parcel 2), the Cemetery (Parcel 3), and the Parsonage (Parcel 4). The Tribe has no plans to alter these sites regardless of whether the parcels are acquired in trust by BIA or not. Parcel 6, which includes the Tribal Government Center, has been designated as tribal cultural property. Parcel 6 is used collectively by the tribal members for a wide range of tribal social and cultural activities including social gatherings, education of tribal members, and ceremonial activities. Anticipated environmental changes include the ongoing construction of low- and moderate-income tribal housing units on Parcel 8. This action was already reviewed pursuant to the National Environmental Policy Act and the Massachusetts Environmental Policy Act.[433]

Several of the Mashpee Sites include land designated as sensitive environment. Part or all of Parcels 1, 3, 4, 5, 6, 7, 8, and 9 have been designated by the Massachusetts Natural Heritage and Endangered Species Program (NHESP) as Priority Habitat and Estimated Habitat. Parcels 4

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[432] *See* Final EIS, Appx. A-1.

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

(Parsonage) and 5 (Museum) contain small areas of wetlands and lie adjacent to wetlands and the Mashpee River, an anadromous fish run. NHESP mapping indicates a potential vernal pool and MassDEP-listed wetlands on Parcel 6 (Tribal Government Center) and a certified vernal pool, potential vernal pools, and MassDEP-listed wetlands near, but not within, Parcel 7 (vacant). The Tribe has agreed to maintain Parcel 7 as conservation land to protect the habitat of the Eastern Box Turtle, a Species of Special Concern under the Massachusetts Endangered Species Act. Parcel 9 (cultural/recreational) includes two wetlands and a manmade stream, and Parcel 11 (agricultural/tribal offices) is bordered by the Santuit River and surrounding wetlands. Parcel 2 (Burial Ground) is subject to a preservation restriction held by the State Register of Historic Places and a conservation restriction held by the Commonwealth's Department of Conservation and Recreation, and will not be developed.

In the IGA between the Tribe and the Town of Mashpee, the Town agreed to support the Tribe's application and any necessary approvals, and acknowledged that the Town may lose revenue and regulatory control over the Mashpee Sites. The Town and Tribe agreed to cooperate and work together through any potential traffic issues that could arise as a result of the proposed improvements related to the trust acquisition. However, because no change in land-use is proposed, no foreseeable traffic impacts or land use impacts are anticipated. As such, no jurisdictional problems or land-use conflicts are anticipated with respect to the Tribe's use of the Mashpee Sites.

In his letter dated September 4, 2012, the Chief Legal Counsel, Office of the Governor's Legal Counsel (Chief Legal Counsel's letter), stated that the Office of the Governor supports the Tribe's application. The Chief Legal Counsel's letter refers to the two IGAs and the Tribal-State Compact for the regulation of class III gaming as addressing most of the concerns expressed by the Commonwealth in 2008. The Chief Legal Counsel's letter further states that the Commonwealth is confident that the Tribe will work with the Commonwealth, as well as the affected communities surrounding the Mashpee and Taunton Sites, to mitigate any remaining concerns. The remaining concerns include the future adoption of laws and an agreement by the Tribe to be governed by the Governor's use of emergency authority on tribal lands. The letter suggests that the Commonwealth may also address the effects of the change of zoning status by including tribal lands in its affordable housing policy and requirements.

Taunton Site

No jurisdictional or land-use problems associated with the Taunton Site are anticipated. The Taunton Site lies in and adjacent to the Liberty and Union Industrial Park (LUIP), located near the junction of two major roadways. The LUIP is a commercial/industrial development park created in 2003 and operated by the private, non-profit entity Taunton Development Corporation for the purpose of generating economic development opportunities in the City of Taunton. The Sites are currently zoned as industrial. The City of Taunton has designated this Site for economic development purposes. Existing development on the Site consists of five light industrial/warehouse/office buildings and three residences totaling approximately 250,400 sq. ft. and associated parking. Other areas of the Site have been graded, but not yet built upon. The Site is well-developed with a central access roadway (O'Connell Way), utilities, and stormwater

retention ponds already in place. An active freight rail line runs east-west through the Site. Approximately 50 acres of the Site are located north of the railroad, consisting of mature forest and former agricultural fields. The area north of the rail line includes Barstows Pond, a small man-made impoundment of the Cotley River. The remainder of the Site, south of the railroad, consists largely of existing commercial development. Much of the undeveloped area is wetland.

As discussed above in **Section 8.6**, the IGA between the Tribe and the City of Taunton provides the City with substantial mitigation for any potential impacts. In exchange for the provision of municipal services, including police, fire, water, sewer, and other services, the Tribe has agreed to pay one-time impact costs and annual costs as summarized in **Table 5** below. The Tribe has also agreed to be responsible for all costs of improvements to transportation infrastructure, including road construction, bridges, road maintenance, and traffic signals necessitated by Preferred Alternative A. These improvements will benefit the Tribe and the City. Further, the Tribe has agreed to pay annual costs related to impacts to schools. The Tribe has agreed to work cooperatively to evaluate and determine the appropriate staffing levels, training, amounts, and types of equipment and necessary facilities to provide additional services. The Tribe has also agreed to pay all costs related to these additional services as defined within the IGA.

Table 5
Summary of Mitigation Costs – City of Taunton[434]

Category	One-Time Construction Phase 1 Cost (estimate)	One-Time Construction Phase 2 Cost (estimate)	Annual Costs (estimate)
Fire	$2,140,000	$720,000	$1,500,000
Police	$2,982,000	$0	$2,500,000
Administrative	$132,000	$0	$400,000
Schools	$0	$0	$370,000
Sewer	$7,500,000	$0	$20,000.00
Water	$2,000,000	$0	$20,000
Total	**$14,754,000**	**$720,000**	**$4,790,000**

The Acting Regional Director determined, and we concur, that jurisdictional problems and potential land use conflicts have been addressed, and that any concerns that may arise in the future will be addressed cooperatively by the Tribe, the Town of Mashpee, the City of Taunton, and the Commonwealth.[435]

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[435] Several nearby jurisdictions raised concerns about impacts from increased traffic and the safety of nearby high school, middle school, and elementary school students, as well at water availability at the Taunton Site. *See e.g.,* letter from Dean V. Cronin, Chairman, Thomas J. Pires, Member, and Patrick W. Menges, Clerk, Dightmon Board of Selectmen, to Franklin Keel, Reg'l Dir., Eastern Reg., (Jan. 6, 2013); letter from Stephen J. Mckinnon, Chairman, Town of Middleborough Board of Selectmen (Jan. 14, 2014); letter from Richard Brown, Town Administrator,

8.8 25 C.F.R. § 151.10(g) - If the land to be acquired is in fee status, whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

The Eastern Regional Office of BIA is located in Nashville, Tennessee, and currently provides technical advice and limited direct field services on trust resources program management matters to the eastern United States. The Regional Office's trust resources management programs include real estate services, forestry, archeology, environmental management services, and natural resources management.

While the distance of the properties from the Regional Office limits BIA's capacity to make regular on-site visits, the current and proposed uses of the Mashpee Sites, along with the active management activities of the Tribe, would not require a regular Federal oversight presence. The planned tribal presence on the Taunton Site and the highly regulated nature of Indian gaming operations generally, and specifically under the 2014 Tribal-State Compact for the regulation of class III gaming between the Tribe and the Commonwealth, would minimize the need for regular onsite inspections by BIA staff. In addition, the Tribe has entered into IGAs with the Mashpee and Taunton governments to provide for, among other things, law enforcement, police and fire protection, sewer and water improvements, and building and fire code enforcement.[436]

Acquiring the Mashpee and Taunton Sites in trust should not impose any significant additional responsibilities or burdens on the level of services currently being provided to the Tribe by BIA. Accordingly, the Acting Regional Director found, and we concur, that BIA is equipped to discharge any additional responsibilities resulting from the acquisition of the land in trust and the development of the proposed gaming facility.

8.9 25 C.F.R. § 151.10(h) - The extent of information to allow the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations

This ROD documents the Department's compliance with NEPA through the preparation of an EIS. The BIA published a Notice of Intent (NOI) to prepare an EIS in the *Federal Register* on May 31, 2012, describing the proposed action of acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation, and announcing the intent to prepare

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Town of Freetown, to Cedric Cromwell, Chairman Tribal Council, Mashpee Wampanoag (Dec. 23, 2013); letter from Rita A. Garbitt, Town Administrator, Town of Lakeville, to Franklin Keel, Regional Director, Eastern Reg., (Jan. 16, 2014); and letter from Jonathan F. Mitchell, Mayor, City of New Bedford (Jan. 17, 2014). These concerns were specifically addressed in Sections 8.0 and 10.00 of the Final EIS and through the mitigation measures identified in the Final EIS and **Section 6.0** of this ROD.

[436] Intergovernmental Agreement, Final EIS, Appx. A-2, Ex. D.

an EIS (77 Fed. Reg. 32,123 (May 31, 2012)). The NOI commenced a public comment period, open through July 2, 2012, by providing an address and deadline for comments. It also announced two public scoping meetings to be held on June 20 and 21, 2012, at the Taunton High School and Mashpee High School auditoriums, respectively. The comments presented at the scoping meetings supplemented the 78 comment letters that were submitted to BIA during the public comment period. A Scoping Report, titled *Mashpee Wampanoag Tribe, Fee-to-Trust Acquisition and Destination Resort Casino, Mashpee and Taunton, Massachusetts* was made available by BIA in November 2012. The Scoping Report outlined the relevant issues of public concern to be addressed in the EIS.

On November 15, 2013, BIA published a Notice of Availability (NOA) in the *Federal Register* that provided information on local public hearings and how to request or view copies of the Draft EIS (78 Fed. Reg. 68,859 (Nov. 15, 2013)).

The EPA published of a Notice of Filing in the *Federal Register* on November 22, 2013, that commenced the 45-day review and comment period lasting until January 6, 2014 (78 Fed. Reg. 70,041 (Nov. 22, 2013)). The BIA voluntarily extended the comment period an additional 11 days, through January 17, 2014, to allow additional review time. The BIA sent hard copies of the Draft EIS to the government offices of the City of Taunton, Town of Mashpee, and their local libraries for public access. The BIA also sent letters describing options for obtaining and commenting on the Draft EIS to Federal, tribal, state, and local agencies, as well as all interested parties who offered comments during scoping period. The BIA published notice of upcoming public hearings on the City of Taunton's and Town of Mashpee's municipal websites on November 15, 2013, and in two local newspapers, the *Taunton Daily Gazette* and *Cape Cod Times*, on November 16, 2013. The BIA held public hearings on December 2 and 3, 2013, at the Mashpee High School and Taunton High School auditoriums, respectively. The 20 statements presented at the hearings supplemented the 44 comment letters that were submitted to BIA during the public comment period.

The BIA published an NOA for the Final EIS in the *Federal Register* on September 5, 2014 (79 Fed. Reg. 53,077 (Sept. 5, 2014)). The BIA also published the NOA in local and regional newspapers, including the *Taunton Gazette* on September 10, 2014, and the *Cape Code Times* on September 12, 2014. The 30-day waiting period ended on October 6, 2014. The comments and responses to each of the substantive comments received during this period that were not previously raised and responded to in the EIS process are included in **Attachment IV** of this ROD.

The Department must complete an Environmental Site Assessment (ESA) pursuant to the Departmental Manual at 602 DM 2 to determine if there are any environmental contamination-related concerns and/or liabilities affecting the land being considered for acquisition. The Department completed Phase I ESAs in October 2014 and August 2015 to ensure there are no environmental contaminant concerns associated with the Sites.

8.10 25 C.F.R. § 151.11(b) - The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation

Presently, the Tribe presently does not have a Federal Indian reservation, although the Mashpee Sites are currently used by the Tribe and tribal entities and the Taunton Site is located within the historical range of the Mashpee Wampanoag people.[437] Mashpee is on the "upper", or western, portion of Cape Cod. Taunton is located approximately 54 miles northwest of Mashpee in Bristol County, Massachusetts. As discussed in detail above in **Section 7.0** of this ROD, the Mashpee and Taunton Sites will be designated as the Tribe's initial reservation because the Tribe has significant historical and modern connections to the areas in which the Sites are located.

8.11 25 C.F.R. § 151.11(c) - Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use

The Tribe has prepared a business plan that addresses the Taunton project's anticipated economic benefits.[438] In general, the project is expected to generate $400 million in the first year.[439] Revenues generated by the project will go toward the current and immediate needs of the Tribe. Priorities for the investment of funds include the construction of affordable housing for tribal members.

The proposed facility is also expected to strengthen the overall regional economy through construction, direct spending at the casino, and off-site spending by visitors and employees. Based on preliminary estimates, the total cost for developing the proposed project is estimated at $573.1 million in 2012 dollars. This cost includes construction costs, but excludes financing, value of land, and marketing. For the economic benefits analysis, the cost of fixtures, furniture, and equipment (FFE) ($120.6 million) is excluded, as it is assumed that FFE are imported from outside Massachusetts, and not constructed on the project site. Therefore, the construction costs used as the basis for this analysis are $452.5 million, of which $433.1 million are assumed to occur in the two-county region.[440]

As a result of the direct expenditures, direct employment from construction of the proposed project (including both on-site construction jobs and jobs resulting from construction soft costs such as architecture and engineering) is estimated at 2,400 person-years of employment in Massachusetts, or an average of 300 full-time equivalent jobs per year during the eight year construction period. In Bristol and Plymouth Counties, construction of the project would

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[437] The Tribe does not presently have a reservation as that term is defined in the Department's trust land acquisition regulations at 25 C.F.R. § 151.2.

[438] Regional Director's Recommendation, Vol. I, Tab 21. Because the Mashpee Sites are not being acquired for business purposes, no plan is required for those Sites.

[439] *See* summary of the Pro Forma Income Statement in Regional Director's Recommendation, Vol. I, Tab 21.1.

[440] Final EIS, Section 8.16.4.3; Regional Director's Recommendation, Vol. I, Ex. 21.

generate 2,297 person-years of employment, or an average of 287 full-time equivalent jobs per year during the eight-year construction period.

Based on our analysis of the information provided in the Tribe's application, the assumptions and estimates of economic benefit to the Tribe, particularly from the gaming operation, appear to be reasonable and obtainable. Further, the project will contribute revenues to the local economy throughout the development and operation phases of the project.

8.12 25 C.F.R. § 151.11(d). Contact with state and local governments pursuant to sections 151.10(e) and (f).

As discussed above in **Section 8.6**, on May 30 and June 1, 2012, BIA sent notices of the proposed acquisition to state and local governments having regulatory jurisdiction over the Sites, and requested comments on the potential impacts to regulatory jurisdiction, real property taxes, and special assessments. See discussion under **Sections 8.6 and 8.7** of this ROD.

9.0 ISSUANCE OF A RESERVATION PROCLAMATION

The Secretary's authority for issuing reservation proclamations is found in Section 7 of IRA, 25 U.S.C. § 467. Section 7 authorizes the Department to proclaim new Indian reservations on lands acquired pursuant to the acquisition authority conferred by the IRA, or to add such lands to existing reservations.[441] A reservation proclamation makes clear that land acquired in trust is a tribe's reservation, and clarifies jurisdictional status of the land. The Department evaluates requests for reservation proclamations pursuant to its internal reservation proclamation guidelines. These guidelines request and evaluate information similar to that which is required for a request to acquire land in trust, including a tribal resolution, legal description, and maps. Issuance of a reservation proclamation is considered a major Federal action requiring review pursuant to the National Environmental Policy Act.

As discussed in **Section 7.0** above, a reservation proclamation is required by IGRA to meet its "initial reservation" exception for gaming eligibility. With the issuance of this ROD, and upon meeting the requirements of the Department's proclamation guidelines, the Department announces its determination that the Mashpee and Taunton Sites are to be proclaimed the Tribe's reservation.

10.0 DECISION TO IMPLEMENT THE PREFERRED ALTERNATIVE

The Department has determined that it will implement the Preferred Alternative A. This decision was made based upon the environmental impacts identified in the EIS, a consideration

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[441] The Secretary's reservation proclamation authority only extends to lands acquired under the IRA, such as by Section 5, and, therefore, a Section 7 reservation proclamation does not affect the earlier determination that the Mashpee had a historical reservation in 1934 for purposes of applying the IRA.

of economic and technical factors, as well as the BIA's policy goals and objectives for the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. Of the alternatives evaluated in the EIS, Alternative A would best meet the purposes and needs of the BIA, consistent with its statutory mission and responsibilities, to promote the long-term economic vitality and self-sufficiency, self-determination, and self-governance of the Tribe. The tribal government facilities and casino-resort complex described under Alternative A would provide the Mashpee Wampanoag Tribe, which has no trust land or reservation, with a reservation land base and the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for its tribal government. This would enable the tribal government to establish, fund, and maintain governmental programs that offer health, education, and welfare services to tribal members, as well as provide the Tribe and local communities with greater opportunities for employment and economic growth.

The Department is aware that completion of the project as detailed in Alternative A will require approval or other actions from federal, state, and local agencies. Federally-recognized tribes possess both the right and the authority to regulate activities on their reservation and trust lands independently from state and local controls. Projects that are undertaken by the Tribe on tribal lands will not be subject to the regulatory requirements of state and local jurisdictions. Federal laws, however, will continue to apply on the site. This means, for example, that the local zoning laws of Mashpee and Taunton would not apply to the trust lands, nor would state laws such as the Massachusetts Wetlands Protection Act (MGL Ch.131 § 40). In Taunton, however, the proposed casino requires, for example, roadway and sewer improvements that are proposed to be constructed on land outside of the proposed trust acquisition. Any such work on non-tribal lands would be fully subject to state and local laws and regulatory permitting programs. Specifically, Alternative A will require a NPDES Construction General Permit from EPA, a Section 404 Permit from the Corps for discharge of materials to waters of the U.S., a Clean Water Act Section 401 Permit (Water Quality Certification) from MassDEP, a Highway Access Permit from MassDOT, and an Order of Conditions from the Taunton Conservation Commission for off-site wetlands impacts.

With the exception of unavoidable impacts identified for each of the development alternatives as a result of development and vehicle emissions, the additional impacts from Preferred Alternative A would be reduced to less than significant levels after the implementation of mitigation measures. Accordingly, the Department will implement Preferred Alternative A subject to implementation of mitigation measures discussed in **Section 6.0** of this ROD.

10.1 Preferred Alternative A Results in Substantial Beneficial Impacts

Preferred Alternative A is expected to result in beneficial effects for the Tribe and its members as well as the City of Taunton, surrounding communities, and the Commonwealth of Massachusetts. Key beneficial effects include:

- Establishment of a land base for the Mashpee Wampanoag Tribe, from which it can operate its tribal government and provide a variety of housing, educational, social,

cultural, and other programs and services, as well as employment opportunities for its members.

- Generation of needed revenues for the Tribe that will allow it to fund the governmental operations and programs to meet tribal needs and allow the Tribe to achieve self-sufficiency, self-determination, and self-government.
- Creation of approximately 300 full-time equivalent jobs per year during the eight-year construction period for the resort-casino facilities, with direct compensation totaling approximately $123.8 million.
- Creation of approximately 3,500 permanent full- and part-time jobs during operation, with direct compensation of approximately $93.2 million annually. As described in Section 8.20.3.1 of the Final EIS, it is anticipated that approximately 90 percent of the employees currently reside in Bristol and Plymouth Counties.
- Indirect and induced employment and economic growth in Bristol and Plymouth Counties and Massachusetts, including approximately 271 full-time equivalent jobs during the eight-year construction period and approximately 1,720 permanent jobs during operations, for a total of approximately $836.5 million of economic activity during construction and approximately $511.8 million annually during operations.[442]
- Generation of annual and one-time revenues to the Commonwealth through the Tribal-State Compact for the regulation of class III gaming, and to the City of Taunton through the IGA.

10.2 Reduced Intensity Alternative I Restricts Beneficial Effects

While the Reduced Intensity Alternatives would result in lesser environmental impacts, they would limit the ability of the Tribe to facilitate and promote tribal economic development, self-determination, and self-sufficiency. The Reduced Intensity Alternative I (Alternative B) would generate less gaming revenue than Preferred Alternative A. As a result, it would restrict the Tribe's ability to meet its needs and to foster tribal economic development, self-determination, and self-sufficiency.

The reduced development program proposed under Alternative B compared to Preferred Alternative A would result in reduced economic benefits both during construction and subsequent operation of the project. Alternative B includes roughly half of the casino space and one-third of the hotel space proposed under Preferred Alternative A, and total economic benefits and employment expected from construction would be reduced roughly proportionately. Alternative B would also support fewer direct, indirect, and induced jobs, less employee compensation, and less economic output than Alternative A.

Due to less development under Alternative B, the effects on the natural environment would be slightly less than those created by Preferred Alternative A. Both alternatives would result in similar levels of impacts after mitigation. While Alternative B would generate substantially

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[442] These figures represent estimates of effects to the Commonwealth of Massachusetts; Section 8.16.4 of the Final EIS also provides estimates of impacts specific to Bristol and Plymouth Counties.

fewer new vehicle trips than Preferred Alternative A, mitigation measures proposed in Section 8.1.3.4 of the Final EIS to improve traffic flow and reduce harmful emissions under Preferred Alternative A would minimize those effects. The BIA believes that the reduced economic benefits of Alternative B make it a less viable option for fulfilling the purpose and need for action (acquiring the Sites in trust and proclaiming them to be the Tribe's reservation). Accordingly, BIA has selected Preferred Alternative A over Alternative B.

10.3 Reduced Intensity Alternative II Restricts Beneficial Effects

The Reduced Intensity Alternative II (Alternative C), identified in **Section 4.0** of this ROD as the Environmentally Preferred Alternative, would limit the beneficial effects that would otherwise be available to the Tribe, the City of Taunton, and the Commonwealth under Preferred Alternative A, and would not substantially meet the purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation.

Because Alternative C does not include a water park and includes 300 fewer hotel rooms compared to Preferred Alternative A, this Alternative would result in fewer economic benefits, when measured in terms of jobs, employee compensation, and economic output, both during construction and continued operation of the casino/resort.

Due to less development under Alternative C, the effects on the natural environment would be less than those created by Preferred Alternative A. Both alternatives would result in a similar level of impacts after mitigation. While Alternative C would avoid impacts to land on the northern portion of the project site in Taunton, the layout of facilities proposed in that area under Preferred Alternative A was designed to minimize and avoid negative environmental impacts, to the extent possible, including avoidance of potential vernal pools and terrestrial habitats as described in Section 8.2.1.1 of the Final EIS. The reduced economic benefits of Alternative C make it a less viable option for fulfilling the purpose and need for action (acquiring the Sites in trust and proclaiming them to be the Tribe's reservation). Accordingly, the BIA has selected Preferred Alternative A over Alternative C.

10.4 No Action Alternative Fails to Meet the Purpose and Need for Acquiring the Sites in Trust and Proclaiming them to be the Tribe's Reservation.

The No Action Alternative (Alternative D) would not meet the stated purpose and need for acquiring the Sites in trust and proclaiming them to be the Tribe's reservation. Specifically, it would not provide a land base for the Tribe or a source of income to allow the Tribe to achieve self-sufficiency, self-determination, and a strong tribal government. This alternative would also likely result in substantially less economic activity and benefits than Preferred Alternative A. Accordingly, the BIA has selected the Preferred Alternative A over Alternative D.

11.0 DECISION

We find that the statutory and regulatory requirements for acquiring the Mashpee and Taunton Sites in trust and proclaiming them to be the Tribe's reservation pursuant to Sections 5 and 7 of

the IRA and its implementing regulations at 25 C.F.R. Part 151 have been satisfied. Section 20 of IGRA generally prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. One exception is made for lands that are acquired in trust as part of the "initial reservation" of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process. 25 U.S.C. § 2719(b)(1)(B). Upon review of Section 20 and its implementation regulations at 25 C.F.R Part 292, we find that the Mashpee and Taunton Sites meet the requirements for the "initial reservation" exception and will be eligible for gaming after they are acquired in trust and proclaimed to be the Tribe's reservation. We, therefore, announce that the Department will implement the Preferred Alternative and acquire the Mashpee and Taunton Sites in trust and proclaim them to be the Tribe's reservation. The Regional Director will be authorized to approve the conveyance document accepting the Sites in trust for the Tribe subject to any remaining regulatory requirements and approval of all title requirements.

Kevin K. Washburn
Assistant Secretary – Indian Affairs

SEP 18 2015
Date