



National
Congress of
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Indians



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Mashpee Wampanoag Tribe and Native Organizations Encouraged by Recent Decision in *Mashpee v. Bernhardt* and Now Call on DOI for Recommitment to Tribal Sovereignty

Yesterday, the United States District Court for the District of Columbia rendered a decision in favor of the Mashpee Wampanoag Tribe in the case of *Mashpee Wampanoag Tribe v. Bernhardt*. In its [opinion](#), Judge Paul L. Friedman ruled:

The Court will grant the Mashpee Tribe’s motion for summary judgment and deny the federal defendants’ and defendant-intervenors’ motions for summary judgment. Furthermore, because the Secretary of the Interior’s September 7, 2018 Record of Decision is arbitrary, capricious, an abuse of discretion, and contrary to law, the Court remands the matter to the Secretary of the Interior for a thorough reconsideration and re-evaluation of the evidence before him consistent with this Opinion, the 2014 M-Opinion, M-37209 – its standard and the evidence permitted therein – and the Department’s prior decisions applying the M-Opinion’s two-part test.

For the first time since the termination era, the Department of the Interior (DOI) attempted to disestablish a Tribal reservation, ordering the homelands of the Mashpee Wampanoag Tribe to be taken out of trust. The order from DOI Secretary David Bernhardt came on March 27, 2020, as the Tribal Nation worked to respond to the COVID-19 public health emergency, during active litigation on the status of the land, and following the rescission of the 2014 *Carcieri* M-Opinion and the issuance of a new 4-part test to qualify under the first definition of “Indian” in the Indian Reorganization Act (IRA). On March 30, 2020, the Mashpee Wampanoag Tribe asked the Court to issue an emergency restraining order to prevent DOI from taking immediate action to disestablish its reservation.

“The DC District Court righted what would have been a terrible and historic injustice by finding that the Department of the Interior broke the law in attempting to take our land out of trust,” said Mashpee

Wampanoag Tribal Chairman, Cedric Cromwell. “We will continue to work with the Department of the Interior — and fight them if necessary — to ensure our land remains in trust.”

The Court ruled DOI’s 2018 decision that the Mashpee Wampanoag Tribe did not prove it was “under federal jurisdiction” in 1934, and therefore did not meet the first definition of “Indian” under the IRA—making the Mashpee Wampanoag Tribe ineligible to acquire land in trust—was arbitrary and capricious. It remanded the decision to DOI with clear direction to issue a decision consistent with the 2014 M-Opinion’s standard and the evidence permitted therein, as well as DOI’s prior decisions applying the 2014 M-Opinion test. The Court further directed DOI to properly address each piece of evidence, give a reasoned analysis as to whether it is probative, explain any departure from past DOI precedent, and view all probative evidence in concert rather than in isolation. And importantly, the Court’s decision also mandates that DOI maintain the land in trust pending DOI’s new determination and prevents DOI from applying its new 4-part test in this case.

“USET SPF is pleased that the Court acted swiftly and justly to provide necessary certainty to the Mashpee Wampanoag in these uncertain times,” said USET SPF President, Kirk Francis. “The Department of the Interior was under no order to take the land out of trust, and so to attempt to rob the Mashpee of their homelands is nothing short of shameful. The Department should be assisting Tribal Nations as we work to reestablish our homelands after centuries of federal action designed to assimilate and terminate. Instead, actions by this Administration are aimed at perpetuating antiquated and regressive federal policies, resulting in the destabilization of our governments. While we celebrate this victory with Mashpee and all of Indian Country today, the centuries-long fight to protect and restore Tribal homelands is ongoing and we must remain steadfast in our vigilance. We continue to stand with Mashpee as the Department reexamines its evidence on remand.”

“On behalf of the National Congress of American Indians, we congratulate the Mashpee Wampanoag Tribe on their historic victory. We consider this a win for all of Indian Country,” said NCAI President Fawn Sharp. “The Mashpee Wampanoag relationship with the United States is one of political equality, derived from their inherent sovereignty, powers, and authority that long predates the United States. No federal agency or civil servant has the authority to diminish or in any way undermine that unique political relationship and standing. We will remain vigilant and stand united with Mashpee who have shaped and supported this country from the arrival of the first European settlers and will coexist as sovereign equals for generations to come.”

USET SPF and NCAI share a profound commitment to Tribal sovereignty and the restoration of Tribal homelands. In light of this commitment, we have been advocating for a fix to the Supreme Court decision in *Carcieri v. Salazar* since it was handed down in 2009. *Carcieri* has created a deeply inequitable 2-class system, in which some Tribal Nations have the ability to restore their homelands and others do not. This 2-class system serves to deny these Tribal Nations a critical component of the trust relationship, vital aspects of the exercise of inherent sovereignty, and the opportunity to qualify for several government programs.

We continue to call for the immediate passage of a fix that contains the two features necessary to restore parity to the land-into-trust process:

- (1) A reaffirmation of the status of current trust lands; and
- (2) Confirmation that the Secretary has authority to take land into trust for all federally recognized Tribal Nations.

While this decision is an important step toward righting centuries of wrong against the Mashpee Wampanoag Tribe, our collective work is not finished. We urge and await a positive determination from DOI on Mashpee's homelands once and for all. Our organizations will continue to fight for the restoration of Tribal homelands and the full delivery of trust and treaty obligations. We call upon DOI to recommit itself to the restoration of homelands, the trust obligation, and Tribal sovereignty.

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About the Mashpee Wampanoag Tribe:

The Mashpee Wampanoag Tribe, also known as the People of the First Light, has inhabited present day Massachusetts for more than 12,000 years. After an arduous process lasting more than three decades, the Mashpee Wampanoag were re-acknowledged as a federally recognized tribe in 2007. In 2015, the federal government declared 150 acres of land in Mashpee and 170 acres of land in Taunton as the Tribe's initial reservation, on which the Tribe can exercise its full tribal sovereignty rights. The Mashpee tribe currently has approximately 2,700 enrolled citizens.

About the National Congress of American Indians:

Founded in 1944, the National Congress of American Indians is the oldest, largest and most representative American Indian and Alaska Native organization in the country. NCAI advocates on behalf of tribal governments and communities, promoting strong tribal-federal government-to-government policies, and promoting a better understanding among the general public regarding American Indian and Alaska Native governments, people and rights. For more information, visit www.ncai.org.

About the USET Sovereignty Protection Fund (USET SPF):

Established in 2014, the USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-Tribal organization advocating on behalf of thirty (30) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.