WHY THE MASHPEE ARE NOT THE LYTTONS

BACKGROUND

At the October 21 meeting of the Windsor Town Council, Mayor Okrepkie claimed that the Bureau of Indian Affairs (BIA) has authority to take land in trust for the Lytton under the Indian Reorganization Act (IRA). He claimed that the Lytton qualify under the "second and third definitions" of Indian in the IRA, and cited to a ruling just issued by the BIA in September that the Mashpee constitute Indians under the second definition and granting their application to take land into trust.

QUESTION

Do the Lytton qualify as Indians under the second and third definitions of Indian in the IRA?

DISCUSSION

The IRA authorizes the Secretary of Interior to acquire lands inside or outside of existing reservations "for the purpose of providing land for Indians." 25 USC §465. Title to such lands is to be taken "in trust for the Indian tribe or individual Indian." *Id.*

Section 479 defines the term "Indian" by describing three separate groups of Indians. The first two are linked in thought and language.

> "The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation..."

The third group is determined by genetics: "all other persons of one-half or more Indian blood."

The first definition, based on tribal status, was the subject of a recent case before the U.S. Supreme Court. In *Carcieri v. Salazar*, the Supreme Court considered whether the term "now" in section 479 refers to 1934, when the law was passed, or to the current time the trust acquisition is being made. The Court held that the phrase, "now under Federal jurisdiction" is "unambiguous" and "refers to those tribes that were under federal jurisdiction of the United States when the IRA was enacted in 1934."
The Lytton do not fall within this definition of Indians. No group of Lytton Indians existed in 1934. In 1927, the BIA purchased 50 acres near Lytton Station to establish a rancheria for the nearby tribe of Dry Creek Indians. (The area is not named after Indians, but after Captain William Lytton who had settled in the area about 1860 and who

ran a well-known resort there called Lytton Springs.) As of 1934, neither the Dry Creek nor any other Indians had taken up residence on the rancheria. The two families that eventually inhabited the Rancheria came in 1937 from other tribes, one from up North and one from the coast. As of 1934, there were no Lytton Indians and thus no Lytton Indians under federal jurisdiction. Therefore, the IRA provides no authority to the BIA to take land in trust for the Lytton.

Mayor Okrepkie's comments seem to accept the fact that the Lytton were not under federal jurisdiction in 1934 and do not qualify as Indians under the first definition. Instead, he now claims that the Lytton satisfy the second and third definitions.

The second definition contains a residency requirement.[1] Persons who are requesting land be taken into trust must be descendants of persons who, as of June 1, 1934, were residing within the then present boundaries of an Indian reservation. The Mashpee easily satisfy this residency requirement but the Lytton do not.

The Mashpee are a historic tribe from Massachusetts with 350 years of history in and around the Town of Mashpee. They applied to have land taken into trust, and were faced with a *Carcieri* issue. Although the Town was almost entirely Indian in 1934, apparently there is no evidence that the Mashpee were under federal jurisdiction in 1934.

However, the Mashpee easily satisfy the residency requirement. Land was first set aside for them in 1665 (350 years ago!) in what became the Town of Mashpee. The land became a self-governing "Indian district," but in the mid-1800s, the lands were allotted to Mashpee members. At first, sale of lands by the Indians was restricted, a common protection similar to a guardianship, but even after the Mashpee were freely allowed to transfer lands, the Town remained Indian in character. As stated in the ROD, "the Mashpee continued to dominate the Town's population, as well as control the Town's government and culture up until the 1970s." Based on this history, the ROD concludes that "a reservation was set aside for the Mashpee Indians...the reservation

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[1] The second definition also incorporates the tribal status requirement in the first definition, though the BIA disputes whether that in part. The BIA construes the second definition in the statute to be ambiguous and interprets it to require only one of the two requirements as to tribal status. The tribe must be recognized, but need not have been under federal jurisdiction in 1934. That interpretation is highly questionable, but irrelevant to analysis of the residency requirement.

That said, we note that prior to *Carcieri,* the BIA had interpreted the first definition not to require that a tribe be under federal jurisdiction in 1934 but under current federal jurisdiction. In *Carcieri*, the Supreme Court held that the statute was unambiguous in requiring that the tribe be under federal jurisdiction in 1934, not currently. It would appear that the BIA remains recalcitrant and is trying again to circumvent the requirement that a tribe be under federal jurisdiction in 1934.

continued to exist in 1934, and at that time, Mashpee members were residing within its boundaries." (p. 113; and discussion following from p. 113-120.)

The long-standing existence of the Mashpee from 1665 through 1934 is in stark contrast to the facts regarding the Lytton. No Lytton tribe ever existed before or as of June 1, 1934. The government had bought a piece of land near Lytton Station for another tribe, but as of June 1, 1934, neither the other tribe nor any other Indians had taken up residence on the rancheria. Therefore, the Lytton cannot qualify as Indians until the second definition.

Mayor Okrepkie asserted that the Lytton satisfy the second definition but he did not discuss the specific requirements. He did not discuss the residency requirement, nor claim that the Lytton satisfy the residency requirement. Consideration of this requirement leads to an easy and quick conclusion that the Lytton do not satisfy it.

Regarding the third section of the definition, Mayor Okrepkie argued that the original residents of the rancheria in 1937 were one-half blood Indians, and therefore the Lytton qualify under that part of the definition. There are a few problems with this analysis. First, blood quantum is determined on an individual basis and therefore, this part of the definition appears to apply just to individuals and not to tribes. Second, the blood quantum requirement appears to apply to current members, not the original members. Third, evidence states that one of the two men who inhabited the rancheria was a one-quarter Pit Indian, not a one-half Indian. There has been no showing that the third part of the definition can apply or does apply.

CONCLUSION

The claims by Mayor Okrepkie and the Town Council seem ill-informed at best and in furtherance of a pattern of deception at worst. Tellingly, this legal theory did not come in a staff report from the Town attorney. It appears that the Mayor and Town Council is attempting to stir up the public's fears in order to overcome public opposition and to thwart the will of the people.