

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-2484

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACORD; DEBORAH CANARY; VERONICA CASEY; PATRICIA COLBERT, VIVIAN COURCY; DONNA DEFARIA; KIM DORSEY; FRANCIS LAGACE; WILL COURCY; ANTONIO DEFARIA; KELLY DORSEY; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; ROBERT LINCOLN; CHRISTINA MCMAHON; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY; LOUISE SILVIA; FRANCIS CANARY, JR.; MICHELLE LEWRY; RICHARD LEWRY

Plaintiffs – Appellees

v.

BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior; SALLY JEWELL, in her official capacity as Secretary – U.S. Department of the Interior; LAWRENCE ROBERTS, Acting Assistant Secretary, Indian Affairs, U.S. Department of the Interior; US DEPT OF THE INTERIOR; UNITED STATES

Defendants

MASHPEE WAMPANOAG INDIAN TRIBE

Defendant – Appellant

**DEFENDANT-APPELLANT MASHPEE WAMPANOAG
INDIAN TRIBE’S STATUS REPORT**

In compliance with this Court’s September 17, 2018 Order granting Defendant-Appellant the Mashpee Wampanoag Indian Tribe’s (the “Tribe”) ten days to “propose to this Court a plan as to whether and how it intends to proceed” in the above-captioned appeal, the Tribe submits this Status Report.

This appeal concerns whether the Tribe satisfies the second definition of “Indian” under Section 19 of the Indian Reorganization Act (the “Act”), such that it is entitled under that second definition to have certain land remain in trust for its benefit. On September 7, 2018, on remand from the U.S. District Court for the District of Massachusetts, the Secretary of the Department of

the Interior (“Secretary”) issued a Record of Decision (the “New Decision”) concluding that the Tribe does not satisfy the first definition of “Indian” under Section 19 of the Act, which first definition is not at issue in this appeal. Today, the Tribe filed a Complaint in the U.S. District Court for the District of Columbia challenging the conclusion of the New Decision that the Tribe did not satisfy the first definition of “Indian” under the Act as arbitrary, capricious, and contrary to law (the “D.C. Action”). *See Mashpee Wampanoag Tribe v. Ryan Zinke, et al.* (D.D.C. C.A. No. 1:18-cv-02242). The D.C. Action will materially impact this appeal and possibly render it moot, for the reasons explained below, including because if the Tribe is entitled to have the at-issue land remain in trust under the first definition of “Indian” the question of whether it satisfies the second definition of “Indian” may be immaterial. Accordingly, the Tribe, by and through undersigned counsel, respectfully requests a stay of the above-captioned action until the entry of a final judgment in that litigation and an order requiring the parties to inform the Court of the impact of the entry of judgment in that litigation on this appeal within 10 days of the entry of judgment. The Tribe submits, respectfully, that allowing the requested stay is in the interests of judicial economy and avoiding piecemeal litigation.

In further support of its request, the Tribe states as follows:

1. The action in the U.S. District Court for the District of Massachusetts underlying this appeal arose out of the September 18, 2015 decision of the Secretary of DOI to acquire certain land in trust for the benefit of the Tribe, a federally recognized Indian tribe (the “Original Decision”). The Secretary decided to take land into trust for the Tribe under the Act, 25 U.S.C. § 479, particularly and solely under the second definition of “Indian” set forth in

Section 479 of the Act.¹ The at-issue land was subsequently taken into trust on November 10, 2015.

2. Plaintiffs-Appellees filed suit challenging the Original Decision. Though comprised of several causes of action, Plaintiffs-Appellees' central argument in the underlying action was that the Secretary lacked authority to take land into trust for the Tribe under the second definition of "Indian" set forth in Section 479 of the Act.

3. In the underlying proceeding, Plaintiffs-Appellees and the Department of the Interior ("DOI") entered into a joint stipulation limiting a hearing on the merits of Plaintiffs-Appellees' claims to the Plaintiffs-Appellees' first cause of action, which sought a declaratory judgment that the Secretary lacked authority to take land into trust for the Tribe under the second definition of "Indian" set forth in the Act.

4. Plaintiffs-Appellees and DOI each moved for summary judgment as to Plaintiffs-Appellees first cause of action seeking a declaratory judgment, and the court below heard oral argument on their respective summary judgment motions on July 11, 2016, after which it took the matter under advisement.

5. On July 28, 2016, the court below granted Plaintiffs-Appellees' request for a declaratory judgment, and ruled that "the Secretary lacked the authority to acquire land in trust for the Mashpees" under the second definition of Section 479 of the IRA. July 28, 2016 Memorandum & Order, at 22. The court remanded the matter "to the Secretary for further proceedings consistent with this opinion." *Id.*

¹ The facts and procedural history described herein are drawn from the orders of the U.S. District Court of Massachusetts at issue in this appeal, namely the July 28, 2016 Memorandum & Order as to DOI's and Plaintiffs-Appellees' cross-motions for summary judgment and the October 12, 2016 Order concerning DOI's Motion for Reconsideration of the July 28, 2016 Memorandum & Order. For the convenience of this Court, true and correct copies of the July 28, 2016 Memorandum & Order and the October 12, 2016 Order are attached hereto as Exhibit A and Exhibit B, respectively.

6. On October 12, 2016, in response to DOI's motion for reconsideration or clarification of the July 28, 2016 Memorandum & Order, the court below clarified that its remand did not preclude DOI from analyzing anew whether the Tribe met the second definition consistent with the Court's ruling, or from analyzing whether the Tribe meets the first definition, which is not at issue in the instant appeal:

Having remanded this matter to the Secretary, it is no violation of the Court's order should the agency wish to analyze the Mashpees' eligibility under the first definition of "Indian" provided in Section 479, or to reassess the Mashpees' eligibility under the second definition consistent with the Court's ruling on the proper interpretation of that definition.

October 12, 2016 Order, at 3.

7. On September 7, 2018, DOI issued a new Record of Decision ("ROD") concluding that under Section 19 of the Act the Tribe does not satisfy the first definition of "Indian," and (ii) it would not revisit or alter the conclusions of the original, 2015 ROD which is at-issue in the above-captioned proceeding.

8. Today (September 27, 2018) the Tribe filed the D.C. Action in the U.S. District Court for the District of Columbia where the decision-makers within the Department of the Interior are located challenging the Department's conclusion that the Tribe does not satisfy the first definition of "Indian" under the Act as arbitrary, capricious, and contrary to law. If the Tribe were to prevail in the D.C. Action and establish that it is entitled to have the at-issue land remain in trust under the first definition, this appeal concerning whether the Tribe is entitled to have the at-issue land remain in trust under the second definition may be immaterial.

9. A delay pending the entry of judgment in the D.C. Action would not prejudice or harm any party to this proceeding, but would solely maintain the status quo.

10. Staying this matter pending the entry of judgment in the new litigation is in the interests of judicial economy and avoiding piecemeal litigation. Doing so ensures that the parties and this Court do not unnecessarily expend time and resources on this appeal where it is possible that the entry of judgment in the D.C. Action would render this appeal moot, or irrelevant.

WHEREFORE, Defendant-Appellant, the Mashpee Wampanoag Indian Tribe respectfully requests that this Honorable Court:

A. stay this matter until the entry of final judgment in the D.C. Action and order that the parties inform the Court of the impact of that entry of judgment on this appeal within 10 days of the entry of judgment; and

B. grant whatever other or additional relief this Honorable Court deems just under the circumstances.

Respectfully submitted,

/s/ Benjamin J. Wish

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September 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018 the foregoing document was filed electronically with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Adam M. Bond
Jason D. Buffington
Dina Michael Chaitowitz
Matthew J. Frankel
Tekla Hansen-Young
Rachel Eileen Heron
Frances Lagace
Steven Miskinis
Michael J. Schaller
David H. Tennant

/s/ Benjamin J. Wish
Benjamin J. Wish