USET SPF Alert: Victory for Mashpee in DC District Court June 5, 2020

Dear USET SPF Board of Directors and DC Tribal Reps,

We write to share some positive news to start your weekend. The D.C. District Court has issued its opinion [linked] in Mashpee Wampanoag Tribe v. Bernhardt et al. In the decision issued this evening, Judge Paul L. Friedman writes:

> "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."

This means the Court has found that the Department of Interior's (DOI) 2018 determination that Mashpee was not "under federal jurisdiction" in 1934 was unlawful and an improper application of the 2-part test set forth under the 2014 M-Opinion that has facilitated the continued acquisition of trust lands for Tribal Nations following the fundamentally flawed decision in *Carcieri v. Salazar* and which DOI recently rescinded. The Judge has directed DOI to reevaluate the evidence presented by Mashpee and issue a new determination in keeping with the 2014 M-Opinion and the evidenced permitted therein, DOI's prior decisions applying the test laid forth in the 2014 M-Opinion, and the Court's opinion. The decision ensures that DOI cannot apply its new 4-part test in determining whether Mashpee was "under federal jurisdiction" in 1934. It also prohibits DOI from taking Mashpee's land out of trust or disestablishing the Mashpee reservation until DOI has made a determination on remand. In March, DOI Secretary David Bernhardt had ordered Mashpee's land taken out of trust.

USET SPF filed an amicus brief [linked] in this case to address our concern that the Department of the Interior acted unlawfully to restrict its trust acquisition authority under the Indian Reorganization Act when it withdrew and replaced the 2014 M-Opinion. Tribal Nations have relied upon and courts have upheld the test and legal reasoning within the 2014 M-Opinion for a decade. USET SPF argued DOI did not have any legitimate legal reason to rescind and replace the 2014 M-Opinion, and instead acted in violation of its legal obligations to interpret its trust acquisition authority broadly and consult with Tribal Nations.

USET SPF celebrates this victory with the Mashpee Wampanoag Tribe and its people. We remain committed to restoring and protecting the homelands of Mashpee and all Tribal Nations. This includes continued advocacy for a fix to the Supreme Court decision in *Carcieri v. Salazar*. *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. USET SPF continues 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 we are still analyzing the opinion, we wanted to inform you of this good news immediately. You can expect additional comment and communication from us in the coming days.