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Legal Sidebar

Mashpee Wampanoag v. Bernhardt: A Tale of Two Definitions of "Indian"

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On June 6, 2020, in *Mashpee Wampanoag v. Bernhardt* (*Mashpee*), the U.S. District Court for the District of Columbia (D.C. District Court) gave the Mashpee Wampanoag Tribe (Tribe or Mashpee Tribe) another opportunity to retain reservation status for land in Taunton and Mashpee, Massachusetts, that the Department of the Interior (DOI) had taken into trust and declared eligible for gaming as an "initial reservation" in 2015. The agency's Record of Decision to take the land into trust (2015 ROD) relied on DOI's interpretation that the Mashpee Tribe met the second of alternative definitions of "Indian" in the Indian Reorganization Act (IRA), the principal statute providing DOI authority to take land into trust "for Indians." In 2016, the U.S. District Court for Massachusetts (Massachusetts District Court) disagreed with DOI, holding that the Tribe did not satisfy that definition.

DOI then reviewed the land-into-trust application under the other IRA definition of "Indian," and in 2018 released a decision (2018 ROD) determining that the Tribe did not satisfy that definition either. Consequently, DOI rejected the Tribe's application. The Tribe challenged the 2018 ROD in the D.C. District Court. In the meantime, the Mashpee Tribe appealed the Massachusetts District Court decision, and the U.S. Court of Appeals for the First Circuit (First Circuit) affirmed that decision in February 2020. DOI then began revoking trust and reservation status of the land. The Tribe added a motion to enjoin DOI from taking the land out of trust to its challenge to the 2018 ROD in the D.C. District Court. In the June 6, 2020 decision, the D.C. District Court held that the 2018 ROD was "arbitrary and capricious" under the Administrative Procedure Act (APA), remanded the decision to DOI for reconsideration, and temporarily enjoined DOI from taking the land out of trust. This Sidebar examines the two cases involving the Tribe's trust acquisition application and their possible implications for Congress. It begins with an overview of the statutory process by which DOI may take land into trust, the Supreme Court's interpretation of the IRA in *Carcieri v. Salazar*, and DOI's post-*Carcieri* guidance, which underpinned the Mashpee litigation.

The IRA, *Carcieri*, and DOI's Post-*Carcieri* Guidance

The IRA authorizes DOI to take land into trust "for Indians." The statute provides two alternative definitions of the term "Indian" at issue in this case:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and

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> [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.

DOI acknowledged the Mashpee Tribe as an Indian tribe in accordance with the agency's administrative process and added it to DOI's list of federally recognized tribes in 2007. However, in 2009, the Supreme Court, in *Carcieri v. Salazar,* held that, for DOI to take land into trust under the IRA, the tribe must have been "under Federal jurisdiction" *in 1934*. The *Carcieri* decision thus cast doubt on DOI's authority to take land into trust for the Mashpee and other recently recognized tribes.

In 2014, DOI established post-*Carcieri* standards for determining whether a tribe was "under Federal jurisdiction" in 1934 through Solicitor's Opinion M-37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act*." M-37029's two-part test required "a showing . . . that the United States has exercised its jurisdiction at some point prior to 1934 and that this jurisdictional status remained intact in 1934." Subsequently, federal courts, including the D.C. Circuit and the Ninth Circuit, upheld M-37029's process for evaluating whether a tribe was "under Federal jurisdiction" in 1934 and thus eligible to have land taken into trust. However, while the D.C. District Court was considering the Mashpee Tribe's appeal of DOI's 2018 ROD, the agency, on March 9, 2020, withdrew M-37029 through the issuance of Solicitor's Opinion M-37055 based on the determination that M-37029 was "not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding" of the statutory text. The day after issuing the new Solicitor's Opinion, DOI issued guidance establishing a more stringent test for determining whether a tribe is eligible to have land taken into trust that requires, among other things, a tribe to have been both "under Federal jurisdiction" and "recognized" in 1934.

First Circuit: Tribe Fails IRA's Second Definition of "Indian"

In the 2015 ROD, DOI determined that the Mashpee Tribe met the IRA's second definition of "Indian" meaning that it was comprised of "descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." The ROD determined that the Tribe "resid[ed] within the boundaries of any Indian reservation" based on state and federal references to the Tribe's 1934 land as "a protected Indian settlement." However the litigation focused on the ROD's interpretation of the rest of the definition. The ROD noted that the phrase "such members" in the second definition incorporates at least part of the statute's first definition—"all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." However, the ROD found the statute ambiguous regarding which parts of the first definition "such members" incorporates. Based on a review of the legislative and implementation history and upon applying canons of statutory interpretation, the ROD concluded that "'such members' . . . was intended to incorporate only the phrase 'members of any recognized Indian tribe' and not the phrase 'under federal jurisdiction' in 1934." Based on this interpretation, the ROD concluded that the Tribe met this part of the second definition because it only needed to be a "recognized Indian tribe" at the time of the trust acquisition, rather than in 1934.

In 2016, the Massachusetts District Court, in a decision that the First Circuit upheld, declared that DOI had exceeded its statutory authority when it took land into trust through the 2015 ROD because the Tribe did not meet the second definition of "Indian." Both the district court and the First Circuit interpreted "such members" in the IRA's second definition of "Indian" as unambiguously referring to "the entire antecedent phrase,"—meaning that only members of "any recognized Indian tribe . . . under Federal jurisdiction" *in 1934* could qualify to have land taken into trust.

D.C. District Court: DOI Must Reconsider Tribe's Eligibility Under the IRA's First Definition of "Indian"

The 2018 ROD stems from remand proceedings following the 2016 Massachusetts District Court decision. In the 2018 ROD, DOI considered and rejected the Tribe's evidence that it qualified for trust acquisition under the IRA's first definition of "Indian"—"all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." The 2018 ROD considered: "specific Federal activities, including considering the Tribe for removal in the 1820s; Federal policy recommendations concerning Massachusetts tribes in the 1850s; mention of the Tribe on Federal censuses between 1850 and 1910; and the enrollment of Tribal students at the Carlisle Indian School in the early 1900s. . . . [; and] references to the Tribe and its history in federal reports or studies prepared [in] 1888, 1890 and 1935."

However, the D.C. District Court determined that the 2018 ROD misapplied M-37029's two-part test because it disregarded the opinion's instructions that "a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction." Instead, the court viewed the 2018 ROD as "evaluating each piece of evidence in isolation." The court also agreed with the Tribe "that some of the reasons that the Secretary provides in the 2018 ROD as to why the Mashpee's evidence is insufficient reflects some of the new standards recently issued in [the M-37055 Solicitor's Opinion]," rather than the applicable M-37029. Specifically, the court noted that M-37029 required treating evidence that tribal members attended BIA schools as "strong probative evidence that the Mashpee Tribe was under federal jurisdiction." According to the court, the 2018 ROD appeared to weigh this evidence less heavily, more in-line with new guidance's "stricter test," which no longer treats tribal school attendance as presumptive evidence of federal recognition. The D.C. District Court, therefore, declared the 2018 ROD "arbitrary, capricious, and an abuse of discretion." The DOI argued that the new guidance should govern the remand. Yet, the D.C. District Court reasoned that "the Tribe has yet to receive an appropriate determination under the two-part test that the Department said it was applying." It, therefore, ordered DOI to issue a decision that conforms with the M-37029 "standard and the evidence permitted therein—and the Department's prior decisions applying the M-Opinion's two-part test."

Considerations for Congress

While DOI decides how to respond to the D.C. District Court decision—either by appealing it or by reconsidering on remand the validity of the Tribe's trust and reservation status, Congress may wish to examine DOI's authority under the IRA, such as specifying a process of reversing trust status, amending the act's definition of "Indian," or addressing the Mashpee Tribe's land-into-trust application directly. DOI's announcement of plans (since enjoined) to revoke trust status for the Mashpee Tribe's land pursuant to the First Circuit's order provoked at least one Native American organization to call on Congress to act. Currently there are several bills addressing various aspects of this issue. Under a 2012 Supreme Court ruling, a federal court may order DOI to strip trust status from tribal land subsequently determined to have been taken into trust unlawfully. However, as a group of Members of Congress argued in an amicus brief they filed in *Mashpee,* no statute currently delegates general authority to DOI to take land out of trust. A bill introduced in the 116th Congress, H.R.7173, would enact a general temporary prohibition on any authority DOI may have to revoke trust or reservation status. Two bills (discussed in an earlier Sidebar), H.R. 375, which passed the House on May 16, 2019, and S. 2808, would enact what is commonly called a "*Carcieri* fix," and open up the IRA land-into-trust process to all federally recognized tribes, regardless of when that recognition occurred.

Two measures that would specifically address the Mashpee situation passed the House in the 116th Congress. One, H. Amdt. 855 to H.R. 7608, would deny DOI funding to revoke trust status, reservation status, or gaming eligibility for the Mashpee Tribe's land, and the other, H.R. 312, would ratify the

Mashpee Tribe's trust land and reservation status, dismiss the court cases, and declare the IRA applicable to the Tribe. House Natural Resources Committee Members filed dissenting views on H.R. 312, voicing concern about an "off-reservation gaming complex" planned for the Taunton portion of the trust acquisition. Another bill introduced this Congress, S. 2628, would reaffirm the trust and reservation status of the Tribe's land.

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