DOI Tribal Land-Into-Trust Guidance 'A Joke,' DC Judge Says

By **Andrew Westney**

Law360 (May 20, 2020, 7:19 PM EDT) -- A D.C. federal judge on Wednesday slammed the U.S. Department of the Interior's guidance for deciding when a tribe qualifies to have its land taken into trust, calling it "a joke" and blasting the government's contention that the guidance should apply to the Mashpee Wampanoag Tribe's land-into-trust application if it's sent back to the agency.

U.S. District Judge Paul Friedman said during a hearing Wednesday that the DOI had a "strong argument" that its 2018 ruling that the tribe couldn't have land taken into trust for a proposed casino project in Taunton, Massachusetts, shouldn't be thrown out.

But he sharply criticized the government's attorney for saying that if the case is ultimately remanded to the department for a new decision, the DOI planned to apply guidance released in March for its revised land-into-trust standards, rather than a 2014 M-Opinion from the Obama-era DOI that the 2018 decision was based on.

"Basically you're saying, 'Heads I win, tails you lose,'" the judge told Sara E. Costello of the U.S. Department of Justice, appearing for the DOI.

"If I remand it to Interior, you want to apply a new guidance to them which makes it harder for them to succeed," the judge said.

After Costello disputed that point, Judge Friedman said, "They're going to have a tough time with this judge if that's what they do."

The judge then opened up on the **March 5 guidance** from three attorneys in the DOI's Office of the Solicitor that accompanied Interior Solicitor Daniel Jorjani's withdrawal of the 2014 M-Opinion and introduction of a new test for determining whether a tribe was "under federal jurisdiction" in 1934 and therefore able to have its land taken into trust.

"That March 5 opinion is one of the worst-written documents I've ever read from any government agency," the judge said, adding there were "typos throughout" and pointing out that former U.S. Supreme Court Justice John Paul Stevens' name was misspelled in the guidance.

"It's a joke," Judge Friedman said. "And you can tell your client that. It's a joke, that March 5 document."

"I don't know how anyone could take that as guidance, because it's incomprehensible and so convoluted that it couldn't guide any lawyer in the field," the judge added.

"I'm not saying I'm going to remand because … you have a strong argument that I shouldn't under the arbitrary and capricious standard [of the Administrative Procedure Act]," the judge said. "But if I did and you applied the 2020 guidance, you're basically telling them they won a Pyrrhic victory."

Costello said the DOI would comply with whatever terms on remand the court decided to order.

Judge Friedman's criticism was a sudden flare-up in a hearing that largely focused on the kinds of evidence the DOI reviewed in the Mashpee tribe's application to have land taken into trust for its planned First Light Casino, and whether that was enough to establish the tribe was under federal jurisdiction for the purposes of the Indian Reorganization Act.

In 2015, the DOI approved the tribe's request to have roughly 320 acres of tribe-owned land in the municipalities of Mashpee and Taunton taken into trust, determining that the tribe could pursue gambling in Taunton because the lands made up its "initial reservation" under the Indian Gaming Regulatory Act following the tribe's 2007 federal recognition.

Residents of Taunton sued over the plan, and U.S. District Judge William G. Young ruled in July 2016 that the DOI misinterpreted the IRA in finding it had the authority to take the land into trust.

Following that decision, the DOI **reversed course** under the Trump administration and denied the land-into-trust request in September 2018. That decision was based on the first definition of "Indian" in the IRA — "members of a recognized Indian tribe now under federal jurisdiction" — as the department said the evidence didn't show the Mashpee tribe was "under federal jurisdiction" in 1934.

The tribe brought the current suit against the department over that decision later in 2018.

The DOI **already caught flak** from Judge Friedman earlier this month, when he said he was "shocked" and "disturbed" that the DOI failed to tell the court that it had withdrawn the 2014 M-Opinion in March and introduced its new test and guidance.

On Wednesday, Tami Lyn Azorsky of Dentons, which represents the tribe, argued that the DOI's 2018 decision didn't apply the standards set by the 2014 M-Opinion, saying it was "implicit in the way the department interpreted" the evidence the tribe submitted that the department is now requiring tribes to be expressly recognized by the federal government as of 1934.

The government considered the tribe's pieces of evidence — including censuses, reports and other information — in isolation instead of putting them all together, when it should have found the tribe was under federal jurisdiction in 1934, as it had done before in similar applications by the Cowlitz Indian Tribe in Washington state and other tribes, Azorsky argued.

Judge Friedman asked Azorsky what would happen to the Mashpees' land if it's taken out of trust, which the government for the time being has agreed not to do.

Azorsky said there are no regulations for taking tribal land out of trust and that it's a "complete unknown" how the land, which was previously fee land owned by the tribe, would be returned to the Mashpees.

While the DOI now contends that it never had the authority to take the land into trust, "there still has to be an orderly process, and the tribe's federal trustee rushing to judgment to disestablish this reservation when no procedure has been figured out yet just doesn't make sense," Azorsky said.

The DOJ's Costello told the court that the DOI had sufficiently explained its reasoning in the 2018

decision, "acted consistently with its prior decisions" and "thoroughly considered each piece of evidence."

The department found evidence regarding the attendance of Mashpee members at the Bureau of Indian Affairs' Carlisle school in the early 1900s to be "plainly relevant," but it and other evidence wasn't enough to establish the government's jurisdiction over the tribe under the 2014 M-Opinion, she said.

David Tennant, who represents the residents of Taunton who opposed the tribe's land-into-trust bid, told the court that the history of the Cowlitz tribe was "nothing like what the New England tribes had," including both the Mashpee and the Narragansett Tribe in Rhode Island, which was ruled ineligible to have its land taken into trust in the U.S. Supreme Court's 2009 decision in Carcieri v. Salazar.

The two are "similarly situated tribes that cannot be treated differently," and "the evidence is that, like the Narragansett, the Mashpees were always under colonial and state rule to the exception of federal rule," Tennant told the court.

The tribe was represented in the arguments by Tami Lyn Azorsky of Dentons.

The government was represented by Sara E. Costello of the U.S. Department of Justice's Environment and Natural Resources Division.

The residents of Taunton were represented as intervenors by David Tennant of the Law Office of David Tennant PLLC.

The case is Mashpee Wampanoag Tribe v. Bernhardt et al., case number 1:18-cv-02242, in the U.S. District Court for the District of Columbia.

--Additional reporting by Dave Simpson, Grace Dixon and Joyce Hanson. Editing by Kelly Duncan.