EXHIBIT E

Affidavit of Leonard Jason, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET NO. 1:13-CV-13286-FDS

THE COMMONWEALTH OF MASSACHUSETTS, Plaintiff, and AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH, Intervenor-Plaintiffs, vs. THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION, Defendants.	AFFIDAVIT OF LEONARD JASON, JR.

Leonard Jason, Jr., being duly sworn, hereby deposes and states as follows:

1.) I am the Assistant Building Inspector for the Town of Aquinnah ("the Town"). I am certified as a municipal building official by the Board of Building Regulations and Standards under the Department of Public Safety and am duly appointed to my position by the Selectmen. My duties include issuing permits

under state and local building codes and regulations, as well as enforcing and administering the Town's Zoning By-laws and land use regulations and decisions of the Martha's Vineyard Commission ("MVC"). I also serve as the Building Inspector for the Towns of Edgartown and Chilmark, Massachusetts, and have served as an assistant building inspector for the Town of West Tisbury. I have held various of these positions for over 30 years.

2.) I have issued permits for and conducted inspections of construction projects on Tribal Lands. Specifically, I have issued two building permits for the proposed community center, which is located on a parcel of land identified on Town Assessor's Map 11 as Parcel 23, a portion of which is historically known and referred to as the "Strock Lands."

3.) Under a document known as the "Land Use Plan" dated October 3, 1983, and under various other documents and statutory enactments which serve to define the relationship between the Town and the Tribe, the Strock Lands are subject to the Town's Zoning By-laws, as they were in effect in 1983. The 1983 Zoning By-Laws prohibit commercial uses, casinos, bingo, gambling or games of chance on the Strock Lands, but generally permit educational, religious and municipal uses.

4.) On or about April 27, 2007, the Tribe submitted a permit application to the Town to build an approximately 6,500-

square-foot community center. The Tribe's plan for the community center was a building for community use, with a gymnasium, stage, locker rooms, and a kitchen.

5.) The Building Inspector, Jerry Wiener, referred the permit to the MVC as a Development of Regional Impact ("DRI") on or about June 12, 2007. The MVC is an Island-wide planning body created by a special act of the Massachusetts legislature, St. 1977, c. 831, as amended. The MVC issues standards and criteria to be used to designate DRIs on Martha's Vineyard. The DRI criteria are reviewed and approved by the Massachusetts Secretary of Energy and Environmental Affairs. DRIs are projects that must be reviewed and processed by the MVC to fulfill its statutory mandate to "protect the health, safety, and general welfare of Island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study, by protecting these values from development and uses which would impair them, and by promoting the enhancement of local economies." (St. 1977, c. 831, § 1.)

6.) The MVC conducted a series of public hearings, and on December 13, 2007 issued a decision approving the community center as a DRI, with conditions. Among the conditions was the

requirement that the Tribe ". . . apply to the appropriate Aquinnah offices and boards, for any local development permits which may be required by law." The MVC also conditioned the project as follows:

> "Should the [Tribe] substantially alter the use of the premises from the proposed uses, it shall return to the Martha's Vineyard Commission to request approval of said alterations."

7.) In 2011 and 2012, I issued a building permit and an amended building permit for the repair, alteration and building of the community center. The purpose of the building, as stated on the Tribe's application, was for a community center. Both the Town permits and the MVC decision limited the use of the building to a "community center," a permitted use under zoning.

8.) On July 1, 2015, Tobias Vanderhoop, the Tribe's Chairman, stated, under oath, that the building permits issued by the Town for the community center are no longer valid because the Tribe has transferred control of the building to the Tribal Gaming Corporation for use as a casino. Mr. Vanderhoop stated that the Tribe did not notify the Town about this change of use, nor did the Tribe seek new or amended permits to reflect the physical changes to the building to accommodate a casino, nor did the Tribe seek a permit reflecting the change of use. He further stated that the Tribe would not permit Town inspections,

and that the type of commercial gaming which would be conducted on the premises was "electronic bingo, or, as is referred to, Class 2 gaming activitiies . . . ."

9.) Mr. Vanderhoop stated that the Tribe has retained a contractor and an architect, although no architectural plans or construction drawings have been made available to the Town. He also acknowledged that at this point, the Tribe does not have its own Building Inspector or Board of Health agent.

10.) Since Mr. Vanderhoop testified that work on the casino building was to commence on July 6, 2015, and that no building permits would be sought and no inspections allowed, I issued a "Cease and Desist" letter on the same date. A copy of my letter is attached hereto as Exhibit "A". We have been informed by the Tribe that they do not intend to comply with the Cease and Desist order. A copy of their reply is attached hereto as Exhibit "B".

11.) I am attaching hereto as Exhibit "C", a letter from our Town Counsel, Ronald H. Rappaport, to the Chairman of the Aquinnah Board of Selectmen dated April 27, 2012, wherein Town Counsel advised the Town that the use of the community center building for a casino or other commercial use would violate zoning.

12.) It is my obligation, as Building Inspector, to ensure that the State building code is complied with; that all

contractors and subcontractors performing work on the site are duly licensed by the Commonwealth of Massachusetts, and have the required insurance and other required documentation; that all required inspections occur, both by myself and by the Town's electrical inspector, plumbing inspector, fire chief, etc., to ensure that all applicable codes are being followed; and that the building will be safe for use. Use of the WCC building as a casino, or for bingo, gambling, or games of chance and indeed for any commercial use, would violate the Town zoning and would violate the Town's and the MVC decision and the building permits issued for this project. Allowing a building to be constructed without appropriate permits, and for a purpose which is contrary to the Zoning By-laws of the Town, not only violates the law but raises substantial public safety concerns. The Town cannot permit any building in the Town to be erected without proper permits.

13.) Unless my Cease and Desist order is complied with, the Town will suffer irreparable injury due to non-compliance by the Tribe of Town and State laws.

Signed under the pains and penalties of perjury this 14th day of July, 2015.

Leonard Jason, Jr.,
Assistant Building Inspector &
Zoning Officer
Town of Aquinnah

Dated: July 14, 2015
4607-009\L. Jason Affidavit.doc

COMMONWEALTH OF MASSACHUSETTS

Dukes County, ss.

On this 14th day of July, 2015, before me, the undersigned notary public, personally appeared Leonard Jason, Jr., Assistant Building Inspector and Zoning Officer, as aforesaid, proved to me through satisfactory evidence of identification, which was personal knowledge
(insert type of identification provided)
to be the person whose name is signed on the preceding or attached document, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his)(her) knowledge and belief.

Patricia A. Willoughby
Notary Public

My commission expires: 7/17/2020

AFFIX :
NOTARIAL :
SEAL :

PATRICIA A. WILLOUGHBY
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
July 17, 2020

EXHIBIT A

TOWN OF AQUINNAH
65 STATE RD.
AQUINNAH, MASSACHUSETTS 02535

TEL. 508 645-2300
FAX 508 645-2310

July 6, 2015

Wampanoag Tribe of Gay Head, Aquinnah
The Aquinnah Wampanoag Gaming Corporation
20 Black Rock Road
Aquinnah, MA 02535

RE: Community Center Building

To Whom It May Concern:

Please be advised that I am the Assistant Building Inspector for the Town of Aquinnah. On or about April 27, 2007, the Wampanoag Tribe of Gay Head, Aquinnah (the "Tribe") submitted a permit application to the Town to build an approximately 6,500-square-foot community center, which has been commonly referred to as the Wampanoag Community Center ("WCC"). The Tribe's plan for the WCC was a building for community use, with a gymnasium, stage, locker rooms, and a kitchen.

The Building Inspector, Jerry Weiner, referred the matter to the Martha's Vineyard Commission ("MVC") as a development of regional impact ("DRI") on or about June 12, 2007. The MVC conducted a series of public hearings and, on December 13, 2007, issued a decision approving the WCC as a DRI, with conditions. Among the conditions, the MVC required that the Tribe, "consistent with the decision, apply to the appropriate Aquinnah Officers and Boards, for any local development permits which may be required by law." The MVC also conditioned the project as follows:

> "Should the [Tribe] substantially alter the use of the premises from the proposed uses, it shall return to the Martha's Vineyard Commission to request approval of said alterations."

Thereafter, in 2011 and 2012, I issued a building permit and an amended building permit for the repair, alteration, and building of the WCC. The purpose of the WCC building, as stated on the application and on the building permits, was for a community center. Both the Town permits and the MVC limited the use of the building to a "community center."

On July 1, 2015, Tobias Vanderhoop, the Tribe's Chairman, stated, under oath, that the prior building permits issued by the Town are no longer valid because the Tribe has transferred control of the WCC building to the Tribal Gaming Corporation for use as a casino, and has the authority to proceed under the Indian Gaming Regulatory Act (IGRA). Mr. Vanderhoop acknowledged that the Tribe did not notify the Town about this change of use, nor did the Tribe seek new or amended permits to reflect its proposed change of use. He further stated that the Tribe would not permit Town inspections, and that the type of commercial gaming which would be conducted on the premises was "electronic bingo, or, as it's referred to, Class 2 gaming activities . . . ." Mr. Vanderhoop stated that the Tribe has retained a contractor and an architect, although architectural plans have not been made available to the Town. He also acknowledged that, at this point, the Tribe does not have its own building inspector.

Please be advised that the Tribe cannot proceed with its renovation plans for a casino in the absence of a revised building permit. Further, commercial gaming is not a permitted use under the Zoning By-laws of the Town of Aquinnah as were in effect in 1983 (and which are in effect today). Also, I do not have in my possession any information about the licensing status of any builders, general contractors, or electricians who may undertake work at the "casino."

Mr. Vanderhoop testified that work was to commence beginning today. Please be advised that no work can be undertaken in the absence of a building permit issued by the

Town. Accordingly, I must instruct you to cease and desist from all construction activities at this time.

Very truly yours,

Leonard Jason, Jr.

Cc: Board of Selectmen
Jerry Weiner
Town Counsel

4607-009\Revised Wampanoag Tribe ltr.doc

EXHIBIT B

CROWELL LAW OFFICES
Tribal Advocacy Group

July 10, 2015

By email: rrappaport@rrklaw.net
Town of Aquinnah
c/o Ronald H. Rappaport, Esquire
REYNOLDS RAPPAPORT & KAPLAN LLP
106 Cooke Street
P.O. Box 2540
Edgartown, MA 02539

Re: Letter dated July 6, 2015 on Town of Aquinnah letterhead from Assistant Building Inspector Leonard Jason Jr.

Mr. Rappaport,

On behalf of the Wampanoag Tribe of Gay Head (Aquinnah), I am writing in response to the July 6, 2015 correspondence (copy attached), signed by Leonard Jason Jr., instructing the Tribe to cease and desist from construction activities on the Tribe's gaming facility. Although the July 6, 2015 letter is from the Town's Assistant Building Inspector and addressed to the Tribe, this matter clearly involves the pending federal court litigation, *Commonwealth of Massachusetts et. al. vs. Wampanoag Tribe of Gay Head (Aquinnah) e.t al.* Dk # 13-13286 FDS (D. Mass.), therefore, communications are more appropriately conveyed between respective legal counsel. I look to you to forward this response to the Board of Selectmen and Assistant Building Inspector Leonard Jason, Jr. I have copied the letter to other counsel for the other parties in the pending litigation.

The Office of the Solicitor of the United States Department of the Interior issued an opinion on August 23, 2013 that the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"), and not the Massachusetts Indian Land Claims Settlement Act, 25 USC §§ 1771(a) et seq. ("Settlement Act"), governs the Tribe's gaming activities. The Office of General Counsel for the National Indian Gaming Commission issued an opinion on October 25, 2013 that the Tribe's trust lands on Martha's Vineyard are eligible for gaming under IGRA. The Tribe publicly announced in October of 2013 that it secured the federal approvals required to proceed with a gaming facility on its trust lands and that it intends to proceed with the development of a gaming facility. The Town intervened in pending federal court litigation in July of 2014, submitting a Complaint specifically alleging that the Tribe is proceeding with the development of a gaming facility. Now in July of 2015, a mere month before the scheduled hearing on pending cross-motions for summary judgment in the pending litigation, the Tribe receives a letter from an Assistant Building Inspector "instructing" the Tribe to cease and desist in the development of a

1487 W. State Route 89A
Suite 8
Sedona, Arizona 86336
Phone: 425 802 5369
Email: scottcrowell@hotmail.com

gaming facility. The July 6, 2015 letter makes reference to Chairman Vanderhoop's July 1, 2015 deposition testimony confirming the Tribe's actions as if it is news, despite the Town's lawsuit against the Tribe and otherwise makes no reference to the pending litigation. It is in this context that the Tribe responds to the July 6, 2015 letter.

First, I repeat the message that the Tribe conveyed to you last Wednesday, July 1, 2015, when Chairman Vanderhoop, my co-counsel Lael Echo-Hawk and I met with you during a break of the deposition noticed by co-plaintiff/intervenor AGCHA. The Tribe stands willing and able to meet with Town officials in the immediate future and discuss on a government-to-government basis (with legal counsel for both governments present) specifics regarding those steps the Tribe is taking to ensure that the building improvements are in compliance with appropriate building codes and that the improvements are being properly inspected for such compliance. Although the Tribe is unwilling to divest its jurisdiction over matters integral to the operation of the gaming facility, including jurisdiction over the improvements to the gaming facility, the Tribe is willing to meet to allay concerns the Town may have. When we met last Wednesday, you indicated that you would pass this message on to the Board of Selectmen. Nothing in the July 6, 2015 letter acknowledges our message and willingness to meet, so we repeat the message here.

Second, the Town has already filed an action in federal court against the Tribe alleging the Tribe's expressed intention to conduct gaming on its trust lands "as soon as possible." The Town's Complaint also incorporates the allegations set forth in the Commonwealth's Complaint, which also alleges that the Tribe intends to proceed to offering gaming activities on its trust lands. By filing that action, the Town has affirmatively chosen a forum to resolve the dispute.

Third, although the Town intervened a full year ago in July of 2014, and has been on notice of the Tribe's actions since at least October of 2013, it has not sought preliminary injunctive relief under the Federal Rules of Civil Procedure. That would be the proper manner in which to attempt to cause the Tribe to cease and desist activities related to the gaming facility. We ask that the Town clarify the context of the July 6, 2015 letter as it appears to be an attempt to engage in a dispute resolution process separate and apart from the federal litigation, and/or an attempt to bypass the standards for securing preliminary injunctive relief pursuant to the Federal Rules of Civil Procedure and applicable case law. If the Town intends to seek a TRO or preliminary injunctive relief at this juncture, we respectfully request as much advance notice as possible. As you know, I live in Sedona, Arizona and Lael Echo-Hawk lives in Seattle, Washington, but we are prepared to appear in Judge Saylor's Court with 48 hours notice. I have copied legal counsel for the Commonwealth and AGCHA on this letter and make the same request to them for reasonable notice of seeking a TRO and/or preliminary injunctive relief.

Fourth, as you are well aware, the Tribe has all the approvals required by federal law to proceed. The United States has expressly endorsed the position maintained by the Tribe that any jurisdiction regarding gaming the Commonwealth or the Town may have possessed prior to the passage of IGRA was superseded by IGRA and expressly rejected the position maintained by the Commonwealth and the Town that the Settlement Act,

rather than IGRA, governs gaming on the Tribe's trust lands. This is likely another reason the Town intervened in the federal litigation more than a year ago. Accordingly, well before now, the Town has been aware that the Tribe does not recognize or acknowledge any jurisdiction of the Town to "instruct" the Tribe to cease and desist any gaming-related activities. The July 6, 2015 letter does not in any way change the Tribe's position.

Fifth, the July 6, 2015 letter makes clear that the Town's motivation for issuing the letter is its intent to stop the Tribe from conducting gaming activities in the gaming facility. The letter alleges that "commercial gaming is not a permitted use under the Zoning By-laws of the Town of Aquinnah as were in effect in 1983 (and which are in effect today)." (emphasis and parenthetical in original). Although the Tribe disputes the characterization of the Zoning By-laws, it is clear from the statement made in the July 6, 2015 letter that the Tribe's pursuit of a Town-issued permit would be futile. The July 6, 2015 letter also makes clear that the Tribe's jurisdiction over permitting and building code compliance of the gaming facility is integral to gaming conducted by the Tribe.

Please do not hesitate to contact me with questions, concerns or comments.

Respectfully,

/s/
Scott Crowell,
On behalf of the Wampanoag Tribe of Gay Head (Aquinnah)

cc: legal counsel appearing in *Commonwealth of Massachusetts et. al. vs. Wampanoag Tribe of Gay Head (Aquinnah) e.t al.* Dk # 13-13286 FDS (D. Mass.).

Attachment, as stated.

EXHIBIT C

REYNOLDS, RAPPAPORT, KAPLAN & HACKNEY, LLC
COUNSELORS AT LAW

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KAREN D. BURKE

OF COUNSEL

KATHRYN R. HAM
JENNIFER S. RAKO
MELISSA MCKEE HACKNEY

April 27, 2012

Mr. James Newman, Chairman
Aquinnah Board of Selectmen
65 State Road
Aquinnah, MA 02535

RE: Tribal Gaming

Dear Mr. Newman:

You have requested that I provide the Aquinnah Board of Selectmen with an opinion as to whether the Wampanoag Tribal Council of Gay Head, Inc. (Aquinnah) (hereafter, the "Tribe") can operate a gaming casino in Aquinnah. The simple answer to the question is no.

I previously did extensive research in connection with a lawsuit filed by the Building Inspector against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Tribe arising from the Tribe's construction of a shed on the Cook Lands without Town permits, which concluded with a decision from the Supreme Judicial Court ("SJC") holding that the Tribe must comply with Town zoning as it existed in 1983. See Building Inspector of Aquinnah vs. Wampanoag Aquinnah Shellfish Hatchery Corp., 443 Mass. 1 (2004) (the "Hatchery case"). I have drawn on our extensive research in that case for most of this opinion.

A. BACKGROUND

1. In 1974, the Tribe, which was not then recognized by the Secretary of Interior as a Native American Tribe, but which was incorporated under Massachusetts law, commenced litigation ("the Tribal lands litigation") against the Town - then known as Gay Head - claiming that certain transfers of public land in the

Town violated the Indian Non-Intercourse Act. See Wampanoag Tribal Council of Gay Head, Inc. et al. v. Town of Gay Head et al., Civil Action No. 74-5826-McN (D. Mass.).

2. In 1983 the Tribe and the Town settled the Tribal lands litigation. As part of the settlement, they entered into an agreement entitled "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims" (the "Settlement Agreement"). The Settlement Agreement incorporated by reference an attached Land Use Plan.

3. The Settlement Agreement includes the following provisions:

a. Paragraph 3:

> The [Tribe] shall hold the Settlement Lands, and any other land it may acquire, in the same manner and subject to the same laws as any other Massachusetts corporation, except to the extent specifically modified by this agreement and the accompanied proposed legislation. Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the [Tribe] in the Town of Gay Head or the Commonwealth of Massachusetts, be impaired or otherwise altered, except to the extent modified in this agreement and in the accompanying proposed legislation.

b. Paragraph 10:

> The Settlement Lands shall comprise the following:
>
> a.) The Common Lands [which include the Cranberry Lands, the face of the Cliffs, and the Herring Creek] . . .; b.) [t]he three parcels of the former Strock Estate . . .; and c.) the Menemsha Neck Lands.

c. Paragraph 11:

> The Settlement Land shall be subject to an express federal statutory restriction against alienation. This statutory provision against alienation shall state explicitly that (a) no Indian tribe or band shall ever exercise sovereign jurisdiction as an Indian tribe other than to the extent agreed herein, over all or any part of the Settlement lands, or over any other land that may now or in the future be owned by or held in trust for, any Indian entity, . . .

d. Paragraph 16:

> The Settlement Lands will be subject to the Land Use Plan attached hereto and made a part hereof.

4. The Land Use Plan describes that various of the Settlement Lands are subject to the zoning regulations in effect in 1983. The Town's Zoning By-law, as of that date, does not allow a casino, gambling facility, or other gaming activities as permissible uses.

5. The Massachusetts Legislature subsequently enacted legislation implementing the terms of the Settlement Agreement and the accompanying Land Use Plan. See St. 1985, c. 277 (the "State Act"). Section 5 of the State Act provides:

> Except as provided in this act, all laws, statutes and bylaws of the Commonwealth, the town of Gay Head, and any other properly constituted legal body, shall apply to all settlement lands and any other lands owned now or at any time in the future by the Tribal council or any successor organization.

(Emphasis added.)

6. During the course of the Tribal lands litigation, the Tribe petitioned for federal recognition of its existence as a Native American tribe. After the Secretary of the Interior responded favorably to the petition on February 10, 1987, a final determination of federal acknowledgment was noted in the Federal Register. See 52 Fed. Reg. 4193 (1987).[1]

7. As the final step in effectuating the settlement, Congress enacted the "Massachusetts Settlement Act" (the "Federal Act")(see Public Law 100-25, codified as 25 U.S.C. §§ 1771-76) on August 18, 1987. While the Federal Act noted that the Tribe would enjoy a government to government relationship with the United States, it made the Tribe subject to the laws identified and incorporated in the Settlement Agreement (and the accompanying Land Use Plan). See 25 U.S.C. § 1771(c). The Federal Act includes the following provisions:

a. "Any lands acquired pursuant to this section, and any other lands which are hereafter held in trust for the [Tribe] . . . shall be subject to this Act, the Settlement Agreement and other applicable laws. 25 U.S.C. § 1771(d).

b. [The Tribe] . . . shall not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws. (emphasis added.) 25 U.S.C. § 1771(e).

c. . . . the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the Town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the

[1] The Settlement Agreement expressly contemplated that the Federal Government could subsequently recognize the Tribe.

> Commonwealth of Massachusetts and the Town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance.)" 25 U.S.C. § 1771(g).

8. In 1992, pursuant to the Settlement Agreement, the Town conveyed by deed (the "Deed") certain Town lands, identified as the Settlement Lands, to the United States of America, to be held in trust for the Tribe. Pursuant to the Deed's terms, the Settlement Lands were specifically made subject to: the Federal Act; the State Act; and the Settlement Agreement, including the accompanying Land Use Plan.

B. PRIOR LITIGATION

In or about 1999, the Wampanoag Aquinnah Shellfish Hatchery Corporation erected a shed on the Cook Lands (one of the Settlement Lands) without obtaining a building permit from the Town. The Building Inspector filed an enforcement action in Dukes Superior Court, and a judge ruled that sovereign immunity barred zoning enforcement. On appeal, the SJC reversed.

A central issue in the litigation was whether the Tribe had waived its sovereign immunity, making it subject to the zoning by-laws and other laws and ordinances of the Town and the Commonwealth. The SJC specifically ruled as follows:

> "Here, the facts clearly establish a waiver of sovereign immunity stated, in no uncertain terms, in a duly executed agreement and the facts show that the Tribe bargained for and knowingly agreed to that waiver . . .
>
> More specifically, the Tribe expressly memorialized a waiver of its sovereign immunity, with respect to municipal zoning and enforcement, by agreeing in paragraph 3 of the Settlement Agreement to hold its land, including the Cook Lands, 'in the same manner and subject to the same laws, as any other Massachusetts corporation'."

Id. at 13.

C. FEDERAL GAMING ACT

In or about 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA") 25 U.S.C. §§ 2701-2721 (1996 Supp.). In 1997, counsel for the Tribe requested an opinion from the Office of the Secretary of the United States Department of the Interior as to whether the IGRA superseded the terms of the Settlement Agreement.

The Assistant Secretary for Indian Affairs issued a five page opinion (a copy of which is attached), in which the Department concluded that the IGRA did not supersede the Settlement Agreement, or the implementing State and Federal Acts, and that the Tribe could not conduct gaming in Aquinnah. The gravamen of the opinion is that the Tribe enjoys the ability, under the IGRA, to seek gaming operations elsewhere in the Commonwealth, but not in Aquinnah (then Gay Head). The letter expressly states:

> "For instance, . . . 25 U.S.C. § 1771(g), relating to the application of state and local civil and criminal laws, including laws and regulations governing bingo and other games of chance, and 25 U.S.C. § 177E(a) limiting Tribal jurisdiction over Settlement Lands, only apply to lands within the Town of Gay Head, Massachusetts." (emphasis added).
>
> These provisions do not grant exclusive jurisdiction to the Commonwealth of Massachusetts or divest the Tribe of concurrent jurisdiction over tribal lands located outside of the Town of Gay Head." (emphasis added).

While I express no opinion as to whether the Settlement Agreement and the implementing State and Federal Acts would preclude the Tribe from conducting gaming activities elsewhere in the Commonwealth, it is clear that the Tribe has no right to seek any gaming rights under the IGRA in Aquinnah.

D. THE STATE GAMING ACT

Recently, the Massachusetts Legislature enacted "An Act Establishing Expanded Gaming in the Commonwealth" (the "State Gaming Act"). Based on my review, there is nothing in the State Gaming Act which purports to abrogate, supersede or override any of the provisions of the Settlement Agreement or the State and Federal Enabling Acts. Stated simply, the State Gaming Act does not allow the Tribe to undertake gaming in Aquinnah.

E. CONCLUSION

For all the reasons set forth above, the Tribe has no authority to conduct gaming activities in Aquinnah.

Very truly yours,

Ronald H. Rappaport

RHR/jmh
Attachment

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

SEP 05 1997

Ms. Patricia A. Marks, Esq.
Morisset, Schlosser, Ayer & Jozwiak
1815 H Street N.W., Suite 750
Washington, D.C. 20006-8738

Dear Ms. Marks:

This is in response to your April 26, 1997, memorandum to the Director, Indian Gaming Management Staff, asking on behalf of the Wampanoag Tribe of Gay Head (Tribe), whether we concur with your opinion that the Tribe could operate a Class II gaming establishment on land to be acquired in Fall River, Massachusetts, assuming that the Federal Government agrees to take this land into trust for gaming and that the Tribe complies with all applicable requirements of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1996 Supp.).

It is our understanding that before investing time and money in preparing a land acquisition proposal, the Tribe desires our concurrence with your opinion because of the uncertainty created by an internal memorandum from the Massachusetts Attorney General's Office, dated March 20, 1997, which concludes that the Commonwealth of Massachusetts retains the authority to regulate and prohibit gambling on any after-acquired lands pursuant to the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 (Wampanoag Settlement Act), 25 U.S.C. § 1771 *et seq.*

For the following reasons, we believe that the Tribe would be authorized to engage in Class II gaming activities on tribal trust lands located in Fall River, Massachusetts, provided the Tribe complies with all applicable requirements of the IGRA.

BACKGROUND

The Wampanoag Tribal Council of Gay Head, Inc., entered into a Joint Memorandum of Understanding concerning Settlement of the Gay Head, Massachusetts Indian Land Claims on November 22, 1983 (Settlement Agreement). The Settlement Agreement reflects the compromise reached by the parties involved in litigation before the United States District Court for the District of Massachusetts known as *Wampanoag Tribal Council of Gay Head, Inc., v. Town of Gay Head*, Civil Action No. 74-5826-G.

To become effective the Settlement Agreement had to be implemented by both the Congress of the United States and the General Court of the Commonwealth of Massachusetts. The Commonwealth of Massachusetts subsequently enacted implementing legislation, known as An

Act to Implement the Settlement of Gay Head Indian Land Claims, on September 18, 1985. *See* Mass. Gen. Laws ch. 278, § 5 (1985). At the time of the agreement, the Tribe was engaged in the administrative process to gain federal recognition. The Bureau of Indian Affairs published its Notice of final determination of the Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., in the *Federal Register* on February 10, 1987. The determination became final on April 11, 1987. On August 10, 1987, following the Tribe's federal recognition, Congress enacted the Wampanoag Settlement Act, Pub. L. No. 100-95, 101 Stat. 704 (25 U.S.C. § 1771-1771i (1996 Supp.)).

DISCUSSION

In our view, the central question is whether the Wampanoag Settlement Act's provisions subjecting tribal trust lands to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts remove concurrent tribal jurisdiction, thus prohibiting the Tribe from engaging in Class II gaming pursuant to the IGRA. Under the IGRA, 25 U.S.C. § 2710(b)(1), a precondition to an Indian tribe's ability to engage in Class II gaming activities is that the tribe exercise jurisdiction over the Indian lands on which the gaming activities are to occur. The definition of Indian lands in the IGRA includes all lands within the limits of any Indian reservation, as well as, off-reservation lands held in trust by the United States for the benefit of the tribe and over which the tribe exercises governmental power. *See* 25 U.S.C. § 2703(4) and 25 CFR § 502.12.

At the outset, we note that certain provisions of the Settlement Act governing grants of jurisdiction to the state and local governments over lands within the Town of Gay Head are inapplicable in this instance because this situation involves land to be acquired in trust in Fall River, Massachusetts, not in the Town of Gay Head. For instance, 25 U.S.C. § 1771g, relating to the application of state and local civil and criminal laws (including laws and regulations governing bingo and any other game of chance), and 25 U.S.C. § 1771e(a), limiting tribal jurisdiction over settlement lands, only apply to lands within the Town of Gay Head, Massachusetts.

However, there are jurisdictional provisions in the Wampanoag Settlement Act, the Settlement Agreement, and the Massachusetts implementing legislation that are applicable to the Tribe's proposed trust land acquisition in Fall River. 25 U.S.C. § 1771d(g) provides as follows:

> The terms of this section shall apply to land in the Town of Gay Head. Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.

In addition, 25 U.S.C. § 1771d(c) provides that "any other lands which are hereafter held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to this subchapter, the Settlement Agreement and other applicable laws." Section 3 of the Settlement Agreement, dated September 28, 1983, and incorporated by reference into the Wampanoag Settlement Act provides as follows:

> Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian land in Gay Head, or the Commonwealth of Massachusetts, be impaired or otherwise altered.

Finally, Section 5 of the Massachusetts implementing legislation also applies all laws of the Commonwealth of Massachusetts to lands held by the Tribe:

> Except as provided in this act, all laws, statutes and bylaws of the commonwealth, the town of Gay Head, and any other properly constituted legal body, shall apply to all settlement lands and any other lands owned now or at any time in the future by the Tribal council or any successor organization.

These provisions do not grant exclusive jurisdiction to the Commonwealth of Massachusetts or divest the Tribe of concurrent jurisdiction over tribal trust lands located outside of the Town of Gay Head, and should not be construed to do so, especially in light of long-standing Executive and Congressional policies favoring the strengthening of tribal self-government, and disfavoring the implicit erosion of tribal sovereignty. In this context, the U.S. Supreme Court has held that Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed. *See e.g., Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

The First Circuit Court of Appeals recently addressed a similar issue in *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir, 1994), *cert. denied*, 115 S. Ct. 298 (1994). A provision of The Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1708, provides that "[e]xcept as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." The First Circuit concluded that this provision only grants non-exclusive jurisdiction to the State, and that the Narragansett Indian Tribe retains concurrent jurisdiction over Indian lands for purposes of the IGRA. The Court stated:

> But the mere fact that the Settlement Act cedes power to the state does not necessarily mean, as Rhode Island suggests, that the Tribe lacks similar power and, thus, lacks "jurisdiction" over the settlement lands. Although the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad [citation omitted], we do not believe that it is exclusive. To the contrary, we rule that the Tribe retains concurrent jurisdiction over the settlement lands and that such concurrent jurisdiction is sufficient to satisfy the corresponding precondition to applicability of the Gaming Act.

Although 25 U.S.C. § 1771d(g) of the Wampanoag Settlement Act is similar to 25 U.S.C. § 1708 of the Rhode Island Settlement Act, Section 3 of the Massachusetts Settlement Agreement appears to go further by providing that State and local civil and criminal jurisdiction shall not "be impaired

or otherwise altered, except to the extent modified in this agreement and in the accompanying legislation." However, we do not believe that this language should be construed to defeat concurrent tribal jurisdiction. Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for "exclusive" state and local jurisdiction, or it would have included limitations on tribal jurisdiction, as it did in 25 U.S.C. § 1771e(a) with respect to jurisdiction over settlement lands within the Town of Gay Head. Congress chose to do neither.

Therefore, it is our conclusion that neither 25 U.S.C. § 1771d(g) nor Section 3 of the Settlement Agreement defeat or modify the Tribe's retained concurrent jurisdiction over tribal trust lands located outside of the Town of Gay Head.

In addition, to the extent that the grant of concurrent jurisdiction to the Commonwealth of Massachusetts in 25 U.S.C. § 1771d(g) and in Section 3 of the Settlement Agreement are inconsistent with the provisions of the IGRA, we believe that, as in the *Narragansett* case, the provisions of the IGRA control. The First Circuit, in the *Narragansett* litigation, held that where the IGRA and the Rhode Island Indian Claims Settlement Act are incompatible, principles of statutory construction dictate that the IGRA trumps the Settlement Act. With respect to Class II gaming, the Court concluded that:

> It is only with regard to Class I and Class II gaming that the Gaming Act *ex propria vigore* bestows exclusive jurisdiction on qualifying tribes. And it is only to these small degrees that the Gaming Act properly may be said to have worked a partial repeal by implication of the preexisting statute.

In *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996), the First Circuit clarified its analysis regarding the interaction between the IGRA and a potentially conflicting federal statute. A provision of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1735(b), provides as follows:

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian Nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine ... shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

The First Circuit concluded that this savings clause in the Maine Indian Claims Settlement Act preserved the jurisdictional grant to the state intact because the IGRA did not include a provision extending its terms to the State of Maine, as required by the Maine Settlement Act. However, the court emphasized that its decision in *Passamaquoddy* was not contrary to its decision in *Narragansett*, and that absent such an explicit savings clause, the IGRA would control over earlier statutory grants of jurisdictional authority. The Wampanoag Settlement Act contains no such savings clause.

The Massachusetts Attorney General's March 20, 1997, internal memorandum urges reliance on the Fifth Circuit Court of Appeals' decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1335, (5th Cir. 1994) on the ground that the language in the Ysleta del Sur Pueblo Restoration Act, 25 U.S.C. § 1300g, is most similar to language in the Wampanoag Settlement Act. We disagree. Section 107 of the Ysleta del Sur Pueblo Restoration Act, 25 U.S.C. § 1300g-6, specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas on the reservation and lands of the Ysleta del Sur Pueblo. The Fifth Circuit construed the scope of this provision in light of the Ysleta Restoration Act's extensive legislative history. There is simply no comparable provision in the Wampanoag Settlement Act addressing gaming on tribal lands outside of the Town of Gay Head.

Finally, in addition to having jurisdiction, the Tribe must also exercise governmental power under the definition of the term "Indian lands" in the IGRA, 25 U.S.C. § 2703(4). However, as the First Circuit stated in Narragansett, 19 F.3d 685, 703 "[m]eeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." Here, exercise of governmental power cannot be assessed since the Tribe has not yet submitted an application to take the land in Fall River into trust.

CONCLUSION

For the foregoing reasons, we conclude that the Tribe would be eligible to conduct Class II gaming activities on land located in Fall River, Massachusetts, if the Secretary of the Interior agrees to take the land in trust for the Tribe, and the Tribe complies with all applicable requirements of the IGRA, including the exercise of governmental authority over the land.

We hope that this information will be useful to your client. Please do not hesitate to contact the Indian Gaming Management Staff at (202) 219-4066, if you have further questions regarding this matter.

Sincerely,

Michael J. Anderson

Ada E. Deer
ACTING Assistant Secretary - Indian Affairs