COMMONWEALTH OF MASSACHUSETTS

DUKES, SS. | LAND COURT
MISC. CASE NO. 299511

ANTHONY C. FRANGOS and)
JAMES J. DECOULOS as they are the)
TRUSTEES OF BRUTUS REALTY TRUST)
)
Plaintiffs)
vs.)
)
TOWN of AQUINNAH,)
ELLEN ROY HERZFELDER as she is)
SECRETARY OF THE MASSACHUSETTS)
EXECUTIVE OFFICE OF)
ENVIRONMENTAL AFFAIRS,)
ELIZABETH O'KEEFE, SOUTH SHORE)
BEACH, INC., DAVID H. SMITH)
FOUNDATION and VINEYARD)
CONSERVATION SOCIETY, INC.)
)
Defendants)

AFFIDAVIT OF JAMES J. DECOULOS
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

My name is James J. Decoulos and the following facts are true to the best of my knowledge, information and belief.

1. I reside at 38 Bow Road in Belmont, Massachusetts with my wife Maria A. Kitras.

2. Maria and I hold beneficial interests in Brutus Realty Trust ("Brutus"), Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust in the Town of Aquinnah (the "Town").

3. I practice environmental engineering and am licensed by the Commonwealth as a "professional civil engineer" under G.L. c. 112, § 81D and a "hazardous waste site cleanup professional" under G.L. c. 21A, § 19.

4. My earliest professional training was in land surveying, working under my father John J. Decoulos, who is licensed as a "professional land surveyor". I conducted numerous boundary surveys, established existing and new rights-of-ways, conducted complex title examinations and prepared plans for registration at the Land Court for my father.

5. I represented the Wampanoag Tribe of Gay Head (Aquinnah) [the "Tribe"] on environmental and civil engineering assignments between 1989 and 2005.

6. My work with the Tribe involved conducting site investigations; preparing environmental assessments; coordinating archaeological surveys; preparing existing condition site plans; preparing wetlands, waterways and endangered species permits; overseeing extensive wetland replication efforts; coordinating municipal and environmental permitting; designing roads and establishing the metes and bounds descriptions of the roadways; managing infrastructure construction; and, technical assistance on environmental issues on lands held in trust for the Tribe by the United States of America.

7. I acted as the liaison for the Tribe in obtaining approvals through the Massachusetts Department of Environmental Protection, the Massachusetts Office of Coastal Zone Management, the Massachusetts Historical Commission, the Massachusetts Environmental Policy Act Unit, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers and the Federal Highway Administration.

8. I have represented the Town for the assessment, design and construction management of the municipal landfill closure between 1995 and 2001.

9. Prior to 1997, the Town was known as Gay Head. Aquinnah is the historic Wampanoag name of the southwesterly peninsula of the island of Martha's Vineyard (the "Vineyard").

10. In 1993, I met with Jerry Alan Wiener, the chairman of the Town's board of health and the Town's building inspector and zoning officer, to discuss the access of private lands in the Town. Wiener informed me that all lots in Town had easements by necessity and educated me on the Land Court case involving the Taylor v. Vanderhoop, Land Court Misc. Case No. 129925 (1989). Attached as Exhibit A is a copy of the decision from Chief Justice Robert V. Cauchon of the Land Court[1].

11. While researching the files of the Taylor case at the Land Court, I came across an Affidavit of Philip J. Norton, Jr. with exhibits, which was filed in the Taylor case. Attached as Exhibit B is a copy of Norton's affidavit with the exhibits.

12. Around 1993, I was informed by Francis Cournoyer of West Tisbury, MA that a lawsuit was filed by the Wampanoag Tribal Council of Gay Head, Inc. in the U.S. District Court for Massachusetts that had effectively clouded all the land in Town between 1974 and 1987. Wampanoag Tribal Council, Inc. v. Town of Gay Head, Civil Action No. 74-5826-McN. Attached as Exhibit C is a copy of the amended complaint of the Wampanoag Tribal Council, which I obtained at the U.S. District Court in Boston on April 11, 2011.

13. The Commonwealth of Massachusetts filed a motion and memorandum to intervene in Wampanoag Tribal Council. See attached Exhibit D, which I obtained at the U.S. District Court in Boston on April 11, 2011. The Commonwealth argued on page 17 of its memorandum that:

> In this case, one defense to this action is that chapter 213 of the Acts of 1870 validly conveyed the lands at issue to the Town of Gay Head. Massachusetts should be permitted to defend the validity of its laws.

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[1] The exhibits cited and attached to this affidavit are lettered. The exhibits relied on by the defendants are numbered.

14. Attached hereto as Exhibit E is a plan I have prepared entitled "Plan of Common Lands Conveyed to the Town of Gay Head in 1870", which is based on Exhibits 20 and 68.

15. Chapter 213 of the Acts of 1870 also incorporated the Town in 1870. See Section 1 of the Act in Exhibit 11.

16. One year earlier, all Indians in Massachusetts were declared to be citizens "entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject." See attached Chapter 463 of the Acts of 1869 as Exhibit F.

17. Cournoyer informed me that title insurance companies were apprehensive of writing insurance policies as a result of the Wampanoag's claims to the common lands, which were conveyed to the town of Gay Head in 1870 under Section 2 of Chapter 213 of the Acts of 1870 (the "Common Lands"). Furthermore, banks and mortgage companies were reluctant to lend money on real property in Town due to the difficulty in obtaining title insurance.

18. Cournoyer owned significant amounts of land in Town between 1974 and 1987 and formerly served on the board of directors for the Dukes County Savings Bank.

19. Cournoyer was a principal plaintiff in Black v. Cape Cod Company, Land Court Misc. Case No. 69813 (1975). He informed me of actions that took place during the Land Court case and his understanding of access being available for all lots in Town. Attached as Exhibit G is a copy of the decision from Chief Justice William J. Randall of the Land Court in Black.

20. Maria and I purchased fractional interests in Lots 178, 241 and 711, together with all the interest Lot 713, from Cournoyer and his wife Janice Feltz based upon this information.

21. On June 4, 2001, Land Court Justice Mark V. Green issued a decision in Kitras et al. v. Town of Aquinnah et al., Land Court Misc. Case No. 238738 which dismissed the case that Maria and I had brought in the Land Court to declare that easements by necessity existed to Lots 178, 243, 711 and 713. Justice Green claimed that the United States of America was a necessary party and that the case must be dismissed because we were unable to join the U.S. as a party. Attached as Exhibit H is a copy of the decision in Kitras.

22. In August of 2001, I met with former Chief Justice Robert V. Cauchon of the Land Court on the Vineyard with other plaintiffs in Kitras.

23. Justice Cauchon felt strongly that all the lots in Aquinnah landlocked from the 1878 partition of the Common Lands were entitled to easements by necessity and did not agree with the 2001 decision from the Justice Green.

24. I am aware of only one reported case from the Massachusetts appeals courts in which the presumption in law that creates easements by necessity was refuted. Orpin v. Morrison, 230 Mass. 529 (1918). In Orpin, a witness was allegedly present at the land sale and testified that the land was sold "cheap" because the buyer had promised to not cross over the land of the seller and that he had another means of access. Id at 531.

25. The Yale Law Journal harshly condemned the Supreme Judicial Court in Orpin. They claimed that the oral testimony contradicted the elementary legal principles of easements by necessity and that the acceptance of the testimony violated the statute of frauds and the parol evidence rule. Attached as Exhibit I is *Evidence of Intention as Rebutting Ways of Necessity*, Yale Law Journal, 29-6 at page 665 (1920).

26. I am not aware of any evidence or testimony from any individuals who were present during the conveyance of the Town's Common Lands to the inhabitants of Gay Head on

December 21, 1878 that there was an intention to create inaccessible lots or that the lots had some alternative route of access that would make the land usable. See Exhibit 21.

27. The lots created from the Town's Common Lands were conveyed by Commissioners Joseph T. Pease and Richard L. Pease after a voluntary petition to partition was filed at the Dukes County Probate Court by residents of the Town under Section 6 of Chapter 213 of the Acts of 1870. See Exhibits 12, 13 and 14. The lots were numbered from 174 to 736.

28. The inhabitants of the Town did not petition the Probate Court to grant rights to extract peat or any other natural resource from the Common Lands.

29. The Legislature did not order the Probate Court to grant rights to extract peat or any other natural resource from the Common Lands.

BACKGROUND TITLE OF BRUTUS LOT

30. The land held by Brutus Realty Trust is defined as the easterly half of Set-Off Lot 557 (the "Property").

31. Prior to acquiring the beneficial interest in Brutus, I conducted a title examination of the Property.

32. The Property is identified on the Common Lands of Exhibit D.

33. My examination of title of the Property at the Dukes County Registry of Deeds (the "Registry") is as follows:

    a. On December 1, 1878, Probate Court Judge Thaddeus G. Defriez approved the petition by Joseph L. Pease and Richard L. Pease to divide the common lands owned by the Town. The petition granted Set-Off Lot 557 to Joseph S. Anthony, which is recorded at the Registry in Book 65, Page 312.
    b. On September 8, 1915, Joseph S. Anthony conveyed Set-Off Lot 557 to Charles S. Norton, which is recorded at the Registry in Book 135, Page 526.
    c. Charles S. Norton passed away on March 3, 1936. He died intestate.
    d. The Estate of Charles S. Norton was administered at the Dukes County Probate Court and is filed as Docket No. D4/1376. The only heirs-at-law of his estate were his son Bayes M. Norton and his daughter Helen N. Andreson.
    e. Bayes M. Norton granted his undivided half interest in Set-Off Lot 557, being the easterly half of Set-Off Lot 557, to his sister Helen N. Andreson on

December 18, 1964, and the transfer is recorded at the Registry in Book 255, Page 549.

f. Helen N. Andreson conveyed her title to the easterly half of Set-Off Lot 557 to the Helen N. Andreson Trust and the transfer was recorded at the Registry in Book 433, Page 47.
g. John Andreson, Jr. and Deborah F. Burns, Trustees of the Helen N. Andreson Trust conveyed Set-Off Lot 557 to John Andreson, Jr. and Deborah F. Burns, individually, and the transfer was recorded at the Registry in Book 711, Page 569.
h. John Andreson, Jr. granted his interest in Set-Off Lot 557 to The John Anderson, Jr. Realty Trust, created under a declaration of trust recorded at the Registry in Book 719, Page 563. The conveyance was recorded at the Registry in Book 719, Page 569.
i. Deborah F. Burns granted her interest in Set-Off Lot 557 to The Deborah F. Burns Realty Trust, created under a declaration of trust recorded at the Registry in Book 719, Page 571. The conveyance was recorded at the Registry in Book 719, Page 574.
j. John Andreson, Jr., Trustee of The John Anderson, Jr. Realty Trust, and Deborah F. Burns, Trustee of The Deborah F. Burns Realty Trust, conveyed the easterly half of Set-Off Lot 557 to Anthony C. Frangos, Trustee of Brutus Realty Trust under a declaration of trust recorded at the Registry in Book 729, Page 153. The conveyance was recorded in Book 737, Page 131 on July 29, 1998.

34. My examination of title found no express easements ever granted to or from Moshup Trail, State Road or any other private or public way for the benefit of the Property.

35. Anthony C. Frangos, the trustee of Brutus, appointed me as co-trustee on April 30, 2004 and the appointment was recorded at the Registry in Book 999, Page 135.

36. Frangos passed away on December 2, 2008.

THE HISTORIC LANDSCAPE OF AQUINNAH

37. The Aquinnah area has been the subject of numerous geologic studies, many sponsored directly through the U.S. Geological Survey. Subsurface conditions vary widely and are boldly revealed in the famous Gay Head cliffs. The multicolored cliffs reach up 150 feet from the western most shoreline in the Town, and offer panoramic views of Vineyard Sound, the Elizabeth Islands and southeastern Massachusetts. The U.S. Department of the Interior designated these cliffs as a Natural Landmark in 1965.

38. The region has a complicated hydrogeologic structure attributable to glacial terminal moraine. The glacial deposits that form the topography of Aquinnah occurred during the Pleistocene glaciation, which ended approximately 11,000 years ago.

39. The Pleistocene glaciation that forms the topography of Aquinnah is comprised of at least six separate glacial drifts. They include the Nebraskan Glaciation, Aftonian Interglaciation, and Kansan, early Illinoian, late Illinoian, early Wisconsin, and late Wisconsin Glaciations. This multiple glaciation provides "probably the most important single locality for Pleistocene glacial stratigraphy in the United States"[2].

40. It has been reported that the Vineyard was "once a well-wooded, island, with many ponds and brook."[3]

41. John Brereton, a passenger on the ship of the English explorer Bartholomew Gosnold in 1602, reported that the Vineyard landscape consisted of "a high canopy forest" with "an impressive assemblage of oaks, hickories, white cedar, wild black cherry, beech and other trees".[4]

42. In a book published by the Vineyard Conservation Society, Inc. ("VCS") and Peter W. Dunwiddie[5], it was reported that:

> The destruction of forests on the Vineyard was part of a process that was occurring throughout the eastern United States following European settlement. The land was a commodity; components of the biological communities were things to be taken if useful, eliminated if they were not. Timber was harvested, wild game hunted, minerals extracted.

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[2] Kaye, Clifford A., "The Autochthonous and Allochthonous Coastal Plain Deposits of Martha's Vineyard and the Marshfield-Scituate Area, Southeastern Massachusetts", U.S. Geological Survey, 1983.

[3] Ritchie, William A., "The Archaeology of Martha's Vineyard", page 1, The Natural History Press, Garden City, NY, 1969.

[4] Brereton, John, "A Briefe and True Relation of the Discoverie of the North Part of Virginia", Dodd, Mead & Co., NY, 1903.

[5] Dunwiddie, Peter W., "Martha's Vineyard Landscapes: The Nature of Change", page 24, The Vineyard Conservation Society and Peter W. Dunwiddie, 1994.

43. Since the deforestation of Aquinnah shortly after European settlement, the landscape of Aquinnah was been gradually recovering to the native vegetative condition which existed prior to the 17th century.

44. In his 1871 report, Richard L. Pease described the physical characteristics of Gay Head landscape:

> Its peculiar geological characteristics have long attracted the attention of scientific men. Hitchcock speaks of it in enthusiastic terms, as "a most picturesque object of scenery," and says, "there is not a more interesting spot in the State to a geologist." Sir Charles Lyell, the famous English geologist, is highly laudatory of it. There is also enough of interest about it to attract the curious and the lovers of rare natural scenery, who are neither scientific nor learned.
>
> "The territory embraces about every variety of soil, a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests." The surface is very irregular, abounding in hills and valleys, ponds and swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land.
>
> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. A very large portion of the lands now inclosed, was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value. As it has been cleared up, fenced and tilled, its value has largely increased.
>
> … The chief interest of Gay Head is not in its agricultural capabilities, which have never yet been developed, but in the rare scenery, the rich and varied colors of its lofty cliffs present to the admiring gaze of the traveler and the passing voyager, in its singularly mixed clays and sands, and in the numerous specimens of fossils and petrifications found in its banks."
>
> *Commissioner Appointed to Complete the Examination and Determination of All Questions of Title to Land and of All Boundary Lines Between the Individual Owners*, 1871" (Ex. 18, Pgs. 110-111)

45. Between the period of 1866 and 1878, Richard L. Pease understood the condition of the Wampanoag Indians and the Aquinnah landscape better than any outsider.

HISTORY OF PUBLIC WAYS IN AQUINNAH

46. Section 5 of Chapter 213 of the Acts of 1870 directed the Dukes County Commissioners to lay out and construct a road — which is now called State Road — from the Chilmark town line to the Gay Head lighthouse.

47. I have conducted diligent searches through the records of the Dukes County Commissioners and the Registry and have been unable to find any action by the Dukes County Commissioners to comply with Section 5.

48. State Road is a public way in Aquinnah which is under the jurisdiction of the Commonwealth of Massachusetts through the Massachusetts Department of Transportation ("MassDOT"). MassDOT was formerly known as the Massachusetts Department of Public Works and the Massachusetts Highway Department ("MHD").

49. On December 17, 2001, I submitted a letter to Bernard McCourt, Director of the regional office of the MHD, seeking the original date that the Commonwealth laid out and took charge of State Road. Additionally, I asked McCourt to provide any information on whether the Dukes County Commissioners ever laid out, held or maintained the public way prior to the control by the Commonwealth. My letter to McCourt is attached hereto as Exhibit J.

50. McCourt responded to my request on December 18, 2001 and informed me that the Commonwealth laid out State Road on October 1, 1913. Furthermore, he could provide no information on whether the Dukes County Commissioners ever laid out, held or maintained State Road. McCourt's letter is attached hereto as Exhibit K.

51. On July 1, 1954, the Dukes County Commissioners received a petition from Gay Head Selectmen Edmund S. Cooper, Walter F. Manning and Leonard F. Vanderhoop which

stated that "common convenience and necessity require the layout, alteration, location or relocation of a highway or an existing highway in Gay Head, in said Dukes County, of a new highway to be known as 'Moshope Trail' ". The petition was accepted by the Dukes County Commissioners at a meeting on January 19, 1955, who "adjudged that public necessity or common convenience or necessity require that said County Commissioners and Associate Commissioners should layout, alter, locate or relocate a highway known as 'Moshope Trail' in said Gay Head". The petition and its acceptance were recorded at the Registry in Book 227, Pages 564 to 566, a copy of which is attached hereto as Exhibit L.

52. My examination of title has found no express easement ever granted to or from Moshope Trail (aka Moshup Trail), State Road or any other private or public way for the benefit of the Property.

THE PARTIES TO THE CURRENT ACTION

53. On March 4, 1996, I met with Resolvert Williams, President of the Sheriff's Meadow Foundation ("SMF"); Richard Johnson and Robert Woodruff of SMF; and, Jennifer Roberts, attorney for SMF and VCS, at their headquarters known as the Wakeman Conservation Center in Vineyard Haven, MA.

54. The purpose of the meeting with officials from VCS and SMF was to attempt to work together on developing a master plan for the area that they were attempting to conserve along Moshup Trail. I informed the representatives at the meeting that Bear consisted of my Maria and I, and that we were attempting to establish access to Set-Off Lots 178 and 711. At the meeting, I described the two prior Land Court cases Black and Taylor.

55. On March 21, 1996, Williams sent me a letter to follow up with our meeting. See attached Exhibit M.

56. On March 28, 1996, I sent a letter to Williams. See attached Exhibit N.

57. I made numerous attempts to work together with VCS in 1996 to develop a master plan of the area and seek creative ways to protect conservation land and property rights of individual property owners.

58. On December 12, 1996, VCS Executive Director Brendan T. O'Neil sent me a letter regarding this effort. See attached Exhibit O.

59. In his letter, O'Neil stated that the Moshup Trail area was a "vanishing ecosystem" and that:

> The project area represents one of the last contiguous blocks of this globally rare habitat left anywhere in the world, hosting a wealth of protected rare plant and animal species.

60. VCS filed suit against Maria and Harold Adler in Dukes County Superior Court, as they were trustees of Bear Realty Trust on April 9, 1997 (the "VCS Complaint"). See attached Exhibit P.

61. Adler was an original investor in Bear who passed away on September 2, 1997.

62. At Paragraph 4 of the VCS Complaint it was stated that:

> The land within the Project's boundaries consists of morainal dunes and heathlands, a rare habitat of which only about 2,000 acres exist worldwide. A true and accurate copy of a plan of land showing the Project's boundaries is attached hereto as Exhibit A.

63. The Property owned by Brutus is in the middle of the Project boundaries identified in Paragraph 4 and shown in Exhibit A of the VCS Complaint.

64. The VCS Complaint was dismissed for lack of necessary parties.

65. The late David H. Smith was a major financial contributor to protecting lands identified by VCS as "the Project" as described in Paragraph 4 of the VCS Complaint.

66. At a web site which describes the David H. Smith Conservation Research Fellowship Program, it is stated that:

> David was best known on the Vineyard for his strong and quiet leadership in many of the most important conservation efforts that have taken place in recent years. He played a major role in the Moshup's Trail initiative, working with the Vineyard Conservation Society and Sheriff's Meadow Foundation to protect more than 30 acres of globally rare historic heathland habitat.

67. Attached as Exhibit Q is a copy of Smith's biography from the web site.

68. I have attached a summary of the corporate listing for South Shore Beach, Inc. ("SSB") from the Massachusetts Secretary of State, which I downloaded from the Secretary's web site on January 20, 2004 and attached hereto as Exhibit R.

69. The late Moses Malkin was formerly listed as the Clerk for SSB.

70. I am aware that Hannah L. Malkin was the wife of Moses Malkin, and that they were key participants in vigorously opposing the claims by the Wampanoag Tribal Council. They fought with other summer homeowners to clear title to private property in Aquinnah that was impacted by the claims of the Wampanoag Tribal Council to the Common Lands in 1974.

71. The Gay Head Taxpayers Association was formed n 1973 by summer homeowners to oppose the Wampanoags efforts for federal recognition by the United States government.

72. In 1976, the Taxpayers Association intervened in Wampanoag Tribal Council as a defendant.

73. In 2003, the Gay Head Taxpayers Association changed its name to Aquinnah/Gay Head Community Association, Inc. (AGHCA).

74. Information about the AGHCA has been obtained from their web site and is attached hereto as Exhibit S.

75. On February 18, 2004, I made copies of the bound book which contained the full Hearing before the Select Committee on Indian Affairs, United States Senate, Ninety-Ninth Congress, Second Session on S. 1452, dated April 9, 1986 at the Law Library Reading Room of the James Madison Memorial Building at the Library of Congress in Washington, D.C (the "Senate Hearing on Indian Affairs"). The manuscript is referenced at the Library of Congress with Call Number KF26.5.I4 1986c.

76. Hannah L. Malkin filed written testimony in the Senate Hearing on Indian Affairs and her testimony is attached hereto as Exhibit T.

77. In her testimony, Malkin stated that "Gay Head remains a remote location of extraordinary beauty." She also urged the Senate Hearing on Indian Affairs to acknowledge that the Common Lands were conveyed to all of the people of the Town in 1870; that the claims by the Wampanoags to the Common Lands were inequitable; and, that Wampanoag Tribal Council "threaten[s] the titles of all Gay Head landowners".

78. On February 18, 2004, I obtained copies of the following documents at the office of Congressman Edward J. Markey in Washington, DC:

a. Congressional Record – House at 29323-29324 (October 7, 1986); attached hereto as Exhibit U; and
b. Congressional Record – Senate at 22895-22896 (August 6, 1987); attached hereto as Exhibit V.

79. On the floor of the U.S. House of Representatives, Congressman Gerry Studds stated:

> Mr. Chairman, 12 years ago, the Wampanoag Indian Tribal Council filed suit in U.S. district court against the town of Gay Head, a small community on the island of Martha's Vineyard. This litigation was an attempt to reclaim public land transferred to the town in 1870 by the Commonwealth of Massachusetts, allegedly in violation of Federal law. Sine that time, property titles in the town have been clouded, making it virtually impossible for residents to obtain mortgages.
>
> Exhibit U at 29326.

80. On the floor of the U.S. Senate, Senator Edward Kennedy stated:

> …This beautiful island off the coast of Massachusetts – longtime home to the Wampanoag Gay Head Indians – is also one of the most popular vacation spots on the east coast.
>
> Exhibit V at 222895.

81. The unresolvable conflicts in Wampanoag Tribal Council, together with the testimony and hearings before Congress in 1986 and 1987, led to the passage of 25 U.S.C. § 1771 *et seq*.

82. I have obtained a copy of a Progress Report to the Friends of the Moshup Trail Project (the "Progress Report"), prepared by the Town, VCS and SMF. See attached Exhibit W.

83. The Progress Report describes the area in and around the Property (also identified by the Aquinnah Assessors as on Map 12 as Parcel 122) as the "rare and beautiful Moshup Trail moors".

84. Approximately 20 acres of land were acquired by the Town along Moshup Trail with $500,000 of state funds through the Massachusetts Division of Conservation Services ("DCS") Self-Help Program Agreement (the "Program Agreement") and the legal documentation is recorded at the Registry in Book 672, Page 436. The Program Agreement is attached hereto as Exhibit X.

85. The defendants in this action allege that the Commonwealth holds an interest in Set-Off Lot 556 as a result of the contribution of state funds and the terms of the Program Agreement.

86. I have traveled along Moshup Trail hundreds of times since the Program Agreement was recorded on March 14, 1996 and conducted numerous field investigations on lands off Moshup Trail.

87. I have never seen the public enjoy any part of Lot 556 and have never seen a sign prominently displayed on any part of Lot 556 - as the Program Agreement requires - indicating that the Lot is open to the public and purchased with state funds.

88. Paragraph 8 of the Program Agreement states the "PARTICIPANT agrees to record a copy of this agreement at the Dukes Registry of Deeds at the same time the deed for the land comprising the PROJECT is recorded."

89. The only deed which followed the Program Agreement was the conveyance of Set-Off Lots 549 and 550 from Macdonald Haskell to the Town of Gay Head for $360,000, which is incorporated in Exhibit X.

90. On May 29, 1996, the Town filed another application for Self-Help Funds from DCS. See attached Exhibit Y.

91. In the cover letter of the Town's application to DCS, Conservation Commission Chairman Mary Elizabeth Pratt described how the Town had prevented additional houses from being built on "rare coastal heathland habitat and preserved the stunning vistas along Moshup Trail forever." Pratt was describing the area in and around the Brutus Property.

Signed under the pains and penalties of perjury this 20th day of April, 2011.

James J. Decoulos

LIST OF EXHIBITS

A. Taylor v. Vanderhoop, Land Court Misc. Case No. 129925, Decision, C.J. Cauchon (July 19, 1989).

B. Affidavit of Philip J. Norton, Jr. with exhibits, from Taylor v. Vanderhoop, Land Court Misc. Case No. 129925.

C. Amended complaint in Wampanoag Tribal Council, Inc. v. Town of Gay Head, Civil Action No. 74-5826-McN, June 2, 1975.

D. Memorandum to Intervene filed by the Commonwealth of Massachusetts in Wampanoag Tribal Council, dated July 9, 1981.

E. "Plan of Common Lands Conveyed to the Town of Gay Head in 1870"; scale: 1"= 2000'; prepared by James J. Decoulos; April, 2011.

F. Chapter 463 of the Acts of 1869.

G. Black v. Cape Cod Company, Land Court Misc. Case No. 69813 (1975), Decision, C.J. Randall (July 14, 1975).

H. Kitras et al. v. Town of Aquinnah et al., Land Court Misc. Case No. 238738, Decision, J. Green (June 4, 2001).

I. *Evidence of Intention as Rebutting Ways of Necessity*, Yale Law Journal, 29-6 at page 665 (1920).

J. Letter from James J. Decoulos to Bernard McCourt, Director of the regional office of the Massachusetts Highway Department, dated December 17, 2001.

K. Letter from McCourt to Decoulos dated December 18, 2001.

L. Petition from Gay Head Selectmen Edmund S. Cooper, Walter F. Manning and Leonard F. Vanderhoop dated July 1, 1954 and acceptance by the Dukes County Commissioners at a meeting on January 19, 1955, who "adjudged that public necessity or common convenience or necessity require that said County Commissioners and Associate Commissioners should layout, alter, locate or relocate a highway known as 'Moshope Trail' in said Gay Head"; recorded at the Registry in Book 227, Pages 564 to 566.

M. Letter from Resolvert W. Williams to James J. Decoulos dated March 21, 1996.

N. Letter from Decoulos to Williams dated March 28, 1996.

O. Letter from Brendan T. O'Neill to James J. Decoulos dated December 12, 1996.

P. Complaint filed in Dukes County Superior Court, Vineyard Conservation Society v. Maria Kitras and Harold Alder, Civil Action No. 97-0026 dated April 9, 1997.

Q. David H. Smith's biography.

R. Corporate listing for South Shore Beach, Inc. from the Massachusetts Secretary of State on January 20, 2004.

S. Background information on the Aquinnah/Gay Head Community Association.

T. Written testimony of Hannah L. Malkin filed with the Select Committee on Indian Affairs, United States Senate, Ninety-Ninth Congress, Second Session on S. 1452, dated April 9, 1986.

U. Congressional Record – House at 29323-29324 (October 7, 1986).

V. Congressional Record – Senate at 22895-22896 (August 6, 1987).

W. Progress Report to the Friends of the Moshup Trail Project, December, 1997.

X. Self-Help Program Agreement between the Town of Gay Head and the Massachusetts Division of Conservation Services as recorded at the Registry in Book 672, Page 436.

Y. Application to the Massachusetts Division of Conservation Services from the Town of Gay Head dated May 29, 1996.

EXHIBIT A

County: **Dukes, ss.**

Case No: **Miscellaneous Case No. 129925**

Date: **July 19, 1989**

Parties: **HUGH C. TAYLOR and JEANNE S. TAYLOR vs. DAVID E. VANDERHOOP and EVELYN VANDERHOOP**

Decision Type: **DECISION**

Hugh C. and Jeanne S. Taylor ("Plaintiffs") commenced this action on October 4, 1988 seeking a declaration, pursuant to GL c. 231A, that David E. and Evelyn Vanderhoop ("Defendants") have no right to enter upon or to pass over a forty (40) foot wide right of way ("Way") depicted on Land Court Plan Nos. 35915A and 35915B as running across a portion of a parcel of registered land owned by the Plaintiffs located on Lobsterville Road in Gayhead, Massachusetts, shown as Lot No. 4 on Land Court Plan No. 35915B ("Locus") (Exhibit No. 1-B), or in the alternative, a declaration that any right of access which the Defendants may possess on or over said Way, does not include the right to use it for vehicular traffic or to install utilities or other services in or over the same. Pending a trial on the merits, the parties filed cross-motions for preliminary injunctive relief. These motions were allowed by Order of this Court dated October 20, 1988, as follows:

> (a) The defendants are enjoined, until further order of this Court, from (i) using for vehicular traffic, (ii) disturbing, or (i-ii) altering the "Way (40.00 wide)" shown on Land Court Plan No. 35915B except that defendants may use the Way, during reasonable working hours, until noon on October 22, 1988, for the purpose of causing one vehicle to pass over said Way in order to reach defendants' land and to excavate a foundation hole on said land; and
> (b) The plaintiffs are ordered, until further order of this Court, to remove from the Way the boat or any other items which may obstruct passage over said Way.

Thereafter, on November 3, 1988, the Order was amended to read as follows:

> A. The plaintiffs are ordered, until further order of this Court, to refrain from obstructing passage over the disputed [Way] . . . or from interfering with the use of the Way by the defendants for passage to and from their land by foot or by ordinary vehicles
> B. The defendants are enjoined, until further order of this Court, from using the Way for construction vehicles of any nature . . . or from altering or causing damage to the Way. . . .

A trial was held in the Land Court, sitting at Edgartown, on January 30, 1988, at which time a stenographer was appointed to record and transcribe the testimony. The matter was submitted on a partial Statement of Agreed Facts (Exhibit No. 1) and oral testimony. Five witnesses testified and five exhibits were introduced into evidence. All exhibits, and certain of the agreed facts, are incorporated herein for the purpose of any appeal. Following trial, the Court viewed the subject premises in the presence of counsel.

On all of the evidence, I find as follows:

1. The Plaintiffs acquired title to Locus by Transfer Certificate of Title No. 3806 (Exhibit No. 1-A) on July 19, 1974. Locus constitutes a portion of the land originally registered to Isaac and Gertrude Taylor ("Taylors") by Final Decree dated August 9, 1971 (See Exhibits No. 1-C-1, 1-C-2 and 1-D). The Taylors' Original Certificate of Title, dated August 9, 1971 (Exhibit No. 1-C-2), contains the following language:

> . . . So much of the land hereby registered as is included within the areas marked "Way-20.00 feet wide; and "Way-40.00 feet wide," approximately shown on [Land Court Plan No. 35915A] (Exhibit No. 1-D), is subject to the rights of all persons lawfully entitled thereto in and over the same. . . .

Although this language is omitted from the Plaintiffs' Transfer Certificate of Title, the aforesaid forty (40) foot wide Way in depicted on the Plaintiffs' Land Court Plan No. 35915B (Exhibit 1. B) and is clearly visible on the ground. In any event, the unexplained omission in a Transfer Certificate of a right in a dominant estate does not extinguish that right absent a release or other appropriate document.

2. By deed from John O. Vanderhoop, Pauline Vanderhoop and Leonard F. Vanderhoop, Sr. dated December 30, 1976, recorded at Book 341, Page 314 in the Dukes County Registry of Deeds (Exhibit No. 1-E), the Defendants acquired title to a certain parcel of unregistered land located to the northwest of Locus and shown in part as a lot marked "Edwin D. Vanderhoop" on Land Court Plan No. 35915A.

3. As shown on said Plan, the Defendants' property lies

between a parcel of registered land located to the north and another parcel of registered land located to the south, both of which parcels are owned by Frances A. Ginnochio ("Ginnochio"). The foregoing parcels appear as Lots No. 1 and 2 on Land Court Plan No. 19215A (Exhibit No. 1-G).

4. At the time of Ginnochio's registration petition, an objection thereto was filed by David F. Vanderhoop, Leonard F. Vanderhoop and Pauline A. Vanderhoop (Exhibit No. 1-H). Thereafter, on November 27, 1946, two Stipulations for Decree (Exhibit Nos. 1- I and 1-J) were entered into by the parties and duly incorporated into Ginnochio's registration decree. The pertinent portion of the Stipulation identified as "Exhibit No. 1-I" reads as follows

> . . . any decree registering the title in [Lot 1] on the Petitioner's plan [19215A], shall subject the fee therein to a right of way over the so-called Coast Guard Station Road as laid out on said plan . . . for the benefit of the present owners of [the Vanderhoop parcel], their heirs or assigns.

5. On November 20, 1953, a Final Decree (Exhibit No. 1~) entered in Ginnochio's registration case incorporating the Stipulation for Decree quoted above in Finding No. 4 as follows:

> So much of said lots 1 and 2 [on Land Court Plan No. 19215A] as is included within the limits of the way forty (40) feet wide, . . . is subject to the rights of all persons lawfully entitled thereto in and over the same (emphasis added), and to the terms of [the] stipulation [referenced above]. . . .
>
> There is appurtenant to said lots 1 and 2 the right to use the way forty (40) feet wide, . . . in common with all other persons lawfully entitled thereto. . (emphasis supplied).

6. The parcels depicted on Land Court Plan No. 35915B as belonging to Taylor, Vanderhoop, Ginnochio and one Broacher were all held at one time as common lands of the District of Gay Head, the same being transferred thereafter to the Town of Gay Head and later partitioned in accordance with Chapter 213 of the Acts and Resolves of 1870.

7. Following the filing of an additional objection to the Ginnochio registration petition by the United States of America ("USA"), an Agreement for Decree (Exhibit No. 1-K) was executed, whereby a perpetual easement for the benefit of the USA was granted in:

> a strip of land twenty (20) feet each side of the center line of existing ways as identified by dotted lines on a plan of land in Gay Head of [Ginnochio] . . . dated April, 1944 ("1944 Plan") (Exhibit No. 1-L) . . . with full right of egress and ingress over said lands by those in the employ of the [USA], on foot or with vehicles of any kind, with boats or any articles used for the purpose of carrying out the intentions of Congress provided for the establishment of life-saving stations; and the right to pass over said lands in any manner in the prosecution of said purposes and to erect such structures upon said land as the [USA] may see fit. . . .

Some time after 1947, the U. S. Coast Guard took over the Life Saving Station ("Station") situated on the parcel marked "1" on the 1944 Plan.

8. The forty (40) foot wide Way appears to have been created some time in the late nineteenth century for purposes of accessing the Station. As it presently appears, the Way runs from Lobsterville Road, a public way, to the site of the Station, crossing over the lands of the Plaintiffs', Defendants',

Ginnochios' and other parcels. The Way constitutes the Defendants' sole means of access from their Land to a public way. The evidence is somewhat vague as to the precise year of the Way's establishment, but I note that the 1887 U.S. Geodetic Survey Map on file with the Land Court shows what now appears to be South Road as the only road then located in Gayhead.

9. From the 1940's through the 1960's, the Vanderhoop family used the Way, or footpaths connecting thereto, to reach the Station for purposes of delivering newspapers and milk, and collecting swill for their pigs. At times, the Vanderhoops crossed over the Way in the course of hunting rabbits or searching for ancient artifacts over the surrounding area. In addition, they occasionally used the Way or connecting footpaths for recreational purposes and/or observing the extent of any erosion of the cliffs of Gayhead. At no time during this period did the Vanderhoops find their use of the Way blocked or obstructed.

10. In 1954, extensive erosion of the surrounding cliffs threatened the Station's structural soundness. Accordingly, the U.S. Coast Guard abandoned the Station and relocated thereafter to Menemsha (See Exhibit No. 3).

The Defendants Vanderhoop assert rights in the subject forty (40) foot wide Way based on the following legal theories: 1) easement by prescription; 2) easement by implication or necessity- and 3) easement in a private way for which the public has acquired rights of use by motor vehicle. For the reasons enunciated below, I find and rule on the evidence that the Defendants have acquired an easement by implication or necessity to pass and repass without

obstruction, by foot or by motor-vehicle, along the entire length of the Way for purposes of access to and egress from their property.

It is familiar law in this Commonwealth that one may acquire a right of way by prescription through twenty years of uninterrupted, open, notorious and adverse use. G.L. c. 187, s 2; Boston Seaman's Friend Society. Inc. v. Rifkin Management. Inc., 19 Mass. App. Ct. 248, 251 (1985); Glenn v. Poole, 12 Mass. App. Ct. 292 (1981); Brown v. Sneider, 9 Mass. App. Ct. 329, 331 (1980); Ryan v. Stavros, 348 Mass. 251, 263 (1964); Garrity v. Sherin, 346 Mass. 180, 182 (1963); Nocera v. DeFeo, 340 Mass. 783 (1959). In the matter herein, the-Vanderhoops' use of the subject Way spans the 1940's through the 1960's. I find such use, however, to be irregular and/or for purposes of reaching the station O Accordingly, the Vanderhoops' use of the Way is of an insufficient nature to establish their acquisition of prescriptive easement rights in and over the Way. See Uliasz v. Gillette, 357 Mass. 96, 101-102 (1970); Akasu v. Power, 325 Mass. 497, 502 (1950). Similarly, I find there to be insufficient evidence in the record before the Court to establish that the Vanderhoops, or the general public, have acquired easement rights in the Way under the theory that it is a private way for which the public has obtained rights.

The Defendant Vanderhoops further assert that they hold an easement by implication or necessity over the Way as it crosses Locus. Implied easements do not arise out of necessity alone. Perodeau v. O'Connor, 336 Mass. 472, 474 (1958). Their origin must

be found in the presumed intention of the parties to be gathered from the language of the relevant instruments read in light of the circumstances attending their execution, the physical condition of the premises and the knowledge which the parties had or with which they are chargeable. Labounty v. Vickers, 352 Mass. 337, 347 (1967); Perodeau at 474; Sorel v. Boisjolie, 330 Mass. 513, 517 (1953); Joyce v. Devaney, 322 Mass. 544, 549 (1948); Dale v. Bedal, 305 Mass. 102, 103 (1940). Additionally, where as here the Way in which an easement by implication or necessity is claimed traverses registered land, the proponents thereof bear the burden of proving that such easement rights accrued prior to the date of a Final Decree in such registration case and that they are members of the class referred to in the Decree as having said rights. The imposition of this burden is consistent with the well-settled rule that an easement by implication may not be created against registered land. G.L. c. 185, s. 53; Goldstein v. Beal, 317 Mass. 750, 757 (1945).

One particular set of circumstances which will give rise to an easement by implication, and which I find to be relevant hereto, exists where, during the common ownership of a tract of land, an apparent and obvious use of one part of the parcel is made for the benefit of another part thereof and such use is being actually made up to the time of the severance and is reasonably necessary for the enjoyment of the other part of the tract. Sorel at 516; Jasper v. Worcester Spinning and Finishing Co., 318 Mass. 752, 756-757 (1945); Joyce at 549. Further, where one conveys a portion of his land in such a way as to deprive himself of access to the remainder

thereof unless he crosses the land sold, the law implies from the resulting situation of the parties that such person has a way of necessity over the granted portion of the premises. The law thus presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. New York & New England Railroad Company v. Board of Railroad Commissioners, 162 Mass. 81, 83 (1894); Gorton-Pew Fisheries. Co. v. Tolman, 210 Mass. 402, 411 (1912); Orpin v. Morrison, 230 Mass. 529, 533 (1918); Davis v. Sikes, 254 Mass. 540' 545-546 (1926); Restatement of the Law: Property, Section 474.

In the instant matter, the respective properties of the Plaintiffs' and Defendants' originally comprised a portion of the common lands of the District of Gay Head. Following the enactment of Chapter 213 of the Acts and Resolves of 1870, however, the District of Gay Head was abolished and the Town of Gay Head established. Thereafter, the common lands were partitioned and conveyed to individual owners, the parcels owned by the Plaintiffs and Defendants being among those created by such partition. Accordingly, as it is immaterial whether the severance of common ownership results from execution of law, See Viall v. Carpenter, 80 Mass. (Gray XIV) 126 (1859); Flax v. Smith, 20 Mass. App. Ct. 149 (1985), a reasonable implication arises that some means of ingress to and egress from the resulting lots is necessary to the lot owners' enjoyment of their property. While the foregoing facts

do not support an easement by prescription, they do demonstrate that the subject forty (40) foot wide Way has been the accepted means of access to and from the surrounding parcels since its establishment in the late 1800's. While the record is devoid of evidence that the Way existed at the time of the partitioning of the common lands, the easement, nevertheless, came into existence at that time as an undefined easement by necessity. Where a right of way is not precisely located or established, its existence is not affected. Emery v. Crowley, 371 Mass. 489, 495 (1976). In such instances, the Court has the authority to establish the easement or the same may come into being by acquiescence of the parties involved. Here, the establishment of the Way on the ground, its use and the surrounding circumstances, including the Vanderhoops' filing of an objection in the Ginnochio Registration Case No. 19215A (See Finding No. 4), all serve to define the easement created by the partition. Additionally, as the Final Decree in the Ginnochio registration case incorporates a Stipulation for Decree whereby the registration of the Ginnochio land was made subject to the Vanderhoops' right to cross over the same for purposes of accessing their land, the reasonable inference to be drawn therefrom is that at that time the parties deemed the Way to be the access route to their properties.

As noted above in Finding No. 1, the Original Certificate of Title held by the Plaintiffs' predecessors in title also refers to Land Court Plan No. 35915A, which depicts the forty (40) foot wide Way and which expressly acknowledges that such registration is subject to the rights which others may lawfully possess therein.

The Vanderhoop's status as persons so entitled to use the Way accounts for their failure to file an objection in Land Court Registration Case No 35915. Accordingly, when the Final Decrees of the Land Court of November 20, 1953 (Ginnochio) and August 9, 1971 (Taylor) were extended onto Land Court Plan Nos. 19215A and 35915A and said plans and decrees were made a matter of public record, some easement of passage over the Ways depicted thereupon became appurtenant to the lot now owned by the Defendants. See Dubinsky v. Cama, 261 Mass. 47, 53-54 (1927); Walter Kassuba Realty Corp. v. Akeson, 359 Mass. 725, 728 (1971).

The Plaintiffs' Transfer Certificate of Title fails to include any language subjecting the registration of Locus to similar easement rights in and over the subject Way', but Land Court Plan No. 35915B, which is specifically referred to therein, shows said Way. I therefore deem this omission of no consequence since the Certificate's reference to the plan places the Plaintiffs on notice as to the existence of the Way, and accordingly, causes the registration of Locus to be subject to any and all easement rights which other persons may lawfully possess in and over said Way. See Anderson v. DeVries, 326 Mass. 127, 132 (1950); Myers v. Stalin, 13 Mass. App. Ct. 127, 137 (1971); Brooks v. Capitol Truck Leasing. Inc., 13 Mass. App. Ct. 471, 478-479 (1971). The Plaintiffs thus took title to Locus subject to the Vanderhoops' right of way and must be estopped to deny the existence of whatever easement of travel was created in and over the Way under the land registration records. See Dubinsky at 56. I note in addition thereto that such "easement of travel" is not limited to access in and over the Way

up to the Ginnochio parcel, as the Taylors' Original Certificate of Title contains no express language so limiting the Defendants' rights in and over the Way. Had the Taylors intended to restrict the extent of such passage to that portion of the Way running in front of the Ginnochio property, and not to any point beyond, they should have so petitioned the Court, rather than leaving the Way open to the rights of all persons lawfully entitled thereto in and over the semen. I thus find the Certificate's reference to the Way, and to the rights contained therein (See Finding No. 1), to further substantiate an acknowledgment on the part of the Plaintiffs' predecessors in title that the Vanderhoops, and others similarly entitled to use the Way, possess rights to pass and repass over the entire length of the Way for purposes of accessing their land. Further, as it is fundamental that where an easement or other property right is granted or created, every right necessary for its enjoyment is included by implication, Sullivan v. Donohoe, 287 Mass. 265, 267 (1934); Anderson at 134, the Defendants' right to so use the Way carries with it the right to make reasonable repairs and improvements thereto at their own expense. Such right further includes the right to install utilities therein, or thereupon as conditions may dictate, for purposes of servicing their property. G.L. c. 187, s. 5; Nantucket Conservation Foundation. Inc. v. Russell Management -Inc., 380 Mass. 212, 217 (1980).

In consideration of the foregoing, I rule in summary that the Defendant Vanderhoops have acquired a right of way by implication to enter upon and to pass and repass without obstruction, by foot

or by vehicle, over and along the entire length of the forty (40) foot wide Way, such easement encompassing each and every right necessary or incidental to the Defendants' enjoyment thereof, and that the Vanderhoops, their heirs and assigns are members of the class so entitled to use the Way.

Judgment accordingly.

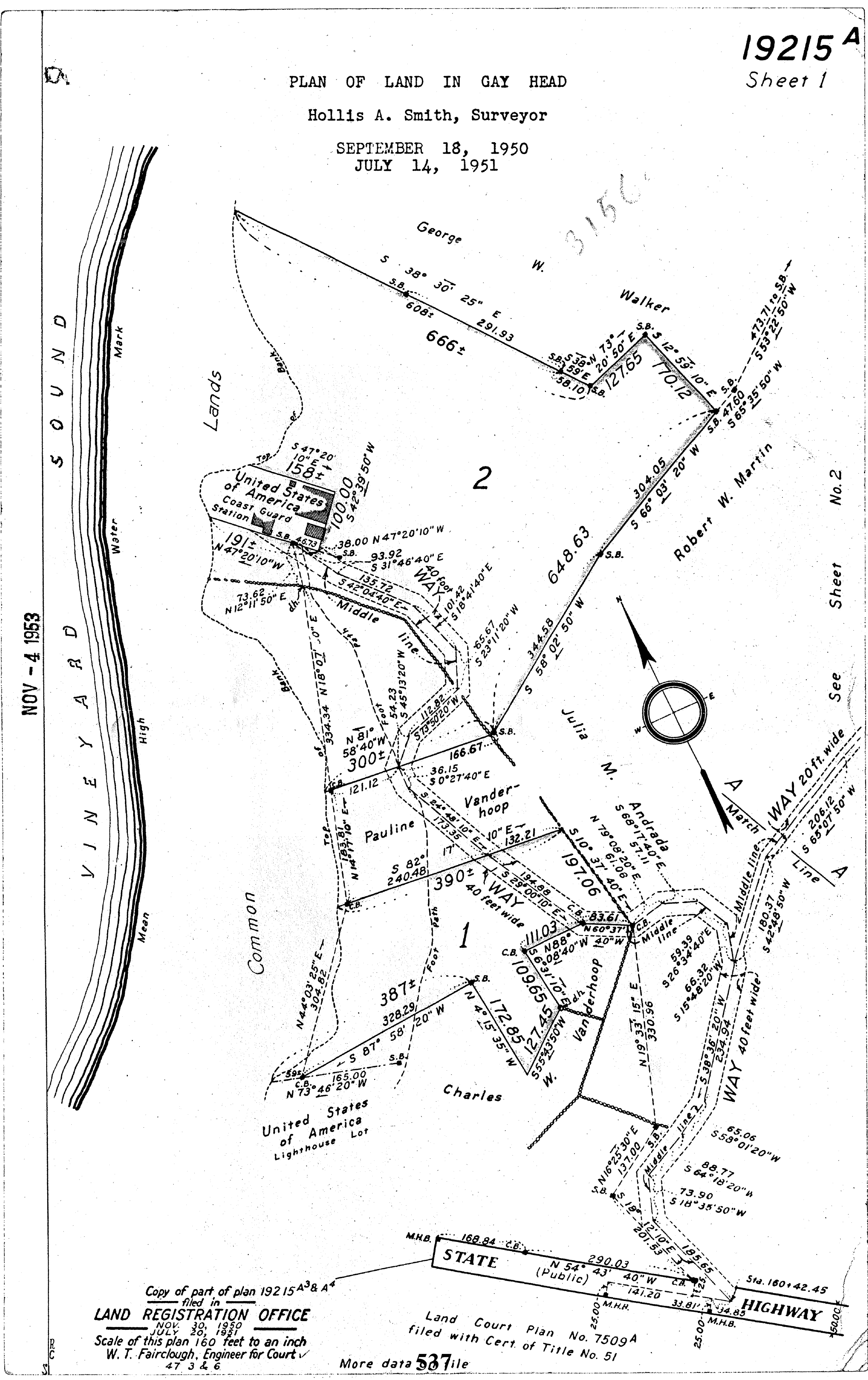
Judge: /**s**/

Robert V. Cauchon

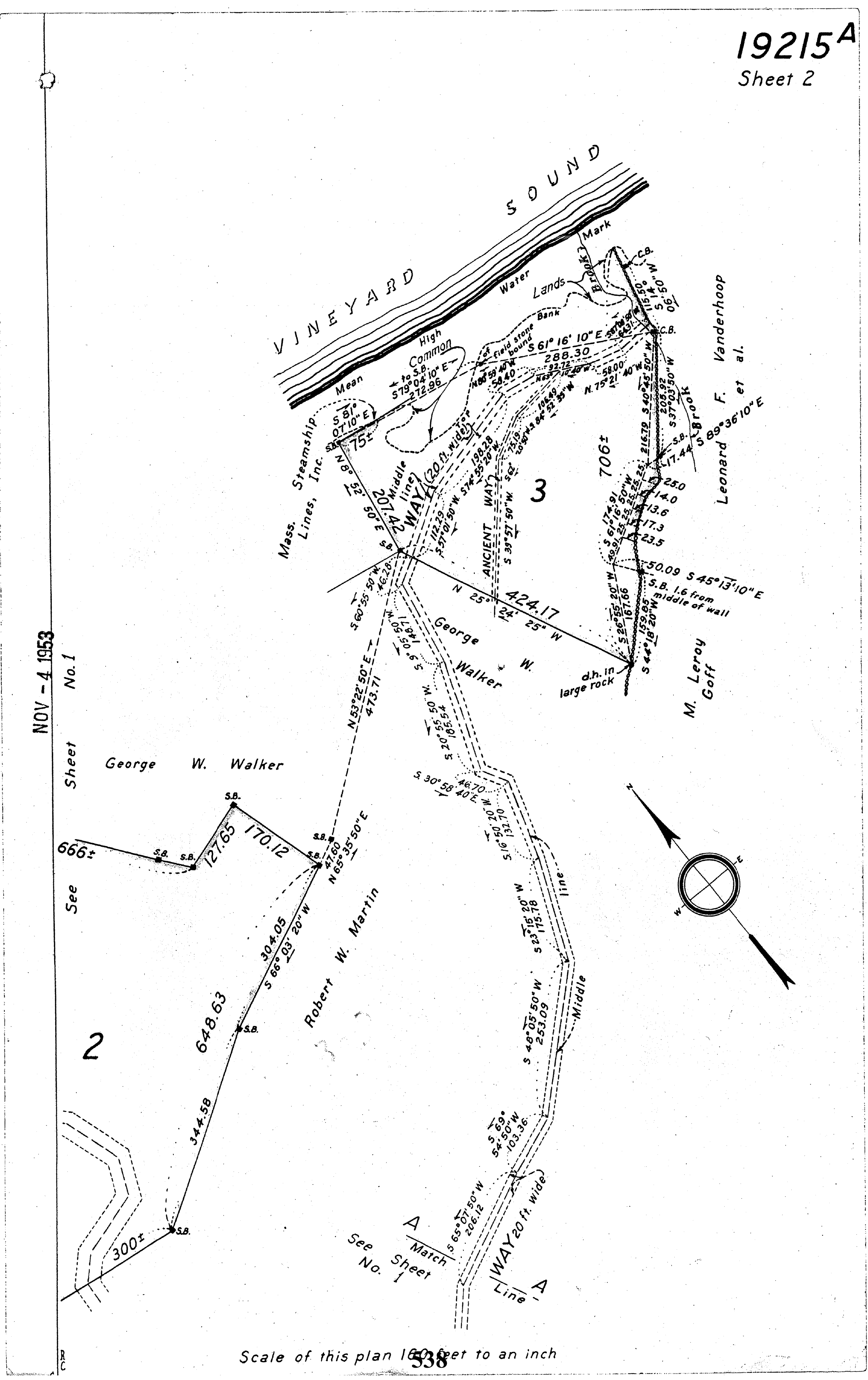
Justice

Dated: July 19, 1989

End Of Decision



19215 A
Sheet 1
PLAN OF LAND IN GAY HEAD
Hollis A. Smith, Surveyor
SEPTEMBER 18, 1950
JULY 14, 1951
NOV - 4 1953
VINEYARD SOUND
Mean High Water Mark
George W. Walker
Lands of United States of America Coast Guard Station
Common
Robert W. Martin
Julia M. Andrada
Pauline Vanderhoop
Charles Vanderhoop
United States of America Lighthouse Lot
See Sheet No. 2
WAY 40 feet wide
WAY 20 ft. wide
STATE HIGHWAY (Public)
Copy of part of plan 19215 A3 & A4 filed in
LAND REGISTRATION OFFICE
NOV. 30, 1950
JULY 20, 1951
Scale of this plan 160 feet to an inch
W. T. Fairclough, Engineer for Court
Land Court Plan No. 7509 A filed with Cert. of Title No. 51
More data 537 file



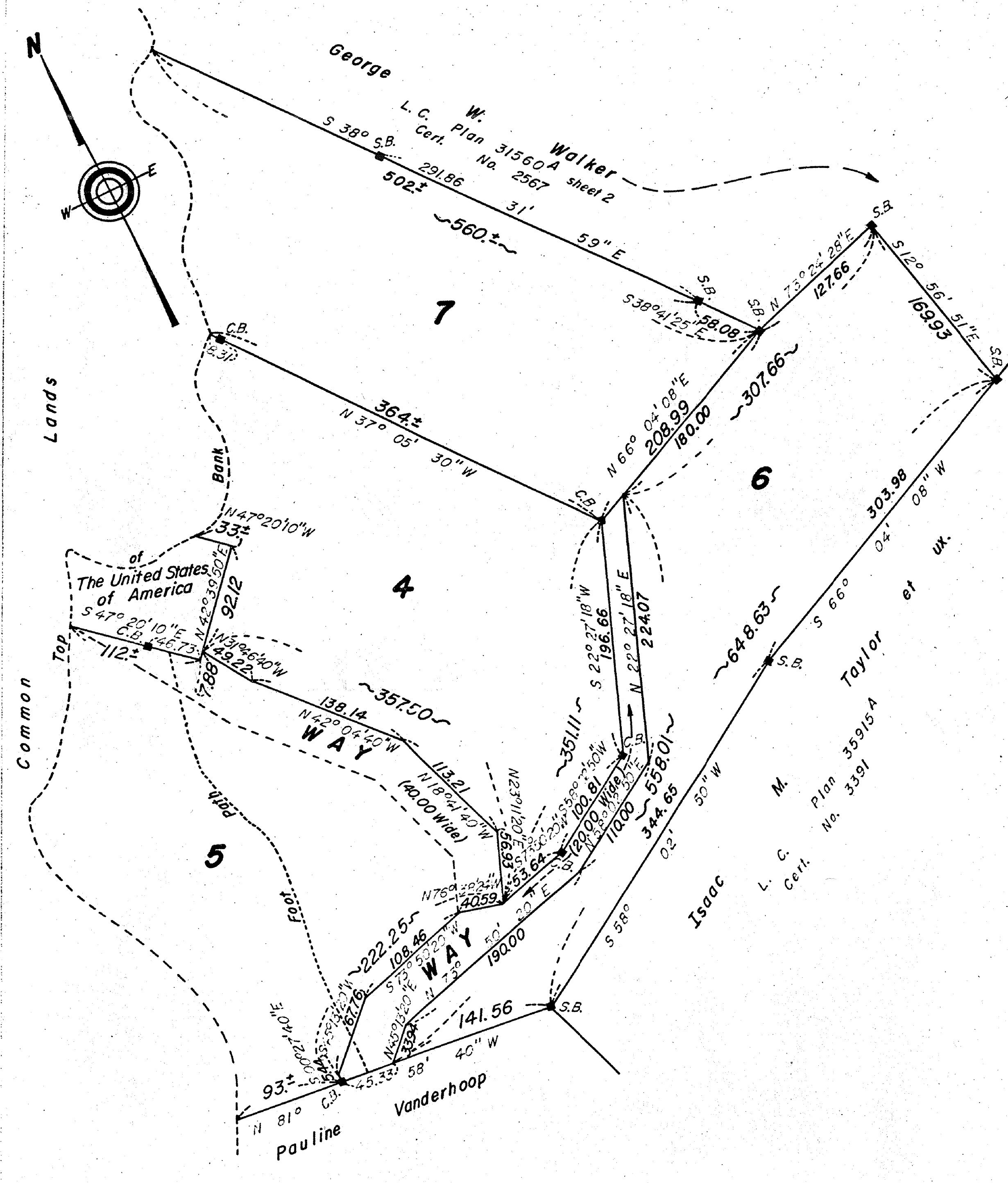
NOV - 4 1953

19215B

SUBDIVISION PLAN OF LAND IN GAY HEAD

Dean R. Swift, Surveyor

October 7, 1976



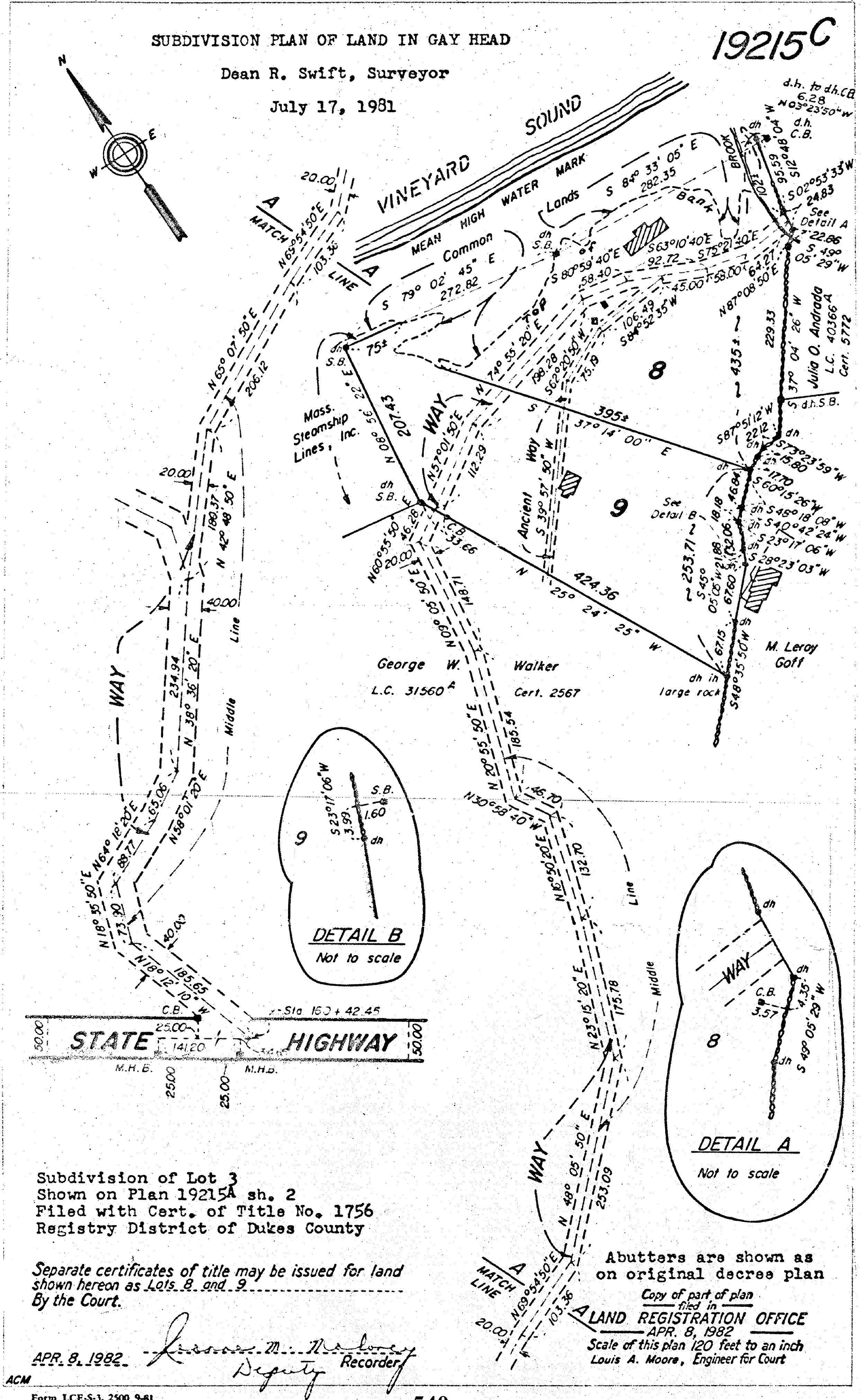
Subdivision of Lot 2
Shown on Plan 19215A sheet 1
Filed with Cert. of Title No. 1756
Registry District of Dukes County

Separate certificates of title may be issued for land shown hereon as Lots 4, 5, 6 & 7
By the Court.

NOV. 5, 1976 Jeanne M. Maloney Deputy *Recorder.*

Copy of part of plan filed in
LAND REGISTRATION OFFICE
NOV. 5, 1976
Scale of this plan 100 feet to an inch
R.L. Woodbury, Engineer for Court

P.A.R.


SUBDIVISION PLAN OF LAND IN GAY HEAD
Dean R. Swift, Surveyor
July 17, 1981
19215C
VINEYARD SOUND
MEAN HIGH WATER MARK
Common Lands
S 84° 33' 05" E 282.35
S 79° 02' 45" E 272.82
BROOK
Bank
Top
Mass. Steamship Lines, Inc.
WAY
Ancient Way
8
9
395±
S 37° 14' 00" E
N 25° 24' 25" W 424.36
George W. Walker L.C. 31560A Cert. 2567
Julia O. Andrada L.C. 40366A Cert. 5772
M. Leroy Goff
dh in large rock
See Detail A
See Detail B
MATCH LINE A
Middle Line
STATE HIGHWAY
Sta 160 + 42.45
DETAIL B
Not to scale
DETAIL A
Not to scale
Subdivision of Lot 3
Shown on Plan 19215A sh. 2
Filed with Cert. of Title No. 1756
Registry District of Dukes County
Separate certificates of title may be issued for land shown hereon as Lots 8 and 9
By the Court.
APR. 8, 1982
Recorder
Deputy
Abutters are shown as on original decree plan
Copy of part of plan filed in LAND REGISTRATION OFFICE APR. 8, 1982
Scale of this plan 120 feet to an inch
Louis A. Moore, Engineer for Court
ACM
Form LCE-S-3. 2500 9-81

35915A

PLAN OF LAND IN GAY HEAD, MASS.
Surveyed for
ISAAC M. & GERTRUDE TAYLOR
October 10, 1968 Scale 1" = 60'
Hollis A. Smith, M. S. Reg'd. Land Surveyor
Vineyard Haven, Mass.

SEE ADDITIONS OR CHANGES
Re: Up to date
letter filed Jan. 4, 1971 JWC

Lot 2
1.22 Acres ±

Lot 1
9.67 Acres ±

Large stones and split stone along Lines on all sides.

Isaac M. & Gertrude Taylor L.C.C. 31560 A Cert. 2580

L.C.C. 31560 A Isaac M. & Gertrude Taylor

L.C.C. 31560

Lot 2 L.C.C. 19215 A Alexander Preston, Saul Wallen, & Harley Shands Cert 2570 Arnold M. Zack Cert. 2787

Old road from Lighthouse to shore - abandoned Not passable

20 ft. Right of Way L.C.C. 19215 A

Dirt road as travelled

LOBSTERVILLE (Lighthouse) ROAD Public County 60 ft.

C & V Elec. Co. & N.E.T.&T. Co.

Bituminous Surface

Drainage Ditch Lot 3 0.40 Acres ±

Isaac M. & Gertrude Taylor L.C.C. 31560 A Cert. 2580

Gay Head Lot 41 Edwin D. Vanderhoop

Gay Head Lot 42

Lot 1. L.C.C. 19215 A Walter M. Platt, Jr. & Helen M. Cert. 2790

Wall bedstones and remains of wall

Gay Head Lot 43 Set off to Georgianna Broacher

40 ft. Right of Way L.C.C. 19215 A

Stone wall and remains of stone wall

Part of Gay Head Lot 48 Leonard F. Vanderhoop

Gay Head Lot 49 James W. & Helen V. Manning

James W. & Helen V. Manning Part of Gay Head Lot 48

Underground pipeline

DETAIL
Not to Scale

See DETAIL

I certify that this actual survey was made on the ground in accordance with the Land Court Instructions of 1959 on and between Sept. 24-28, 1968. Bounds were set October 10, 1968.

November 12, 1968. Hollis A. Smith, Reg'd Land Surveyor
Vineyard Haven, Mass.

C.E.C.

SEE ADDITIONS OR CHANGES
C.H.B. destroyed: Up to date.
SEE: letter filed: JAN. 4, 1971
BY ENGINEERING FILES

DECREE PLAN
Order H Papers ✓
Traverse filed Yes
47-6
E.N.W.
Silva
Chipson
1/4/71

MAY BE FILED
12-4-68
R.C.C.
Atlas 47-6
Trav. filed
Bds. ✓✓

LAND COURT
DEC-9'68
FILED

HOLLIS A. SMITH No. 4591 REGISTERED LAND SURVEYOR

2 prints needed

35915A

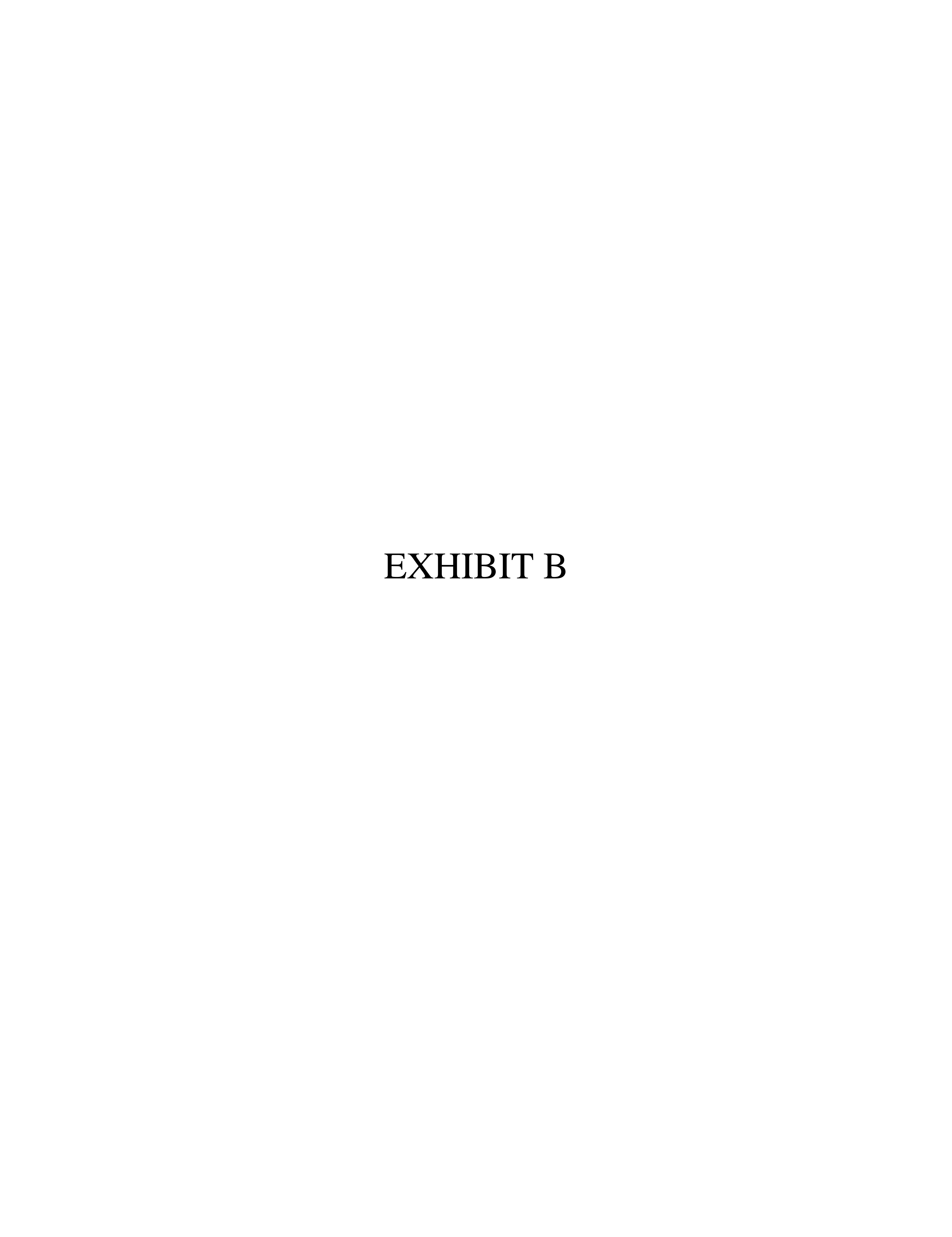


EXHIBIT B

(19)

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, SS.

LAND COURT DEPARTMENT
OF THE TRIAL COURT
SUPPLEMENTAL REGISTRATION
NO. 129925

7

FILED
LAND COURT
OCT 28 3 51 PM '88

HUGH C. TAYLOR and JEANNE S. TAYLOR, Plaintiffs vs. DAVID E. VANDERHOOP and EVELYN VANDERHOOP, Defendants	AFFIDAVIT OF PHILIP J. NORTON, JR.

1. I am an attorney at law licensed to practice in the Commonwealth of Massachusetts and I maintain my law office at 26 Church Street in Edgartown.

2. My legal specialty is, and for over 20 years has been, real estate law. I am also a land court examiner.

3. As a real estate lawyer on the island of Martha's Vineyard I am personally familiar with the problems of real estate in Gay Head. Specifically, at the time of the set off of lands in Gay Head no provision was made for access to many of the lots that were created. To deal with this problem, particularly in a community where many of the landowners over the years have been unsophisticated, I have always understood that land court registration decrees use standard phrases in the registration preserving to interested parties the right to prove an easement by necessity over registered land.

4. Attached to this affidavit are excerpts from land

registration case no. 39904 and an excerpt of the examiner's report in registration case no. 17763 which make reference to "the policy of the late Charles Thòrnton Davis.., in these Gay Head cases, to enter decrees subject to and with the benefit of rights of way legally existing."

Signed under pains and penalties of perjury this 27th day of October, 1988.

Philip J. Norton, Jr.

LAND COURT
MAR 27 1980
FILED

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

IN THE MATTER OF
ALEXANDER D. FORGER, TRUSTEE

LAND REGISTRATION
CASE NO. 39904

RESPONDENT ANN WRIGHT'S RESPONSE TO
PETITIONER'S MOTION FOR PRODUCTION OF DOCUMENTS

In response to Petitioner's Motion for Production of Documents as allowed by the Court on February 27, 1980, Respondent Ann Wright submits the following:

(1) Memorandum Concerning Gay Head Property Prepared by Russell Wright dated August 29, 1973.

This memorandum is in Ann Wright's possession and was delivered to her by her father, Russell Wright, in advance of his conveyance of the subject parcel to her--the subject parcel being Lot 595 in the Division of Indian Lands at Gay Head made by Commissioners appointed to make such division and also shown as Lot 595 on the plan on file with the Engineering Office of the Court in this case ("the plan"), which lot was conveyed by the said Russell Wright to Ann Wright by deed dated April 24, 1974 recorded in Dukes County Deeds Book 316, Page 461.

Reference is made in this memorandum to the existence of "the right of way legally" to the subject parcel. From the time she took title, therefore, Ann Wright has understood that she had a right of access to her parcel. Recognizing that "the dirt road" and the "vehicle tracks" shown on the plan on file in this case constitute the only means of access to her parcel, she filed her answer to the Petitioner's Registration Petition objecting to Petitioner's allegation that there are no rights in others in the said "dirt road" and "vehicle tracks." Ann Wright has reason to believe that she, through her predecessors in title, has an easement by necessity over these existing access routes. She is undertaking research by way of title examination and other inquiry on the issue of her right of access.

(2) Documents in Land Registration Case No. 17763 Relating to Lot 585.

Lot 585, which abuts Ann Wright's parcel, is now owned by the Petitioner. This lot was the subject of a land

registration petition that was consummated by the entry of a Registration Decree on October 1, 1941.

The title abstract in the aforesaid land registration case contains the following information.

As with Ann Wright's parcel, Lot 585 was established by a division of Indian common lands in the then new town of Gay Head by Commissioners duly appointed. The title examiner specifies that

> An examination of the map prepared under the direction of the commissioners...discloses no road leading to or from this lot (Lot 585).
>
> It is to be said, however, that the policy of the late Charles Thornton Davis was, in the Gay Head cases, to enter decrees subject to and with the benefit of rights of way legally existing. In all probability, Doctor King (the petitioner) and his abutters have ways leading to and from their properties. (emphasis added)

The registration decree in this case then states that "there is appurtenant to the land hereby registered any rights of way by necessity legally existing."

There is a notation on the decree that counsel for Ralph Hornblower, the petitioner's predecessor in title to Lot 585, had read the decree and assented to its issuance.

Ann Wright's parcel (Lot 595) abuts said Lot 585. The two lots are similarly situated with, we assume, similar title histories. Taking note of the aforementioned references to rights of way by necessity legally existing, and to the fact that the "dirt road" and "vehicle tracks" referred to in Petitioner's registration petition are the only existing means of access to Ann Wright's parcel, she again avers that she has reason to believe that she, through her predecessors in title, has an easement by necessity over these existing access routes.

Respectfully submitted,

Ann Wright
By her attorney,

Jon E. Steffensen
Goodhue, Colt & Steffensen
73 Tremont Street
Boston, MA 02108

Always number this sheet 1

LAND COURT

Certificate of Opinion.

Pursuant to Section 37, Chapter 185, of the General Laws, I herewith file as my report an abstract of th title to the land described in petition No. 17763 In my opinion the petitioners has "a good title as alleged, and proper for registration."

The title of said land is subject to

Restrictions, see Sheet No.

Easements, " " " See memoranda Sheets A and B.

Party walls, " " "

Debts of, " " "

Legacies, " " "

Mortgages, " " "

Attachments, " " "

Liens, " " "

Lease, Dower, or Life Estate, etc.

There is appurtenant to said land certain rights and privileges, see Sheets Nos A and B.

Boundaries on streets and ways run (to the *middle* or *side* lines, so far as appears by the deeds of locus

See Sheet No.

For other comments, see Sheet Nos A and B.

If citation is issued in this case I recommend that, *in addition to the parties named in said petit* notice be given to the parties named on the other side of this sheet.

NOTE: This list of persons, if any, should include, without comment here, except as the blank prov for parties having any possible adverse interest with their present residences, if known to the Examiner, or state the residence given, if any, in the instrument abstracted on the sheet referred to as showing the par interest. Any comments on other sheets than this showing possible adverse interests will necessarily be looked by the Recorder in issuing the citation, unless mentioned here.

My examination ends 21 October 1940 Oliver L. Braley *Examiner.*

Lof

2550

520

Sheet No. 1 Title No. 17763

ARTHUR W. DAVIS
ATTORNEY-AT-LAW
EDGARTOWN
MASSACHUSETTS

November 8, 1940

Recorder of the Land Court
Court House
Pemberton Square
Boston, Massachusetts

Dear Sir: In re: Petition of Stanley King,
No.17763.

In the above entitled matter I desire to further reply to your communication of October 22. With referance to any ways to and from the petitioner's land.

The lot sought to be registered is Lot 585 upon the south shore of Gay Head. It is part of the set off of Indian Lands. As I understand it Judge Davis had a "stock clause" which he used in all these cases of registration at Gay Head. In looking over the report of the Commissioners who made the set off of lots, I cannot seem to find any provision for rights of way. I would suggest that Mr. Cummings look up some of Judge Davis' old cases with the idea of using the same form of decree.

Very truly yours,

Arthur W. Davis

P.S. This stock clause relating to rights of way. Names and addresses of abutters would be impossible.

Sheet No. 521 a Title No. 17763

Land Court

Memoranda

--John Prospere Vanderhoop died on the 13th of November 1914 (Sheets 2,3 leaving two sons and a grand-daughter then a minor. It is to be noticed that there are two separate proceedings in the Probate Court in this estate. I cannot say why this was. In neither estate is there an account on file. The Court may desire a "tax waiver" to be obtained from the Commissioner.

---In 1925 (Sheets 4,5) the sons and the grand-daughter, then, I am informed of age, sold locus to Stanley King, now President of Amherst College.

---The land borders on the Atlantic and registration should be subject to public rights.

--An examination of the map prepared under the direction of the commissioner under the Act of 1870, discloses no road leading to or from this lot.

--It is to be said however, that the policy of the late Charles Thornton Davis was, in these Gay Head cases, to enter decrees subject to and with the benefit of rights of way legally existing. In all probability, Doctor King and his abutters have ways leading to and from their properties.

--Lot 586 is said to be in the heirs of Lydia C. Mingo. There is no probate of Lydia, but I am informed that Lydia Smalley of Gay Head is the heir. No doubt, counsel for the petitioner can furnish fuller information.

--Chapter 42 of the Resolves of I863 provided, substantially, that the treasurer of the "district of Marshpee" should determine boundary lines between individual owners, and the boundary line between the common lands and the individual owners adjoining the common lands in the "Indian Distr of Gay Head".

--Chapter 67 of the Resolves of I866 provided, substantially, that the rep of Charles Marston should be confirmed and the book of titles prepared by him as commissioner be deposited in the local Registry of Deeds.

--Chapter 2I3 of the Acts of I870 abolished the "district of Gay Head" - and incorporated its territory into the Town of Gay Head. Section 6 of the Act provided, after petition, that the local Judge of Probate should appoin commissioners to divide etc the common lands in the new Town.

--It is also to be noted that Chapter 67 of the Resolves of I866 also provided for the appointment by the Governor of a commissioner to complet the examination and determination of questions of title under the I863 Resolve not passed upon by the Commissioner acting under it etc.

--From a record in the Registry of Deeds in the report of the commissione acting under the I866 Resolve it would appear that John Prospere Vanderho a sea-man, residing in Gay Head and there born, had a wife Abby ANN Corson, and that his date of birth was the 26th of March I845.

---Under the report of the Commissioners appointed under the Act of I870, it appears that lot 585 was drawn by Vanderhoop.

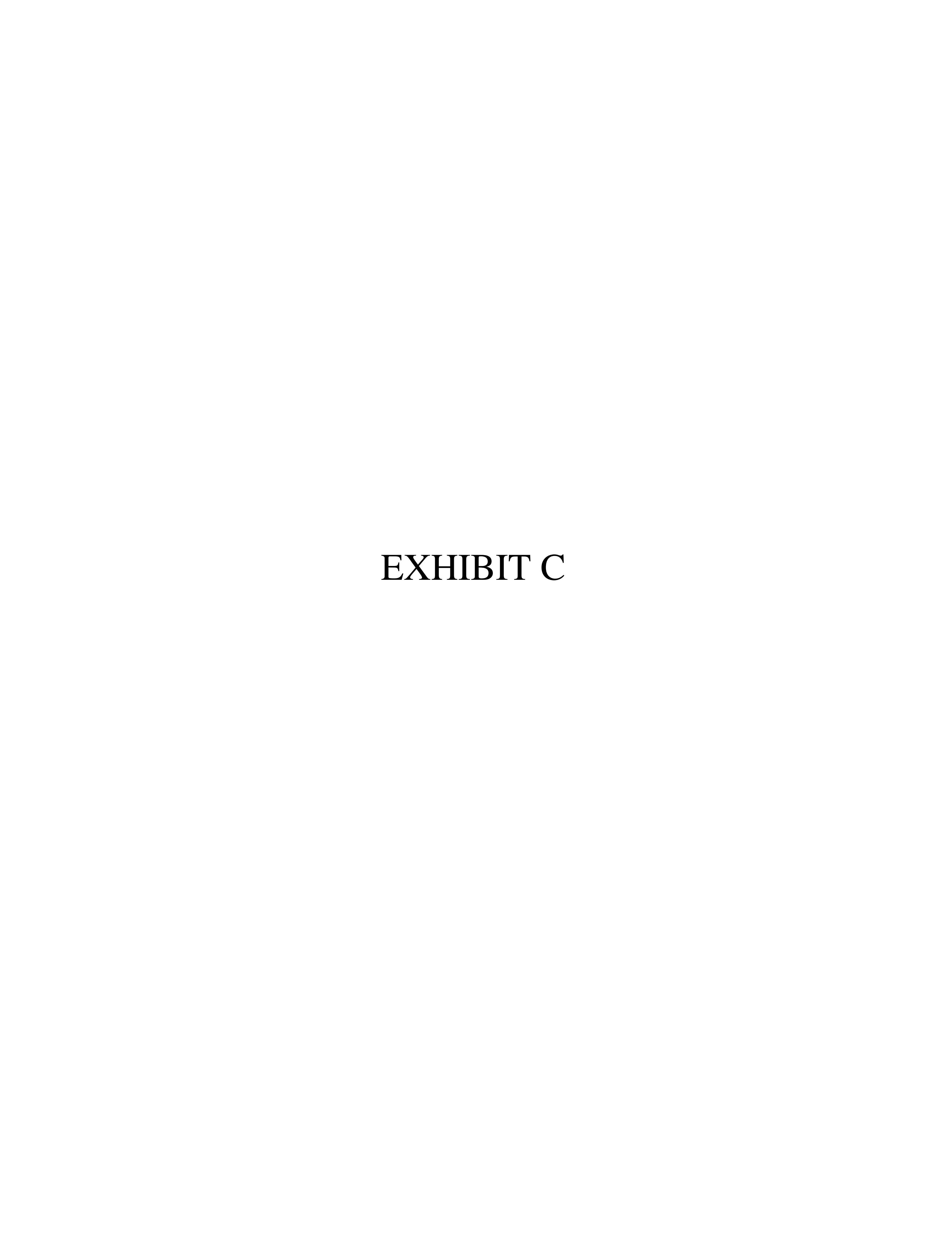


EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

WAMPANOAG TRIBE OF GAY HEAD, AND WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., PLAINTIFFS,	:	CIVIL ACTION NO. 74-5826-G
v.	:	
TOWN OF GAY HEAD, LUTHER MADISON, LEONARD VANDERHOOP, and WALTER MANNING, individually and in their official capacities as Selectmen of the Town of Gay Head, Massachusetts, DEFENDANTS.	:	FIRST AMENDED COMPLAINT

INTRODUCTION.

1. This is a civil action to establish the right of possession of the Wampanoag Tribe of Gay Head to certain aboriginal and reservation land.

JURISDICTION.

2. The jurisdiction of the court is invoked pursuant to 28 U.S.C. §§ 1331 and 1337. The amount in controversy exceeds $10,000, exclusive of interest and costs.

3. Plaintiffs' claim for relief arises under the federal restriction against extinguishment of Indian title or right of occupancy except by the action of the United States, and under Article I, § 8 and Article VI of the Constitution of the United States and 25 U.S.C. § 177, which in whole or in part incorporate that federal restriction.

PARTIES.

4. Plaintiff Wampanoag Tribe of Gay Head (hereinafter the "Tribe") is a tribe of Indians which has resided in the Commonwealth of Massachusetts since time immemorial. The Tribe consists of the Wampanoag Indians of Gay Head.

5. Plaintiff Wampanoag Tribal Council of Gay Head, Inc. (hereinafter the "Council"), is the governing body of the Tribe. The Council is duly incorporated under the laws of Massachusetts for the purpose of transacting business within the said Commonwealth. The address of the principal place of business of the said Council is: State Road, Gay Head, Massachusetts 20535.

6. The defendant Town of Gay Head is a municipal corporation organized and existing under the laws of the Commonwealth of Massachusetts.

7. Defendants LUTHER MADISON, LEONARD VANDERHOOP, and WALTER MANNING, are the duly elected selectmen of the Town of Gay Head, and are charged with the administration, care and custody of the lands which are the subject of this dispute.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

8. Article I, § 8 of the United States Constitution provides, in pertinent part, that "The Congress shall have Power to ... regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

9. Article VI of the United States Constitution provides, in pertinent part, that:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof ... shall be the Supreme Law of the Land.

10. 25 U.S.C. § 177 provides in pertinent part:

> No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

FACTS OF THE CASE.

11. Since time immemorial, and until the acts complained of herein, the Tribe owned, exclusively used, and occupied the following portions of the present Town of Gay Head, Massachusetts (hereinafter referred to as the "Common Lands"), as part of its aboriginal territory:

a) Those lands known as the Clay Cliffs, bounded on the North, West and South by Vineyard Sound and the Atlantic Ocean, and on the East by lots 32, 33, 35, 34, 37, 48, 39, 44, 40, 41, 42, 45, 47, 50, 51, 729, 730, 731, 732, 733, 734, 188, 189, and the unnumbered lot lying between lots 33 and 35, as shown on a map entitled "Map of Gay Head, showing the Partition of the Common Lands, as made by Joseph T. Pease and Richard L. Pease, Commissioners, Appointed by the Judge of Probate under Section 6, Chapter 213 of the Acts of 1870," on file in the Dukes County Registry of Probate, Edgartown, Massachusetts;

b) Those lands known as the Cranberry Lands and designated as such on a map entitled "Map of Gay Head, Eastern Section, showing the Partition of the Common Lands, as made by Joseph T. Pease and Richard L. Pease, Commissioners, Appointed by the Judge of Probate, under Section 6, Chapter 213 of the Acts of 1870," on file in the Dukes County Registry of Probate, Edgartown, Massachusetts; and

c) That stream known as the Herring Creek, in the Town of Gay Head, Massachusetts, running from Menamsha Pond to

Squibnocket Pond, and a strip of land one rod wide on each side of the said Creek.

12. The European Nations, including Great Britain, which asserted claims to territory in the New World also claimed, as an incident of their discovery, the inherent and exclusive sovereign power of extinguishing the Indian right of occupancy. This power passed to the government of the United States upon separation from Great Britain in 1783.

13. In 1789 the Constitution of the United States was ratified, reserving to the federal government the power to regulate commerce with the Indian Tribes.

14. In 1790, the United States adopted the first Indian Nonintercourse Act, incorporating in whole or in part the restrictions set forth in paragraphs 12 and 13 and confirming the right of Indian Tribes, including the plaintiff Tribe, to possession of all lands then owned or occupied by them, until alienated with the consent of the Government of the United States.

15. As of 1870, the Tribe owned, exclusive used, and occupied the Common Lands.

16. By Chapter 213 of the Acts of 1870 the Commonwealth of Massachusetts purported to terminate the legal existence of the Tribe, and without compensating the Tribe, purported to convey all of the Tribe's remaining property, including the Common Lands, to the Town of Gay Head.

17. Defendants Madison, Vanderhoop and Manning, acting personally and through their agents and employees and asserting a claim of right acquired pursuant to the said act of the Commonwealth of Massachusetts, are presently in possession of, and exer-

cise dominion and control over, the Common Lands, and keep plaintiff out of possession of the same.

18. The Government of the United States has never approved or consented to the said enactment of the Commonwealth of Massachusetts by which the Common Lands were purportedly conveyed, nor to any other transaction by which the defendants claim right or title to any of the Common Lands.

19. The Tribe therefore retains its original title and right of possession and occupancy to the Common Lands. Neither defendants Madison, Vanderhoop and Manning, nor any other party, has ever obtained title or right or any interest in the said lands.

20. The plaintiff Council has a present right to possess and occupy the Common Lands as the governing body of the Tribe.

21. The Common Lands are not and never have been the property of the defendant Town of Gay Head, and the defendant Town of Gay Head has never been in possession of the said lands.

FIRST CLAIM FOR RELIEF.

22. Defendants Madison, Vanderhoop and Manning are in possession of the Common Lands in violation of the federal restriction against extinguishment of Indian title except by action of the United States, 25 U.S.C. § 177, and Article I, § 8 and Article VI of the United States Constitution. Said violation interferes with plaintiffs' title and right to possession of the said lands.

SECOND CLAIM FOR RELIEF.

23. If the defendant Town of Gay Head is also in possess-

ion of the Common Lands its possession violates the federal restriction against extinguishment of Indian title except by action of the United States, 25 U.S.C. § 177, and Article I, § 8 and Article VI of the United States Constirution. Said violation interferes with plaintiffs' title and right to possession of the said lands.

W H E R E F O R E , plaintiff respectfully pray that this Court:

1. Adjudge and decree that plaintiffs have the right of possession to the Common Lands and restore the plaintiffs to possession of the said lands.

2. Grant such other and further relief as the court deems just and proper.

Dated: June 2, 1975
Calais, Maine

/s/ Thomas N. Tureen

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ATTORNEYS FOR PLAINTIFFS

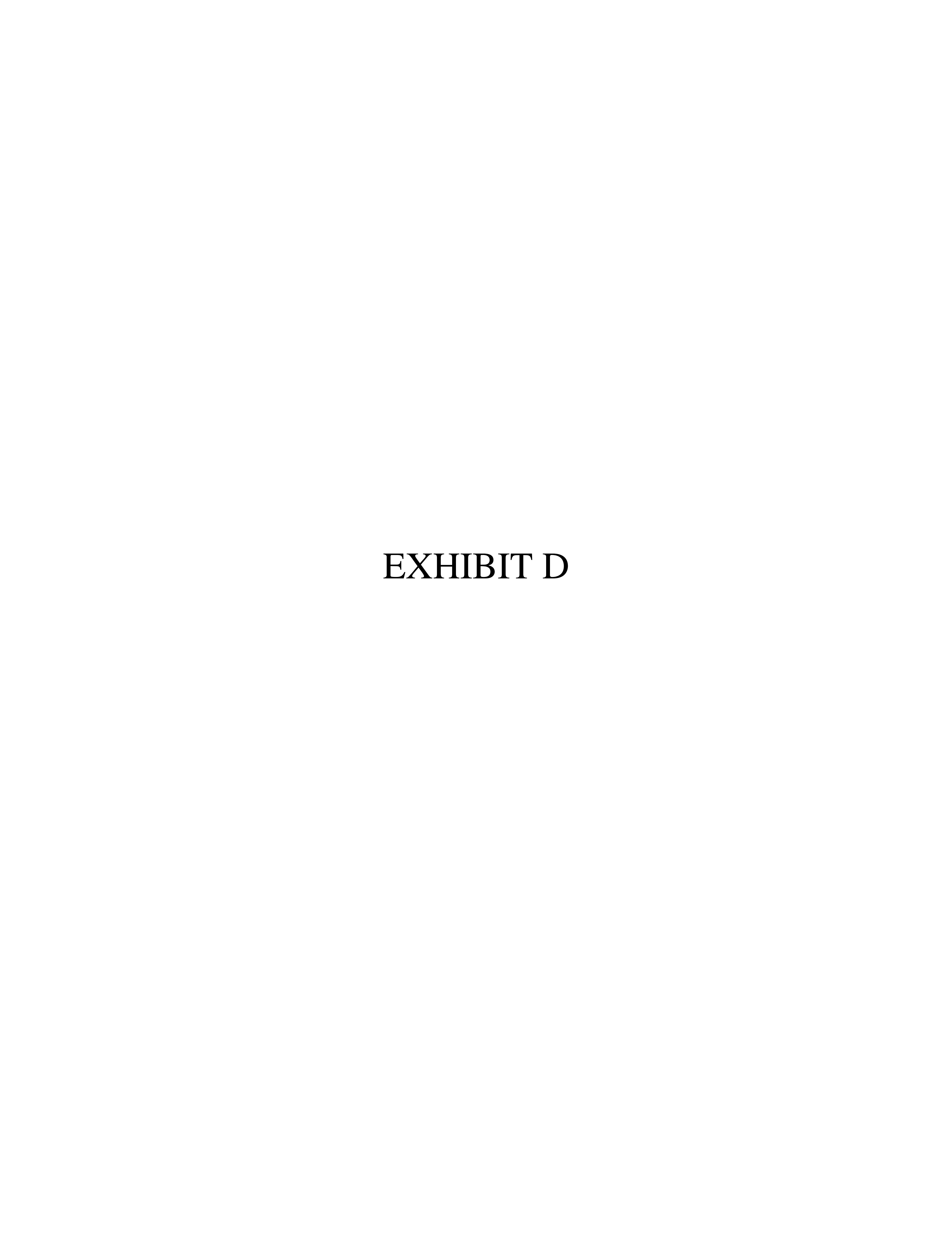
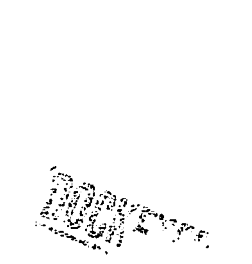


EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS



WAMPANOAG TRIBE OF GAY HEAD, AND WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., Plaintiffs, v. TOWN OF GAY HEAD, et al., Defendants.	CIVIL ACTION NO. 74-5826-MC MEMORANDUM IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS' MOTION TO INTERVENE

STATEMENT OF THE CASE

On or about June 3, 1975, the alleged Wampanoag Tribe of Gay Head and the Wampanoag Tribal Council of Gay Head, Inc. filed an amended complaint against the Town of Gay Head and its selectmen seeking to establish the right of possession of the alleged Wampanoag tribe to the town of Gay Head's Common Lands. The plaintiffs characterized the common lands as "aboriginal and reservation land". Amended Complaint, paragraph 1. The exact land sought by plaintiffs is set forth in paragraph 11 of the Amended Complaint. The Common Lands sought by plaintiffs include five public beaches and the land known as the Clay Cliffs, which are cliffs of particular beauty and ecological importance, frequenty visited by the Commonwealth's citizens individually and in guided tour buses.

On or about December 10, 1976 the Gay Head Taxpayers Association sought to intervene in this case as a defendant. The principal basis for the Taxpayers Association motion to intervene was the failure of the Town of Gay Head to actively defend the case after officers of the plaintiff Tribal Council took control of the defendant Board of Selectmen. The Taxpayers Association's motion to intervene was not acted upon during the period of 1976-1981, as settlement negotiations were ongoing between the plaintiffs and the Taxpayers Association. In February or March, 1981, settlement negotiations broke down and the Taxpayers Association requested the Court to act upon its motion to intervene. On March 2, 1981, the Court established a schedule which would close discovery on September 1, 1981, and hold a pre-trial conference on September 21, 1981. The Court also directed the defendant, Town of Gay Head, to decide by July 15, 1981, whether it was going to participate in the defense of this case. The Town of Gay Head originally scheduled a town meeting for July 8, 1981, to decide (1) whether to actively defend the case and (2) whether to petition the Massachusetts Legislature to give the disputed land to the Indians. However, as the warrant was not posted in time, the town meeting will now be scheduled in late July or early August. On a previous occasion, the town has vetoed against an appropriation to defend the suit. The non-Indians in town are a voting minority. On May 18, 1981, the Court allowed the Taxpayers Association's motion to intervene.

In early June, 1981, the Taxpayers Association informally requested the Massachusetts Department of the Attorney General to intervene on behalf of the Commonwealth of Massachusetts as a defendant in this case. On June 29, 1981 the Taxpayers Association wrote to the Attorney General again requesting the Commonwealth of Massachusetts to intervene. In this letter, the Taxpayers Association indicated that it has no resources other than the voluntary contributions of its members, some 80 families in all. The Taxpayers Association expressed its concern that it will have substantial practical problems in defending this case and that its representation might be inadequate without the involvement of the Commonwealth. Specifically, it indicated an inability to finance the discovery needed to adequately defend the rights of "non-Indian" members of the community. See a copy of the Taxpayers Association's letter to Attorney General Bellotti, attached to this Memorandum as Attachment A. As of the date this motion to intervene was filed, no party in the case has undertaken any discovery from opposing parties.

ARGUMENT

I. THE COMMONWEALTH OF MASSACHUSETTS IS ENTITLED AS A MATTER OF RIGHT TO INTERVENE IN THIS CASE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2)

Fed. R. Civ. P. 24(a)(2) provides in relevant part:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action. . . when the

> applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

Effective July 1, 1966, the current rule 24(a)(2) was adopted. The 1966 amendments were intended to inject elasticity into the right to intervene. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133-134 (1967). The general rule as of today is that intervention is freely allowed. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 84 F.R.D. 383, 396 (D. Kan. 1979); National Farm Lines v. I.C.C., 564 F.2d 381, 384 (10th Cir. 1977). In particular, applications for intervention of right are to be accorded "liberal treatment". Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir. 1970).

A. The Commonwealth Of Massachusetts' Motion To Intervene Is Timely Filed.

As a prerequisite to both intervention of right as well as permissive intervention, an application to intervene must be timely filed. While the Commonwealth of Massachusetts is seeking to intervene over six years from the date the amended complaint was filed, the motion is nevertheless timely. The case was dormant until 1981, pending settlement negotiations.

The Commonwealth has sought to intervene less than two months after the Taxpayers Association's motion to intervene was allowed and approximately one month after being requested to intervene by the Taxpayers Association. As of the date the Commonwealth's motion to intervene was filed, no party has yet to initiate discovery of any opposing parties.

In determining whether an application to intervene is timely, the mere passage of time is but one factor to be considered in light of all the circumstances. Spring Contruction Co., Inc. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980); Evans v. Lynn, 376 F.Supp. 327, 330 (S.D. N.Y. 1974). The most important consideration is whether the delay has prejudiced any of the other parties. Spring Construction Co., Inc. v. Harris, 614 F.2d at 377. In fact, at least one court has indicated that prejudice may be the only significant factor in determining timeliness when the proposed intervenor seeks intervention as of right. McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970).

In this case, the Commonwealth's delay in seeking to intervene has caused no prejudice to any party. The intervenor Taxpayers Association has actively sought the Commonwealth's intervention. No discovery has been conducted by any party as of this date. While the Commonwealth would certainly prefer that discovery remain open past September 1, 1981, to enable the Commonwealth to undertake more than the less than two months of

discovery remaining, the Commonwealth, recognizing its role as intervenor, shall not seek on its own motion to extend the time of discovery. The Commonwealth shall, (if necessary), be ready to go forward at the pre-trial conference presently scheduled for September 21, 1981. This case is similar to Diaz v. Southern Drilling Company, 427 F.2d, 1118, 1125 (5th Cir. 1970), cert. den. 400 U.S. 878, where the Government was permitted to intervene approximately one year after the date it knew of the suit because there had been no legally significant proceedings as of the date of the intervention. See, also, Hodgson v. United Mine Workers of America, 473 F.2d 118, 129 (D. Conn. 1972). (Intervention allowed seven years after complaint filed, where intervenor disavows any desire to reopen previously litigated questions); Curacao Trading Co. v. Federal Insurance Co., 2 F.R.D. 261, 265 (D. Del. 1942) (Intervention allowed although the case was four years old as the case was not set for trial until the day upon which the application for intervention was filed); Meyer v. MacMillan Publishing Co,, Inc., 85 F.R.D. 149, 150 (S.D.N.Y. 1980) (Government allowed to intervene five years after original complaint filed with that agency and one and one-half years after court complaint filed, where government represented it would coordinate its discovery with plaintiff); Brown v. Board of Education, Topeka, Shawnee County, Kansas, supra, (Intervention allowed after case lay dormant for twenty four years, given lack of prejudice).

B. The Commonwealth Of Massachusetts Claims An Interest Relating To The Property Which Is The Subject Of The Action.

In Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), the Supreme Court held that the term "interest" in Fed. R. Civ. P.24(a) should be liberally construed. In the intervention area, "the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967). The interest test must be viewed particularly broadly in "atypical cases". United States v. Reserve Mining Company, 56 F.R.D. 408, 413 (D. Minn. 1972). One factor relevant to whether a government has a sufficient interest to intervene is the government's decision itself to allocate its limited resources to seek intervention in a case. Meyer v. MacMillan Publishing Co., Inc., 84 F.R.D. at 150-151.

In this case, the Commonwealth of Massachusetts has the following four distinct "interests", each one, in and of themselves, sufficient to justify intervention in this case: (1) preventing the diminution in state taxes that would follow plaintiffs' success in this case, (2) protecting the Commonwealth's sovereignty, (3) upholding state law challenged in this case; and (4) protecting the right of the people to enjoy the natural, scenic, and esthetic qualities of the environment.

First, if plaintiffs were to succeed in this case, the Commonwealth's treasury would be negatively affected. Plaintiffs claim that the common lands of Gay Head are tribal and reservation lands. Amended Complaint, paragraph 1. The Commonwealth cannot impose a property tax on tribal held land absent Congressional approval, The Kansas Indians, 72 U.S. 737 (1866), nor can the Commonwealth tax an individual Indian or the tribe on income arising from sources on the reservation, McClanahan v. State Tax Commissioner of Arizona, 411 U.S. 145 (1973). The Commonwealth further would be unable to collect sales taxes on goods sold by both Indian and non-Indian merchants to tribal members on tribal property. Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965). A government's interest in being able to tax property and individuals within the borders of its state has long been recognized as a sufficient "interest" to justify intervention. Of particular note is the case of People of the State of California v. United States. 180 F.2d 596 (9th Cir. 1950). In this case, the United States sought to prevent a public service water company from diverting water for irrigation purposes from the Little Truckee River in the State of California. The United States claimed ownership of the river, for among other reasons, because of its trusteeship of the Pyramid Lake Indian Reservation through which the river flowed. 180 F.2d at 598. The State of California sought to intervene in the case because

the river's irrigation projects affected California's economy and tax structure. Id. at 599. Intervention was allowed. Similarly, in United States v. Reserve Mining Co., 56 F.R.D. 408, 412 (D. Minn. 1972) local town governments were permitted to intervene in an action against an alleged industrial polluter, because the governments were "dependent upon the individuals and [the company] and supporting businesses for tax revenues necessary to maintain the efficient operation of local government."

The Commonwealth also has an interest in preventing the loss of sovereignty over state property and its citizens that would follow from plaintiffs' succeeding in this case. The Supreme Court held in Worcester v. Georgia, 31 U.S. 515 (1832) that reservations are separate from the state in which they are located. If plaintiffs were to prevail, the Commonwealth would be required to tolerate the existence of separate tribal laws, Turner v. U.S., 248 U.S. 354 (1919), Native American Church v. Navajo Tribal Council, 236 U.S. 68 (1915), and the authority of tribal courts, Colliflower v. Garland, 243 F.2d 369 (9th Cir. 1965), Littel v. Nakai, 344 F.2d 486 (9th Cir. 1965), cert. den. 382 U.S. 986 (1966). Simply stated, the Commonwealth would be forced to share concurrent jurisdiction with the Wampanoag Tribal Council and its courts, thus surrendering the Commonwealth,s sovereign right to ensure the uniform application of its laws throughout the breadth of its territory. In

general, if a violation of the law occurred, the situation that would result would be that: (1) if the occurrence is off the reservation, state law would control regardless of the parties involved; (2) if the occurrence was on tribal land and the perpetrator as well as the victim was non-Indian, state law would control, but; (3) if an Indian was the perpetrator or victim, or an offense against trust property was involved with the occurrence within tribal land, the jurisdiction would be either fedeal or Indian or both, but not state. Organized Village of Kake v. Egan, 369 U.S. 60 (1962). For example, a Wampanoag Indian could not be sued in a State Court on a debt that arose from a transaction on the reservation, Williams v. Lee, 358 U.S. 217 (1958); thus, in addition to not being able to ensure the uniform application of its laws, the Commonwealth would be unable in some situations involving delinquent Indian debtors, to provide a convenient forum to its citizens for the prompt adjudication of these issues.

The government's right to intervene in its parens patriae capacity to protect the general welfare of its citizens has also been previously recognized by the courts. Nuesse v. Camp, 385 F.2d at 699, 4.4. The court in People of the State of California v. United States, 180 F.2d at 601, recognized the right of the state to intervene to protect interests which rise above a mere question of local private right. In at least two other Indian claims cases, the state has been allowed to

intervene to protect its interests. Joint Tribal Council of Passamaqueddy Tribe v. Morton, 388 F.Supp. 649 (D.ME. 1975); Badoni v. Higginson, 455 F.Supp. 641 (C.D. Utah 1977).

The Commonwealth also has a legally recognizable interest in seeking to uphold the state law whose validity is challenged in this case. Plaintiffs allege that Chapter 213 of the Acts of 1870 of the Commonwealth of Massachusetts invalidly conveyed plaintiffs' alleged property to the Town of Gay Head. ended Complaint, paragraphs 15-18. In People of the State of California v. United States, 180 F.2d at 600, the court declared that a court should not "deny the state the right to defend th[e] provisions of its Constitution and Laws". See also, Nuesse v. Camp, 385 F.2d at 701.

Finally, the Commonwealth has an interest in this case in protecting the people's right to enjoy the natural, scenic and esthetic quality of the environment. The plantiffs in this case seek ownership of public beaches as well as the environmentally significant and beautiful Gay Head Cliffs. Article 97 of the Massachusetts Constitution provides that:

> [T]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

If plaintiffs were to succeed, the public would lose its right to enjoy the cliffs and to bathe and walk on the beaches. Opinion of the Justices, 365 Mass. 681, 6 87-688 (1974); Butler v. Attorney Genral, 195 Mass. 79 (1907).

The Commonwealth's interest in preserving the people's right to enjoy the environment has previously been recognized as sufficient to justify intervention. In United States v. Reserve Mining Company, 56 F.R.D. at 416-417, the court recognized the state of Michigan's right to intervene in its parens patriae capacity to represent its citizens' interests in recreational and esthetic uses of Lake Superior.

C. The Commonwealth of Massachusetts Is So Situated That Disposition Of This Case May As A Practical Matter Impair Or Impede Its Ability To Protect Its Interests.

Disposition of this case in favor of plaintiffs as a practical matter would impair and impede the Commonwealth's ability to protect its interests. If plaintiff were declared to be a tribe, such a jury finding would carry considerable weight in any attempt by plaintiff to establish itself with the federal government as a tribe and its land as reservation land. See 25 U.S.C. §465. For all practical purposes, relitigation of the issues by the Commonwealth would probably accomplish little if anything. As the court noted in Nuesse v. Camp, 385 F.2d at 701, a state should be allowed to intervene in an action whose decision would carry great weight, even

though the state technically would not be precluded by res judicata from relitigating the issues in a later action. See also, United States v. Reserve Mining Company, 56 F.R.D. at 414 (A government's ability to protect its tax base would be impeded by prohibiting intervention).[1/]

D. The Commonwealth's Interests May Not Be Adequately Represented by Existing Parties.

The defendent, Town of Gay Head and its selectmen, as of this date, have still not indicated any intention to defend this case. The intervenor, Taxpayers Association, may not adequately represent the interests of the Commonwealth.

Fed. R. Civ. P. 24(a)(2) provides for intervention "unless the applicants' interest is adequately represented by existing parties.". As the court noted in Nuesse v. Camp, 385 F.2d at 702, the wording of the rule "underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." The Supreme Court has noted that "[t]he requirement of the Rule is satisfied if the applicant

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1/ The Taxpayers Association argued in their Memorandum in Support of their Motion to Intervene that "where interest has been found, it appears to be universally the rule that the impairment condition of the intervention is automatically met." Memo at p. 11. This court allowed the Taxpayers Association's intervention motion. The likelihood that the Commonwealth's interests would be impeded by a judgment for plaintiffs is the same as the likelihood that the Taxpayers Association's interests would have been impeded.

shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. Mine Workers, 404 U.S. 528, 538, n. 10 (1972). The "competency" element of the adversity of interest test relates to the ability, both legally and practically, of existing parties to represent the interests of the intervenor. United States v. IBM, 60 F.R.D. 530, 538, u. 20 (S.D.N.Y. 1974).

Legally, no existing party represents the interests of the Commonwealth. At least three courts have noted that the possibility of inadequate representation exists where the state has a broader interest than the narrow interests of the private parties in the case. Holmes v. Government of the Virgin Islands, 61 F.R.D. 3, 4-5 (D. St. Croix 1973); United States v. Reserve Mining Company, 56 F.R.D. at 415; Nuesse v. Camp, 385 F.2d at 703-704. In Holmes, the Court noted that "the most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties". 61 F.R.D. at 4. See also, C. Wright and A. Miller, 7A Federal Practice and Procedure at 524 (1972). The court went on to conclude that although the private party will likely seek the same outcome as the government, the parties' interests nevertheless are different.

In this case, intervenor - Taxpayers Association might also have practical difficulties in providing the same type of defense the Commonwealth could afford in this case. In Nuesse,

the court noted the relevance of the government's sometimes better position to adduce evidence or an issue. Id. at 704. The Taxpayers Association has indicated that they are concerned that their representation will be inadequate without the involvement of the Commonwealth. See Attachment "A" to this Memorandum.

Finally, this Court should recognize the view held by some commentators that the applicant is the best judge of when representation is adequate, and that intervention should always be allowed when the applicant is willing to bear the cost of separate representation. Holmes v. Government of the Virgin Islands, 61 F.R.D. at 5.

II. THE COMMONWEALTH OF MASSACHUSETTS SHOULD BE PERMITTED TO INTERVENE IN THIS CASE PURSUANT TO FED. R. CIV. P. 24(b).

Fed. R. Civ. P. 24(b) provides in relevant part:

> Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action. . . when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Even if this court were to find that the Commonwealth of Massachusetts is not entitled as of right to intervene in this case, this court, in its discretion, should nevertheless permit the Commonwealth to intervene.

A. The Commonwealth's Defense Raises Questions Of Law And Fact In Common With The Main Action.

The Commonwealth's proposed defense of the case, in common with the defense of the Taxpayers Association's defense set forth in their Answer, raises the issues of (1) the legal consequences of the plaintiffs' delay in bringing this action and (2) whether the plaintiffs are a tribe or Indian nation within the meaning of 25 U.S.C., §177. Thus, while the Commonwealth's interests may be broader than other defendants, their defense of the case raises legal and factual issues in common with the main action of the case. See United States v. Reserve Mining Company, 56 F.R.D. at 416 (granting permissive intervention to the State of Wisconsin to allow the state to assert its parens patriae, quasi-sovereign interests over the state's natural resources); Mitchell v. Singstad, 23 F.R.D. 62, 64 (D. Md. 1959). (Where public interest is clear, state permitted to intervene on parens patriae grounds even though grounds for intervention under a literal interpretation of Rule 24 did not exist.)

B. <u>As Defense Of This Action Relies, In Part, On A Massachusetts Statute, The Commonwealth Should Be Permitted To Intervene To Defend That Statue.</u>

Rule 24(b) specifically provides that when a party relies for a ground of defense upon a state statute, the governmental officer charged with administrating that statute upon timely application may be permitted to intervene in the action. The court in <u>Nuesse v. Camp</u>, 385 F.2d at 705, noted that a court considers such a governmental application "with a fresh and more hospitable approach." The court concluded:

> It is a living tenet of our society and not mere rhetoric that a public office is a public trust. While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in litigation.
>
> <u>Id.</u> at 706.

In this case, one defense to this action is that chapter 213 of the Acts of 1870 validly conveyed the lands at issue to the Town of Gay Head. Massachusetts should be permitted to defend the validity of its laws.

C. <u>Intervention Of The Commonwealth Of Massachusetts Will Not Unduly Delay Or Prejudice The Adjudication Of The Rights Of The Original Parties.</u>

For the same reasons set forth previously in this Memorandum in discussing the timeliness of the Commonwealth's Application, the Commonwealth's intervention would not unduly

delay or prejudice the adjudication. See also, Spangler v. Pasadena City Board of Education, 552 F.2d 1326, 1329 (9th Cir. 1977). (One factor relevant in granting permissive intervention is whether party seeking intervention will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.)[2/]

CONCLUSION

For the reasons stated in this Memorandum, the Commonwealth of Massachusetts has a right to intervene pursuant to Fed. R. Civ. P. 24(a)(2), and should be permitted to intervene to Fed. R. Civ. P. 24(b).

2/ In this case, the resources of the Commonwealth might lead to fuller development of the facts and legal issues than the private parties and town could develop on their own.

BY THE COMMONWEALTH OF MASSACHUSETTS' ATTORNEYS,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: [signature]
Stephen Schultz
Administrative and Legal Counsel
to the Attorney General
One Ashburton Place, 20th Floor
Boston, Massachusetts 02108
(617) 727-1224

Date: July 9, 1981

ATTACHMENT A

MIREL & GRAAE, P.C.
ATTORNEYS AT LAW

LAWRENCE H. MIREL
STEFFEN W. GRAAE

SUITE 503
918 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006
202/463-7880

COUNSEL TO
GOLDFARB, SINGER & AUSTERN

June 29, 1981

Attorney General Francis X. Bellotti
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts

Dear Mr. Attorney General:

I represent the Taxpayers' Association of Gay Head, Martha's Vineyard. On May 18 of this year the Federal District Court in Boston (Judge McNaught) allowed the intervention of our Association on behalf of the Town of Gay Head in the pending case of The Wampanoag Tribal Council of Gay Head v. The Town of Gay Head (C.A. No. 74-5826-G). This suit, in which a group of individuals claiming to be an Indian Tribe has asked that all town common lands be turned over to the "tribe", affects the members of the Taxpayers' Association, all of whom are land-owners in the Town of Gay Head who have no claim to be "Indians". The suit also affects all citizens of Massachusetts, in our view, because the land involved, which includes a number of five beaches now open to the general public, would, if the suit is successful, become inalienable property of a putative Indian tribe. Not only the Town but also the Commonwealth could be stripped of its sovereignty over land that is now owned by the general public. For this reason, we are requesting that the Commonwealth of Massachusetts enter the case on behalf of the Town.

In support of this request we direct your attention to the fact that all three selectmen of the Town of Gay Head are also members of the Tribal Council, and that the "non-Indians" in the Town, represented by the Taxpayers' Association, are a voting minority. The Town, which is nominally the defendant, has not yet indicated an intention to defend the suit, and we are doubtful that the Town has sufficient resources to defend even if it wanted to. On once occasion, prior to our motion to intervene, the Town voted against an appropriation to defend the suit, and the Selectmen later directed the Town's attorney to resolve the matter by conveying the land to the Tribal Council (a process which has not yet been carried out).

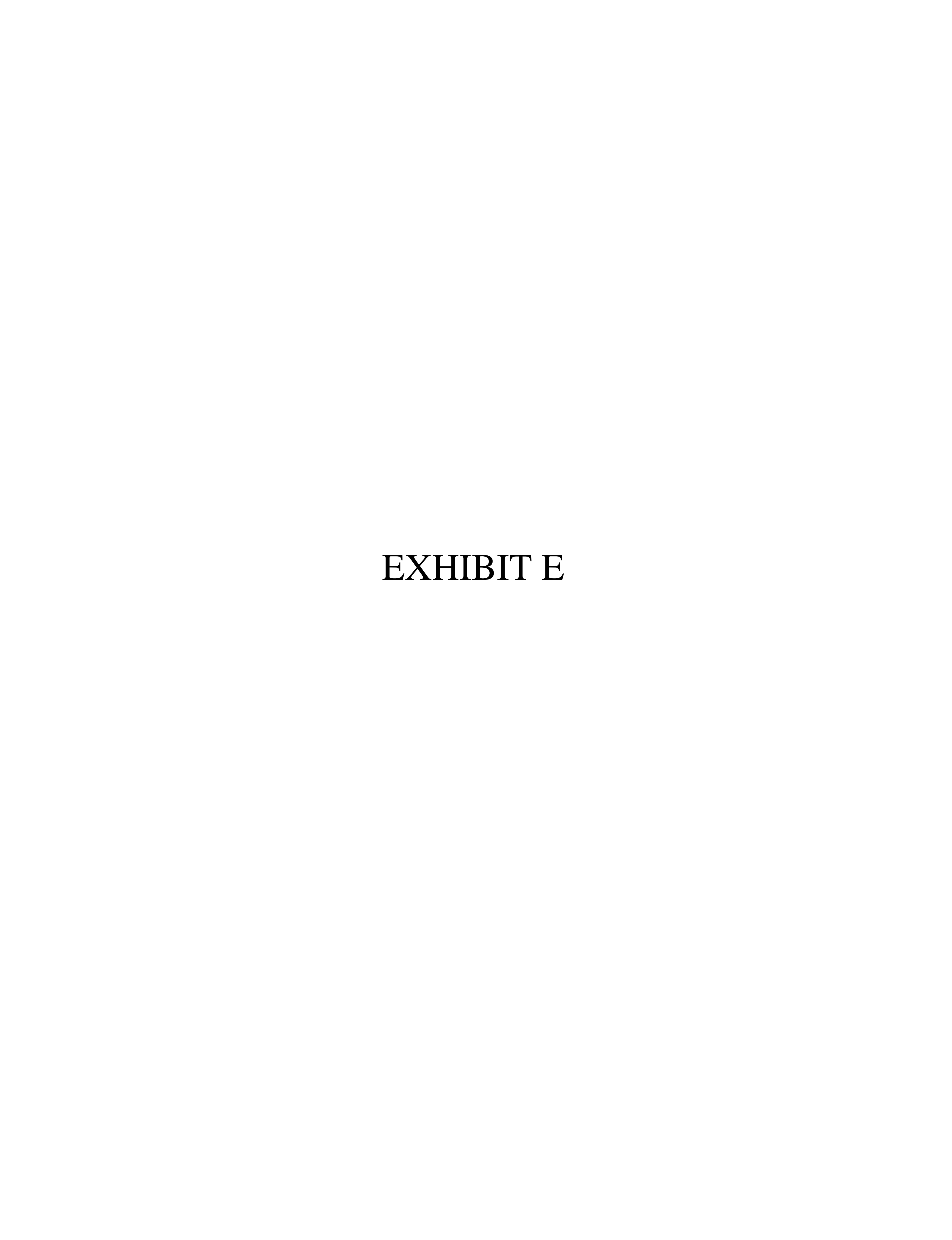


EXHIBIT E

VINEYARD SOUND

STATE ROAD

OLD SOUTH ROAD

MENEMSHA POND

ATLANTIC OCEAN

SQUIBNOCKET POND

AQUINNAH

CHILMARK

243

178

711

713

557

N

LEGEND

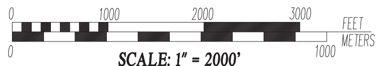
HOMESTEAD LOTS AND LOTS 1 THROUGH 173 ESTABLISHED BY COMMISSIONERS CHARLES MARSTON AND RICHARD L. PEASE AS LAND HELD IN SEVERALTY UNDER THE AUTHORITY OF CHAPTER 42 OF THE ACTS OF 1863 AND CHAPTER 67 OF THE ACTS OF 1866.

COMMON LANDS CONVEYED TO THE TOWN OF GAY HEAD FROM THE COMMONWEALTH OF MASSACHUSETTS UNDER THE AUTHORITY OF CHAPTER 213 OF THE ACTS OF 1870, SECTION 2.

REFERENCES

1. "SECTION PLANS OF INDIAN LANDS ON GAY HEAD, MADE UNDER THE DIRECTION OF RICHARD L. PEASE, ESQ., COMMISSIONER APPOINTED BY GOV. BULLOCK UNDER CHAPTER 67 OF 1866 TO DETERMINE THE BOUNDARY LINES OF INDIAN LANDS AT GAY HEAD", SCALE: 25 ROADS TO AN INCH; JOHN H. MULLIN, CIVIL ENGINEER.

2. "PLAN OF GAY HEAD SHOWING THE PARTITION OF THE COMMON LANDS AS MADE BY JOSEPH T. PEASE AND RICHARD L. PEASE, COMMISSIONERS APPOINTED BY THE JUDGE OF THE PROBATE UNDER SECTION 6 OF CHAPTER 213 OF THE ACTS OF 1870, BY JOHN H. MULLIN, SCALE: 200 FEET TO AN INCH" ON FILE WITH THE DUKES COUNTY REGISTRY OF PROBATE.



SCALE: 1" = 2000'

PLAN OF COMMON LANDS
CONVEYED TO TOWN OF GAY HEAD IN 1870

prepared by: James J. Decoulos

April, 2011

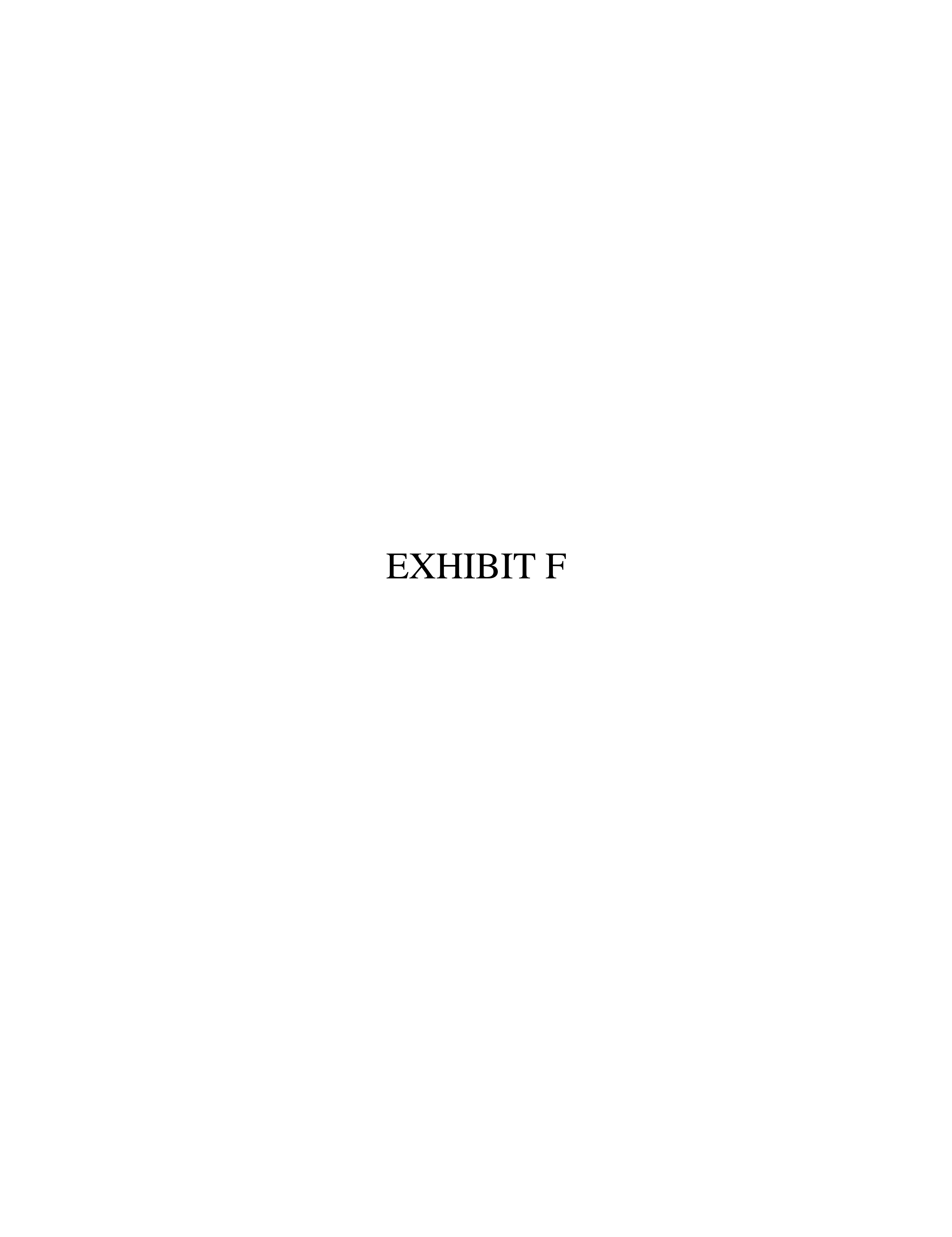


EXHIBIT F

Corrupting water, &c.

the same, or renders it impure, or destroys or injures any dam, aqueduct, pipe, conduit, hydrant, machinery, or other works or property held, owned or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may also be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year: *provided*, that nothing herein contained shall be construed to prevent persons from cutting and securing ice on Flax and Sluice Ponds in the manner heretofore practised.

Proviso.

Act to be submitted to the voters.

Section 14. This act shall be void, unless submitted to and approved by a majority of the voters of said city present and voting at meetings held simultaneously for the purpose, in the several wards, on the first Monday of August next, upon notice duly given, at least seven days before the time of holding said meetings.

City council to determine from whence water shall be taken.

Section 15. The city council shall, by joint ballot, at least fourteen days before said first Monday of August, determine the source from which, in the event of the acceptance of this act, said city shall take the water; and shall, forthwith, notify the inhabitants of said city of its decision, by publication in the newspapers of said city.

Aqueduct to be constructed within three years.

Section 16. This act shall be void unless the aqueduct shall be constructed within three years.

Section 17. This act shall take effect upon its passage.

Approved June 23, 1869.

Chap. 463

An Act to enfranchise the Indians of the Commonwealth.

Be it enacted, &c., as follows:

Indians, &c., made citizens.

Section 1. All Indians and people of color, heretofore known and called Indians, within this Commonwealth, are hereby made and declared to be citizens of the Commonwealth, and entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject.

Indian lands.

Section 2. All lands heretofore known as Indian lands, and rightfully held by any Indian in severalty, and all such lands which have been or may be set off to any Indian, shall be and become the property of such person and his heirs in fee simple: *provided*, that such lands shall not be held liable to be taken upon attachment or execution for any debt or liability which existed before the passage of this act; and all Indians shall hereafter have the same rights as other citizens to take, hold, convey and transmit real estate.

Proviso.

Section 3. The judge of probate of the county in which any lands held in common belonging to any tribe of Indians may lie, except in the case of the Indians of Marshpee and Gay Head, upon the application of any member of said tribe, after notice to all parties interested and a hearing of the same, if in his opinion it is for the interest of said parties that any or all of said lands be divided, shall appoint two discreet, disinterested persons commissioners to make partition of the same, and their award, being confirmed by said court, shall be final in the premises; but if he shall adjudge that it is for the interest of said parties that the same, or a part of the same, be sold, he shall direct the said commissioners, after they shall have given such bonds as the court may require, to proceed to sell any or all of said lands, and to divide the proceeds of the same among the parties rightfully entitled thereto in proportion to their several interests therein, under the direction of the said court; and the judge of probate of the county in which any lands heretofore and now known as Indian lands, and claimed in severalty by any Indians, may lie, shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and shall properly describe and set forth the same in writing, and such description being approved by the court, shall be final in the premises; and the same, together with all deeds of partition, division or sale made by such commissioners shall be recorded in the registry of deeds in the county, and the expenses of said commissioners, including the cost of recording said deeds, the same being approved by the judge of probate, shall be paid out of the treasury of the Commonwealth, the same being also approved by the governor and council.

Judge of probate to appoint commissioners to divide lands.

Said commissioners are authorized to sue for, collect and receive all funds belonging to, or held in trust for, any tribe of Indians for which said commissioners are appointed; and all such funds shall be divided by said commissioners among the parties rightfully entitled thereto under the direction of the probate court of the county in which such tribe resides; and any property held in trust by any person for any tribe of Indians shall be sold by such person under the direction of the judge of probate, and the proceeds of such sale shall be paid over to the commissioners to be divided as aforesaid. The judge of probate of Plymouth county shall have jurisdiction over all matters relating to the Herring Pond Indians under this section.

Commissioners to collect all funds, &c., and divide same.

Any person aggrieved by any order, decree or denial of the judge of probate under this act, shall have the same right of

Right of appeal.

appeal, under the same rules and regulations as provided for in chapter one hundred and seventeen of the General Statutes: *provided*, that the attested copies and notices required to be given by said chapter shall be served upon such parties as the judge of probate shall direct.

Proviso.

Provision for the support of poor Indians in state almshouses.

Section 4. Upon the application of the overseers of the poor of any town, to the board of state charities, said board shall make provision in the state almshouses or elsewhere for the support of any persons heretofore known as Indians who may be unable to support themselves, and who have not acquired a settlement in any town; and upon the application of any Indian who has heretofore received aid from the Commonwealth, the said board shall furnish to such person in the state almshouses or elsewhere, such aid as they may deem expedient.

Agent of board of state charities may sell or lease house in Webster.

Section 5. The general agent of the board of state charities shall take charge of the house, and all property connected therewith, in the town of Webster, belonging to the Commonwealth, and may lease the same to persons heretofore known as members of the Dudley tribe of Indians, upon terms substantially like those upon which they have heretofore occupied it; or he shall, under the direction of the board of state charities, sell the same at public auction, and the proceeds of such leases or sale shall be paid into the treasury of the Commonwealth. *Approved June 23, 1869.*

Chap. 464

An Act in further addition to an act making appropriations to meet certain expenditures authorized the present year, and for other purposes.

Be it enacted, &c., as follows:

Appropriations.

Section 1. The sums hereinafter mentioned are appropriated to be paid out of the treasury of the Commonwealth, from the ordinary revenue, except in cases otherwise ordered, for the purposes specified in certain acts and resolves of the present year, and for other purposes, to wit:—

Compensation of legislature, &c.

In the resolve chapter ninety-six, establishing the compensation of members of the senate and house of representatives and of the clerks and chaplains thereof, and of the lieutenant-governor and council, a sum not exceeding one hundred and seventy-five thousand five hundred dollars in addition to the amounts heretofore appropriated.

Daniel Lorden and others.

In the resolve chapter ninety-seven, in favor of Daniel Lordon and others, the sum of ten thousand two hundred and seventy-two dollars and thirty-nine cents.

Invertebrate animals.

In the resolve chapter ninety-eight, in relation to the republication of the report on the invertebrate animals of Massachusetts, a sum not exceeding seven thousand dollars.

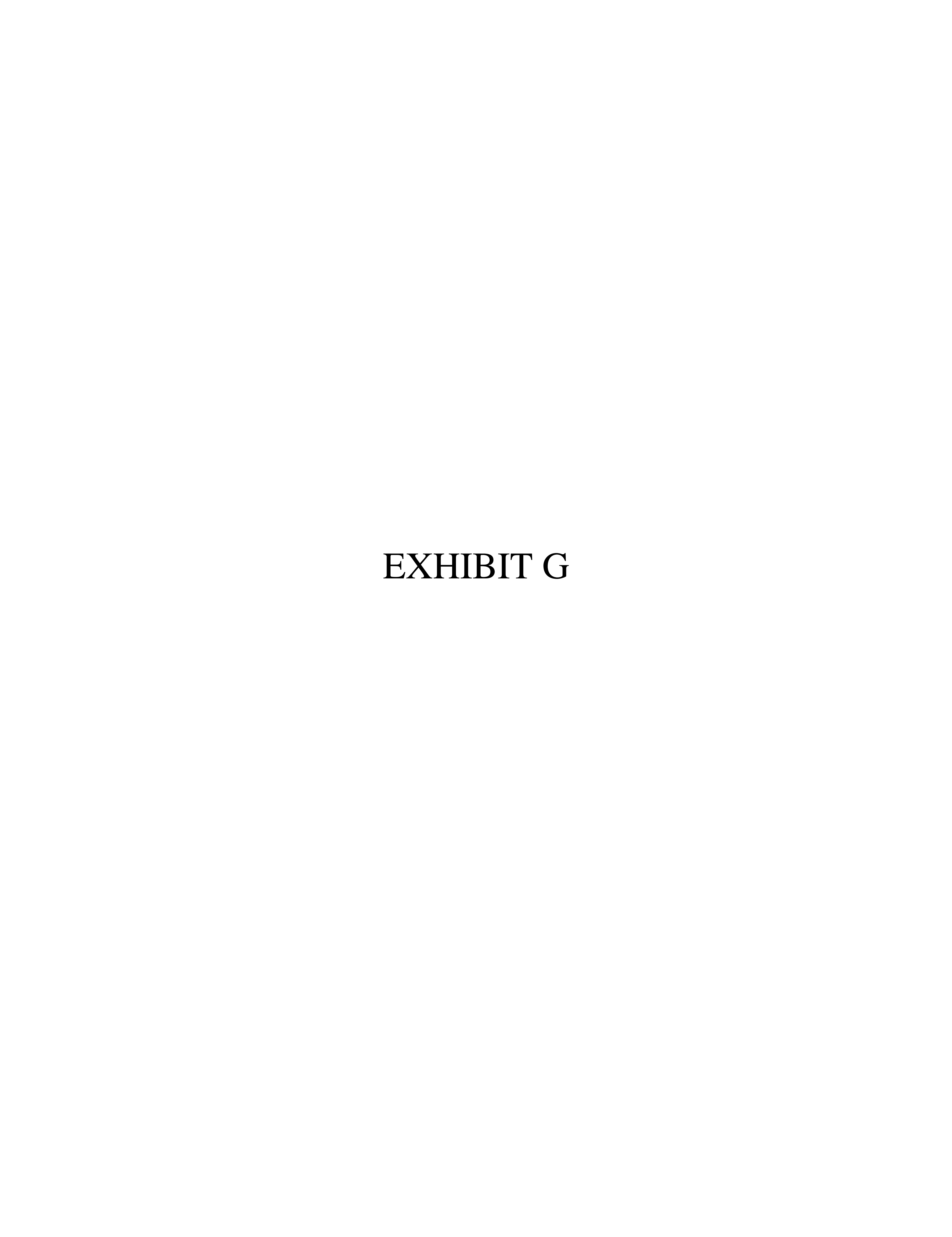


EXHIBIT G

COMMONWEALTH OF MASSACHUSETTS

Dukes, ss. LAND COURT

Everel A. Black
John L. Black
Francis F. Cournoyer
Gertrude R. Cournoyer,
Plaintiffs

Miscellaneous
Case No. 69813

vs.

Cape Cod Company
Henry Hornblower, II,
Defendants

DECISION

The Complaint was brought under the provisions of the General Laws, Chapter 185, Section 1(k) and Chapter 240, Section 6, by the plaintiffs[1] who pray that an easement by necessity be established to and from their land "over land of respondents at a point to be designated by order of the Court and to include the right to install and maintain public utility systems" thereon. In additon to other prayers not now applicable, plaintiffs seek to enjoin defendants from blocking the "public way" passing through their property.

The plaintiffs filed a stipulation dismissing the complaint as against Henry Hornblower, II. The Cape Cod Company answered plaintiffs' complaint, denying the claimed right of way by necessity over its land, the right to install and maintain public utility systems thereon, and their unlawful interference with plaintiffs' ingress and

1. Francis F. Cournoyer was joined as plaintiff by an amendment to the complaint.

egress. Further, defendants claim that plaintiffs were guilty of

egress. Further, defendants claim that plaintiffs were guilty of
laches, but not having been argued this is deemed to have been waived.

The case was heard on June 4, 1974, at the Dukes County Courthouse in Edgartown, Massachusetts. A view of the premises was taken on that day with plaintiffs, defendants, and their attorneys present. Five witnesses were called by the plaintiffs with their testimony being taken by a stenographer who was sworn by the Court. Eight exhibits were introduced into evidence and are incorporated herein for the purpose of any appeal. All references to book and page numbers are to documents recorded at the Dukes County Registry of Deeds unless otherwise noted.

The evidence produced at the trial shows that plaintiffs Cournoyer own the northwesterly half and plaintiffs Black own the southeasterly half of Lot 594 as shown on the plan introduced into evidence as Exhibit No. 5. Defendants own Lot 587 which abuts Lot 594 at the northwesterly corner thereof as shown on said plan.

The land in question was formerly held for the benefit of the Indians located in the Indian district of Gay Head. Until the passage of the St. of 1869 c. 463 the Indians were wards of the Commonwealth and the title to the lands occupied by them was held by the Commonwealth. Coombs, Petitioner, 127 Mass. 278, Danzell v. Webquish, 108 Mass. 133, 134. The Court takes judicial notice of Chapter 42 of the Resolves of 1863 entitled "Resolve Relating To The Establishment of Boundary Lines of Indian Lands at Gay Head." As a result of this resolve, a commissioner was appointed "to examine, and fully and finally to determine, all boundary lines between the individual owners of the land located in the Indian district of Gay Head...and also to determine

the boundary lines between the common lands of said district and the individual owners adjoining said common lands...." By Chapter 67 of the Resolves of 1866 the report of the Honorable Charles M. Marston, the commissioner so appointed under Chapter 42 of the Resolves of 1863, was accepted and a further resolve authorized the appointment of still another commissioner to complete "the examination and determination of questions of title under said resolve, not passed upon by said commissioner." A map of "Gay Head" was prepared [Exhibit No. 8] "under the direction of Richard L. Pease, Eng., Commissioner appointed by Gov. Bullock under Resolve Chap.67 of 1866,"recorded in Book 5, Pages 34 and 35.

By Section 6 of St. 1870, Chapter 213, "An Act to Incorporate the Town of Gay Head" the General Court as part thereof authorized the Probate Court of Dukes County to appoint two commissioners to recommend the division of these lands among the Indians. Richard Pease and Joseph Pease were appointed commissioners in 1878 and submitted their report recommending the parceling of the common land to individual Indians [Exhibit No. 1]. Thereafter, Lot 587 was parceled out to Leander Basset and Lot 594 to Amy Spencer [Exhibits No. 2 and 3] as shown on the plan submitted by the commissioners in connection with the set off. [Exhibit No. 6]. Each lot was described by making reference to abutting lots in accordance with the plan which showed the lots set forth as on a grid. The plan itself [Exhibit No.6] showed that the only road ran from the Chilmark town line westerly to the Gay Head Light House. The deeds to the individual lots made no provision for any rights of way or easements to get to and from any of the lots. There was evidence that showed that at the time of

the set-off the whole area was used in common by the Indians for planting corn, as pasture for their wild ponies and presumably in part for their abodes. The lots were undefined on the ground as there were no fences or any other separation of the lots. The Indians traveled on foot or on horseback without reference to any one person's land or boundaries. None of the trails were more than three feet wide and vehicles were never used.

Plaintiffs' title to Lot 594 comes by mesne conveyance from the title set-off to Amy Spencer [Exhibit No. 2] while defendant's title to Lot 587 comes from the lot set off to Leander Bassett [Exhibit No. 3]. Moshup Trail is a two-lane tar road built according to testimony in 1963-1964 which loops southerly from the state road. There is one new house on the south side of Moshup Trail 1/3 to 1/2 mile east of the turn off sought to be established as a right of way to 594. Utility lines end at this house, coming to it from the east. Except for this house, the area is wild and uninhabited, being sparsely covered with grass growing in loose, sandy soil ever more sparse as one approaches the beach to the south. The terrain itself is made up of small hills that may be passed over in a jeep or four-wheel drive vehicle.

The way over which plaintiffs claim their easement is part of an ancient way which commences at an undetermined point off "Old South Road" (which appears on Exhibit No. 5) and runs thence in a generally southeasterly direction to Moshup Trail. Ink lines on Exhibit No. 5 indicate that the way runs from Moshup Trail across Lots 577, 581 and 582 to Lot 587 where it divides into two ways, one

curving to the north, and the other, with which this case is concerned, to the south across Lot 587 to and through Lot 594. From there, it proceeds across Lot 595, a beach area, and thence westerly across Lots 585, 584, 583, 575 and 572 to Moshup Trail. The portion running from Lot 595 westerly to Moshup Trail is known as "Zack's Cliff Road." Since the Complaint alleges the right claimed by the plaintiffs to lie across Lot 587, the Court is unconcerned with Zack's Cliff Road. Because the necessity of access is to Moshup Trail, the Court is unconcerned with that part of the ancient way running between Old South Road and Moshup Trail. The way from Moshup Trail to Lot 594 was originally a horse trail which was widened by the repeated driving of an automobile over it. There is a gate across the way at the westerly boundary line of Lot 587, built by the defendants and kept locked by them since 1964. There was evidence indicating that the plaintiffs and others would, whenever they found it locked, cut the locks and throw them into the bushes in order to pass through Lot 587 to Lot 594 and beyond.

The partition of 1878 of the land held in common by the Indians was to establish parcels to be owned individually by the Indians, and this partition contained no provision for access to and from land-locked parcels by the designated owners of such parcels. There is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access. Rights of way of necessity are created by a presumption of law. Where a landowner conveys a portion of his land in such a manner that he is unable to reach the land retained without travelling over the land conveyed, the law

presumes in the absence of contrary evidence that the intent of the parties to the conveyance was to provide access to the former by passage over the latter. Davis v. Sikes, 254 Mass. 540. The necessity of the right of access does not of itself create the right, but it is evidence that the right can be implied from the intent of the parties. Orpin v. Morrison, 230 Mass. 529, Gorton-Pew Fisheries Co. v. Tolman, 210 Mass. 402. This principle is not disrupted by the fact that these parcels were all created at one and the same time in a partition of the land and not as a result of a landowner conveying out or retaining an inaccessible parcel.

That the Commonwealth in 1878 did not provide for specific means of access to the parcels partitioned perhaps indicates its awareness of the Indians' customary travelling on horseback and on foot without regard to the boundaries of individual lots as a means of access. Use of such a means was, perhaps, an exercise of an easement which now may need only specific location because of the changes in the use and occupation of the land involved and because of changes in modes of transportation. One cannot, obviously, drive an automobile to a landlocked parcel in complete disregard of the boundaries of other parcels.

If the Court were to rule that plaintiffs did have, as a result of the necessity of access and the lack of evidence of an intent on the part of the Commonwealth to deny access, an easement of access to Lot 594, it would not compel any conclusion that their easement lies over the way which they have been using to reach their Lot 594. The most direct way to reach Moshup Trail might be across Lots 586,

582, 583, 575, 576 and 572, in addition to Lot 587. The owners of these lots are not before the Court and thus the Court cannot issue in their absence any decree or judgment that would affect their rights. Even if, as plaintiffs allege, their right were to lie across the way over which they claim an easement, perhaps by prescription, that way runs across Lots 582, 581 and 577, in addition to Lot 587. The owners of these lots are likewise not before the Court, and the Court is powerless to issue in their absence any decree or judgment that would affect their rights. Finally, the Court notes that there are other landlocked parcels which may have rights over Lot 594. While this fact does not of itself prevent the Court from determining plaintiffs' claim, it does suggest the crying need for a thorough and comprehensive planning of access to the entire area. One manner of providing access, which might under other circumstances be judicially imposed, would be to plan ways sufficiently wide to allow vehicular use along the boundary lines of each lot (on all four sides if necessary to give access to Moshup Trail to any given lot), burdening each lot with one-half the width of the way and in turn benefiting each lot with a right of way over such of the other remaining lots as is necessary to reach Moshup Trail. This would be imposed in such a manner as would divide the burden of ways as equitably as possible.

The Court reluctantly concludes that the owners of at least Lots 571, 572, 575, 576, 577, 581, 582, 583, and 586 are indispensable parties to this action, and relief cannot without their presence in the action be granted. Rule 1A of the new Rules of Civil Procedure, designed to provide guidance in the transition of procedure

from the old rules to the new rules, provides in Rule 1A(3) and 1A(8) authority for the Court to dispose of this case under the procedure effected by new Rules of Civil Procedure. Under Rule 19(a) of the new rules, the Court can on its own motion order these other owners to be joined in these proceedings. Rule 19(a) (1), Rule 19(a) (2) (i). Alternatively, under Rule 19(b), the Court can dismiss the case without prejudice until such time as the plaintiffs upon proper pleadings and process can join in this action these indispensable parties. It is the Court's view that any judgment that could issue at this point in these proceedings, assuming such a judgment would be favorable to the plaintiffs, would be either unavoidably prejudicial to one or more parties not now before the Court, or completely inadequate to the needs of the plaintiffs. The Court chooses in its discretion to dismiss the case without prejudice under Rule 19(b) because the information necessary to make an order under Rule 19(a) is not now before the Court. More important, a dismissal without prejudice under Rule 19(b) will not only tend to accomplish the same purpose as an order under Rule 19(a), should the plaintiffs desire to file the appropriate motions and pleadings, but also a dismissal will tend to give the present parties ample latitude in their pursuit of this litigation. The Court is a suitable place for determining rights of the parties before it under the law, but legal process is not always the best means for planning access to a large number of lots; the Court has no special expertise in land development. However, the Court is quite prepared to decide whatever legal issues are presented to it provided all the proper parties are before it.

The Court orders that the petition be dismissed without prejudice to the plaintiffs to file appropriate motions and pleadings for further hearings in this matter.

So Ordered.

William D Rondell
JUDGE

Dated: July 14, 1975.

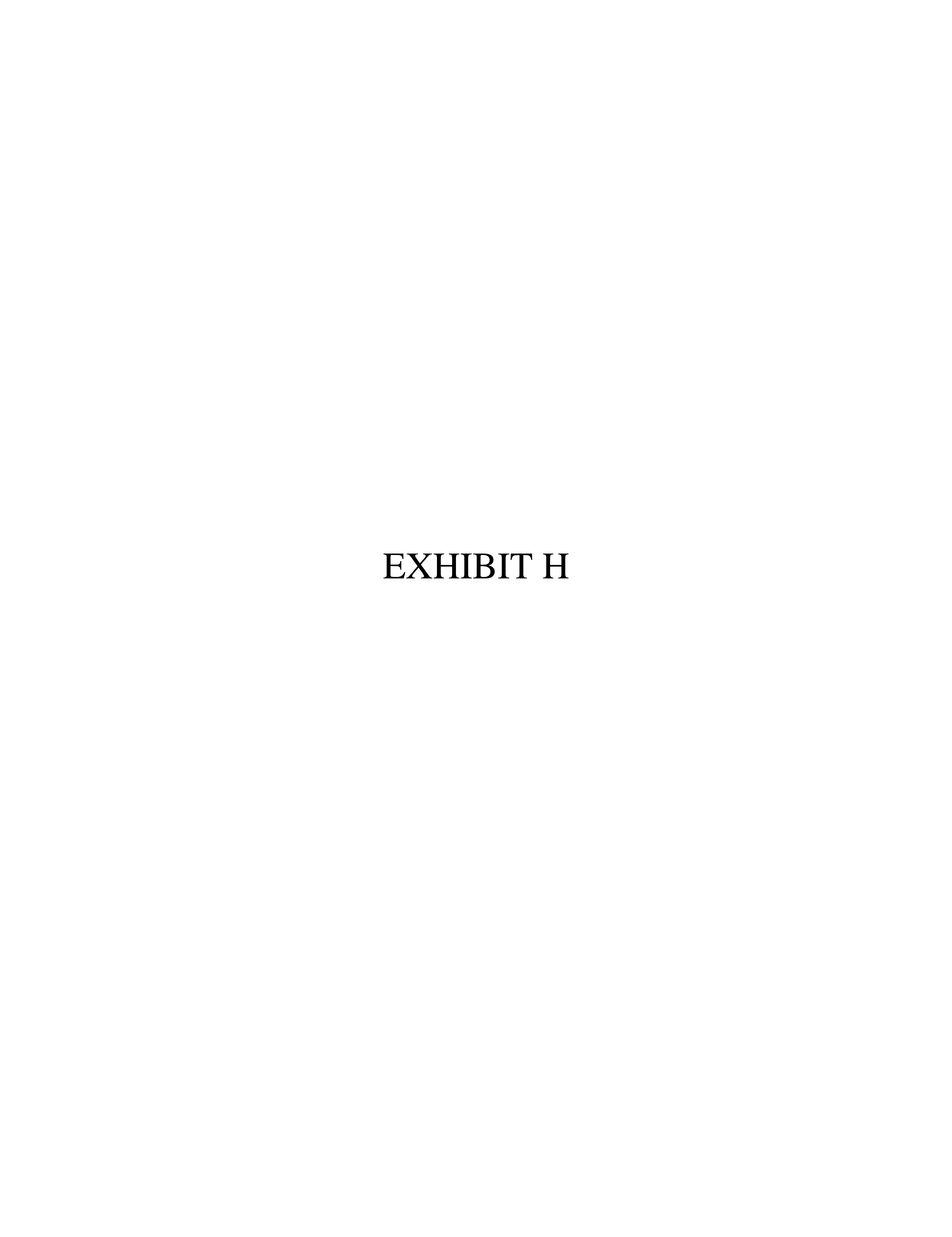


EXHIBIT H

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO DISMISS

In this action, plaintiffs seek to determine their access rights in the portion of Aquinnah, Dukes County, sometimes referred to as the "Zack's Cliffs" region. The question of access arises from the

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[1]Of Bear Realty Trust and of Bear II Realty Trust.

[2]Paul D. Pettegrove, as trustee of Gorda Realty Trust; Victoria Brown; Gardner Brown, Jr; Mark Harding; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; and Eleanor Harding, as trustee of Eleanor P. Harding Trust.

[3]Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; Susan Smith and Russell Smith; John F. Kennedy, Jr., and Caroline Kennedy; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman and Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoye; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Camman; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and United States of America as trustee for the Wampanoag Tribe of Gay Head (Aquinnah).

set-off, in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. The two set-off reports made no express provision for easement or other access rights across or for the benefit of the various set-off lots. Plaintiffs are the successors in title to certain of the set-off lots who claim rights of access, under various legal theories, over other of the set-off lots now owned by defendants.[4]

Following a status conference held on February 29, 2000, and pursuant to the schedule established at the conference, VCS on October 6, 2000 filed its motion for summary judgment or, alternatively, to dismiss, together with a memorandum in support of the motion. A number of defendants thereafter joined in the VCS motion, including: JoAnn Fruchtman, Jack Fruchtman, Jr., Sarah Saltonstall, Mary Elizabeth Pratt, Caroline Kennedy, South Shore Beach, Inc., David Wice, and Betsy Wice. Defendants David Wice and Betsy Wice, defendant Thomas Seeman, defendant Caroline Kennedy, and defendants Russell Smith and Susan Smith, filed separate motions to dismiss the complaint. Defendants Beverly Evans, Patrick Evans and Lawrence Evans filed a separate motion for summary judgment. On November 7, 2000, plaintiff Kitras filed a cross-motion for summary judgment, together with a memorandum in support of the cross-motion, and plaintiffs Gardner Brown and Victoria Brown filed a separate motion adopting the arguments advanced in Ms. Kitras's memorandum.

I heard argument on the cross-motions and the motions to dismiss on December 18, 2000. At

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[4]A summary of the procedural history of this matter appears in orders entered on April 21, 1998, and November 30, 1999. The latter order includes reference to the dismissal of the complaint as to defendants Heidi B. Stutz; Michael W. Stutz; Kevin Craig; Cynthia Craig; Flavia Stutz; Selma Greenburg; William Greenburg; Wilma Greenburg, and (following removal to the Federal District Court and preceding the remand to this court) the United States of America. The dismissal as to the named private defendants was based on the failure of the complaint to assert a claim against the lots owned by such defendants. The dismissal as to the United States of America, entered in the Federal District Court on motion by the United States, was based on sovereign immunity.

the hearing, plaintiffs stipulated to the dismissal of the complaint as to the following defendants: Thomas Seeman; Lawrence B. Evans; Patrick J. Evans; and Beverly A. Evans.

In addition to the verified amended complaint, the summary judgment record includes (i) two affidavits of Jennifer S. D. Roberts, Esq., authenticating various documents; (ii) an affidavit of Brendan T. O'Neill, the executive director of defendant Vineyard Conservation Society, Inc. (VCS); (iii) an affidavit, with attachments, of James J. Decoulos;[5] (iv) an affidavit of Gardner Brown; (v) answers furnished by plaintiffs Victoria and Gardner Brown to interrogatories propounded by VCS; and (vi) responses and further responses furnished by plaintiffs Maria A. Kitras and Paul D. Pettegrove to interrogatories propounded by defendant VCS.[6]

The following facts are not in dispute.

1. Plaintiff Maria Kitras, as trustee of Bear Realty Trust and of Bear II Realty Trust (Kitras), holds record interests in lots 178, 711 and 713 (Kitras lots) as shown on a plan of land entitled "Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullin Civil Engineer" on file with the Dukes County registry of probate (set-off plan). As shown on the set-off plan, the Kitras lots are contiguous.

2. Plaintiff Paul D. Pettegrove, as trustee of Gorda Realty Trust (Pettegrove), owns lots 232 and 243 on the set-off plan (Pettegrove lots). Lot 232 enjoys an appurtenant easement for access

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[5]At the summary judgment hearing, I allowed VCS's motion to strike portions of the Decoulos affidavit as to paragraphs 11, 12, 14, 15, 27, 28, 29, 30, 31, 32, 33, 39, 42 and 43. I denied the motion to strike as to paragraphs 3, 4, 5, 6, 7, 8, 9, 20 and 38.

[6]The items listed in clause (vi) are in the record on the motion of defendant Vineyard Conservation Society, Inc. to supplement the summary judgment record filed on December 22, 2000, and heard and allowed on February 14, 2001.

under an agreement recorded with the Dukes County registry of deeds in book 640, page 895.[7]

3. Plaintiffs Gardner Brown and Victoria Brown (Browns) own lot 238 on the set-off plan (Brown lot). The Brown lot is contiguous to two of the Kitras lots (lots 178 and 713).

4. Plaintiffs Eleanor Harding, as trustee of Eleanor P. Harding Trust, and Mark Harding (Hardings) own lots 554 and 555 on the set-off plan (Harding lots). The Harding lots are contiguous to one of the Kitras lots (lot 711).

5. Plaintiff Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust (Gossamer Wing), owns lots 707, 710 and 302 on the set-off plan. Lot 710 is contiguous to one of the Kitras lots (lot 711); the other Gossamer Wing lots are not contiguous to any of the Kitras lots.

6. Defendants own various other lots on the set-off plan, as described in the verified complaint and as identified on the sketch plan submitted by plaintiffs and attached as appendix A.[8]

7. By St. 1862, c. 184, § 4, the General Court established the district of Gay Head. Section 5 of the same chapter directed the clerk of the district of Gay Head to make and maintain a register of the existing members of the Gay Head tribe, and to make and maintain "a register of the lands of each Plantation, as at present held, whether in common or severalty, and if in severalty, by whom held."

8. By chapter 42 of the Resolves of 1863, the General Court appointed and commissioned

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[7]I take judicial notice of the record in land court miscellaneous case numbers 248339 and 249539.

[8]Some of the lot number designations on the sketch plan do not correspond to the designations on the set-off plan. For example, there is a lot numbered 242 shown on the sketch plan as owned by "Weiner;" that lot appears on the set-off plan as part of lot 96, adjacent to lot 314 (which is omitted from the sketch plan). In addition, certain of the designated owners are not current. For example, following the commencement of this action VCS acquired set-off lot 532, shown on appendix A as owned by "Nuovo." Nonetheless, for purposes of this decision the sketch plan is sufficiently accurate to serve as a useful guide to the general layout of the area and the relationship among the several parcels involved.

the treasurer of the district of Marshpee [sic] "to examine, and fully and finally to determine, all boundary lines between the individual owners of land located in the Indian district of Gay Head, in the county of Dukes County, and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands; and he, the said commissioner, is hereby authorized to adjust, and fully and finally to settle, equitably, and as the interest of the petitioners and all other parties may require, all the matters, claims and controversies, now existing and growing out of or in connection with the boundaries of the aforesaid lands." The resolution further provided for hearing, following notice by publication, of all claims by interested parties, directed the commissioner to "make a report of his doings to the governor and council," and appropriated a sum not exceeding one hundred dollars as compensation for his services.

9. The commissioner appointed in 1863 died before completing the assigned task, and the General Court appointed a new commissioner, Richard L. Pease, in 1866. Resolves 1866, c. 67. Commissioner Pease submitted his report on the lands held in severalty to the Governor in 1871, establishing set-off lots 1 through 173. As of the time of the commissioner's 1871 report, a significant portion of the land in Gay Head appears to have remained common land.[9]

10. A short time before the commissioner's 1871 report, the General Court abolished the district of Gay Head, and in its place incorporated the town of Gay Head. St. 1870, c. 213. Section 6 of that chapter established a new procedure for the determination of property rights in the town, in apparent substitution for the procedure prescribed under the 1863 resolution. The 1870 statute authorized the "judge of probate of the county of Dukes-county [sic], upon the application of the selectmen of Gay Head, or of any ten resident owners of land therein, after such notice as the judge

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[9] A report submitted to the Senate observes that approximately nineteen hundred acres remained common lands, compared to approximately fifteen hundred acres held in severalty. See Sen. Doc. No. 14, 1869, p 4-5.

may direct to all parties interested and a hearing on the same, if he shall adjudge that it is for the interest of said parties that any or all of the common lands of said town be divided, shall appoint two discreet, disinterested persons commissioners to make partition of the same, and their award, being confirmed by said court, shall be final in the premises . . . and the said judge of probate shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and to properly describe and set forth the same in writing, and the title and boundaries thus set forth and described, being approved by the court, shall be final in the premises." Pursuant to that authority, and on the petition of certain individual claimants (but contrary to the request of the Gay Head selectmen and others) the probate court appointed Joseph L. Pease and Richard L. Pease as commissioners to carry out the partition of common lands and the determination of claims to other lands held in severalty.

11. Commissioners Joseph Pease and Robert Pease submitted their final report to the probate court, which approved the report on December 21, 1878. The commissioners' 1878 report advises that

> "[the Commissioners] have made and completed a division of the common and undivided lands of Gay Head, among all the inhabitants of that town adjudged to be entitled thereto; and have made careful and correct descriptions of the boundaries and assignment of each lot in the division; and have also examined and defined the boundaries of those lots held or claimed by individuals of which no satisfactory record evidence of ownership existed.
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> In accordance with the almost unanimous desire of the inhabitants, the Commissioners determined to leave the cranberry lands near the sea shore, and the clay in the cliffs, undivided; it being, in their judgment, impracticable to make a division that would be, and continue to be, an equitable division of these cranberry lands, and of the clays in the cliffs, owing to the changes continually being made by the action of the elements.
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> The numbers refer to a map - made under the direction of the Commissioners - accompanying this Report."[10]

[10]The set-off plan is the map which accompanied the commissioners' 1878 report.

12. The commissioners' 1878 report further explains that "[t]he lots of common lands drawn or assigned by the Commissioners . . .are numbered from no. 189 and upwards, in regular order. Lots no. 1 to no. 173, inclusive, were run out and bounded under previous provisions of the statutes. The record of these lots will be found in Land Records Book 49, pages 89 to 198, inclusive. Lots no. 174 to no. 189 were run out and bounded afterwards by the Commissioners who made partition of the Indian common lands."[11]

13. Chapter 213 of the Acts of 1870 also directed the Dukes County county commissioners to lay out and construct a road from Chilmark to the Gay Head lighthouse. The road thus established (now called State Road) is shown on the set-off plan, passing in a generally east-west direction in the area north of plaintiffs' lots. At the time of the 1871 and 1878 commissioners' reports, there were no other public roads in the vicinity of the set-off lots.

14. By 1939, an unpaved way leading from State Road to and across the Kitras lots had developed on the ground. That way, known as "Zack's Cliffs Road," is visible on aerial photographs taken in 1939 and during the 1940s, and is shown on topographic maps from that and later periods.[12] The summary judgment record does not reveal when Zack's Cliffs Road first came into use, if at any time before 1939.

15. In 1954, a new road (called Moshup Trail) was established by layout approved by the Dukes County county commissioners and recorded with the Dukes County registry of deeds in book

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[11]The record does not include the portion of the report assigning lot 189, which is described in the quoted excerpt within both the lots resulting from the partition of common lands and the lots described on claims of ownership in severalty. It is immaterial for purposes of this decision which category applies to lot 189.

[12]A portion of the unpaved way, running in an east-west direction, appears to be known as "Old South Road," and provides the connection to State Road. Zack's Cliffs Road extends southerly from Old South Road, at a point west of the intersection between Old South Road and State Road.

227, page 564.[13] From its intersection with State Road east of plaintiffs' lots, Moshup Trail branches to the south and passes in a generally east-west direction in the area south of plaintiffs' lots.

16. By easement dated April 29, 1987, and recorded in book 472, page 317 (Gossamer Wing easement), Moshup Trail Limited Partnership acquired from Gossamer Wing for the benefit of lots 711 and 178 (as well as other lots not currently owned by any plaintiff) an express easement over lots 320 and 323 then owned by Gossamer Wing. A sketch plan attached to the Gossamer Wing easement shows a way, described to be forty feet wide, extending from lot 86 to State Road, and traversing lots 324, 325, 320, 179, 319, 300, 309 and 316. By contemporaneous easement recorded in book 472, page 319 (Moshup Trail easement), Gossamer Wing acquired from Moshup Trail Limited Partnership for the benefit of lots 302, 707 and 710 (as well as other lots not currently owned by any plaintiff) an express easement over lots 68, 71, 72, 73, 78, 79, 80, 85, 86, 87, 178, 179, 231, 246, 254, 294, 299, 300, 301, 309, 316, 319, 322, 324, 325, 334, 335, 351, 514, 52, 525, 700, 703, 705, and 711 then owned by Moshup Trail Limited Partnership. The Moshup Trail easement refers to an attached sketch plan, but the copy of the instrument in the record does not include such a plan. Following execution of the Gossamer Wing easement, Gossamer Wing acquired additional set-off lots. By first amendment to easement dated February 1, 1988, and recorded in book 493, page 293, the parties agreed that the Gossamer Wing easement would burden lots 302, 322, 334, 339, 707 and 710 (in addition to lots 320 and 323).[14] Combined, however, the Gossamer Wing easement (as amended) and the Moshup Trail easement do not extend from plaintiffs' property to State Road, as other land not

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[13]All references herein to recorded instruments or plans are to this registry, unless otherwise noted.

[14]The amendment does not include or refer to a plan illustrating where the way would be located on the newly-burdened lots, and they are not shown on the sketch plan attached to the original Gossamer Wing easement.

owned by any party to either easement intervenes between State Road and the lots benefitted by the easements.[15] The Gossamer Wing easement and the Moshup Trail easement do not appear to coincide with the historic traveled way of Zack's Cliffs Road.

17. In 1989, the United States of America, using its power of eminent domain, took set-off lots 78, 79 and 87.[16] A short time earlier, the United States also acquired from Moshup Trail Limited Partnership lots 68, 71, 72, 73, 80, 86, 179, 246, 254, 294, 299, 300, 301, 309, 316, 319, 324, and 325, under a deed dated February 1, 1988 and recorded in book 493, page 222. The deed states that the lots so conveyed enjoy the benefit of certain recorded easements, including the easement described in the Gossamer Wing easement agreement. The United States holds such property as trustee for the Wampanoag Tribe of Gay Head. Zack's Cliffs Road previously passed across lot 87; the eminent domain taking had the effect of extinguishing all rights of other parties in Zack's Cliffs Road over lot 87.[17] Zack's Cliffs Road also passed across lot 319, among the lots the United States acquired by deed from Moshup Trail Limited Partnership.

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By their amended verified complaint, plaintiffs claim easement rights (i) by implication or necessity in an unspecified location (count one), (ii) by prescription over Zack's Cliffs Road (count two), (iii) by prescription over a way called the "radio tower road" (count three), and (iv) by virtue of the alleged status of Zack's Cliffs Road as a public way by prescription (count iv). However, in response to interrogatories propounded by VCS, plaintiffs Kitras, Pettegrove and the Browns stated

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[15]As shown on appendix A, the intervening land appears to include set-off lots 88 and 244, and an unnumbered tract described on the sketch plan as owned by "Tacknash R. T."

[16]According to the declaration of taking, Moshup Trail Limited Partnership held an interest in each of the lots taken by eminent domain.

[17]Plaintiffs acknowledge this result in paragraph 29 of the amended verified complaint.

as to each of counts two, three and four that they "at the present time waive their claim, without prejudice." Accordingly, counts two, three and four of the amended verified complaint are dismissed as to plaintiffs Kitras, Pettegrove and the Browns. In addition, counts two and four are dismissed as to the remaining plaintiffs as against all defendants other than those defendants owning land across which Zack's Cliffs Road passes. According to the summary judgment record, those defendants (in other words, the remaining defendants as to counts two and four) are: VCS; George Brush, as trustee of Toad Rock Realty Trust; heirs of Esther Howwasswee; Moshup Trail II Limited Partnership; and Julie B. Hoyle. Similarly, count three of the complaint is dismissed as to all defendants other than those defendants owning land across which the radio tower road passes. According to the summary judgment record, those defendants (in other words, the remaining defendants as to count three) are: VCS; the Town of Aquinnah; and John F. Kennedy, Jr. and Caroline Kennedy.[18]

The parties' cross-motions principally address plaintiffs' claim of an easement by implication or necessity, arising from the severance of plaintiffs' respective lots from access to any public way as a result of the 1871 and 1878 set-offs.

The land subject to this action falls into three categories. The first category is the land held in severalty and determined according to the commissioner's 1871 report (in other words, lots 1-173). The record is unclear regarding the status of title to those lots prior to the commissioner's 1871 report, but at least as of the submission of the commissioner's 1871 report, set-off lots 1-173 were owned by the owners determined by the commissioner's 1871 report, and enjoyed such rights in the remaining common lands as may have appertained to tribal members. The second category is the land held in

[18]The response of defendant Caroline Kennedy to the cross-motions for summary judgment advises that defendant John F. Kennedy, Jr. is deceased, but that no motion has yet sought to substitute the executor of his estate.

severalty and determined according to the commissioners' 1878 report (in other words, lots 174-189).[19] The third category is the common land partitioned in favor of separate owners pursuant to the commissioners' 1878 report.[20]

On the summary judgment record, State Road was the only public way providing access to the set-off lots at the time of the commissioners' 1871 and 1878 reports. The commissioner's 1871 report did not sever the set-off lots from access to the public way, since the owners of such lots held rights in the common lands. By partitioning the common lands and assigning the resulting set-off lots to individual owners, the commissioners' 1878 report severed from the public way (i) each of the set-off lots (nos. 1-173) determined under the commissioner's 1871 report which did not have frontage on the public way, and (ii) each of the set-off lots (nos. 174 and higher) determined in severalty or partitioned and assigned under the commissioners' 1878 report which did not have frontage on the public highway. Plaintiffs' lots fall into the latter group.

"It 'is familiar law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a

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[19]VCS's memorandum suggests that lots 174-189 somehow came into separate ownership between the 1871 and 1878 reports. A more likely interpretation of the historical records is that the commissioner appointed under the 1866 resolution concluded his report upon the status of his efforts as of the adoption of St. 1870, § 213, before determining all claims of owners holding land in severalty, and that the commissioners' 1878 report completed the determination of such claims under the supervision of the probate court.

[20]A fourth category, not implicated in this action, is the land reserved as common land in the commissioners' 1878 report.

portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way.'" Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New England Railroad v. Railroad Commissioners, 162 Mass. 81, 83 (1894). See generally Restatement Third, Property (Servitudes) § 2.15.

"Easements by implication generally are created when land under single ownership is severed and the easement is reasonably necessary for the enjoyment of one of the parcels." Silverlieb v. Hebshie, 33 Mass. App. Ct. 911, 912 (1992). The severance of common ownership need not occur by means of a deed of conveyance; a severance occurring by partition will, under appropriate circumstances, give rise to an easement by implication. Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 106 (1933); Viall v. Carpenter, 14 Gray 126, 127 (1859). As the parties claiming an easement by implication, plaintiffs bear the burden of proving its existence. Boudreau v. Coleman, 29 Mass. App. Ct. 621, 633 (1990).

"The origin of an implied easement 'whether by grant or by reservation . . . must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.'" Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940). "What is required, however, is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance." Flax v. Smith, 20 Mass. App. Ct. 149, 153 (1985). "There are cases where a single circumstance may be so compelling as to require the finding of an intent to create an easement. For example, if, after a conveyance of some of his land, an owner is left with a parcel entirely surrounded by the land conveyed, the sole fact that he has no access to the land retained without crossing the land conveyed may be sufficient basis for the implication of

an easement . . ." Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. at 104. However, "[i]t is not the necessity which creates the right of way, but the fair construction of the act of the parties." Nichols v. Luce, 24 Pick. 102, 104 (1834).

The presumption noted in Davis v. Sikes (that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it) finds its root in the principle that a grant of land is presumed to include everything reasonably necessary for its use and enjoyment. See Gayetty v. Bethune, 14 Mass. 49, 56 (1817). See also Restatement Third, Property (Servitudes) § 2.15. The presumption "is, however, a pure presumption raised by the law . . . Such a presumption ought to be and is construed with strictness." Orpin v. Morrison, 230 Mass. 529, 533 (1918). Accordingly, the presumption may be overcome by evidence that the parties did not intend to provide a way of access. Id. at 533-534.

An easement often may be implied over a way already in existence and use when a parcel is severed from common ownership. See Dale v. Bedal, 305 Mass. 102, 104 (1940), and cases cited. However, it is not necessary for a way to be in existence and use at the time of such severance where the severance creates an absolute physical necessity. See, e.g., Nichols v. Luce, supra; Viall v. Carpenter, supra. Cf. Davis v. Sikes, 254 Mass. at 546.

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).[21]

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[21] I note that plaintiffs have stipulated that they will not present any testimony on their claims beyond the summary judgment record.

The fact that the commissioners' 1878 report severed plaintiffs' lots from access to the only public way then in existence creates a presumption that the partition intended that each owner of a set-off lot would hold a way by necessity for access to their lot from the public way. Though, as noted, the presumption may be overcome by evidence of an intent to create a parcel without access, no such evidence appears in the present case.[22] For the reasons discussed below, however, I do not reach the question whether a way arose by necessity on the commissioners' 1878 report, but I assume for purposes of the following discussion that a way by necessity did so arise.[23]

A right of way not defined in the instrument creating it may be located by implication, in the location of a way in use at the time the easement was created. See, e.g., Dunham v. Dodge, 235 Mass. 367, 371 (1920). Alternatively, an undefined easement may be located by express agreement of the parties. Cheever v. Graves, 32 Mass. App. Ct. 601, 605 (1992). "The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed." Davis v. Sikes, 254 Mass. 540, 546 (1926) (citations omitted). "After the location of an undefined way has been fixed, it cannot be changed except by agreement." Id. An easement created by necessity ceases when the necessity ceases. Viall v.

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[22]VCS's argument regarding tribal customs of common use is interesting, but it does not support a conclusion that either the commissioners or the several set-off lot owners intended that there would be no access to the set-off lots. In so stating, I am not shifting from plaintiffs the burden of proof on the existence of a way by necessity; instead, I am applying in support of that burden the presumption that severance of land from a way implies an intention that the land should have a means of access to the way.

[23]Even if an easement arose by necessity in 1878, however, such an easement does not include (as requested in plaintiffs' prayer for relief) the right to install utilities in the way. See Nylander v. Potter, 423 Mass. 158, 160 n.6 (1996); Nantucket Conservation Found., Inc. v. Russell Management, Inc., 2 Mass. App. Ct. (1974). See also Cumbie v. Goldsmith, 387 Mass. 409, 411-412 n.8 (1982).

Carpenter, 14 Gray at 127.[24]

As the only public way in the area in 1878 was State Road, located to the north of plaintiffs' lots, any way that arose by necessity on the commissioners' 1878 report must extend northerly from plaintiffs' lots to State Road. The record does not indicate the existence of any way in use on the ground at the time of the commissioners' 1878 report, and the present record is insufficient to establish conclusively the location of a way by necessity. The record does establish that Zack's Cliffs Road eventually came into use and served as the principal means of access from plaintiffs' lots to State Road.[25] That use suggests that the landowners in the area may have adopted Zack's Cliffs Road as the means of access to State Road, or at least from plaintiffs' lots to State Road.[26] However, Zack's Cliffs Road traverses, among other land, lots 87 and 88. Because set-off lots 87 and 88 were among the lots determined in severalty under the commissioner's 1871 report, they were not part of the common lands at the time the commissioners' 1878 report severed plaintiffs' lots from their access to State Road. Accordingly, a way by necessity arising from the commissioners' 1878 report cannot be imposed on lot 87 or lot 88.[27] In other words, to the extent Zack's Cliffs Road might serve to locate a way by

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[24]Accordingly, Pettegrove's claim of a way by necessity for the benefit of lot 232 fails, by reason of the express easement benefitting that lot.

[25]Paragraph 43 of plaintiffs' amended verified complaint asserts that, prior to the opening of the Moshup Trail, Zack's Cliffs Road and the other connecting ways were the sole means of access to plaintiffs' lots. That assertion is supported by the various aerial photographs and maps submitted in the record.

[26]Plaintiffs' complaint asserts that other ways, connecting to Zack's Cliffs Road, served other lots. However, the existence of such other ways does not affect plaintiffs' claim, as Zack's Cliffs Road runs directly through the Kitras lots.

[27]Because the parties have not addressed the question of plaintiffs' prescriptive use of Zack's Cliffs Road, I do not consider on the present record whether the use of Zack's Cliffs Road over the years gave rise to prescriptive rights in that way, or whether such prescriptive rights would serve to supercede an inchoate way by necessity in another location. Similarly, the record is not sufficient to allow me to determine whether the Moshup Trail easement and the Gossamer Wing easement served

necessity resulting from the partition under the commissioners' 1878 report, it may do so only over the lots it traverses which were partitioned into separate ownership under the commissioners' 1878 report, and not over the lots determined in severalty under the commissioner's 1871 report.[28]

Despite the difficulty of determining on the present record the definitive location of an easement by necessity for the benefit of plaintiffs' lots, any claim of an easement by necessity for the benefit of plaintiffs' lots necessarily implicates the lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head which came out of the partition under the commissioners' 1878 report. Defendants accordingly argue that the United States is an indispensable party to this action, and that the complaint must be dismissed because the United States cannot be joined.

Mass. R. Civ. P. 19(a) provides:

> "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

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to relocate, by agreement, any way by necessity as it extends across the lots affected by those easements. A third possibility, not addressed by the parties (but suggested in the present record), is that Moshup Trail Limited Partnership (Kitras's predecessor in title) formerly held the Kitras lots in common with the lots currently owned by the United States. Such ownership could have merged any easement benefitting the Kitras lots with the fee in the lots currently held by the United States, and would suggest examination of plaintiffs' claim of an easement by necessity in the context of the 1988 conveyance by Moshup Trail Limited Partnership to the United States.

[28]Defendants argue that the 1989 eminent domain taking (which extinguished all rights in Zack's Cliffs Road as it passed through lot 87) terminated any easement by necessity plaintiffs may have acquired by virtue of the commissioners' 1878 report. A taking by eminent domain that deprives a parcel of its sole means of access does not give rise to an easement by necessity, or a right to extend or relocate the prior means of access. See Darman v. Dunderdale, 362 Mass. 633, 641 (1972); New England Continental Media, Inc. v. Milton, 32 Mass. App. Ct. 374, 378 (1992). Cf. Nylander v. Potter, 423 Mass. 158, 163 n.10 (1996). However, as any easement by necessity arising from the commissioners' 1878 report cannot traverse lot 87, the 1989 eminent domain taking cannot have extinguished plaintiffs' rights in such a way by necessity (unless the way had relocated onto lot 87 by other means).

obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant."

Mass. R. Civ. P. 19(b) addresses the possibility that an indispensable party cannot be joined:

> "If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Because plaintiffs' claim of an easement by necessity necessarily implicates the land currently held by the United States, I consider the United States to be a party necessary for a just adjudication of the present action. As noted above, the summary judgment record strongly suggests that any easement by necessity that arose as a result of the commissioners' 1878 report was located by common use across a number of the lots now held by the United States. Any determination of plaintiffs' claim without the United States as a party presents a substantial likelihood of prejudice to the remaining defendants, who face the threat that an easement by necessity might now be located over their property simply because the easement cannot be placed on land of the United States.

"When, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing other factors' set out in Rule 19(b), because immunity 'may be viewed as one of those interests compelling by themselves.'" Enterprise Management Consultants, Inc. v. United States of America, 883 F.2d 890, 894 (10th Cir. 1989), quoting Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986).

Because the present action cannot be determined in the absence of the United States without

substantial and unavoidable risk of prejudice to the remaining parties, I conclude that count one of the complaint must be dismissed pursuant to Mass. R. Civ. P. 19(b). In dismissing plaintiffs' claim, I am aware that the dismissal likely precludes plaintiffs' opportunity to prosecute their claims of an easement by necessity for so long as the United States owns lots set-off by partition under the commissioners' 1878 report. In mitigation of the apparent harshness of that result, I note that (i) plaintiffs (and their predecessors in title) waited to present their claims for more than one hundred years after the commissioners' 1878 report and before the United States acquired the land it now holds (and for nine more years after the United States acquired such land); and (ii) the situation producing this dismissal (ownership of set-off lots by a party immune from suit) is a result of the 1988 conveyance to the United States by Kitras's immediate predecessor in title, without reservation of any right of access for its remaining land.[29]

Defendants' motions to dismiss are allowed, and plaintiffs' cross-motions for summary judgment are denied. Count one of the complaint is dismissed. The prescriptive claims of certain plaintiffs over the land of certain defendants remain for determination in such further proceedings as may be appropriate.[30]

Mark V. Green
Justice

Dated: June 4, 2001

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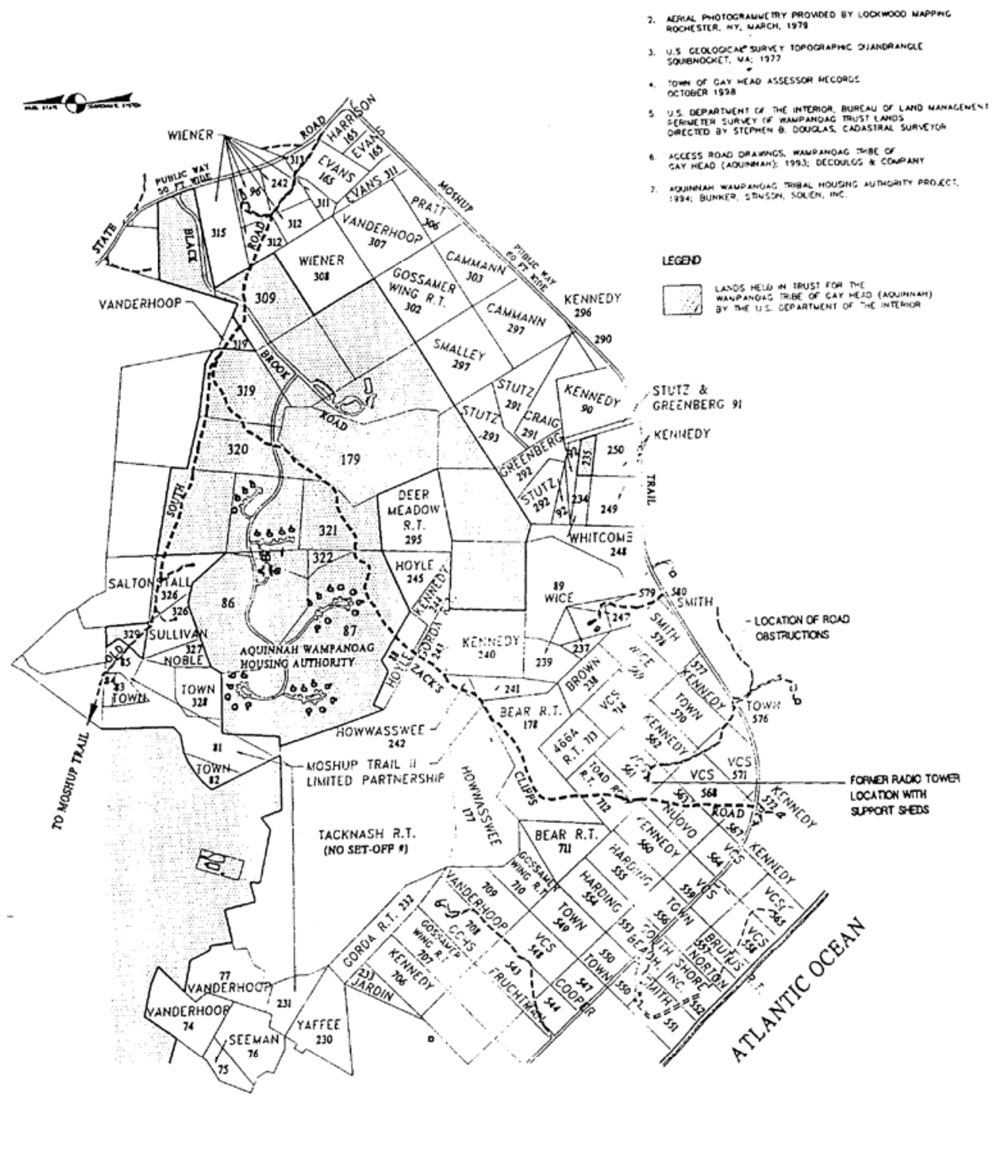
[29]I do not consider whether plaintiffs have any action in damages by reason of the United States' refusal to waive sovereign immunity.

[30]See the discussion on page 10, above.



MOSHUP TRAIL TO STATE ROAD ALONG ZACK'S CLIFFS ROAD
SET-OFF LOT DELINEATIONS
AQUINNAH, MASSACHUSETTS

DATE 10/14/98
SCALE 1" = 1000'
PLAN NO. 1

APPENDIX A

EXHIBIT I

right is enforced, wherever the stockholder has placed the assets. The reason given may be that the one corporation has been left a mere "shell," or is a "dummy," or has been "literally swallowed whole." But the fact is that the legal entity fiction will be disregarded when necessary to enforce the stockholder's duty according to his true contract. However to go farther and disregard the corporate entity seemingly at will would be an unjustifiable blow at the basis of corporation law. It is submitted that it would tend toward accuracy of thought and justice to recognize more frankly the exact relations of the parties.

EVIDENCE OF INTENTION AS REBUTTING WAYS OF NECESSITY

Can the presumption of a grant, or of a reservation, of an easement of necessity be rebutted by proof of an oral agreement of the parties to the contrary? In giving effect to a written instrument, even where a writing is required by law, oral conversations are admissible to "rebut an equity."[1] This old and very ambiguous doctrine, though sometimes construed to relate merely to constructive or resulting trusts,[2] has nevertheless been extended to a rather miscellaneous group of legal presumptions.[3] Clearly, however, not all legal presumptions may be overriden by this kind of evidence.[4] Upon what principles are conclusions arising out of the application of legal presumptions to written instruments admitted to or excluded from the protection of the "parol evidence" rule?

In the case of *Orpin v. Morrison*,[5] a deed was delivered embracing land so situated as to give rise, under ordinary circumstances, to a way of necessity across the land of the grantor. In litigation involving the existence of this "right of way," the alleged servient owner introduced without objection evidence of an oral understanding that no such easement should be granted. Subsequently the court was requested to rule that this evidence could not be considered. It was held that the evidence, once admitted, was relevant to prove the actual intentions of the parties as a means of rebutting the presumption.

It seems clear, notwithstanding a contrary intimation in the opinion,[6] that we have here no middle ground between the absolute irrelevancy and the absolute admissibility of the evidence in question and that the latter, if objectionable at all, could not possibly be cured by the failure to object to its introduction. We need not enter into the by no means

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[1] 1 Jarman, *Wills* (6th ed. Sweet, 1910) 497; Thayer, *Preliminary Treatise on Evidence* (1898) 437-441; 4 Wigmore, *Evidence* (1904) sec. 2475; *Langham v. Sanford* (1811, Eng. Ch.) 17 Ves. 435.

[2] *Hughes v. Wilkinson* (1860) 35 Ala. 453, 463.

[3] Thayer, *op. cit.*, 437 ff.

[4] *Hall v. Hill* (1841, Ir.) 1 Dr. & War. 94.

[5] (1918) 230 Mass. 529, 120 N. E. 183.

[6] *Ibid.*, 532.

settled controversy whether there exists a technical rule of evidence applicable to oral conversations when offered for strictly interpretative purposes.[7] However this may be, the rule which prohibits the use of such evidence to contradict or supplement a writing is generally recognized as one of substantive law.[8] In the present case, where the question was merely one of rebutting a legal presumption, the problem was manifestly one of contradiction and not of interpretation. The sole inquiry is, therefore, whether the legal conclusion thus contradicted was or was not within the protection of the parol evidence rule. If so, the conversation offered in contradiction was as irrelevant as if in direct conflict with the specific language of the instrument. If not, the conversation was not merely relevant, but perfectly good evidence within a well-established rule.[9]

How should the issue of relevancy thus raised be decided? If it was correctly resolved in favor of the proof of the oral conversations, this must be, as recognized in the principal case,[10] by virtue of the actual state of mind common to the parties as disclosed by the evidence, and not by reason of the oral agreement as an objectively operative fact. Under the statute of frauds[11] the latter could not operate independently of the deed to create or prevent the creation of an easement. Could it be said that the deed was executed with reference to the oral agreement, just as it must be presumed to have been executed with reference to the physical situation and condition of the property? To assert this would be virtually to incorporate the oral agreement bodily into the deed in a manner which bears not the slightest resemblance to an interpretation of the document. To prevent such a proceeding is the very purpose of the parol evidence rule.[12]

We are left then with the question as to the relevancy of the subjective state of mind of the parties as a fact overriding the legal presumption of a way of necessity. Is this a contradiction of the "instrument" which is protected against contradiction by the parol evidence rule?

Clearly the "instrument" within the meaning of this rule is much more than the mere succession of written words on the face of the document. No one would contend, for example, that the principles of syntax and the fixed canons of verbal usage are not within the protection of the rule to the same extent as the words themselves. Furthermore it is well settled that genuine, as distinguished from artificial, rules of construction applicable to particular parts of the

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[7] See Thayer, *op. cit.*, ch. x; 4 Wigmore, *op. cit.*, sec. 2471; Holmes, *The Theory of Legal Interpretation* (1899) 12 Harv. L. Rev. 417.

[8] Thayer, *op. cit.*, 391-392; *Mears v. Smith* (1908) 199 Mass. 322, 85 N. E. 165; *Moody v. McCown* (1865) 39 Ala. 586.

[9] See note 1, *supra*.

[10] *Orpin v. Morrison, supra*, 532.

[11] Mass. Rev. Laws, 1902, ch. 127, sec. 3.

[12] See *Doe v. Hubbard* (1850) 15 Q. B. 227, 243.

writing are essential elements of the instrument within the meaning of the rule.[18] This is undoubtedly equally true of many rules of presumption for ascertaining the interrelation of different provisions of the document, or the relative efficacy of different elements in the text in overriding apparent contradictions. Thus it is incredible that the presumption that monuments control distances in the specification of a boundary could be rebutted by proof of an oral understanding to the contrary, or that in the case of a bilateral contract embodied in a writing complete on its face, the condition implied in law of contemporaneous performance or readiness to perform could be excluded by proof of an oral agreement that the reciprocal promises should be strictly independent.

In fact the parol evidence rule would be devoid of meaning unless it were held to debar an interference, by direct proof of actual intention, with the legal consequences arising from the language of the instrument by a genuine process of interpretation. All these legal consequences, however, ensue only by the extrinsic operation of law, having for its purpose the giving effect to the instrument as a complete and exclusive expression of intention. These legal effects are not, and can not be, set forth with completeness in the text of the document. The law is as truly construing the instrument as such, when it finds an expression of intention in the general scheme of the document as when it finds such an expression incorporated in an express provision.

In the case of a way of necessity, however, the legal presumption is founded, not directly upon the express language or the structure of the document, but upon the immediate physical consequences of the grant which may or may not be ascertained without resort to extrinsic proof. It may be suggested that we have in such a case no longer a process of interpretation or construction, and that consequently a presumption thus founded is in no sense a part of the instrument within the protection of the parol evidence rule. But words in instruments of grant are always used with a view to producing physical effects through the changes in the legal relationship involved. How, then, can the value of these words be appraised as an expression of probable intention unless we look to the direct physical consequences thus produced, within the range of the probable contemplation of the parties? To examine the situation outside the deed to ascertain the change which the deed has effected is not to discard the instrument but to seek a more complete rational understanding of it as something dynamically operative rather than a mere series of formal expressions. If, therefore, such an examination discloses as a direct consequence of the grant a parcel deprived of direct access, and if the law finds in this situation a rational basis for an inference of intention sufficiently cogent to give rise to a presumption of a way of necessity, is not this

[18] *Hall v. Hill, supra;* 2 Taylor, *Evidence* (9th ed. 1897) sec. 1231.

legal conclusion well within the range of a genuinely interpretative process of inference, which starts with the language of the document and which adheres throughout to the purpose of appraising this language as an expression of probable intention?[14]

The presumption of a way of necessity is founded upon the elementary principle that the grant of a thing carries with it whatever is reasonably necessary to its enjoyment.[15] It has therefore vastly greater genuinely probative force than those legal conclusions which are admittedly subject, under the authorities, to rebuttal by direct evidences of actual intention. Thus conclusions based upon technically equitable considerations are thus rebuttable,[16] but these by their very nature exclude the element of probable intention. The implied warranty of title in the law of sales has been held to be within the same rule,[17] but this is by the better opinion, deemed to proceed upon an essentially quasi-contractual disregard of probable intention. So too statutory presumptions, such as that of the inadvertence of the omission of a lineal descendant from a will, are within the rule,[18] but these manifestly ride rough-shod over truly interpretative considerations. There remains the "artificial" class of presumptions, such as courts of equity have sometimes adopted, often borrowing them from the civil law, as makeshifts for the solution of difficulties created by the absence of genuine probative data.[19] Whether a repeated testamentary gift was intended to be cumulative or substitutional,[20] whether an executor

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[14] "The deed of the grantor as much creates the way of necessity as it does the way by grant; the only difference between the two is that one is granted in express words, and the other only by implication." *Nichols v. Luce* (1834, Mass.) 24 Pick. 102, 104.

[15] *Schmidt v. Quinn* (1884) 136 Mass. 575 ("a right of way is presumed to be granted; otherwise the grant would be practically useless."); *Doten v. Bartlett* (1910) 107 Me. 351, 78 Atl. 456 ("it is not to be presumed that the parties intended the grantee to have no beneficial enjoyment of the estate."); *Higbee Fishing Club v. Atlantic City Electric Co.* (1911) 78 N. J. Eq. 434, 79 Atl. 326 ("In such a case the right of way is a necessary incident to the grant, for without it the grant would be useless; the grant is necessarily for the beneficial use of the grantee and the way is necessary to the use."); *Collins v. Prentice* (1842) 15 Conn. 39.

[16] *Mann v. Executors* (1814, N. Y.) 1 Johns. Ch. 231; *Faylor v. Faylor* (1902) 136 Calif. 92, 68 Pac. 482 (resulting trust); *Thurston v. Arnold* (1876) 43 Iowa, 43 (equitable rule that time is not of the essence of the contract).

[17] *Miller v. Van Tassel* (1864) 24 Calif. 458.

[18] *In re Atwood's Estate* (1896) 14 Utah, 1, 45 Pac. 1036; *Buckley v. Gerard* (1877) 123 Mass. 8.

[19] "The anomalous case of what are called 'presumptions' of law are, in reality, rules of construction derived from the civil law, which, having obtained a lodgment in English law, but being disapproved of, have been allowed to retain their own antidote in the shape of the capability of being rebutted by parol evidence, which (in common, however, with other rules of construction) they possessed in the system from which they were originally derived." Hawkins, *Wills* (2d Am. ed. 1885) ix.

[20] *Trimmer v. Bayne* (1802, Eng. Ch.) 7 Ves. 508.

given a specific legacy was thereby intended to be excluded from the residue,[21] whether a bequest by a debtor to his creditor was intended as a payment of the debt,[22]—these are all questions upon which the intrinsic bases for inference of intention are meagre and nicely balanced.[23] The presumptions applied to their solution being artificial and exotic, it is not surprising that, at a time when the parol evidence rule was still in a rudimentary stage, rebuttal by direct proof of subjective intention was admitted.

It must be conceded, under the authorities, that evidence of the prospective use of the granted premises is admissible to show whether, in view of such prospective use, an existing mode of access is sufficient to prevent the operation of the presumption.[24] This, however, is suggestive of the usual case of bringing the subjective intention to the relief of an intrinsically ambiguous situation, rather than a use of the evidence in the rebuttal of the legal presumption.

In the law of conveyancing, in which the statute of frauds and the parol evidence rule coöperate to produce a system of transfers in permanent and accessible form, and in which the systems of recording render the results of an examination of the record both indispensable and decisive in important real estate transactions, it is of especial importance that legal principles should be applicable to matters of record with a minimum of resort to transient and untrustworthy evidences of subjective intention. The relaxation of the parol evidence rule in the principal case, though supported by some authority,[25] is believed to be contrary both to immediate practical considerations and to sound principle.

INJURY BY VOLUNTARY ACT OF COËMPLOYEE UNDER WORKMEN'S COMPENSATION ACTS

The decision of the Connecticut Supreme Court of Errors in the case of *Marchiatello v. Lynch Realty Company* (1919, Conn.) 108 Atl. 799,

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[21] *Ulrich v. Litchfield* (1742, Eng. Ch.) 2 Atk. 372.

[22] *Wallace v. Pomfret* (1805, Eng. Ch.) 11 Ves. 542. But see *Hall v. Hill, supra*, 122, 123.

[23] "It (the testator's mere extrinsic intention) comes in as a mere incident to the 'equity,' as a ground of relief against the operation of a rule which refuses its proper construction to the document." Thayer, *op. cit.*, 439.

[24] *Feoffees v. Proprietors* (1899) 174 Mass. 572, 55 N. E. 462; *Hildreth v. Googins* (1898) 91 Me. 227, 39 Atl. 550; *Myers v. Dunn* (1881) 49 Conn. 71; *Kingsley v. Gouldsborough Co.* (1894) 86 Me. 279, 29 Atl. 1074.

[25] *Golden v. Rupard* (1904) 25 Ky. L. Rep. 2125, 80 S. W. 162, erroneously relying upon *Lebus v. Boston* (1899) 107 Ky. 98, 52 S. W. 956, in which, however, the oral agreement offered operated as an admission of the existence of access at the time of the grant. See *Jann v. Standard Cement Co.* (1913) 54 Ind. App. 221, 222, 102 N. E. 872, 874; *contra, Kruegel v. Nitschmann* (1897) 15 Tex. Civ. App. 641, 40 S. W. 68.

EXHIBIT J

DECOULOS & COMPANY
ENVIRONMENTAL ENGINEERING & LAND PLANNING

VIA FACSIMILE

Monday, December 17, 2001

Bernard McCourt, Director
MHD - District 5
1000 County Street
Taunton, MA 02780

Dear Mr. McCourt:

On behalf of a group of property owners in the Town of Aquinnah, I hereby request the original date that the Massachusetts Highway Department (or the Massachusetts Department of Public Works) laid out and took charge of the State Highway in the Town of Aquinnah (formerly known as Gay Head). The road runs from the town line of Chilmark and Aquinnah to the Gay Head cliffs and is known by the names of State Road, South Road or County Road.

Furthermore, I would like to know whether the Dukes County Commissioners ever laid out, held or maintained the road prior to the control by the Commonwealth.

I have spoken to George Ayoub of your office who suggested I make this written request.

Should you have any questions or need additional information please feel free to contact me. Thank you.

Very truly yours,

James J. Decoulos, PE, LSP
jamesj@decoulos.com

248 ANDOVER STREET, PEABODY, MASSACHUSETTS 01960
TEL: 978 532 8154 FAX: 978 359 6034
WWW.DECOULOS.COM

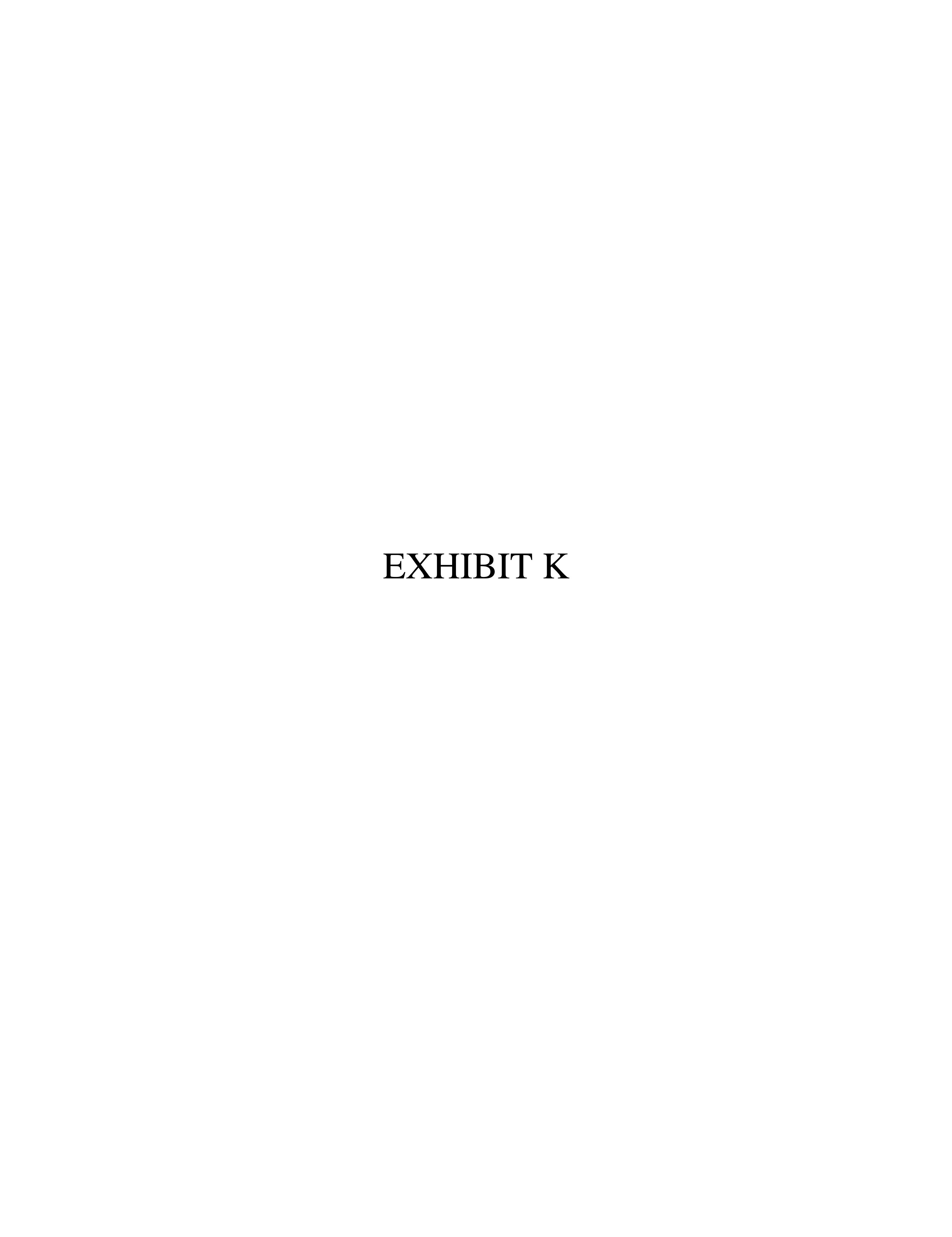


EXHIBIT K

Jane Swift
Governor

Kevin J. Sullivan
Secretary

Matthew J. Amorello
Commissioner

December 18, 2001

James J. Decoulos, PE, LSP
248 Andover Street
Peabody, MA 01960

Dear Mr. Decoulos:

Reference is made to your Fax dated December 17, 2001, regarding the original date that the Massachusetts Highway Department (MassHighway) laid out the State Highway in the Town of Aquinnah.

Please be advised that the state road in the Town of Aquinnah, has been laid out on October 1, 1913, as a State Highway by the Massachusetts Highway Department.

Any prior roadway ownership or maintenance responsibility should be researched at the Dukes County Registry of Deeds.

Thank you for bringing this matter to our attention.

Sincerely,

Bernard E. McCourt
District Highway Director

GTA/vr

Cc: BEMcC
HW
File

A TRUE COPY - ATTEST

SECRETARY, MASS. HIGHWAY COMM.
MASS. HIGHWAY DEPARTMENT
Commonwealth of Massachusetts

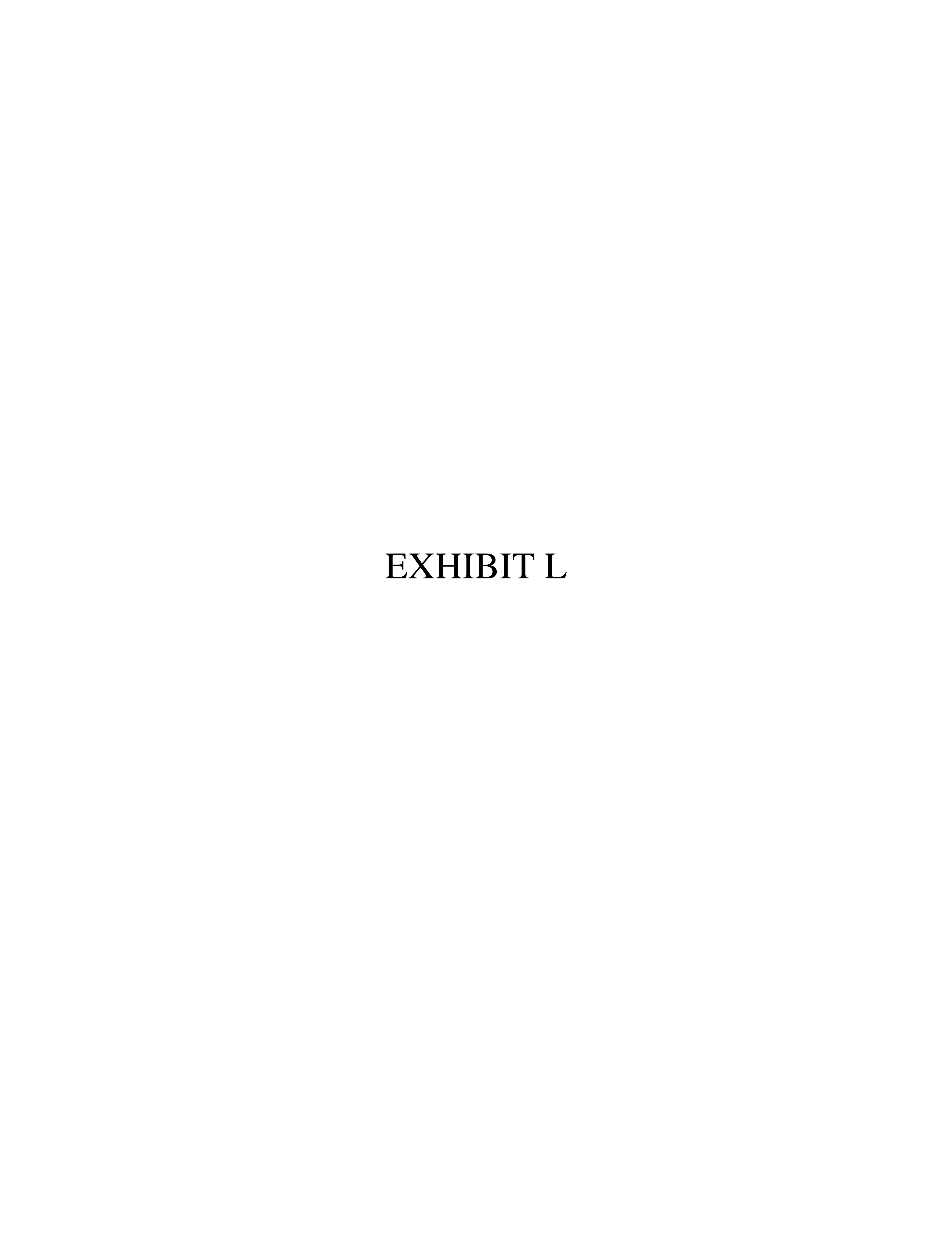


EXHIBIT L

Court of Record having by law a seal, DO HEREBY CERTIFY that Charles H. Buckley whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a NOTARY PUBLIC in and for the State of New York, duly commissioned and sworn and qualifed to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instrument for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits, and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe thatthe signature is genuine. IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 20 day of JAN 1955 Archibald R. Watson County Clerk and Clerk of the Supreme Court, New York County FEEPAID 50¢ Court Seal. Edgartown, Mass., Feb. 7, 1955 at 9 o'clock and 45 minutes A.M. received and entered with Dukes County, Deeds Book 227, Page 562.

Attest: Philip J. Norton Register.

For Plans see P.B. 12 Page 33

RECORD OF THE LAYOUT OF A HIGHWAY IN THE TOWN OF GAY HEAD IN THE COUNTY OF DUKES COUNTY, MASSACHUSETTS LAYOUT NO. 24 ____ TO THE HONORABLE THE BOARD OF COUNTY COMMISSIONERS IN AND FOR THE COUNTY OF DUKES COUNTY: Respectfully represent the undersigned, that common convenience and necessity require the layout, alteration, location or relocation of a highway or an existing highway in Gay Head, in said Dukes County, of a new highway to be known as "Moshope Trail" beginning at the southerly side of the State Highway laid out on October 1, 1913 and October 4, 1927, about opposite the road to Lobsterville, and extending thence southerly to southeasterly, easterly and northeasterly, about 3.2 miles to the southwesterly location line of said 1913 layout, about 0.5 of a mile distant northwesterly from the Chilmark-Gay Head town line.

Edmund S. Cooper
Walter W. Manning
Leonard F. Vanderhoop

COMMONWEALTH OF MASSACHUSETTS Dukes County, ss. Court of County Commissioners At a Court of the County Commissioners holden at Edgartown in and for the County of Dukes County, on the 1st day of July, 1954 on the foregoing petition ordered, that the petitioners give notice of a meeting of said County Commissioners to be held at the Court House in Edgartown, in said Dukes County, on Wednesday, the 18th day of August, 1954, at 9:30 o'clock in the forenoon, when they will proceed to view the land over which said way is prayed to be laid out, altered or relocated and considerand adjudicate upon the common convenience and necessity of laying

out, altering or relocating said way as prayed for by the petitioners, by causing an attested copy of the aforesaid petition and this order thereon to be served upon the Town Clerk of the Town of Gay Head, fifteen days at least before said 18th day of August, 1954, and also by causing like copies of said petition and this order thereon to be posted in two public places in said Town of Gay Head, and a like copy to be published in the Vineyard Gazette, a newspaper printed in said Edgartown, three weeks successively, said posting and the last of said publications to be seven days at least before the said 18th day of August, 1954, that all persons and corporations may then and there appear if they see fit.

James A. Boyle Clerk

Dukes, ss. July 26th 1954 I have this day served a true and attested copy of this petition in hand, to Frieda Madison, Town Clerk of the Town of Gay Head, and afterwardson the same day July 26, 1954, I did post, two, true and attested copies of this petition in two public places, namely on the Town Hall and School building. Fees: Service 2.00
2 postings2.00
3 copies 3.00
Travel 2.00
Use of car3.90
$ 12.90

Rodney D. Marks
Deputy Sheriff

COMMONWEALTH OF MASSACHUSETTS Dukes County, ss. Court of County Commissioners
I, HENRY BEETLE HOUGH on behalf of the Vineyard Gazette, Inc., a corporation duly organized accordingto law with a principal place of business in Edgartown, in the County of Dukes County and Commonwealth of Massachusetts, hereby certify that there was published in the Vineyard Gazette, a newspaper published in Edgartown aforesaid, by said corporation, the petition and order thereon of Walter W. Manning et al praying for the layout of a highway in Gay Head, Dukes County, Massachusetts, that said publications were made July 23, 1954, July 30, 1954 and August 6, 1954, and that there is annexed hereto a copy of said petition and order thereon as published.
(copy of notice as published annexed) Henry Beetle Hough
Dukes County, ss. Subscribed and sworn to before me- James A. Boyle Notary Public.
COMMONWEALTH OF MASSACHUSETTS Dukes County, ss. Court of County Commissioners.
A meeting of the County Commissioners was held at the Court House (Clerk's Office) Edgartown, in said Dukes County, on January 19, 1955, (by adjournment) at 9:30 A.M., Present: Hon. Antone H. Alley, Stephen C. Luce, Jr., and Kenneth T. Galley, County Commissioners, and James A. Boyle, Clerk. At this meeting the layout, alteration or relocation of a highway known as "Moshope Trail" in Gay Head, in said Dukes County, beginning at the southerly side of the State Highway laid out on October 1, 1913 and October 4, 1927, about opposite the road to Lobsterville, and extending thence southerly to southeasterly, easterly and northeasterly about 3.2 miles to the southwesterly location line of said 1913 layout, about 0.5 of a mile distant northwesterly from the Chilmark-Gay Head town line, being petition of Edmund S. Cooper, and others, was presented and the order of notice having been

duly returned and no objections noted at this meeting. Upon motion duly seconded it was voted to adopt the following layout, alteration, location or relocation of said "Moshope Trail", in said Gay Head. LAYOUT WHEREAS the County Commissioners for the County of Dukes County, have on the 19th day of January, 1955, (by adjournment) adjudged that public necessity or common convenience or necessity require that said County Commissioners and Associate Commissioners should layout, alter, locate or relocate a highway known as "Moshope Trail" in said Gay Head, as follows: beginning at the southerly side of the State Highway laid out on October 1, 1913 and October 4, 1927, about opposite the Road to Lobsterville, and extending thence southerly to southeasterly, easterly and northeasterly about 3.2 miles to the southwesterly location line of said 1913 layout, about 0.5 of a mile distant northwesterly from the Chilmark-Gay Head town line, more particularly shown upon a plan entitled "The Commonwealth of Massachusetts Plan of Road in the town of Gay Head Dukes County Laid out by the County Commissioners Scale: 40 feet to the inch Office of Mass. Dept. of Public Works-100 Nashua St., Boston June 14, '54." THEREFORE, we Antone H. Alley, Stephen C. Luce, Jr., Kenneth T. Galley, County Commissioners for the County of Dukes County, do hereby layout, alter, locate or relocate a highway in the Town of Gay Head, known as "Moshope Trail", as follows: GAY HEAD 1954 County Layout The layout establishes the location for a new highway to be known as "Moshope Trail", beginning at the southerly side of the State highway laid out on October 1, 1913 and October 4, 1927, about opposite the road to Lobsterville, and extending thence southerly to southeasterly, easterly and northeasterly, about 3.2 miles to the southwesterly location line of said 1913 layout, about 0.5 of a mile distant northwesterly from the Chilmark - Gay Head town line, being more fully described as follows:- The base line of location for this layout is that of a survey made by the engineers of the Massachusetts Department of Public Works, in February 1953, and begins at a point on the base line of location of the aforesaid 1913 State highway layout, shown on plan as station 161+76.64 and as station 0+00 for this layout, and extends thence leaving said base line and on the 1913 system of bearings south 6° 53' 50" west 1051.71 feet; thence by a curve to the left of 2400.00 feet radius 1917.77 feet to a point shown on plan as station 29+69.48 for the line back, and as 29+87.65 for the line ahead; thence south 38° 53' 10" east 2313.89 feet; thence by a curve to the right of 2000.00 feet radius 1194.97 feet; thence south 4° 39' 10" east 622.45 feet; thence by a curve to the left of 2000.00 feet radius 955.28 feet; thence south 32° 01' 10" east 2380.06 feet; thence by a curve to the left of 1000.00 feet radius 1335.71 feet; thence north 71° 27' 00" east 958.76 feet; thence by a curve to the right of 1000.00 feet radius 577.56 feet; thence south 75° 27' 30" east 394.52 feet; thence by a curve to the left of 1000.00 feet radius 802.71 feet; thence north 58° 33' 00" east 2467.10 feet to a point at the end of the layout in the location of the aforesaid 1913 layout shown on plan as station 169+90.66. The northerly location

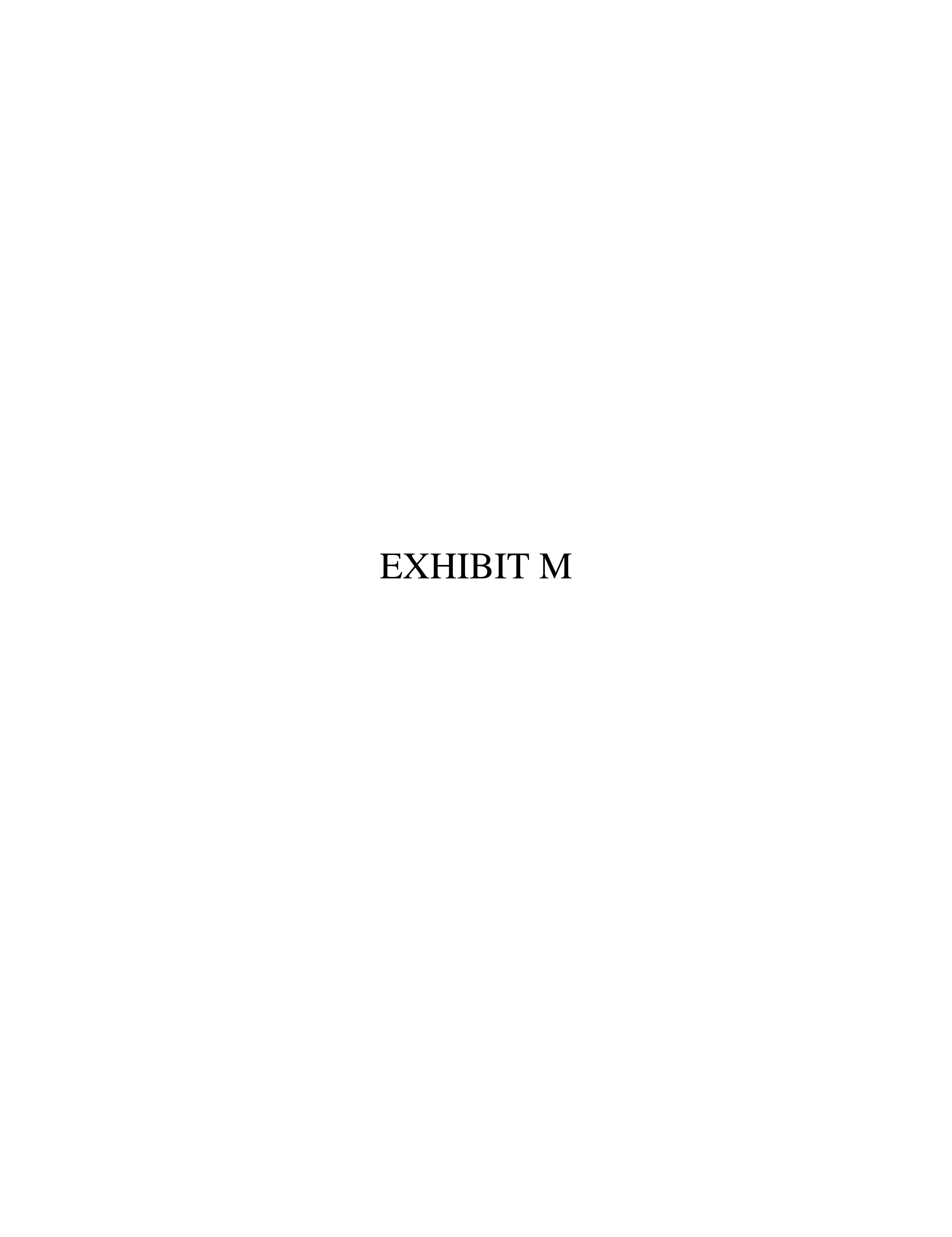


EXHIBIT M

Wakeman Conservation Center • RFD Box 319X • Vineyard Haven, MA 02568 • Tel. 508-693-5207 • Fax 508-693-0683

March 21, 1996

Mr. James Decoulos
Decoulos & Company
248 Andover Street
Peabody, Ma. 01960

Dear Jim,

Thank you for updating Jennifer, Bob and me regarding your plans for Map 12, lots 115 and 127 on Moshup Trail.

As you know, for several years the Sheriff's Meadow Foundation has been assisting the Town of Gay Head in conserving the Moshup area, most actively in the past year and a half. The emphasis has been on conserving the scenic, cultural and ecological integrity of the "bend of the road" area which has such extraordinary importance to the Town and to the Island as a whole. The events of the past three months have highlighted just how important this area is and how much time and energy and expense is involved in this effort.

You have asked us to comment on your proposal to use the road into the former communication tower, and beyond, as access to lots 115 and 127. Assuming that you are correct in your assessment that this is an "ancient way" and that you have a legal right to use it as access, we none the less feel this would not be a good alternative for several reasons:

1. The Town has just taken some extreme measures to protect these lots (99,100,101) including the acceptance of State funding. This raises all kinds of questions regarding the appropriateness and legality of the use and "improvement" of this way for subdivision access. To have it used for development access would fly in the face of the efforts to protect the area.

2. In order to get to lots 115 and 127 you would have to get DEP and Conservation Commission approval to "improve" the way over two or three additional lots which support extensive wetlands. Are these agencies likely to grant permits to alter wetlands on lands which are being proposed for acquisition?

3. You have earned a good reputation as a land planner on the Island and in Gay Head in particular, through your work for the Tribe and the Town. From a professional standpoint it seems risky to pursue an access which is bound to become a high focus issue and one which could damage your good image.

4. Finally, Sheriff's Meadow Foundation is committed to the protection of this area and will likely be called upon to take a stand in opposition to your proposed access plan. This would not be pleasant. We would rather work <u>with</u> you on the kind of level you and Bob have been engaged in thus far with the Tribe and the Town.

Our hope and advice, Jim, would be to pursue other means of access to lots 177 and 115. Again, thanks for meeting with us.

Sincerely,

Resolvert W. Williams
President

RWW:ab

recycled paper

EXHIBIT N

DECOULOS & COMPANY

ENVIRONMENTAL ENGINEERING & LAND PLANNING

Thursday, March 28, 1996

Mr. Resolvert W. Williams, President
Sheriff's Meadow Foundation
Wakeman Conservation Center
RFD Box 319X
Vineyard Haven, MA 02568

RE: Assessor's Map 12, Lots 115, 116 and 127

Dear Rez:

I am in receipt of your letter of March 21 and would like to clarify a few issues you have raised on behalf of Bear Realty Trust:

- The access over the ancient ways that was presented to you, Jennifer, Bob and Dick on March 1 is the only legal access currently available to the Trust. Any other potential access will be considered an "alternative."

- The improvement to the way we are proposing is relatively insignificant. There would be no apparent visual change from what currently exists, other than restoring the environmental damage of the way from the Warshaw construction.

- The Trust needs approval from the Conservation Commission for activities proposed within the buffer zone. DEP would interact only if an Order of Conditions is issued and appealed.

- The existing way we are proposing for access will require improvements to Parcel 111 to reach the lands controlled by the Trust. There are routes available through Parcel 111 that would not require the alteration of any wetland resource area and provide suitable access for swap lot Parcel 113.

- The Trust is strongly committed to protecting the scenic, cultural and environmental integrity of the "bend of the road" area and is willing to assist in this effort. The first step has been taken in this direction by providing photogrammetric mapping of the entire area to the conservation coalition to better assess the land.

Please feel free to contact me if you have any additional concerns or questions. Thank you.

Very truly yours,

James J. Decoulos, P.E., L.S.P.

cc: Megan Ottens-Sargent, Gay Head Planning Board
Mary Elizabeth Pratt, Gay Head Conservation Commission

248 ANDOVER STREET, PEABODY, MASSACHUSETTS 01960
TEL: 508 532 8154 FAX: 508 531 0936
WWW.TIAC.NET/USERS/DIMITRI

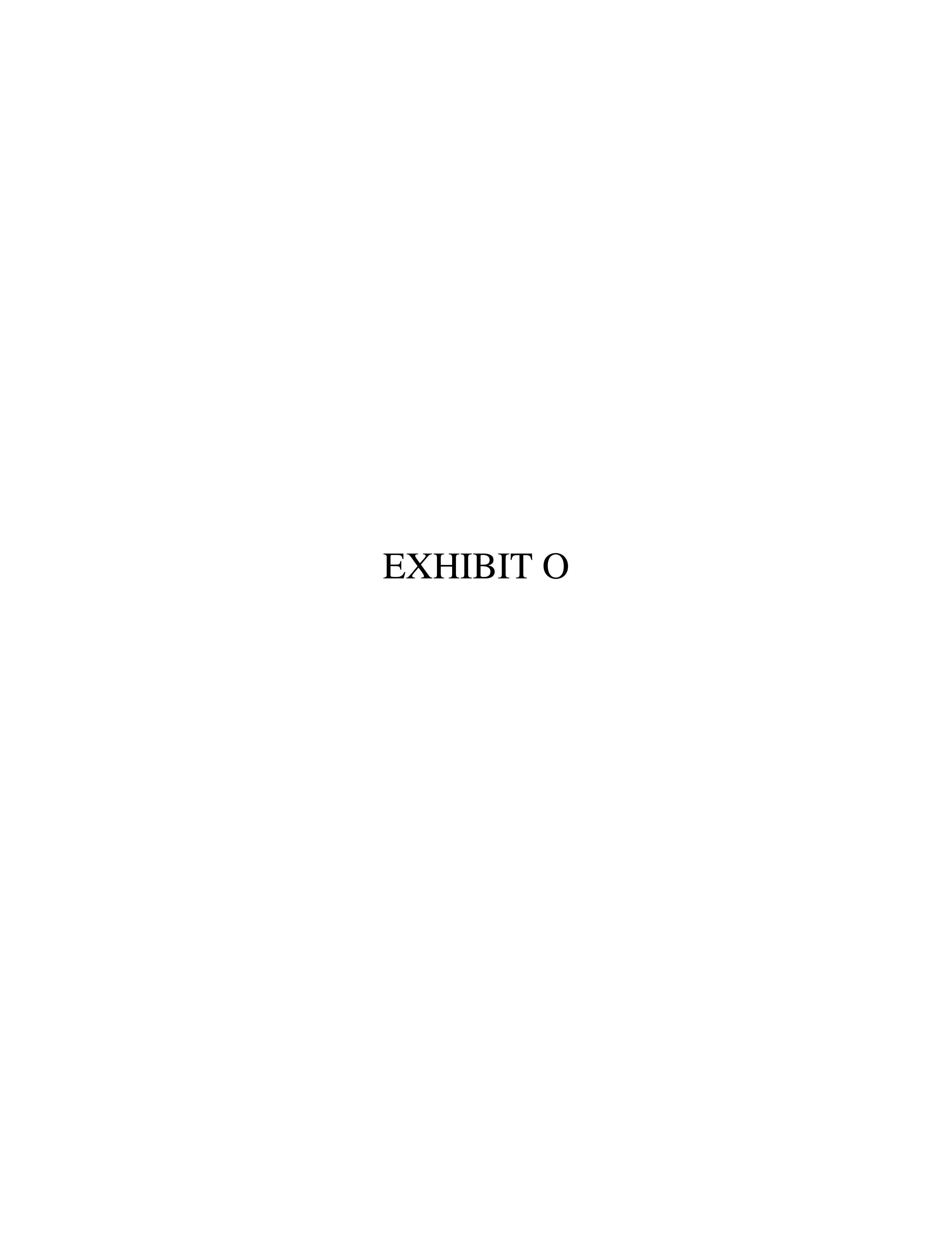


EXHIBIT O

Vineyard Conservation Society

Protecting the environment of Martha's Vineyard since 1965

P.O. Box 2189 • Vineyard Haven, MA 02568 • 508/693-9588 • Fax 508/693-0683

12 December 1996

Mr. James Decoulos
Decoulos & Company
248 Andover St.
Peabody, MA 01960

Re: Moshup Trail, Gay Head

Dear Jim:

Thank you for your 9 December phone call. I am following up to reiterate the position of the Vineyard Conservation Society (VCS) with regard to your interest in identifying an appropriate access to your Gay Head real estate holdings.

As you know, VCS is a participant in a remarkable effort involving other conservation organizations, the town, the state environmental affairs office, private foundations and scores of individual contributors to permanently preserve Gay Head's Moshup Trail heathlands. The project area represents one of the last contiguous blocks of this globally rare habitat left anywhere in the world, hosting a wealth of protected rare plant and animal species. The primary threat to this habitat comes from its fragmentation through house and road construction. Our acquisition efforts over the last year have resulted in the permanent protection of many of the areas most at risk of fragmentation, and the work continues.

We understand that you are interested in developing land near the conservation project area and are exploring the possibility of securing access through parcels 99 and 102, currently owned by VCS.

It is important to be clear that we have no desire to impinge on your rights in your land, and would be happy to cooperate in any way we can in identifying other, more appropriate access. Similarly, we trust that your own planning efforts will respect our land - this most precious neighboring natural resource area - and its limitations.

The question really seems to be, on balance, what is the best access solution? Because road construction through the heathland preserve would fragment the habitat and threaten its long-term viability, that route is not the best answer. For an area where so much time, effort and public money has been spent to maintain this last vestige of a vanishing ecosystem, it does not make good business or public policy sense to adopt an approach which would compromise gains

made to-date.

We sincerely hope we can reach agreement on this point. VCS stand ready to help in any way we can as your inquiry into the best access to your land proceeds. Please feel free to contact us if we can be of assistance.

Sincerely.

Brendan T. O'Neill
Executive Director

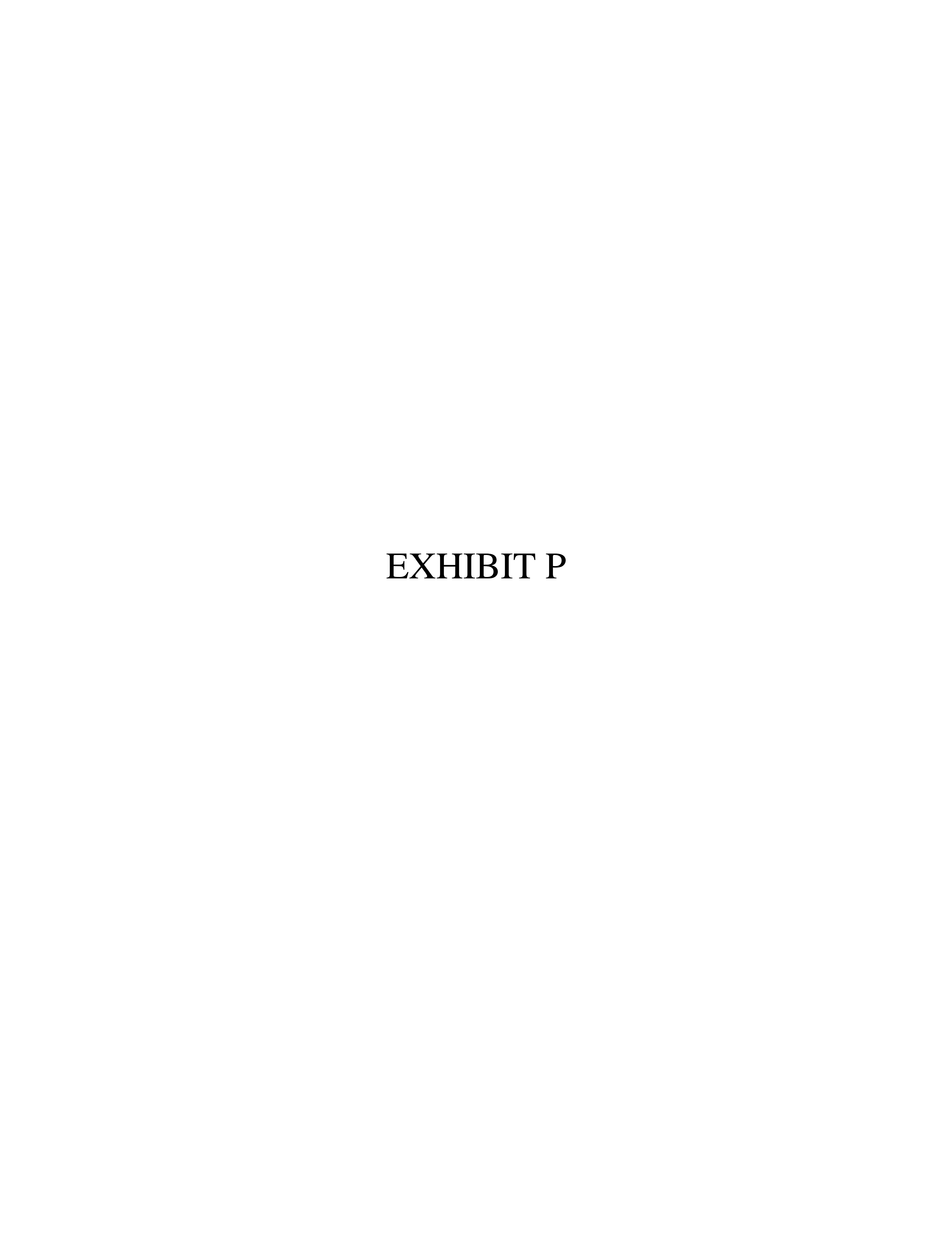


EXHIBIT P

COPY

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 97-0026

VINEYARD CONSERVATION SOCIETY, INC.,

Plaintiff,

v.

MARIA KITRAS and HAROLD ADLER, as Trustees of Bear Realty Trust,

Defendants.

COMPLAINT AND JURY DEMAND

1. Plaintiff Vineyard Conservation Society, Inc. ("VCS") is a Massachusetts charitable corporation, organized for the purpose of conserving the natural resources of the island of Martha's Vineyard, with its principal place of business off of Lambert's Cove Road, Tisbury, Massachusetts.

2. Defendant Maria A. Kitras resides in Boston, Massachusetts and is a trustee of Bear Realty Trust ("Bear Realty Trust") u/d/t dated December 9, 1994 and recorded with the Dukes County Registry of Deeds at Book 650, Page 282.

3. Defendant Harold Adler resides in Lincoln, Massachusetts and is a trustee of Bear Realty Trust.

RECEIVED
DUKES COUNTY
SUPERIOR COURT
'97 APR 1 AM 11 28

Background

The Parties' Ownership Interests in Land

4. In 1995, VCS joined with Sheriff's Meadow Foundation and local officials of the Town of Gay Head to preserve a 50 acre tract of land along Moshup Trail in Gay Head, called the Moshup Trail Project ("the Project"). The land within the Project's boundaries consists of morainal dunes and heathlands, a rare habitat of which only about 2,000 acres exist worldwide. A true and accurate copy of a plan of land showing the Project's boundaries is attached hereto as Exhibit A.

5. In the last 18 months, VCS and its partners have successfully acquired 23 acres of land within the Project area, and are continuing to pursue acquisitions.

6. On or about May 30, 1996, as part of the Project, VCS acquired title to Lots 568 and 571 ("the Conservation Property"), as shown on Exhibit A hereto, by deed dated June 3, 1996 and recorded at the Dukes County Registry of Deeds at Book 678, Page 614.

7. Bear Realty Trust acquired a partial interest in Lots 178 and 711, as shown on Exhibit A, by deed recorded at the Dukes County Registry of Deeds on February 8, 1996 at Book 669, Page 716 ("the Bear Realty Property").

8. Bear Realty Trust has no recorded right to pass over the Conservation Property to access the Bear Realty Property.

19

The Controversy

9. On information and belief, Bear Realty Trust intends to develop the Bear Realty Property, which is presently undeveloped, to provide for as many as seven house lots.

10. In various meetings and correspondence between participants in the Moshup Trail Project and a representative of Bear Realty Trust, James J. Decoulas, P.E., Bear Realty Trust has asserted a legal right to pass over the Conservation Land to access the Bear Realty Property.

11. VCS and other participants in the Moshup Trail Project have disputed that right, instead contending that Bear Realty Trust has no legal right to create access over fragile habitat acquired for conservation purposes.

12. On information and belief, Bear Realty Trust is continuing with its development plans and intends to use the Conservation Land as access to its property.

Count I

13. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

14. There is an actual controversy between the parties as to whether, and if so, where, Bear Realty Trust may pass over the Conservation Land.

WHEREFORE, plaintiff Vineyard Conservation Society, Inc. respectfully requests that this Court issue an order:

a. Entering judgment for the plaintiff on Count I and declaring that Bear Realty Trust has no right of access over Lots 568 or 571;

b. Awarding plaintiff its costs and attorney's fees; and

c. Granting such other and further relief as this Court deems equitable and just.

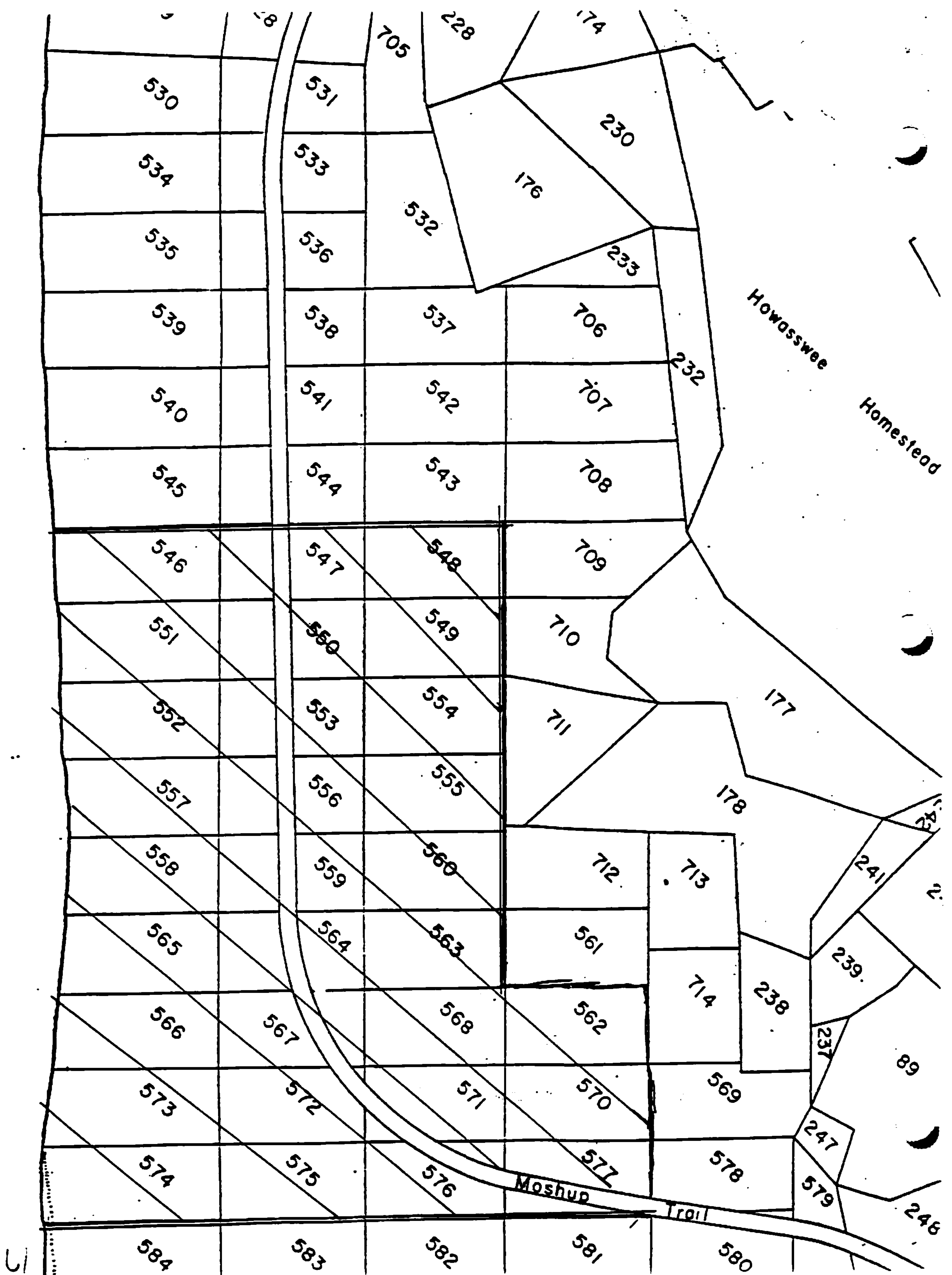
Demand for Jury Trial

Plaintiff demands a trial by jury on all claims so triable.

Jennifer S.D. Roberts
BBO No. 541715
Attorney for Plaintiff

886 Main Street
P.O. Box 1026
Osterville, Massachusetts 02655
(508) 428-5094

Dated: April 9, 1997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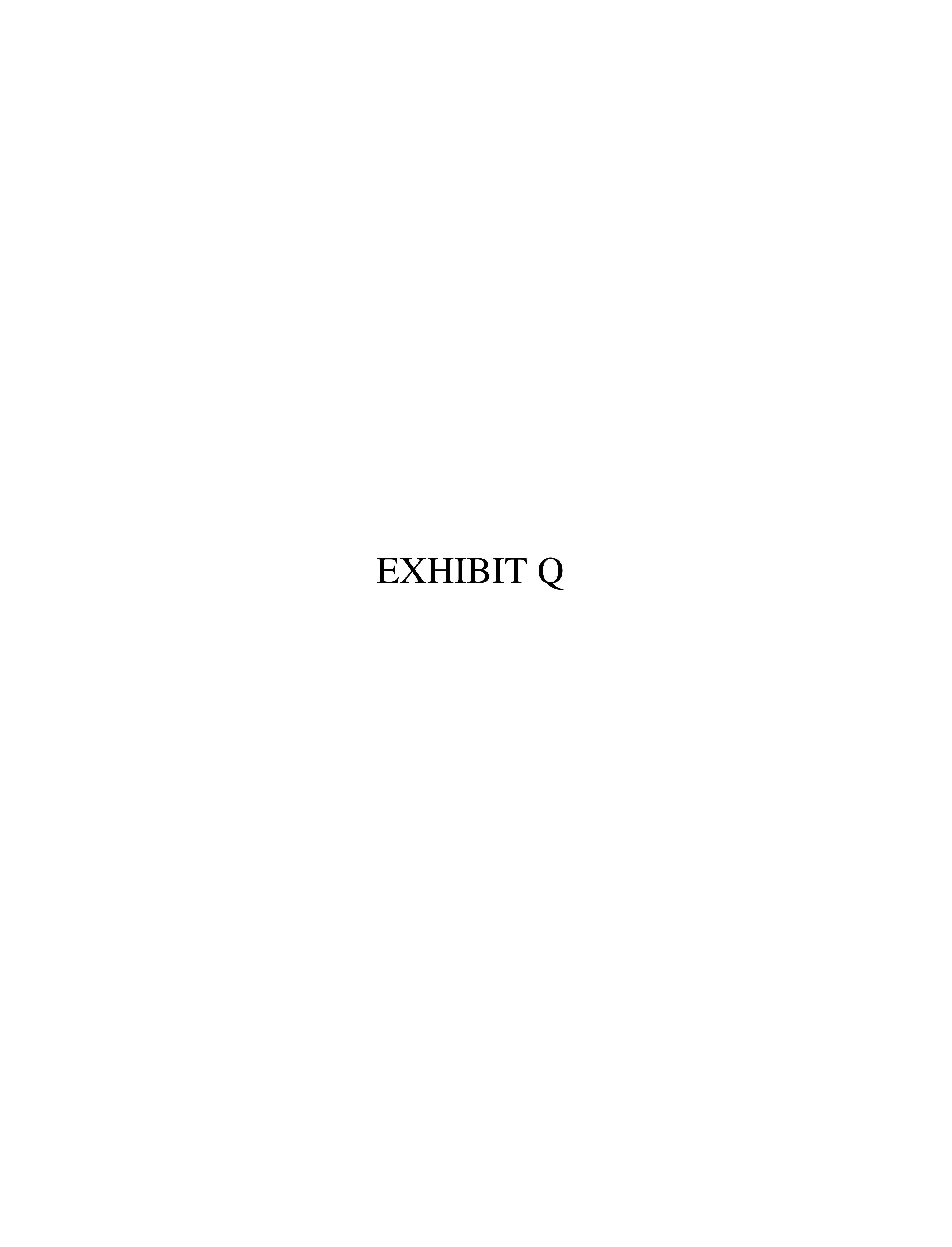

EXHIBIT Q

Smith Fellows

David H. Smith Conservation Research Fellowship Program ABOUT THE PROGRAM MEET THE FELLOWS APPLY

David H. Smith

Visionary. Conservationist. Leader.
These are some of the words used to describe Dr. David Hamilton Smith, founder and sole benefactor of the David H. Smith Conservation Research Fellowship Program. From the inception of his career, Dr. Smith did things a little bit differently and a little bit better than most. Beginning with his early days as a pediatrician and ending with his final days as an active member of The Nature Conservancy cadre, Dr. Smith was the epitome of quiet yet bold ambition in making positive changes. The changes for which he worked, in fields ranging from conservation to public health, are still present today. They are examples for all of us to follow. David Smith willed something even more valuable than his bequest - the legacy and example of himself.

The early years
Dr. Smith earned his medical degree from the University of Rochester in 1958. The University offered a "year out" program, in which third-year medical students spent a year working in the field. Dr. Smith spent his third year at the Children's Hospital in Boston and that is where he met his mentor, Dr. Charles A. Janeway.

One day, as the class made their rounds to see Dr. Janeway's patients, they stood around the bed of a child suffering from spinal meningitis. “I think there are very few seminal moments,” Dr. Smith said. But this moment, as he stood over the child’s bed, proved to be one of them. Dr. Janeway said to his students, "This can be prevented. It is wrong to wait until we have to try and treat these children. One of you should try and find a vaccine." Dr. Smith, the entrepreneur, was listening.

He went on to finish his studies at Rochester and subsequently applied for and received a three-year postdoctoral fellowship from Harvard Medical School. He was the first physician to be accepted into what Dr. Smith describes as a precursor of today's M.D./Ph.D. program. He focused his research theory on how bacteria learn to resist antibiotics. And though he had a strong appreciation for academia and the development of new theories and ideas, Dr. Smith wanted to solve problems - not just theorize. Taking the lead on new ideas and applying them to current medical and social dilemmas was David's goal. Having the dual degrees facilitated his ability to practice medicine as a pediatrician and still perform clinical research.

In 1976, Dr. Smith returned to his alma mater, the University of Rochester, where he chaired the pediatrics department. In the world of science at that point in history, most researchers were working on antibiotics to combat illness and disease, but Dr. Smith couldn't forget what Dr. Janeway said about the importance of vaccines and disease prevention. It wasn't far into his time at Rochester before Dr. Porter Anderson, one of Dr. Smith's colleagues from the Children's Hospital in Boston contacted him. He and Dr. Smith had spent many hours discussing the possibilities of a vaccine for spinal meningitis when they attended medical school together. Now Dr. Porter was calling to find out if Dr. Smith was ready for the challenge. They contacted Dr. Janeway, their mentor. He helped them find funding for the research, and the proceeded on the long road to develop a vaccine.

“Trying to come up with a vaccine for a bacterial disease in the late ‘60s was pretty lonely work,” Dr. Smith admitted. Drs. Smith and Porter had a very hard time getting funding for their work. “The manufacturers weren’t interested,” he remembers. “Most of them were producing antibiotics… maybe they thought we’d cut into their business. And the attitude at the National Institute of Health seemed to be, ‘Smith, if you want us to help, go out and find a new antibiotic.’”

After six long years of fund raising and research, Drs. Smith and Porter secured a vaccine for the bacteria that caused spinal meningitis and were on the road to a second - one that would prove effective in infants. They spent long hours in the laboratory testing the vaccine on animals and they were so sure the vaccine would work in humans, that, when they could not find any volunteers to participate in their trials, they vaccinated themselves. Now, with such great accomplishments in tow and profound happenings on the horizon, the two doctors set out to have their vaccine manufactured. That is when the real challenge began.

Since most pharmaceutical companies were in the market to manufacture antibiotics, they were not interested in the Drs.' proposal of bringing the vaccine to the market. Though the FDA urged the companies to take on the project, the companies knew it was not business savvy to manufacture a vaccine that was slated to compete with their existing products. So, Dr. Smith did something completely unheard of. In April of 1983 he left his position as chair of the pediatrics department and founded his own Biotech company, Praxis Biologics.

Dr. Smith's own daughter attests that starting a business was something her father knew very little about. He went to the local bookstore to buy books on how to write a business plan. He raised $1.5 million in seed money to get the company started. With three daughters of college age, he mortgaged his house and sold family antiques just to raise enough money to get the company off the ground. The steps he was taking made Dr. Smith a true leader and the champion of entrepreneurs.

The first years at Praxis were difficult ones. The first employee showed up to find only a man with a vision and a closet. At first, Praxis Biologics consisted of only that large closet at the University of Rochester and a few employees with tireless dedication. Dr. Smith professed, “Our people walked on hot coals to make the company work, but they did it out of pride, loyalty, and commitment to an idea.”

Never losing hold of his vision, he made his dream a reality and brought the harsh chapter of spinal meningitis to a dramatic close. In just 10 years after brining the vaccine to the market, the number of cases of spinal meningitis plummeted from 20,000 in 1987 to 81 in 1997. A true success story. In 1996, Dr. Smith was awarded both the Lasker Prize, one of the most prestigious awards in the country, and the Pasteur Award from the World Health Organization. The recognition for years of work and sacrifice were well deserved.

The later years

Dr. Smith, the conservationist, was born in the years after he sold Praxis Biologics. He applied the same courage and tenacity that he used in developing and marketing his vaccine to solve problems and help protect the land on the island he loved, Martha’s Vineyard, Massachusetts. David was best known on the Vineyard for his strong and quiet leadership in many of the most important conservation efforts that have taken place in recent years. He played a major role in the Moshup’s Trail initiative, working with the Vineyard Conservation Society and Sheriff’s Meadow Foundation to protect more than 30 acres of globally rare historic heathland habitat. David was the driving force for the preservation of the nationally respected Polly Hill Arboretum, a 60-acre horticultural landscape in North Tisbury in 1997.

David often built a partnership between his foundation, a local conservation organization, and the Commonwealth of Massachusetts, with the Polly Hill Arboretum and Moshup’s Trail serving as the primary examples. “Dr. Smith felt collaboration was essential, and he modeled the public-private partnership approach to conservation which he believed in strongly. He felt that people had to work together and then he modeled how to do it,” according to Matthew Stackpole, former executive vice-president for the David H. Smith Foundation.

In times of crisis, it takes strategic vision to act effectively. David Smith knew that planning, not panic, was the key to success. His primary conservation work came at a time when the Vineyard was being inundated with increasing development and escalating land values. Dr. Smith’s guidance and thoughtful approach to conservation science led to prioritization of potential properties to protect biodiversity. He was so good at what he did on the Vineyard that, in recognition of his work for conservation science on the Vineyard, The Nature Conservancy selected Dr. Smith as the recipient of the 1997 Conservation Achievement Award. In addition, he was presented with the Governor’s Award for Open Space Preservation in Massachusetts in 1998.

In the same bold and quiet way, Dr. Smith used a portion of his foundation’s money to create the David H. Smith Conservation Research Fellowship Program. Over the first six years, the program was administered by the The Nature Conservancy and worked to transform scientists who were early in their career into communicative, precocious leaders who were able to apply the findings of their research to the challenges of everyday conservation science. Today, the Society for Conservation Biology (SCB) leads the Fellowship program - SCB's relationships with leaders from a diverse constituency of conservation organizations world-wide offer Smith Fellows a broad range of research, management, and policy experiences.

A partnership between the Society for Conservation Biology and the Cedar Tree Foundation

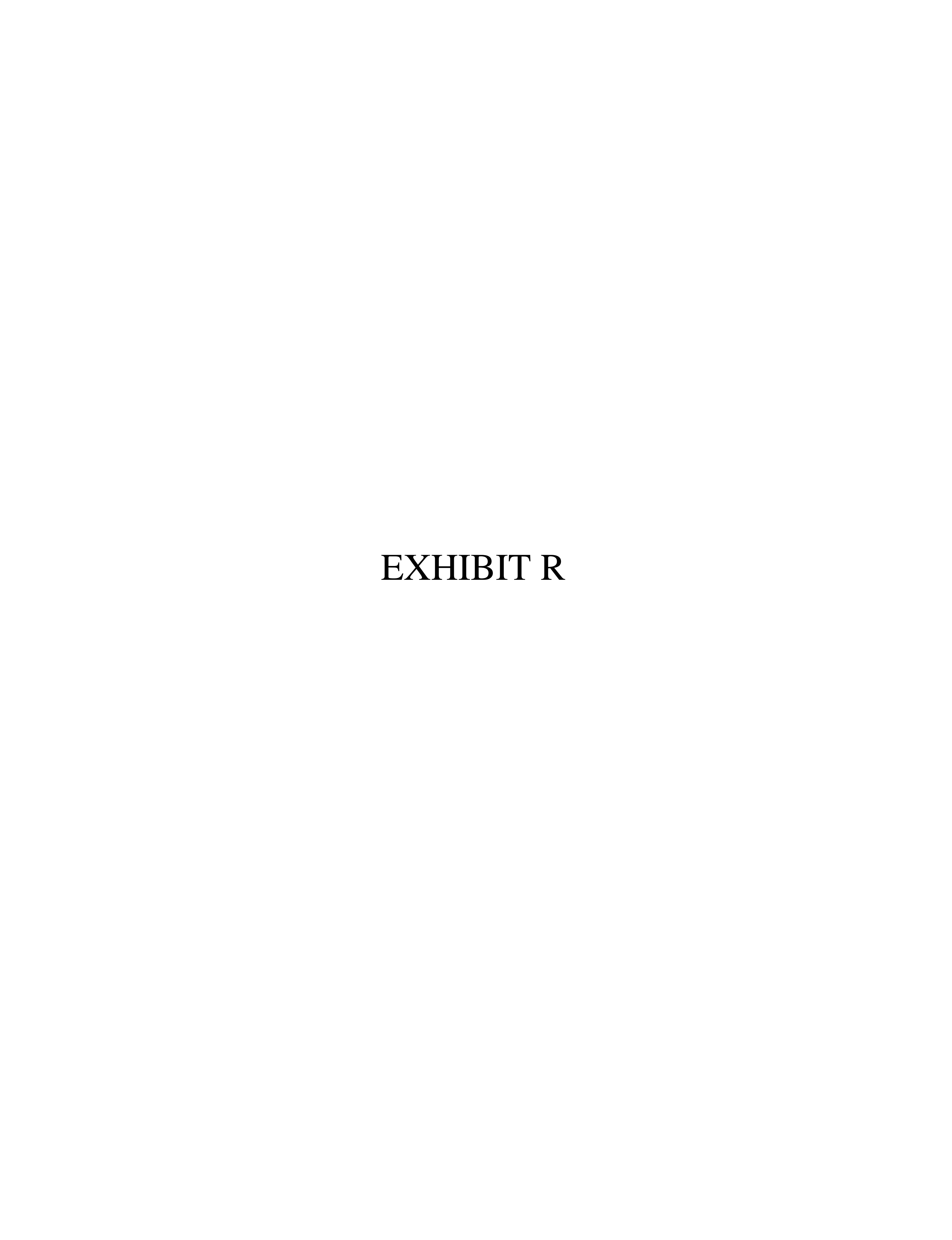

EXHIBIT R

The Commonwealth of Massachusetts
William Francis Galvin

Secretary of the Commonwealth
One Ashburton Place, Boston, Massachusetts 02108-1512
Telephone: (617) 727-9640

SOUTH SHORE BEACH,INC. Summary Screen

Help with this form

Request a Certificate

The exact name of the Domestic Profit Corporation: SOUTH SHORE BEACH,INC.

Entity Type: Domestic Profit Corporation

Identification Number: 000168279

Date of Organization in Massachusetts: 04/03/1981 **Date of Revival:** 08/04/1997

Date of Voluntary Dissolution: 12/15/2003

Current Fiscal Month / Day: 03 / 31 **Previous Fiscal Month / Day:** 00 / 00

The location of its principal office in Massachusetts:
No. and Street: P.O. BOX 1270
City or Town: EDGARTOWN State: MA Zip: 02539 Country: USA

If the business entity is organized wholly to do business outside Massachusetts, the location of that office:
No. and Street:
City or Town: State: Zip: Country:

The name and address of the Resident Agent:
Name: FLAVIA STUTZ
No. and Street: RR1 BOX 260, MOSHUP TRAIL GAY
City or Town: HEAD State: MA Zip: Country: USA

The officers and all of the directors of the corporation:

Title	Individual Name First, Middle, Last, Suffix	Address (no PO Box) Address, City or Town, State, Zip Code	Expiration of Term
PRESIDENT	ALVIN S. LANE	RR1 BOX 97 GAY HEAD, MA 02535 USA	
TREASURER	CYNTHIA BERMUDES	22 FLYNT HILL RD. W. TISBURY, MA 02575 USA	
CLERK	MOSES MALKIN	22 LIGHTHOUSE RD. AQUINAH, MA 02535 USA	
DIRECTOR	CYNTHIA BERMUDES		

		22 FLYNT HILL RD. W. TISBURY, MA 02575 USA	
DIRECTOR	ALVIN S. LANE	RR1 BOX 97 GAY HEAD, MA 02535 USA	
DIRECTOR	MOSES MALKIN	22 LIGHTHOUSE RD. AQUINAH, MA 02535 USA	

business entity stock is publicly traded: ___

The total number of shares and par value, if any, of each class of stock which the business entity is authorized to issue:

Class of Stock	Par Value Per Share Enter **0** if no Par	Total Authorized by Articles of Organization or Amendments *Num of Shares* *Total Par Value*	Total Issued and Outstanding *Num of Shares*
No Stock Information available online. Prior to August 27, 2001, records can be obtained on microfilm.			

___ Consent ___ Manufacturer ___ Confidential Data ___ Does Not Require Annual Report

___ Partnership ___ Resident Agent ___ For Profit ___ Merger Allowed

Note: There is additional information located in the cardfile that is not available on the system.

Select a type of filing from below to view this business entity filings:

ALL FILINGS
Annual Report
Application For Revival
Articles of Amendment
Articles of Consolidation - Foreign and Domestic

View Filings New Search

Comments

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Help

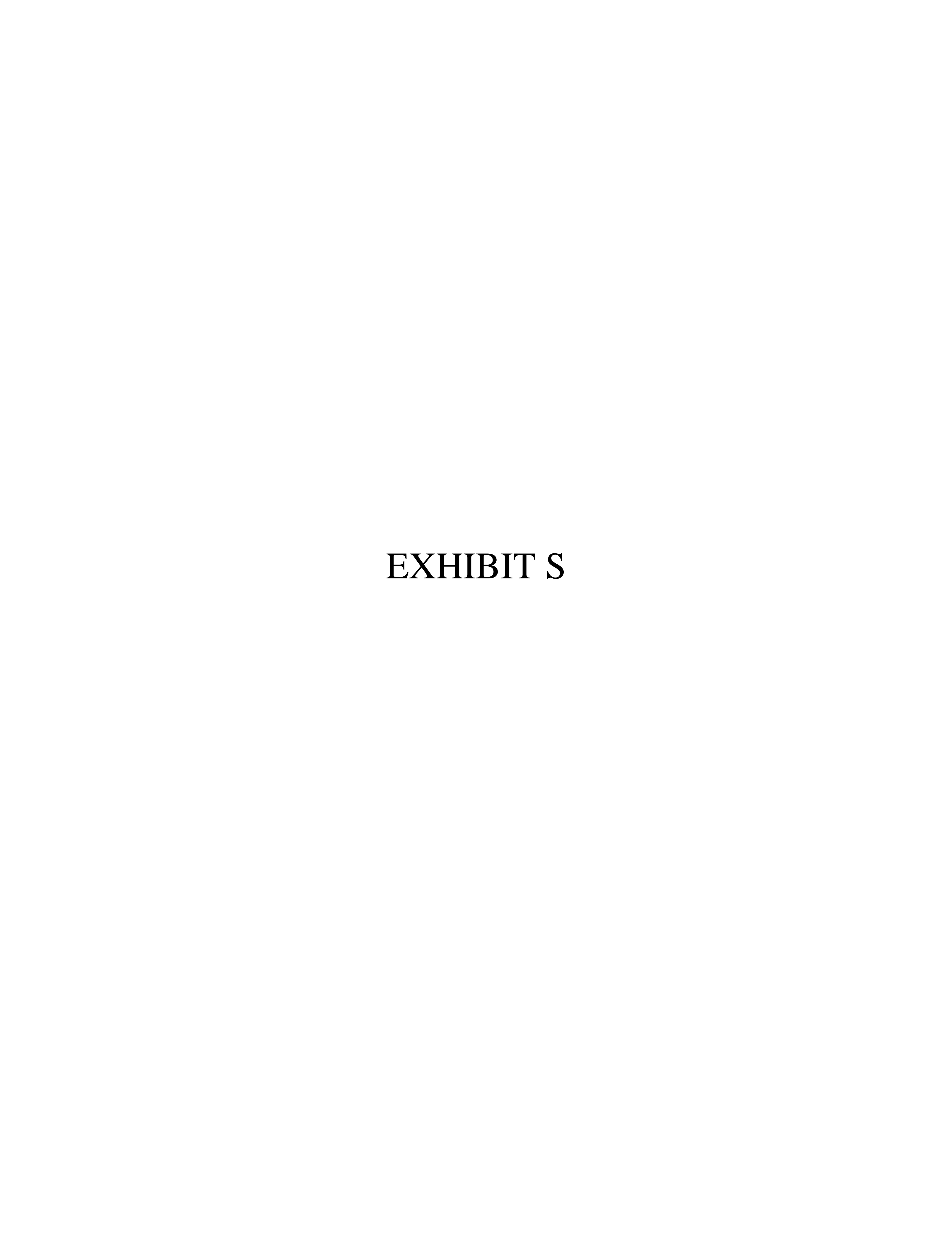
EXHIBIT S

About the AGHCA

In 2003, Gay Head Taxpayers Association (GHTA) changed its name to Aquinnah/Gay Head Community Association, Inc. (AGHCA) and incorporated as a not-for-profit corporation under Massachusetts law, and obtained a Section 501 (c) (3) tax exempt status.

1974 Lawsuit and Aftermath

The GHTA was established over 30 years ago and shortly afterwards combined with an existing, informal civic improvement group. In 1974, the newly formed Wampanoag Tribal Council brought a law suit against the Town of Gay Head to reclaim the Town's "Common Lands" (the Gay Head Cliffs and the Cranberry Lands) on the grounds that they had been transferred to the Town in 1870 by the Commonwealth in violation of a Federal law passed in 1790. Analysis indicated that if the basis of the claims was valid it could be extended to include all of the privately owned property in the Town, thereby creating a cloud on all private property titles in the Town. Property owners quickly found it very difficult to buy or sell or to obtain title insurance or mortgages. Accordingly, property sales in the Town dropped precipitously.

When the Town decided at a Town Meeting to take steps simply to transfer the claimed property to the Tribal Council, it was obvious that the Town was not going to defend against the law suit. The GHTA then promptly intervened in the law suit to defend the interests of the Town in opposition to the claims by and relief sought by the Tribal Council. (The Town subsequently indeed dismissed its own attorney who had been recommending that the Town defend the suit.).

To avoid the cost and acrimony of trial, difficult and protracted settlement negotiations took place primarily among the Tribal Council and the GHTA and their respective attorneys, with cooperation from the Office of the Attorney General of the Commonwealth (which also subsequently had intervened as a party to the law suit.) In 1983, a Settlement Agreement was entered into among the Tribal Council, the Town, the GHTA and the Commonwealth after a Town Meeting had overwhelmingly agreed to the terms of the Settlement Agreement and its accompanying Land Use Plan. Following several unsuccessful attempts to have Congress pass a statute implementing the Settlement Agreement, the requisite Commonwealth and Federal Acts were passed in 1985 and 1987, respectively. This was preceded by a second Town Meeting which had confirmed the Town's agreement and support of the Settlement Agreement. The law suit was then dismissed (with prejudice) by agreement among the parties when the prerequisites for doing so were satisfied; namely, the passage of both Federal and Commonwealth statutes and the land transfers envisioned by the Settlement Agreement. (The last land transfer was effected in 1992, with the approximate $4 million acquisition cost prior to transfer being shared equally by the Federal government and the Commonwealth.)

Brief Summary of the Terms of the Settlement Agreement and Statutes

For the Tribe: The Settlement Agreement gave added impetus and weight to its appeal for Federal recognition as a Tribe and the benefits available to recognized tribes. Its first application had been denied, but recognition was awarded in 1987. The Tribe obtained ownership of a land base for the first time, consisting of approximately 400 acres, including the Common Lands, the Face of the Cliffs, the over 200 acre parcel where the Tribal headquarters and housing development are located, and the Cook Properties (Herring Creek). Except for the Cook Properties, the Tribal lands are inalienable and tax free (except for commercial activities), and the Tribe may purchase land contiguous to its settlement lands and have any such new lands then put into Trust.

For the Town and Commonwealth: All past, present and future Indian claims (except for individual claims pursued under laws generally applicable to non-Indians as well), whether monetary, possessory, aboriginal or otherwise, involving "lands and waters" in the Town and the Commonwealth were extinguished. The Town retained ownership of all of its beaches on the Ocean (including the beach under the Cliffs), the Sound, and the Ponds, and all residents and their guests and assigns were assured access for recreational purposes. The Tribal settlement lands continue to be generally subject to Federal, Commonwealth and Town laws and regulations and jurisdiction, including the laws on gaming. The Tribal settlement lands continue to be subject to the Town's zoning and other land use regulations and procedures. The Tribe has no jurisdiction over non-tribal individuals.

For the GHTA: In addition to all of benefits accorded the Town and Commonwealth, all of the above had the effect of removing the cloud on titles and it again became possible to obtain title insurance and mortgages.

Support of Town Public Works

After the above law suit and resulting acts reached their end, the GHTA maintained a quiet stance for a number of years, and devoted itself to various forms of support of Town functions, including the Town's ocean beach (for which, as an example, the GHTA purchased and maintained the seasonal boardwalks for several years before donating them to the Town), the volunteer fire department and the Town library. A number of significant developments then occurred over the past several years, however, which required us to expand our level and type of activities. The two which are most profound and which had potential implications for the Town and Martha's Vineyard generally relate to (a) the law suit the Town brought in 2001 against the Tribe to enforce the Town's zoning regulations and procedures with respect to construction undertaken by the Tribe at its hatchery on Herring Creek without having obtained a building permit from the Town and (b) the Tribe's effort to establish its own armed police force.

2001 Lawsuit/Police Force

Law Suit. Briefly, the Tribe's position regarding the building-permit issue was that it had a common law sovereign immunity that it did not waive in the Settlement Agreement and which was not extinguished in the resulting legislation, and that the restrictions it agreed to in the Settlement Agreement are only with respect to the land but do not establish enforcement rights against the Tribe. The Town responded forcefully, correctly stating that the jurisdictional issues involved go to the heart of the Settlement Agreement and related legislation and that a determination in favor of the Tribe would vitiate core provisions in the Settlement Agreement and those laws. We also concluded that it was appropriate for us to more actively support the Town in connection with the litigation – since indeed the issues had potentially wide-ranging import – and to be in a position to actively pursue or defend an appeal if need be. Thus, based on our being a party to the underlying

Settlement Agreement we intervened in and became a party to the law suit in support of the Town. (A private abutting property owner, the Benton Trust, also intervened.)

The lower court judge ruled in favor of the Tribe, based on his conclusion (which he himself characterized as being "patently unfair") that the underlying documents did not serve to waive the Tribe's sovereign immunity to suit. After the judge denied motions to reconsider his rulings, AGHCA moved to appeal his judgment and in view of the import of the issues involved to have the highest court in Massachusetts (the Supreme Judicial Court ["SJC"]) to hear the appeal directly. (AGHCA's earlier determination to intervene and become a full party to the action was well-reasoned, in view of the unfortunate and disappointing decision by the Selectmen of Aquinnah to have the Town not undertake an appeal itself.) This motion was granted, as was a motion by the Attorney General of the Commonwealth to intervene as a party to the appeal in view of the potential import of the issues throughout the Commonwealth. In addition, the Martha's Vineyard Commission and the Towns of Chilmark and West Tisbury filed amicus briefs as part of the appeal process.

In a very strong decision issued in December, 2004, the SJC reversed the lower court and held that the Tribe had indeed waived its immunity to suit. The key provisions of the opinion were:

"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. There is absolutely nothing to suggest that the Tribe was "hoodwinked" or that its negotiators were "unsophisticated" or did not know what they were doing. From all that appears on the record, the parties, represented by able counsel, engaged in protracted and difficult negotiations which produced the settlement agreement bespeaking, in unambiguous terms, the parties' complete understanding.

More specifically, the Tribe expressly memorialized a waiver of its sovereign immunity, with respect to municipal zoning enforcement, by agreeing, in paragraph three 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". This language is clear and the words "in the same manner" convey a special known, and obvious meaning. These words are used by the United States and by the Commonwealth to waive sovereign immunity."

The Tribe's remaining recourse was to seek a review by the United States Supreme Court, which the Tribe ultimately declined to do in July, 2005. Accordingly, the case was then remanded back to the lower court for the purpose of determining the remedy or remedies to be provided to the Town. The Town moved to re-join the law suit and then advised the Court that the remedy it sought was for the Tribe to file for the permits for the projects which were the subject of the Suit. AGHCA supported this remedy and March, 2006 the Tribe advised the Court that it would be filing for the permits. This then led to the law suit being formally concluded. Many of the representatives of the Town and the Tribe and a number of other interested residents then worked diligently to come to agreement on and then to document a process intended to minimize the potential of litigation should land use disputes arise, in particular issues pertaining to the permitting process relating to future land use permit requests by the Tribe. This led to the entering into of a Memorandum of Understanding (the "MOU") between the Town and the Tribe in June, 2007. The MOU provides for a number of review and advisory procedures should such disputes arise.

Police Force. The Tribe's effort to establish its own armed police force also was vigorously opposed by the Town, including by the Town's chief of police. To date, the Town has provided police (and fire) protection to the Tribal properties pursuant to a contract between the Town and Tribe. Aside from questioning the practical need for a second police force in what is one of the smallest towns in the Commonwealth, the overriding issue is one of control over police presence in the Town. Corollary yet important issues include the extent to which its police activities would equate to jurisdiction by the Tribe over non-tribal individuals and the ability to carry arms on Town property (including, as one example, on its beaches while supervising the Cliffs), both generally and while in transit from one of the Tribal lands to another. The Town several years ago requested an opinion of the Attorney General of the Commonwealth regarding the basic rights and restrictions that are applicable which has not been issued, and there have been no developments on this matter for some time. Accordingly, since this matter is dormant it remains premature to assess whether it is appropriate for us to take an active stance on this matter, but it is one that merits continued careful attention.

The above by necessity is little more than a thumbnail description of our history and our present activities, and the issues involved. We hope it has been helpful and would be pleased to respond to any requests for further information.

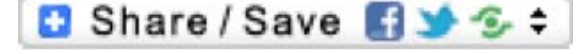

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EXHIBIT T

TESTIMONY OF HANNAH L. MALKIN
PRESIDENT OF THE GAY HEAD TAXPAYERS ASSOCIATION
BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

Mr. Chairman, members of the Committee, I am Hannah L. Malkin, a landowner in the Town of Gay Head, Massachusetts and the President of the Gay Head Taxpayers Association. It is an honor to appear before you today to testify on S. 1452, a Bill which means so much to the people of Gay Head.

Gay Head is a small community located on the Island of Martha's Vineyard. It has long been famous for the magnificent clay cliffs which overlook the Elizabeth Islands. The lighthouse located on those Gay Head cliffs has, since 1799, guided mariners and more recently attracted tourists to Gay Head and to Martha's Vineyard.

My husband and I came to Gay Head in 1969 to purchase a home. We selected Gay Head for many of the same reasons which have attracted people to Gay Head for hundreds of years. Although Gay Head is only 90 miles from Boston, 7 miles off of Cape Cod, and 15 miles from the more settled Martha's Vineyard towns of Edgartown and Vineyard Haven, Gay Head remains a remote location of extraordinary beauty. It combines areas of woods, moors and dunes with breathtaking views of Vineyard Sound, the Atlantic Ocean, and Menemsha Pond.

However, perhaps even more attractive than its physical beauty was the fact that Gay Head offered the opportunity to enjoy the simpler way of life which had vanished from much of America. Gay Head has always been a small town. Even today there are fewer

than 250 homes in Gay Head. For centuries Gay Head has offered the sense of community which results from living in a small community where families know and trust each other.

To obtain the benefits of this sense of community, individuals now members of the Taxpayers Association purchased land in Gay Head at considerable sacrifice and expense. In many cases, the sellers were the individuals whose claim now poses a threat to that land.

In the early 1970's Gay Head underwent a change. At a time when other eastern Indian groups were beginning to assert claims to land, 14 people formed the Wampanoag Tribal Council of Gay Head, Inc. The Tribal Council promptly began to work toward the transfer of the common lands owned by the Town of Gay Head to the Tribal Council. In March 1973, the Tribal Council proposed at a town meeting that the Town transfer those common lands to it, but the matter was never brought to a vote. In the Fall of 1974 Thomas Tureen, Esq., who was then handling an Indian land claim in Maine, filed in the Massachusetts federal court a suit on behalf of the Tribal Council against the Town of Gay Head. According to Mr. Tureen's lawsuit, the ownership of those common lands never passed out of the hands of the proprietors of Gay Head when Gay Head became a town and the Tribal Council was the rightful representative of the heirs of those proprietors. That lawsuit, if successful, would threaten the titles of all Gay Head landowners.

The filing of that lawsuit worked a substantial change at Gay Head. The suggestion that any portion of the town lands

did not belong to all of the people of the town was a sharp break from Gay Head's tradition as a close-knit community. Non-Indian taxpayers and residents became concerned that they would lose title to their property, that access to the shoreline and other natural resources would be lost and that the jurisdiction of state and local governments would be compromised.

Our organization, the Gay Head Taxpayers Association, was formed in 1973. I am currently its president. Our membership includes more than 75 percent of the people of Gay Head who are not affiliated with the Wampanoag Tribal Council of Gay Head, Inc. or others who assert an ancient claim to the ownership of Gay Head. Approximately 140 families are members of our organization. In 1976 our organization voluntarily joined the litigation commenced by the Tribal Council as a defendant. From the very beginning, our goals have been to protect our homes and land, and to return Gay Head to the harmonious atmosphere which attracted us to it. All of us also believe that there is an inherent and obvious inequity in compelling innocent landowners to defend their titles against a claim based on acts occurring more than 100 years ago.

In 1977, at our urging, Albert Sacks, then dean of the Harvard Law School, became a mediator and attempted to resolve the disputes between the residents of Gay Head who were aligned with the Tribal Council and those who were aligned with our organization. That effort at mediation continued for two years, but was ultimately unsuccessful.

Later, in 1981, we began another effort to attempt to settle the dispute which was tearing our town apart. For more than two years Lawrence Mirel and Thomas Tureen negotiated in an attempt to achieve a mutually acceptable solution to the competing interests of the Tribal Council on one hand and our association and its members on the other.

In late 1983 we were successful in reaching the understanding contained in the Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims. The Bill which is before the Committee today, S. 1452, is the result of that agreement, and, on behalf of the members of my association, I urge this Committee to report favorably on that Bill.

Our membership urges the passage of this Bill for three basic reasons.

First, as our counsel will testify, the litigation of an Indian land claim is an extremely complex and extraordinarily expensive undertaking. Our membership of only 140 families has raised and spent almost $175,000.00 in an effort to defend our properties and to seek the passage of the legislation necessary to resolve this dispute. We have been forced to raise and spend these funds despite the fact that no one suggests that any member of our organization is in any way responsible for any of the wrongs the Tribal Council claims were worked upon it. We are, of course, committed to continue to defend our homes and property,

but believe that the continuation of the litigation is a burden we should not be forced to bear.

Second, in addition to the money we have spent, the pendency of this lawsuit has been a severe hardship to us. Although the prospect that the litigation might be settled by the enactment of a Bill such as S. 1452 has spared us the extraordinary hardships visited on the residents of Mashpee and other areas where Indian land claims are pending, title insurance companies are reluctant to insure the titles of Gay Head properties. In addition, banks have been reluctant to provide mortgages, thus making land transactions difficult if not impossible.

Third, this legislation is a fair resolution of the dispute. It produces a result which is desired by the plaintiffs. From our standpoint, not only does the Bill remove the cloud upon our titles, but it respects the expectations we had when our members came to Gay Head. Our members bought their lands and homes on the understanding that they were moving into a community where the rules and regulations were the same as in the other towns in Massachusetts. It was for that reason that we conditioned our acceptance of the settlement upon a requirement that all of the laws, ordinances and regulations of the Commonwealth of Massachusetts apply to all of the lands in our town. That is what is contained in Section 10 of this Legislation. That section insures that none of the lands in our town will be exempt from generally applicable state regulations

against gambling or other presently prohibited activities which would ruin our town.

While this bill does not provide any party with all they might want, it does provide all parties with that which they need most. For the Tribal Council, the Bill provides an inalienable land base and a new opportunity to pursue their Indian ancestry. For the Town, the Bill preserves the invaluable common lands from development, continues its ownership of the beaches, preserves its tax base and confirms its jurisdictional authority. For the State, the Bill likewise confirms that Gay Head and its residents are subject to the same laws and regulations as any other citizen of the Commonwealth of Massachusetts. For the property owners, the Bill removes the cloud on their titles, removes a heavy financial burden and provides an opportunity to eliminate the divisiveness which so threatens our community.

Mr. Chairman and members of the Committee, on behalf of the Gay Head Taxpayers Association I ask that you report favorably on this Bill. Only the enactment of a Bill such as this can end the expense, uncertainty and division which has been visited upon our town. The Commonwealth of Massachusetts has done at least its share to make this settlement of this litigation possible both by authorizing the transfer of town lands and its expression of a willingness to contribute one-half of the cost of this settlement. Now only Congress can effectuate the settlement which both we and the Tribal Council have reached and desire.

Thank you for permitting me this opportunity to convey the sentiments of our members.

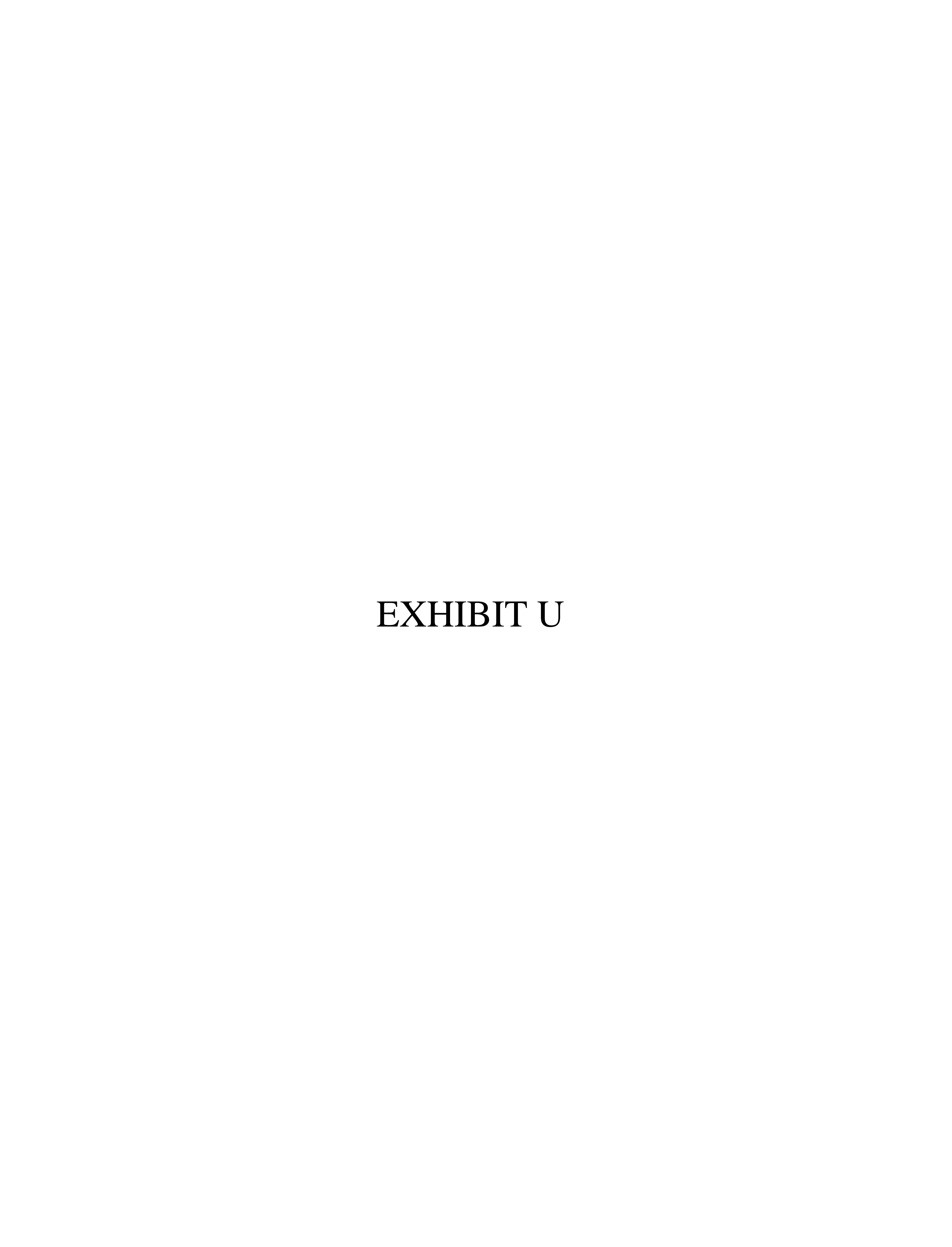

EXHIBIT U

A motion to reconsider was laid on the table.

EXTENDING THE AUTHORITY OF THE SUPREME COURT POLICE

Mr. GLICKMAN. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 5362) to extend the authority of the Supreme Court Police to provide protective services for Justices and Court personnel, with a Senate amendment thereto, and concur in the Senate amendment.

The Clerk read the title of the bill.

The Clerk read the Senate amendment, as follows:

Page 1, after line 8, insert:

SEC. 2. (a) Section 105(a) of the Legislative Branch Appropriations Act, 1979 (2 U.S.C. 72a note), as reenacted by section 115 of the joint resolution entitled "Joint resolution making continuing appropriations for the fiscal year 1982, and for other purposes", approved October 1, 1981 (95 Stat. 963), is amended by striking out "September 30, 1986," and inserting in lieu thereof "February 28, 1987,".

(b) The amendment made by subsection (a) shall take effect on October 1, 1986.

Mr. GLICKMAN (during the reading). Mr. Speaker, I ask unanimous consent that the Senate amendment be considered as read and printed in the RECORD.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Kansas?

There was no objection.

The SPEAKER pro tempore. Is there objection to the initial request of the gentleman from Kansas?

Mr. WALKER. Mr. Speaker, reserving the right to object, I am a little concerned about the number of bills that we are now beginning to run onto the floor by unanimous consent; and I understand that there have been clearances on them; but I am also understanding that we have a process underway that, where the majority may go to the Rules Committee and ask for the right for hand enrolling of bills so that they can be gotten down to the President quicker so that the situation can put the President in an additional bind; that we may in fact have the Rules Committee acting at the present time on a blanket waiver of the 3-day rule which will mean that we will not have sufficient time to consider a bunch of this legislation; it will be brought out here without having to comply with the 3-day rule.

I also understand that we now have under consideration a new short-term continuing resolution that will carry us over into next week. The Members have no idea what is going on here; we do not know what resolutions may be brought before us, and now we are faced with the prospect that, as we sit around waiting for all of these things to happen, we have unanimous-consent resolutions run out here on the floor in a steady stream.

Mr. Speaker, I am concerned. I do not know what the program is; I do not think very many Members of the House know what the program is; the rumor going around here today is that we are going to be here at least until the end of next week. A lot of us do not understand why that has to be, and if the fact is we are going to be around here until next week and we are going to have all the junk bins of the committees cleared out here on the floor during that period of time, this gentleman for one is not going to allow it to happen; and I am going to begin objecting to virtually all of the unanimous-consent requests that come out here regardless of whether they have been cleared or not.

I would hope that within the next few minutes we can get some kind of decision by the leadership to tell us what it is they have in mind for us, or we are going to stop this process of running bills out here that nobody knows what is in them and nobody knows just how the schedule is going.

I will not object to this particular request. I take the reservation only to say that if there are any more of them that come up today, they are not going to be passed out here by unanimous consent until we know the program.

Mr. Speaker, I withdraw my reservation of objection.

□ 1630

Mr. COBLE. Reserving the right to object, Mr. Speaker, if the gentleman from Kansas would explain the amendment, I think that would remove any cloud over this bill.

Mr. GLICKMAN. Mr. Speaker, will the gentleman yield?

Mr. COBLE. I yield to the gentleman from Kansas.

Mr. GLICKMAN. I thank the gentleman for yielding.

Mr. Speaker, let me say to my colleague from Pennsylvania [Mr. WALKER], since I am not a Member of the House leadership, I cannot respond to his question.

Maybe one day I will run for that position, but right now I am forced to deal with this particular bill, and I do not want to be a victim in this connection.

This is a bill that has passed the House already, extending the authorization of the Supreme Court Police to protect all of the justices including the two new ones whom the President just appointed and the Senate confirmed.

I think that is something we all want to do. In addition to that, the Senate has added an amendment requested by the Senate majority leader by which the duration of the Office of Classified National Security, which is under the Office of the Secretary of the Senate, is extended.

This is an office under the policy direction of the Senate majority leader. My senior Senator from Kansas has asked me to put this on the bill, and I see no problem with it. I think this bill is necessary.

The amendment attached to H.R. 5362 by the Senate extends the duration of the Office of Classified National Security which is under the Office of the Secretary of the Senate. This office is under the policy direction of the Senate majority leader, minority leader, and the chairman of the Committee on Rules and Administration of the Senate. The Office has the responsibility of safeguarding restricted data and classified information as any Senate committee may assign to it.

The authorization of this Office expired September 30, 1986. The amendment extends the duration until February 28, 1987, in order to allow the Senate majority and minority leaders to determine how and to what extent they want to upgrade this Office. The amendment is to become effective October 1, 1986.

This is a Senate housekeeping amendment, and I recommend that the House accept it.

Mr. COBLE. I thank the gentleman from Kansas.

Mr. Speaker, I withdraw my reservation of objection.

The SPEAKER pro tempore (Mr. KILDEE). Is there objection to the initial request of the gentleman from Kansas?

There was no objection.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. BOUCHER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on H.R. 5445, a bill previously passed today by the House.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Virginia?

There was no objection.

GAY HEAD WAMPANOAG INDIAN CLAIMS SETTLEMENT ACT OF 1985

Mr. MOAKLEY. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 570 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 570

Resolved, That at any time after the adoption of this resolution the Speaker may, pursuant to clause 1(b) of rule XXIII, declare the House resolved into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 2868) to settle Indian land claims in the town of Gay Head, Massachusetts, and for

other purposes, and the first reading of the bill shall be dispensed with. All points of order against the consideration of the bill for failure to comply with the provisions of section 302(f) of the Congressional Budget Act of 1974, as amended, are hereby waived, and all points of order against the bill for failure to comply with the provisions of clause 5(a) of rule XXI are hereby waived. After general debate, which shall be confined to the bill and shall continue not to exceed one hour, to be equally divided and controlled by the chairman and ranking minority member of the Committee on Interior and Insular Affairs, the bill shall be considered for amendment under the five-minute rule, and each section shall be considered as having been read. It shall be in order to consider two amendments to the bill if offered by Representative McCain of Arizona or his designee, one inserting a new title containing only the text of the bill H.R. 1915 as passed by the House, and one inserting a new title containing only the text of the bill H.R. 4174 as passed by the House, and all points of order against said amendments for failure to comply with the provisions of clause 7 of rule XVI are hereby waived. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted, and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit.

The SPEAKER pro tempore. The gentleman from Massachusetts [Mr. MOAKLEY] is recognized for 1 hour.

Mr. MOAKLEY. Mr. Speaker, I yield the customary 30 minutes to the gentleman from Missouri [Mr. TAYLOR], pending which I yield myself such time as I may consume.

Mr. Speaker, House Resolution 570 is an open rule providing for the consideration of the bill H.R. 2868, the settlement of Indian land claims within the town of Gay Head, MA.

The rule provides 1 hour of general debate, to be equally divided between the chairman and ranking minority member of the Committee on Interior and Insular Affairs. The rule waives points of order against the bill for failure to comply with the provisions of section 302(f) of the Congressional Budget Act.

Section 302(f) prohibits consideration of legislation providing discretionary new budget authority in excess of a committee's 302(b) allocation of such authority. Since the bill provides $1.5 million in direct spending for fiscal year 1987, and since the Committee on Interior and Insular Affairs has received no new discretionary budget authority for fiscal year 1987, the bill would violate section 302(f) of the Budget Act.

However, Mr. Speaker, the Committee on Interior and Insular Affairs will offer an amendment making the direct spending provisions subject to an appropriation, thereby making the waiver for the Budget Act violation purely technical in nature.

Mr. Speaker, the rule also waives points of order against the bill for failure to comply with the provisions of clause 5(a) of rule XXI, which prohibits appropriations in a legislative bill. Section 3(c) of the bill requires that the State of Massachusetts deposit matching funds into a Gay Head settlement fund and authorizes the Secretary of the Interior to spend those funds. Since this is considered an appropriation a waiver of Clause 5, of rule XXI is necessary.

In addition, the rule makes in order two amendments to be offered by Mr. MCCAIN of Arizona or his designee. The first amendment would consist of the text of H.R. 1915, which would amend the procedures of the Secretary of the Interior for approving or disapproving tribal constitutions. The second amendment would consist of the text of H.R. 4174, which would amend procedures for the granting of contracts to tribes under Indian self-determination.

The rule waives all points of order against the amendments for failure to comply with the provisions of clause 7 of rule XVI, which prohibits the offering of any nongermane amendment to the bill. The two amendments that will be offered by Mr. MCCAIN or his designee both passed the House but failed to be acted on by the other body, since both bills are regarded as being noncontroversial the Rules Committee decided to allow the bills to be attached to this legislation.

Finally, Mr. Speaker, the rule provides one motion to recommit.

Mr. Speaker, H.R. 2868 would allow the purchase and transfer of private lands within the town of Gay Head, MA to the Wampanoag Tribal Council of Gay Head. The bill authorizes $1.5 million for the establishment of a Gay Head Indian claims settlement fund, to provide for the purchase of some of these lands.

As I stated earlier in my statement, the Commonwealth of Massachusetts would also deposit $1.5 million in matching funds for a combined total of $3 million. The bill would make in order an out of court settlement reached by all concerned parties that in essence provides for the exchange of over 500 acres of land to the Wampanoag Tribe, provided that all Indian claims within the town of Gay Head are dropped.

Mr. Speaker, basically what this bill would do is protect the innocent land owners of Gay Head from possibly losing their land because of something that happened a long time ago and that they had no control over. With time running out of the remainder of this session I think it would be in the best interest of all that we pass this rule and pass H.R. 2868.

Mr. TAYLOR. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, House Resolution 570 is an open rule under which the House will consider legislation authorizing $1.5 million to settle Indian land claims in the town of Gay Head, MA.

The rule waives all points of order against consideration of the bill, H.R. 2868, which fails to comply with section 302(f) of the Budget Act. As reported, H.R. 2868 provides $1.5 million in direct spending in excess of the Interior Committee's discretionary budget authority for fiscal 1987.

Mr. Speaker, the Budget Act waiver should be considered as technical in nature, since the Interior Committee will offer an amendment making the direct spending provision subject to future appropriations, thus curing the Budget Act violation.

Mr. Speaker, the rule also waives clause 5(a) of rule XXI against H.R. 2868, because it violates the rule's prohibition against appropriations in a legislative bill. The waiver is included because of the direct spending provision. Since the Interior Committee plans to offer an amendment making this provision subject to future appropriations, thus curing the violation of the rule, the waiver should be considered technical in nature.

The rule makes in order two specified amendments, which will be offered by the Gentleman from Arizona, the chairman of the Republican Task Force on Indian Affairs.

The two McCain amendments deal with issues previously passed by the House. One of these, H.R. 1915, amends the procedures used by the Secretary of the Interior for approving or disapproving tribal constitutions. The other is similar to H.R. 4174, which amends the procedure for granting of contracts to tribes under the Indian Self-Determination Act.

Mr. Speaker, most of the Republican members of the Committee on the Interior oppose H.R. 2868, because it settles a legal suit by allowing the purchase and transfer of private land within the town of Gay Head, MA, to a group that has yet to be legally recognized as a tribe.

The lands in question are located on the western portion of Martha's Vineyard Island, and the ownership of them has been in dispute since 1974. Although H.R. 2868 follows an out-of-court settlement reached by all parties in 1983, the administration opposes the bill.

The bill requires a Federal contribution of $1.5 million to settle what the administration believes to be an invalid claim involving primarily non-Federal interests.

Mr. Speaker, I support this open rule since it allows the House to proceed in the normal legislative manner.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. MOAKLEY. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

The resolution was agreed to.

A motion to reconsider was laid on the table.

The SPEAKER pro tempore. Pursuant to House Resolution 570 and rule XXIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 2868.

□ 1642

IN THE COMMITTEE OF THE WHOLE

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 2868) to settle Indian land claims in the town of Gay Head, MA, and for other purposes, with Mr. JONES of Tennessee in the chair.

The Clerk read the title of the bill.

The CHAIRMAN. Pursuant to the rule, the first reading of the bill is dispensed with.

Under the rule, the gentleman from Arizona [Mr. UDALL] will be recognized for 30 minutes and the gentleman from Arizona [Mr. MCCAIN] will be recognized for 30 minutes.

The Chair recognizes the gentleman from Arizona [Mr. UDALL].

Mr. UDALL. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, H.R. 2868 is a bill which provides for the settlement of the claims of the Wampanoag Indians within the town of Gay Head, MA.

In 1974, the Wampanoag Indians of Gay Head filed a lawsuit against the town of Gay Head, alleging that in the 1870's, their lands were given away by the Commonwealth of Massachusetts to the town of Gay Head in violation of the 1790 Trade and Intercourse Act. This act required Federal approval for any transfer of Indian lands.

In 1983, the Indians, the town, the State of Massachusetts, and the non-Indian landowners of Gay Head reached a settlement to the lawsuit. Before this settlement agreement can become valid, it needs to be approved by Congress. H.R. 2868 implements this settlement agreement.

Under this settlement, the Indians would relinquish their claim to Gay Head, which consists of about 3,600 acres, and in return, would receive about 240 acres of lands currently held by the town of Gay Head and about 185 acres of land currently held by private parties. The United States and the State of Massachusetts would each contribute half of the funds necessary to purchase the private lands and the bill authorizes the appropriation of $1.5 million for this purpose.

Finally, in an attempt to get the endorsement of the administration, the committee adopted an amendment which provides that the provision of the bill will only become effective if and when the Secretary of the Interior decides to grant Federal recognition to the Gay Head Wampanoag Indians as an Indian tribe. The Gay Head Indians have filed a petition for Federal recognition as an Indian tribe with the Department of the Interior and a final secretarial decision is due by the end of the year.

Mr. Chairman, I believe that this is the last year that we will be able to enact this particular settlement. If the Gay Head Indians get federally recognized as an Indian tribe by the Secretary of the Interior before this legislation is passed, I believe that they may either decide to pursue the court case or ask for a higher priced settlement.

The congressional policy has been to encourage the parties to negotiate settlements to such Indian land claims so that innocent landowners are not forced to pay for mistakes made a long time ago. The parties in this case have done just that and I believe that they have reached a fair settlement. This lawsuit has been going on for 12 years now and I am afraid that if we do not pass this bill now, we would encourage such protracted litigation which only hurts the local landowners who have not committed any wrongs and now have to pay for past governmental mistakes. Mr. Chairman, this is a fair negotiated settlement which has been endorsed by all the parties in the litigation and I urge my colleagues to pass this bill.

Mr. Chairman, I reserve the balance of my time.

The CHAIRMAN. The gentleman from Arizona has consumed 2 minutes.

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Mr. McCAIN. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I would first like to recognize the efforts of the gentleman from Massachusetts [Mr. STUDDS] on this bill. The gentleman has been working diligently for at least 4 years that I know of on behalf of a small group of Indians, and I commend him for his dedication to it. I do not believe the bill would be on the floor at this time without his hard work with me and with other members of the Interior Committee.

Mr. Chairman. I rise to speak on the bill, H.R. 2868, the Gay Head band of Wampanoag Indians land settlement.

For many years the U.S. Government has tried to assist Indian tribes in settling disputes over land claims. Many mechanisms have been set up for this—the Indian Claims Commission, the U.S. Claims Court, suits in U.S. district court, and legislation before Congress to ratify negotiated settlement.

One of the first hurdles in any lawsuit for land claims by Indian tribes is the establishment that there is any entity which retained the legal right to the lands in question—namely a tribe. Mr. Speaker, H.R. 2868 is predicated on the fact that the existence of the tribe is questioned by the Department of the Interior—in this case we are voting to authorize a settlement before we even know if a tribe exists.

The Department of the Interior has made a preliminary finding that the group calling itself the Gay Head Wampanoag Tribal Council, Inc., is not the Gay Head Tribe of 100 or 200 years ago. The first criteria has not been met. This group is seeking a different result on appeal, but there is no recognized tribe at this time, and we owe it to this possible tribe and other Indian tribes to hold off any settlement until this threshold is met.

If there is a tribe, is this a good settlement for those Indian people, or are we just letting a group of non-Indians off the hook? I can't say, because the committee did not focus on the terms of the settlement. Who is to say that the entire town of Gay Head, MA, shouldn't be returned to the tribe, or possibly, as suggested by the administration, their claim has already been extinguished.

The fact is, without fully certifying that a tribe exists, and that it is a valid claim, we are authorizing 1.5 million Federal dollars to be matched by 1.5 million State dollars for the benefit of a group of people on Martha's Vineyard.

Mr. Chairman, I think it may be beneficial that we slow down, give the Interior Department a chance to conclusively decide if a tribe exists, and then negotiate. It might be better to wait another year before spending taxpayers' dollars. Therefore, I, like the administration, have concerns about this settlement at this time. However, I will not object to this bill because of the assurances I have received about the contingencies contained in the bill.

I also believe that we ought to give this legislation an opportunity to move forward.

Mr. Chairman, I reserve the balance of my time.

Mr. UDALL. Mr. Chairman, I yield 2 minutes to the distinguished author of the bill, the gentleman from Massachusetts [Mr. STUDDS].

Mr. STUDDS. Mr. Chairman, I want to take just one moment to thank the distinguished chairman of the Interior Committee, the gentleman from Arizona, and the other gentleman from Arizona who has just spoken, Mr. MCCAIN. I want to thank the gentleman for his kind personal words and for his faint praise for the legislation which has his—I cannot come up with

the right adjective to characterize the gentleman's support, but it is appreciated.

Mr. Chairman, both gentlemen who have spoken have summarized the substance of the issue and the contents of the bill. I just wish to say that initially the administration had two objections, and they were not without reason. One was that the initial proposal was that the entire cost of the proposed settlement be borne by the Federal Government. The administration countered that in its judgment, one-half of that cost ought reasonably to be borne by the State of Massachusetts.

We concurred, the State concurred; the State legislature has just enacted an appropriation of $1.5 million to cover its half of the settlement cost.

Second, the administration argued that we ought not to proceed with any settlement until the question of whether or not the tribe deserved Federal recognition as such had been resolved.

That we thought was not utterly without reason as well and, consequently, as both gentlemen who have previously spoken indicated, there is a contingency clause in this bill which says that this bill and the settlement shall not take effect until such time as Federal recognition is formally granted the tribe by the Department of the Interior.

I would also point out that I think the resolution embodied in this settlement is a fair and reasonable one for all sides, for the tribe, for the town, for the State and for the Federal Government. The potential liability for the Federal Treasury, should this litigation be protracted, is enormous. Land values in this part of the country are rising practically as we speak.

I think that for all concerned, and particularly in this instance speaking to Members' concerns for the Federal taxpayer, this is a bargain indeed.

I urge support for this bill.

Mr. Chairman, 12 years ago, the Wampanoag Indian Tribal Council filed suit in U.S. district court against the town of Gay Head, a small community on the island of Martha's Vineyard. This litigation was an attempt to reclaim public land transferred to the town in 1870 by the Commonwealth of Massachusetts, allegedly in violation of Federal law. Since that time, property titles in the town have been clouded, making it virtually impossible for residents to obtain mortgages.

After the lawsuit was filed, the parties engaged in a prolonged series of difficult negotiations. In November 1983, a settlement was adopted, with the overwhelming approval of tribe members and the concurrence of the town's voters, the Taxpayers Association and the Commonwealth of Massachusetts. Under this agreement, the town and State would convey 238 acres of public land to the tribal council, and the Federal Government would finance the purchase of an additional 175 acres. In return, all claims that the Wampanoag Tribe of Gay Head may have to land within the town or the State of Massachusetts would be extinguished.

H.R. 2868, which I introduced on June 25, 1985, provides the Federal approval necessary to implement this agreement. The Massachusetts Legislature has passed the required State implementing legislation, and, has approved a $1.5 million appropriation as the State's contribution toward settlement costs.

The bill has been amended to address two specific objections raised by the administration. One amendment requires the State of Massachusetts to pay for one-half the settlement costs. The Massachusetts Legislature, has, in fact, already enacted a $1.5 million appropriation as the State's contribution toward the overall $3 million cost. Another amendment makes enactment of the bill contingent on official Federal acknowledgement of the tribe by the Department of the Interior.

Mr. Chairman, like most such agreements, the settlement underlying this legislation is not 100 percent satisfactory to all parties. It is, however, far more desirable than the alternative—continued uncertainty, economic instability, and bitter controversy. The parties to this matter have acted, after protracted negotiations, to settle their differences. The Commonwealth of Massachusetts has done its share. It is now time for the Federal Government to act to resolve this longstanding problem. I urge passage of this bill.

Mr. McCAIN. Mr. Chairman, I have no further requests for time, and I yield back the balance of my time.

Mr. UDALL. Mr. Chairman, I have no further requests for time, and I yield back the balance of my time.

The CHAIRMAN. The Clerk will designate section 1.

Mr. UDALL. Mr. Chairman, I ask unanimous consent that the bill be printed in the RECORD and open to amendment at any point.

The CHAIRMAN. Is there objection to the request of the gentleman from Arizona?

There was no objection.

The text of H.R. 2868 is as follows:

H.R. 2868

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gay Head Wampanoag Indian Claims Settlement Act of 1985".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY.

The Congress hereby finds and declares that—

(1) there is pending before the United States District Court for the District of Massachusetts a lawsuit that involves Indian claims to certain public lands within the town of Gay Head, Massachusetts;

(2) the pendency of this lawsuit has resulted in severe economic hardships for the residents of the town of Gay Head by clouding the titles to much of the land in the town, including land not involved in the lawsuit;

(3) The Congress shares with the Commonwealth of Massachusetts and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claim;

(4) the parties to the lawsuit and others interested in settlement of Indian land claims within the Commonwealth of Massachusetts executed a Settlement Agreement which, to become effective, requires implementing legislation by the Congress of the United States and the General Court of the Commonwealth of Massachusetts; and

(5) the town of Gay Head has agreed to contribute approximately 50 per centum of the land involved in this settlement.

SEC. 3. GAY HEAD INDIAN CLAIMS SETTLEMENT FUND.

(a) FUND ESTABLISHED.—There is hereby established within the Treasury of the United States a fund to be known as the "Gay Head Indian Claims Settlement Fund". Amounts in the fund shall be available to the Secretary to carry out the purposes of this Act.

(b) AUTHORIZATION FOR APPROPRIATION.—There is hereby authorized to be appropriate $3,000,000 for such fund to remain available until expended.

SEC. 4. APPROVAL OF PRIOR TRANSFERS AND EXTINGUISHMENT OF ABORIGINAL TITLE AND CLAIMS OF GAY HEAD INDIANS.

(a) APPROVAL OF PRIOR TRANSFERS.—Any transfer before the date of the enactment of this Act of land or natural resources now located anywhere within the United States from, by, or on behalf of the Wampanoag Tribal Council or the Gay Head Indians, or (2) any transfer before the date of the enactment of this Act by, from, or on behalf of any Indian, Indian nation, or tribe or band of Indians, of any land or natural resources located anywhere within the town of Gay Head, Massachusetts, including any transfer pursuant to any statute of the State, and the incorporation of the town of Gay Head, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by or on behalf of any Indian, Indian nation, or tribe or band of Indians (including the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof). Any such transfer and any transfer in implementation of this Act, shall be deemed to have been made with the consent and approval of Congress as of the date of such transfer.

(b) EXTINGUISHMENT OF ABORIGINAL TITLE.—Any aboriginal title held by the Wampanoag Tribal Council, or Any other entity presently or at any time in the past known as the Gay Head Indians, to any land or natural resources the transfer of which is consented to and approved in subsection (a) is considered extinguished as of the date of such transfer.

(c) EXTINGUISHMENT OF CLAIMS ARISING FROM PRIOR TRANSFERS OR EXTINGUISHMENT OF ABORIGINAL TITLE.—Any claim (including any claim for damages for use and occupancy) by the Wampanoag Tribal Council, the Gay Head Indians, or any other Indian,

Indian nation, or tribe or band of Indians against the United States, any State or political subdivision of a State, or any other person which is based on—

(1) any transfer of land or natural resources which is consented to and approved in subsection (a), or

(2) any aboriginal title to land or natural resources the transfer of which is consented to and approved in subsection (b), is extinguished as of the date of any such transfer.

(d) PERSONAL CLAIMS NOT AFFECTED.—No provision of this section shall be construed to offset or eliminate the personal claim of any individual Indian which is pursued under any law of general applicability that protects non-Indians as well as Indians.

SEC. 5. CONDITIONS PRECEDENT TO FEDERAL PURCHASE OF SETTLEMENT LANDS.

(a) INITIAL DETERMINATION OF STATE AND LOCAL ACTION.—No action shall be taken by the Secretary under section 6 before the Secretary publishes notice in the Federal Register of the determination by the Secretary that—

(1) the Commonwealth of Massachusetts has enacted legislation which provides that—

(A) the town of Gay Head, Massachusetts, is authorized to convey to the Wampanoag Tribal Council the public settlement lands and the Cook lands subject to the conditions and limitations set forth in the Settlement Agreement,

(B) the settlement lands shall be exempt from taxation by the State or any political subdivision of the State to the extend provided in Settlement Agreement, and

(C) the Wampanoag Tribal Council shall have the authority, after consultation with appropriate State and local officials, to regulate any hunting by Indians on the settlement lands that is conducted by means other than firearms or crossbow to the extent provided in, and subject to the conditions and limitations set forth in, the Settlement Agreement; and

(2) the town of Gay Head, Massachusetts, has authorized the conveyance of the public settlement lands and the Cook Lands to the Wampanoag Tribal Council.

(b) RELIANCE UPON THE ATTORNEY GENERAL OF MASSACHUSETTS.—In making the findings required in subsection (a) of this section, the Secretary may rely upon the opinion of the Attorney General of the Commonwealth of Massachusetts.

SEC. 6. SECRETARY REQUIRED TO PURCHASE AND TRANSFER PRIVATE SETTLEMENT LANDS.

(a) NEGOTIATIONS AND SURVEY BY THE SECRETARY.—Within sixty days following the date of publication of findings under section 5(a), the Secretary shall enter into negotiations for the purchase of the private settlement lands on behalf of the tribe at the fair market value of such lands (determined without regard to pending Indian claims). The Secretary, during this time period, shall also cause a survey to be conducted to determine the precise acreage and boundaries of the settlement lands.

(b) ARBITRATION REQUIRED IN CASE OF FAILURE TO ESTABLISH PURCHASE PRICE.—If the Secretary and any owner of private settlement land are unable to agree on fair market value before the end of the ninety-day period beginning on the last day of the sixty-day period described in subsection (a), the fair market value of such land shall be determined by binding arbitration conducted in accordance with the rules and procedures of the American Arbitration Association.

(c) PURCHASE BY THE SECRETARY.—Within sixty days after the price and any other terms for the purchase of the private settlement land has been agreed to under subsection (a) or determined in accordance with subsection (b), as the case may be, the Secretary shall acquire all rights, title, and interest to such private settlement land.

(d) TRANSFER AND SURVEY OF LAND TO WAMPANOAG TRIBAL COUNCIL.—All rights, title, and interest to all private settlement land purchased by the Secretary under this section shall be transferred to the Wampanoag Tribal Council and shall be held by such council in accordance with the provisions of this Act, the Settlement Agreement and any other applicable laws.

(e) PROCEEDINGS AUTHORIZED TO ACQUIRE OR TO PERFECT TITLE.—The Secretary is authorized to commence such condemnation proceedings as the Secretary may determine to be necessary—

(1) to acquire or perfect any right, title, or interest in any private settlement land, and

(2) to condemn any interest adverse to any ostensible owner of such land.

SEC. 7. JURISDICTION OVER SETTLEMENT LANDS; RESTRAINT ON ALIENATION.

(a) LIMITATION ON INDIAN JURISDICTION OVER SETTLEMENT LANDS.—No Indian tribe or band may exercise any form of jurisdiction (whether or not such tribe or band is a federally recognized Indian tribe or band) over any part of the settlement lands, or any other land that may now or in the future be owned by or held in trust for such Indian entity in the town of Gay Head, Massachusetts, except to the extent provided in this Act, the State Implementing Act, or the Settlement Agreement.

(b) RESTRAINT ON ALIENATION.—

(1) IN GENERAL.—No right, title, or interest in any settlement land (other than the Cook lands and the West Basin Strip in accordance with paragraph 11 of the Settlement Agreement) may be sold, granted, or otherwise conveyed by the Wampanoag Tribal Council (or, in the case of private settlement land held by the Secretary pursuant to section 6(c) before the transfer of such land under section 6(d), by the Secretary) to any person other than any Indian tribe or tribal organization in Gay Head, Massachusetts, whose existence is subsequently acknowledged by the Secretary.

(2) PROHIBITED DISPOSITION WITHOUT LEGAL EFFECT.—No disposition and no attempt to make any disposition of settlement land to any person other than and Indian tribe or tribal organization referred to in subparagraph (1) shall have any effect in law or equity.

(3) SUBSEQUENT HOLDER BOUND TO SAME TERMS AND CONDITIONS.—Any tribe or tribal organization which acquires any settlement land from the Wampanoag Tribal Council shall hold title to such land subject to the same terms and conditions as are applicable to such lands when held by such council.

(b) RESERVATION OF RIGHT AND AUTHORITY RELATING TO SETTLEMENT LANDS.—No provision of this Act shall affect or otherwise impair—

(1) any authority to impose a lien or temporary seizure on the settlement lands as provided in the State Implementing Act,

(2) the authority of the Secretary to approve leases in accordance with the Act entitled "an Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases." and approved August 9, 1955 (25 U.S.C. 415 and following), as such Act may have been or may be amended; or

(3) the legal capacity of the Wampanoag Tribal Council to grant or otherwise convey—

(A) the right to use the settlement lands to its members,

(B) any easement for public or private purposes in accordance with the laws of the Commonwealth of Massachusetts or the ordinances of the town of Gay Head, Massachusetts, or

(C) title to the West Basin Strip to the town of Gay Head, Massachusetts, pursuant to the terms of the Settlement Agreement.

SEC. 8. MISCELLANEOUS PROVISIONS.

(a) LIMITATION ON LIABILITY OF UNITED STATES TO WAMPANOAG INDIANS UNDER THIS ACT.—Subject to subsection (b), the United States shall have no duties or liabilities with respect to the Wampanoag Tribal Council or any settlement lands after the Secretary has completed any action required under this Act.

(b) RESERVATION OF INDIAN RIGHT TO FEDERAL RECOGNITION.—No provision of this Act shall be construed to affect—

(1) the right of any Indian entity in the town of Gay Head, Massachusetts, to petition the Secretary for Federal recognition of such entity as an Indian tribe, or

(2) the eligibility of such entity, or members of such entity, for services or benefits provided by the United States to federally recognized Indian tribes if the Secretary acknowledges the existence of such entity as an Indian tribe.

SEC. 9. DEFINITIONS.

For the purposes of this Act:

(1) COOK LANDS.—The term "Cook lands" means the lands described in paragraph (5) of the Settlement Agreement.

(2) GAY HEAD INDIANS.—The term "Gay Head Indians" means any Indian tribe, band, group, or nation whether or not considered an eligible recipient under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) or under chapter 67 of title 31, United States Code, or otherwise federally recognized, known as the Gay Head Indians, Gay Head Tribe, Gay Head Wampanoag Tribe, or the Wampanoag Indians of Gay Head, or any other entity, person, or group of persons, or any predecessor or successor in interest or shareholder of any such tribe or entity, claiming or having tribal status, tribal land, or aboriginal title to any land or natural resources situated in whole or in part in the town of Gay Head, Massachusetts.

(3) LAND OR NATURAL RESOURCES.—The term "land or natural resources" means any real property or natural resources, or any interest in or right involving, any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish.

(4) LAWSUIT.—The term "lawsuit" means the action entitled Wampanoag Tribal Council of Gay Head, and others versus Town of Gay Head, and others (C.A. No. 74-5826-McN (D. Mass.)).

(5) PRIVATE SETTLEMENT LANDS.—The term "private settlement lands" means approximately one hundred and seventy-five acres of privately held land described in paragraph 6 of the Settlement Agreement.

(6) PUBLIC SETTLEMENT LANDS.—The term "public settlement lands" means the lands described in paragraph (4) of the Settlement Agreement.

(7) SETTLEMENT LANDS.—The term "settlement lands" means the private settlement lands and the public settlement lands.

(8) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(9) SETTLEMENT AGREEMENT.—The term "Settlement Agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts, Indian Land Claims," executed as of November 22, 1983, and renewed thereafter by representatives of the parties to the lawsuit, and as filed with the Secretary of the Commonwealth of Massachusetts.

(10) STATE IMPLEMENTING ACT.—The term "State implementing act" means legislation enacted by the Commonwealth of Massachusetts conforming to the requirements of this Act and the requirements of the Massachusetts Constitution.

(11) TRANSFER.—The term "transfer" includes—

(A) any sale, grant, lease, allotment, partition, or conveyance,

(B) any transaction the purpose of which is to effect a sale, grant, lease, allotment, partition, or conveyance, or

(C) any eveny or events that resulted in a change of possession or control of land or natural resources.

(12) WEST BASIN STRIP.—The term "West Basin Strip" means a strip of land along the West Basin which the Wampanoag Tribal Council is authorized to convey, under paragraph (11) of the Settlement Agreement, to the town of Gay Head.

(13) WAMPANOAG TRIBAL COUNCIL.—The term "Wampanoag Tribal Council" means the Wampanoag Tribal Council of Gay Head, Incorporated.

SEC. 10. APPLICABILITY OF STATE LAW.

Except as otherwise expressly provided in this Act or in the State Implementing Act, 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 Commonwealth of Massachusetts and the town of Gay Head, Massachusetts.

SEC. 11. LIMITATIONS OF ACTION; JURISDICTION.

Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this Act shall be barred unless the complaint is filed within sixty days following publication of the notice specified in section 5. Exclusive original jurisdiction over any such action and any proceedings under section 6(d) is hereby vested in the United States District Court of the District of Massachusetts.

SEC. 12. EFFECTIVE DATE.

The provisions of section 4 shall take effect upon the trasnfer of title to the settlement lands to the Wampanoag Tribal Council. The fact of such transfer, and the date thereof, shall be certified and recorded by the Secretary of the Commonwealth of Massachusetts. All other provisions of this Act shall take effect upon enactment.

COMMITTEE AMENDMENTS

The CHAIRMAN. The Clerk will report the committee amendments.

The Clerk read as follows:

Committee amendments: Page 3, line 11, delete "$3,000,000" and insert in lieu thereof "$1,500,000".

Page 3, after line 12, insert the following new subsection: "(c) STATE CONTRIBUTION REQUIRED.—Amounts may be expended from the fund only upon deposit by the State of Massachusetts into the fund of an amount equal to that amount to be expanded by the United States so that both the United States and the State of Massachusetts bear one half of the cost."

Page 4, line 20, before the word "any", insert the word "or".

Page 5, line 4, delete the words "Wampanoag Tribal Council" and insert in lieu thereof the phrase "Secretary to be held in trust for the Gay Head Indians".

Page 6, line 15, before the word "shall" insert the phrase "or the tribal governing body referred to in section 6(d) of this Act,".

Page 6, line 24, delete the words "Wampanoag Tribal Council" and insert the phrase "Secretary in trust for the Gay Head Indians".

Page 8, line 10, beginning with the word "shall" delete all through the period on line 13 and insert in lieu thereof the following: "and the title to public settlement lands conveyed by the Town of Gay Head shall be held in trust for the Gay Head Indians and is subject to this Act, the Settlement Agreement, and other applicable laws. The Wampanoag Tribal Council of Gay Head Indians, Inc., a corporation chartered by the state of Massachusetts, shall be the interim tribal governing body for administration of the settlement lands on behalf of the Gay Head Indians until a tribal governing body is established and recognized by the Secretary."

Page 10, line 16, delete "(b)" and insert in lieu thereof "(c)".

Page 11, line 16 through page 12, line 9, delete section 8 and renumber the subsequent sections accordingly.

Page 15, line 7, after the word "the" delete all through the period on line 8 and insert in lieu thereof the following: "the entity recognized by the Secretary as representing the Gay Head Indians."

Page 16 beginning on line 4, strike all through the period of line 9 and insert in lieu thereof the following: "This act (except section 4) shall take effect on publication in the Federal Register within one year of enactment of this act of a notice of the Secretary's acknowledgment under Part 83 of title 25, Code of Federal Regulations, that the Gay Head Indians exist as an Indian tribe. Section 4 shall take effect on the later of the foregoing date or on transfer of title to the settlement lands to the Secretary of the Interior to be held in trust for the Gay Head Indians or the tribe organized by those individuals who the Secretary of the Interior determines are Gay Head Indians descendants: Provided that, initial and future membership in the tribe shall be limited to Gay Head Indians descendants."

Mr. UDALL (during the reading). Mr. Chairman, I ask unanimous consent that the committee amendments be considered en bloc, and that they be considered as read and printed in the RECORD.

Mr. CHAIRMAN. Is there objection to the request of the gentleman from Arizona?

There was no objection.

AMENDMENTS OFFERED BY MR. UDALL TO THE COMMITTEE AMENDMENTS

Mr. UDALL. Mr. Chairman, I offer two technical amendments to the committee amendments, and I ask unanimous consent that they be considered en bloc.

The CHAIRMAN. Is there objection to the request of the gentleman from Arizona?

There was no objection.

The CHAIRMAN. The Clerk will report the amendments to the committee amendments.

The Clerk read as follows:

Amendments offered by Mr. UDALL to the committee amendments: On page 8, line 6, before the period insert "with such amounts as provided in appropriation Acts".

In the committee amendment beginning on page 8, line 10, through line 22, strike the sentence beginning on line 16 with the words "The Wampanoag Tribal Council" and all that follows through the period and insert the following in lieu thereof: "The Secretary shall provide for an interim governing body for administration of the settlement lands on behalf of the Gay Head Indians until a tribal governing body is established and recognized by the Secretary.".

Mr. UDALL (during the reading). Mr. Chairman, I ask unanimous consent that the amendments to the committee amendments be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Arizona?

There was no objection.

Mr. UDALL. Mr. Chairman, one of the amendments is designed to bring the bill into compliance with the Budget Act, and the other amendment corrects a clerical omission in the committee amendments.

The CHAIRMAN. The question is on the amendments offered by the gentleman from Arizona [Mr. UDALL] to the committee amendments.

The amendments to the committee amendments were agreed to.

The CHAIRMAN. The question is on the committee amendments, as amended.

The committee amendments, as amended, were agreed to.

AMENDMENTS OFFERED BY MR. MC CAIN

Mr. McCAIN. Mr. Chairman, I offer amendments, and I ask unanimous consent that the amendments be considered en bloc, considered as read, and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Arizona?

There was no objection.

The text of the amendments en bloc is as follows:

Amendments en bloc offered by Mr. McCAIN: At the end of the bill, add the following new titles:

TITLE II

That this title may be cited as the "Indian Self-Determination Amendments of 1986."

SEC. 2. (a) The Congress finds that:

(1) the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638, 25 U.S.C. 450, et seq.), (the "Act") has furthered the development of local self-government and education opportunities for Indian tribes but its goals and progress have been impeded by lack of clarity and direction on the part of Federal agencies regarding their roles in implementing the Federal policy of Indian self-determination;

(2) the Federal responsibilities for welfare of Indian tribes demands effective self-government by Indian tribal communities; and

(3) additional legislation is necessary to assure that Indian tribes have an effective voice in the planning and implementation of programs for the benefit of Indians.

SEC. 3. Section 4 of the Act is amended as follows:

(1) In subsection (b), after the words "village corporation" add "or regional association."

(2) At the end of subsection (c), replace the semicolon by a colon and add the following: "*Provided*, That in areas where the Indian Health Service has no direct care facilities and the tribes are served by a tribal organization, such tribal organization shall be eligible to receive a contract under the authority of this Act if it has the approval of each tribe it proposes to serve.".

(3) Redesignate subsection (f) as subsection (e) and add the following new subsection:

"(f) 'Construction' means the planning, design, construction, repair, improvement, and expansion of buildings or facilities including, but not limited to, housing, sanitation, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, or port facilities.".

(4) Add the following new subsection (g):

"(g) 'Contract Support Costs' means reasonable costs for activities which must be carried on by a tribal organization as a contractor under the act to ensure compliance with the terms of the contract and prudent management but which (i) normally are not carried on by the respective secretary in his direct operation of the program or (ii) are provided by the Secretary in support of the contracted program from resources other than those under contract.".

SEC. 4. Subsection (a) of section 102 is amended by inserting the words "including construction programs" after the words "administer programs" and by inserting after the words "subsequent thereto" the following: "including (i) any program or portion thereof, including construction program, administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of the Interior, and (ii) any program, or portion thereof, for the benefit of Indians without regard to the agency or office of the Department of the Interior within which it is performed;".

SEC. 5. (a) Subsection (a) of section 103 of the Act is amended by inserting after the words "as amended" a comma and the following: "or any program, or portion thereof, which the Secretary is authorized to administer for the benefit of Indians including (i) any such program, or portion thereof for which appropriations are made to agencies other than the Department of Health and Human Services and (ii) any such program, or portion thereof, without regard to the agency or office within which it is performed within the Department of Health and Human Services".

(b) Subsection (c) of section 103 of the act is amended to read as follows:

"(c) Notwithstanding the provisions of section 2671, title 28, any tribal organization which has entered into a contract, grant or cooperative agreement with the Secretary of Health and Human Services shall be treated as an agency within the Department of Health and Human Services for purposes of the Federal Torts Claims Act with respect to any tort arising out of its performance of such contract, grant or cooperative agreement. For purposes of this subsection and the Federal Tort Claims Act, the Secretary of Health and Human Services is designated as the head of the agency within the meaning of section 2672, title 28.".

SEC. 6. Subsection (e) of section 105 of the act is amended by deleting the words "on or before December 31, 1985,".

SEC. 7. (a) Subsection (a) of section 106 of the act is amended by changing the period at the end thereof to a colon and adding the following: *Provided further*, That any request by an Indian tribe or tribal organization for a waiver of such laws or regulations or other regulations of the appropriate Secretary shall be granted unless declined in accordance with the criteria provided in section 102 or 103 of this Act and under the procedures established by regulations for the declination of tribal requests under such sections.".

(b) Subsection (e) of section 106 of the Act is further amended by changing the period at the end of the sentence to a colon and inserting in lieu the following: "*Provided*, That at his discretion, the appropriate Secretary may transfer the title to the Indian tribe to any personal property found to be in excess to the need of the Bureau of Indian Affairs or Indian Health Service.".

SEC. 8. Section 106 of the Act is amended by changing subsection (h) to read as follows:

"(h)(1) The amount of funds provided under the terms of contracts entered pursuant to this Act shall be no less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portion thereof for the period covered by the contract: *Provided*, That—

"(i) for other than school or education programs, to such amount shall be added contract support costs which shall be negotiated with each contractor annually and which shall include costs attributable to all nonschool or noneducation programs for which the tribal organization has contracted pursuant to sections 102 and 103 of this Act, and

"(ii) for school and education programs, the Secretary of the Interior shall adopt regulations establishing a formula for determining the amount of administrative overhead costs necessary to sustain the administration of such programs. This formula shall among others, include such factors as school enrollment, education program scope, organizational and administrative plans, support services plan, size of facilities, size or area within the school's service area boundaries, isolation, unique regional costs, presence of noneducational programs, personnel training plan, and the allowable indirect costs standards. Funds for administrative overhead costs allocated by this formula shall be promptly added to each contract.

"(2) Once contract obligations are negotiated, the contract amount may be increased or decreased only with the consent of the contractor to reflect an increase or decrease in the level of appropriations.

"(3) Any savings in operation or administration of such contract shall be utilized to provide additional services or benefits under the contract and may be carried over to the succeeding fiscal year without any reduction in the funding to which the contractor is otherwise entitled. Grounds for declining to carry over such saving shall be limited to those grounds specified in section 102 and 103 of the Act.

"(4) At the request of any Indian tribe, the appropriate Secretary shall disclose the most current amount of funding planned, obligated and expended for any program, or portion thereof, administered for the benefit of such tribe down to the fourth level of each agency's accounting system.

"(5) The appropriate Secretary shall include in annual budget requests to the Congress a request for the funds necessary to provide contract support costs for all contracts anticipated in the fiscal period covered by the request and shall provide a supplemental report to the Congress on or before June 15 of each year identifying any deficiency of funds requested below estimated needs.".

SEC. 9. Section 106 of the Act is further amended by adding the following new subsection (i):

"(i) The appropriate Secretary shall insure the responsive and efficient consideration of tribal requests under sections 102, 103, and 104 of the Act by designating an official within the Bureau of Indian Affairs or the Indian Health Service, as appropriate, to supervise the review of applications and the negotiation, award and monitoring of contracts, grants or cooperative agreements by the appropriate agency. These two officials shall be charged with the duty to further the purposes of this Act. The appropriate Secretary shall also delegate to such official the authority to review, at the request of the contractors, decisions to decline such contract, grant or cooperative agreement applications subject to the right of any applicant to an appeal and hearing as provided in this Act.".

SEC. 10. Title I of the Act is amended by adding a new section 111 as follows:

"SEC. 111. (a) The appropriate Secretary shall designate officials who are not employed by the Bureau of Indian Affairs or the Indian Health Service for the purpose of conducting hearings in declination appeals.

"(b) Appeals and hearings on any declination to contract based on insufficient funding shall be conducted under the same procedures as apply in the case of other declinations.

"(c) The appropriate agency shall give notice of any disallowance of costs within 365 days of receiving any required audit report and shall provide for an appeal and hearing to the appropriate officials on any such disallowance. Any right of action or other remedy relating to any such disallowance shall be barred unless notice has been given within the designated period.".

SEC. 11. Title 1 of this Act is further amended by adding a new section 112 as follows:

"SEC. 112. All contracts, grants and cooperative agreements entered into or issued pursuant to this Act shall be subject to the Contract Dispute Act of 1978, Public Law 95-563.".

"SEC. 12. Title 1 of the Act is further amended by adding a new section 113 as follows:

"SEC. 113. Whenever an indrect cost rate is negotiated annually between a tribe or tribal organization and the cognizant Federal agency, that rate shall be applicable to all contracts and grants made with such tribe or tribal organization pursuant to sections 102, 103, and 104 of this Act. If not otherwise specifically prohibited by any other provisions of law, such rate shall be applicable to any other Federal program administered by such tribe or tribal organization, and each Federal agency responsible for such program shall apply such negotiated indirect cost rate and pay the full indirect

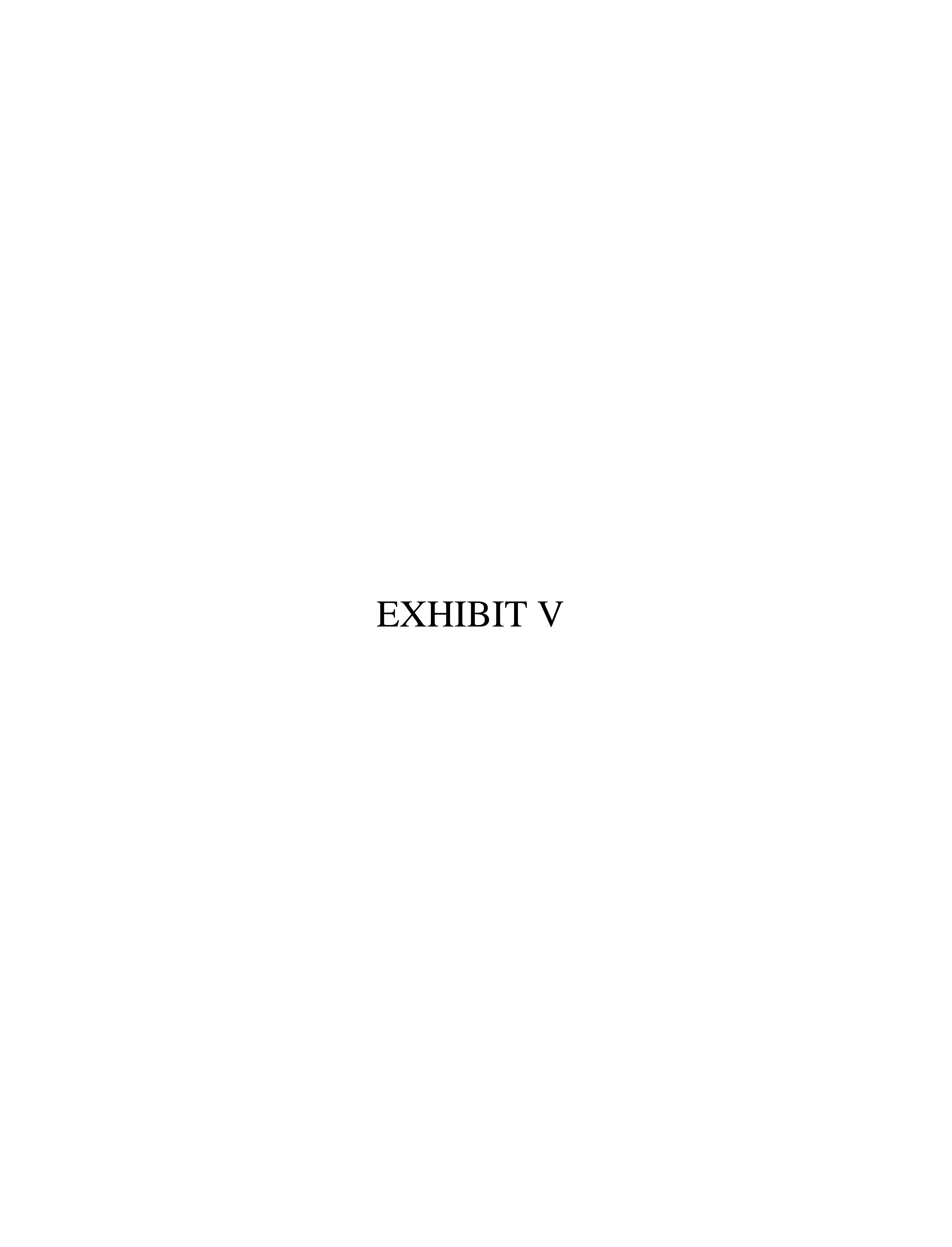


EXHIBIT V

Mr. WILSON. Mr. President, all of the nominations read by the majority leader have been cleared on the Republican side.

Mr. BYRD. Mr. President, I thank the distinguished Senator.

Mr. President, I ask unanimous consent that all the nominations enumerated be considered en bloc and confirmed en bloc; a motion to reconsider be laid on the table; the President to be immediately notified that all nominations have been confirmed today; and that the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations considered and confirmed en bloc are as follows:

IN THE AIR FORCE

The following-named officer for appointment to the grade of lieutenant general on the retired list pursuant to the provisions of title 10, United States Code, section 1370:

Lt. Gen. Philip C. Gast, 498-34-9821FR, U.S Air Force.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Hansford T. Johnson, 251-58-7597FR, U.S. Air Force.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be reassigned in his current grade to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Lt. Gen. Harry A. Goodall, 288-28-0199FR, U.S. Air Force.

IN THE NAVY

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370.

To be vice admiral

Vice Adm. James E. Service, 163-24-3700/1310, U.S. Navy.

POSTAL RATE COMMISSION

John W. Crutcher, of Kansas, to be a commissioner of the Postal Rate Commission for the term expiring October 16, 1992, reappointment.

FEDERAL LABOR RELATIONS AUTHORITY

Jerry Lee Calhoun, of Washington, to be a member of the Federal Labor Relations Authority for a term of 5 years expiring July 29, 1992, reappointment.

NATIONAL SCIENCE FOUNDATION

Kenneth Leon Nordtvedt, Jr., of Montana, to be a member of the National Science Board, National Science Foundation, for the remainder of the term expiring May 10, 1990, vice Simon Ramo, resigned.

NATIONAL COUNCIL ON EDUCATIONAL RESEARCH AND IMPROVEMENT

James L. Usry, of New Jersey, to be a member of the National Council on Educational Research and improvement for a term expiring September 30, 1989, vice J. Floyd Hall, term expired.

NATIONAL ADVISORY COUNCIL ON EDUCATIONAL RESEARCH AND IMPROVEMENT

Ruth Reeve Jenson, of Arizona, to be a member of the National Advisory Council on Educational Research and Improvement for the term expiring September 30, 1989, vice Donna Helene Hearne, resigned.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

BILL INDEFINITELY POSTPONED—S. 887

Mr. BYRD. Mr. President, I ask unanimous consent that S. 887 be indefinitely postponed.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE CALENDAR

Mr. BYRD. Mr. President, I inquire of the acting Republican leader, have the following Calendar Order Nos. 272, 275, 277, and 282 been cleared on the Republican side?

Mr. WILSON. Mr. President, they have been cleared.

Mr. BYRD. Mr. President, I ask unanimous consent that the calendar orders which I have read be considered en bloc and that where amendments to measures or to preambles are shown they be considered and agreed to, and that the measures be agreed to en bloc, that a motion to reconsider en bloc be laid on the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

SETTLEMENT OF INDIAN LAND CLAIMS IN GAY HEAD, MA

The Senate proceeded to consider the bill (H.R. 2855) to settle Indian land claims in the town of Gay Head, MA, and for other purposes.

Mr. KENNEDY. Mr. President, I rise in support of H.R. 2855, the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 and ask for its immediate consideration.

This bill is the culmination of nearly 15 years of negotiation between the Wampanoag Tribal Council of Gay Head, Inc., the Town of Gay Head, the Gay Head Taxpayers Association and the Commonwealth of Massachusetts.

It will extinguish a claim brought by the Wampanoag Tribal Council in 1974, against the Town of Gay Head in Federal district court seeking to recover land in this small community on Martha's Vineyard. The claim was based on the Non-Intercourse Act, which prohibits the alienation of tribal lands without congressional consent. In an effort to avoid costly, time-consuming litigation, and alleviate the financial burdens of clouded property title on Gay Head, the parties entered into extensive negotiations which resulted in the adoption of a settlement agreement in November 1983. This legislation would carry out the terms of the agreement.

Congressman GERRY STUDDS is the sponsor of this bill and it is similar to the legislation that I introduced earlier this year with my colleague Senator KERRY. The only difference between the two bills are minor, technical amendments that were added during the markup by the House Interior and Insular Affairs Committee.

There are several unique features of this bill that deserve special recognition.

Last year, the bill that I introduced made the transfer of property contingent on the recognition of the tribe. That provision is no longer necessary because on February 4, 1987, the Secretary of Interior recognized the Wampanoag Indians of Gay Head as a tribe.

Second, this bill calls for 418 acres of land to be held in trust for the benefit and use of the tribe for housing and business enterprises. Under the agreement, the Commonwealth of Massachusetts will transfer 238 acres of public land to the tribe. The authority for the transfer of the property has already been approved by the State legislature. The remaining 180 acres of land will be purchased jointly by the Federal Government and the State of Massachusetts—each will finance one-half of the $4.5 million land cost. This bill establishes a $2.25 million Gay Head Indian Claims Settlement Fund representing the Federal share of the land purchase.

The most important reason for expeditious action on this bill is the problem of escalating land prices on Martha's Vineyard. This beautiful island off the coast of Massachusetts—longtime home to the Wampanoag Gay Head Indians—is also one of the most popular vacation spots on the east coast. The availability of affordable property on Martha's Vineyard is diminishing. Through this unique arrangement, the parties to this settlement have had access to a block of land that would accommodate the Indians' needs. But the longer we delay, the price of the land increases and we potentially jeopardize subdivision of the private property by its current owners into smaller lots for sale.

This legislation recognizes that in a time of fiscal restraint it is important for Congress to ensure that Indian land claims settlements meet certain broadly applicable standards.

The Wampanoag Tribe of Gay Head Indians has persevered to meet these standards, which include: Federal recognition of the tribe, which the Gay Head Indians achieved February 4, 1987; payment by Massachusetts of 50 percent of the settlement costs; and

documentation of the validity of the land claim, which the Gay Head Indians have produced. Furthermore, the current value of the settlement property is based on an independent appraisal.

I ask my colleagues in the Senate to act favorably and finalize this agreement which represents the final step in a long, arduous negotiation process.

It is time to conclude an issue that has finally reached an amicable resolution and allow the Wampanoag Indian Tribe of Gay Head to provide long overdue opportunities for their members.

The bill (H.R. 2855) was ordered to a third reading, read the third time, and passed.

CREATION OF "SENATORS' OFFICIAL PERSONNEL AND OFFICE EXPENSE ACCOUNT"

The Senate proceeded to consider the bill (S. 1574) to combine the Senator's Clerk Hire Allowance Account and the Senator's Official Office Expense Account into a combined single account to be known as the Senators' Official Personnel and Office Expense Account, and for other purposes.

Mr. D'AMATO. Mr. President, would the chairman of the Senate Rules and Administration Committee respond to a question? In section 1(b)(1) of S. 1574, does expense category 3, "costs incurred in the preparation of required official reports, and the acquisition of mailing lists to be used for official purposes, and in the mailing, delivery, or transmitting of matters relating to official business," authorize a Member to be reimbursed for expenses incurred for any official Senate mailing which is in excess of authorized allocations that limit the amount of appropriated funds available in the appropriation—official mailing costs?

Mr. FORD. I would be happy to respond to my good friend from New York. The answer is yes! Expense category 3 could be used to reimburse the costs incurred for any official Senate mailing which is in excess of authorized allocations that limit the amount of appropriated funds available to the appropriations—official mailing costs. I would like to confirm with the ranking member of our committee, TED STEVENS, that my response is consistent with his understanding.

Mr. STEVENS. Yes! Absolutely! The whole point of this legislation consolidating office accounts is to allow Members more control and flexibility on how they can allocate the resources the Senate provide to meet their individual office needs so they can best respond to the residents in their States. The chairman's answer to my friend from New York's question is how I understood the new consolidated account could assist Members in their mailings. In fact, I had ventured that opinion in a private conversation with Senator D'AMATO. I commend the Senator from New York for bringing the question to the floor so the chairman could put to rest, on the record, any doubt that any other Senator may have on that point.

The bill was ordered to be engrossed for a third reading, read the third time, and passed; as follows:

S. 1574

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a)(1) effective January 1, 1988, there shall be, within the contingent fund of the Senate, a separate appropriation account to be known as the "Senators' Official Personnel and Office Expense Account" (hereinafter in this section referred to as the "Senators' Account").

(2) The Senators' Account shall be used for the funding of all items, activities, and expenses which, immediately prior to January 1, 1988, were funded under either (A) the Senate appropriation account for "Administrative, Clerical, and Legislative Assistance Allowance to Senators" (hereinafter in this section referred to as the "Senators' Clerk Hire Allowance Account") under the headings "SENATE" and "SALARIES, OFFICERS AND EMPLOYEES", or (B) that part of the account, within the contingent fund of the Senate, for "Miscellaneous Items" (hereinafter in this section referred to as the "Senators' Official Office Expense Account") which is available for allocation to Senatorial Official Office Expense Accounts. In addition, the Senators' Account shall be used for the funding of agency contributions payable with respect to compensation payable by such account, but moneys appropriated to such account for this purpose shall not be available for any other purpose. The account, which in clause (A) of the first sentence of this paragraph is identified as the "Senators' Clerk Hire Allowance Account" and the account, which in clause (B) of such sentence is identified as the "Senators' Official Office Expense Account" shall, when referred to in other law, rule, regulation, or order (whether referred to by such name or any other) shall on and after January 1, 1988, be deemed to refer to the "Senators' Official Personnel and Office Expense Account".

(3)(A) Effective on January 1, 1988, there shall be transferred to the Senators' Account from the Senators' Clerk Hire Allowance Account all funds therein which were available for expenditure or obligation during the fiscal year ending September 30, 1988, and from the Senators' Official Office Expense Account so much of the funds therein as was available for expenditure or obligation for the period commencing January 1, 1988, and ending September 30, 1988; except that the Senators' Official Office Expense Account shall remain in being solely for the purpose of being available to pay for any authorized item, activity, or expense, for which funds therein had been obligated, but not paid, prior to such transfer.

(B) Any of the funds transferred to the Senators' Account from the Senators' Clerk Hire Allowance Account pursuant to subparagraph (A) which, prior to such transfer, had been obligated, but not expended, for any authorized item, activity, or expense, shall be available to pay for such item, activity, or expense in like manner as if such transfer had not been made.

(4) On January 1, 1988, there shal[illegible] transferred to the Senators' Account, fro[illegible] the appropriation account for "Agency Co[illegible]tributions", under the headings "SENAT[illegible]" and "SALARIES, OFFICERS AND EMPLOYEES" [illegible] much of the moneys in such account as [illegible] appropriated for the purpose of mak[illegible] agency contributions for administrati[illegible] clerical, and legislative assistance to Sen[illegible]tors with respect to compensation payab[illegible] for the period commencing January 1, 19[illegible] and ending September 30, 1988; and th[illegible] moneys so transferred shall be availab[illegible] only for the payment of such agency contri[illegible]butions with respect to such compensatio[illegible]

(5) Vouchers shall not be required for th[illegible] disbursement, from the Senators' Accou[illegible] of salaries of employees in the office [illegible] Senator.

(b)(1) Effective January 1, 1988, section 506(a) of the Supplemental Appropriations Act, 1973 (2 U.S.C. 58(a)) is amended to read as follows:

"SEC. 506. (a) The contingent fund of the Senate is made available for payment to or on behalf of each Senator, upon certifica[illegible]tion of the Senator, for the following e[illegible]penses incurred by the Senator and hi[illegible] staff:

"(1) telecommunications equipment and services subject to such regulations as may be promulgated by the Committee on Rules and Administration of the Senate;

"(2) stationery and other office supplies procured for use for official business;

"(3) reimbursement to each Senator for costs incurred in the preparation of re[illegible]quired official reports, and the acquisition of mailing lists to be used for official purposes, and in the mailing, delivery, or transmitting of matters relating to official business;

"(4) reimbursement to each Senator for official office expenses incurred (other than for equipment and furniture and expenses described in paragraphs (1) through (3)) for an office in his home State;

"(5) reimbursements to each Senator for expenses incurred for publications printed or recorded in any way for auditory and visual use (including subscriptions to books, newspapers, magazines, clipping, and other information services);

"(6) subject to the provisions of subsection (e) of this section, reimbursement of travel expenses incurred by the Senator and employees in his office;

"(7) reimbursement to each Senator for expenses incurred for additional office equipment and services related thereto (but not including personal services), in accordance with regulations promulgated by the Committee on Rules and Administration of the Senate;

"(8) reimbursement to each Senator for charges officially incurred for recording and photographic services and products; and

"(9) reimbursement to each Senator for such other official expenses as the Senator determines to be necessary, but only (A) in the case of expenses for the period commencing January 1, 1988, and ending with the close of September 30, 1988, to the extent that such expenses do not exceed ten percent of the total amount of expenses authorized to be paid to or on behalf of such Senator under this section (excluding any amount so authorized by subsection (b)(2)(A)(iv) of this section), and (B) in the case of expenditures for periods commencing on or after October 1, 1988, to the extent such expenses do not exceed ten percent of the total amount of expenses authorized to be paid to or on behalf of such

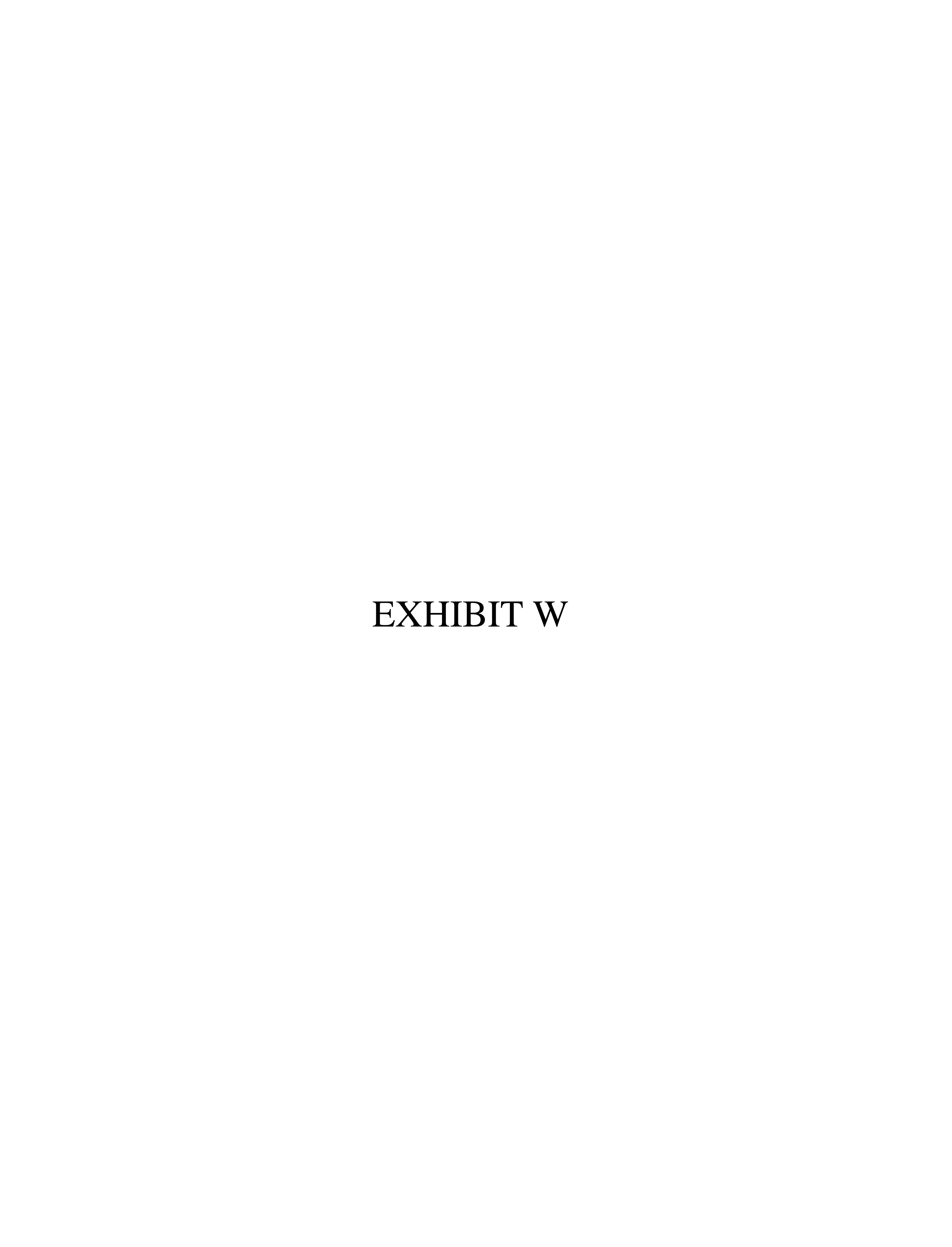


EXHIBIT W

A public and private land conservation partnership including the Gay Head Conservation Commission, the Gay Head Planning Board, the Sheriff's Meadow Foundation and the Vineyard Conservation Society, to protect and preserve Gay Head's Moshup Trail • Martha's Vineyard, Massachusetts

The Moshup Trail Project

The Moshup Trail Project c/o Vineyard Conservation Society
Post Office Box 2189 • Vineyard Haven MA 02568
508 / 693-5207 • 508 / 693-9588 • Fax 508 / 693-0683

Progress Report to the Friends of the Moshup Trail Project

December, 1997

We are writing to you, as a key supporter of the Moshup Trail Project, to thank you for your help in the past, to provide you with an update on the achievements of the last several months, an I to alert you to the work remaining to be done to bring this Project, already successful by any measure, to its conclusion.

Background -

The collaborative effort to conserve the last undeveloped block of rare and beautiful Moshup Trail moors has come a long way since the Vineyard Conservation Society, Sheriff's Meadow Foundation and the Town of Gay Head launched the Moshup Trail Project in 1994. Since then, 17 lots in 9 ownerships totaling 33 acres have been acquired at a cost of more than $2.5 million, with funds raised from individuals, foundations and the Commonwealth of Massachusetts. Nearly eleven acres were acquired in the last month alone. Gifts of land and conservation restrictions are in the works on several other parcels. This success has been hard-fought, and represents a major conservation accomplishment for Martha's Vineyard.

Moshup Trail Project Acquisitions To Date

Lot Number	Acres	Closing Date	Purchase Price
100	2.9	March 7, 1996	$525,000
134, 135	4.4	March 15, 1996	$360,000
124, 125	2.5	April 3, 1996	$300,000
97, 99, 102	5.2	June 3, 1996	$440,000
106, 107, 108	4.9	October 8, 1996	$357,500
119, 120	2.5	June 19, 1997	$165,000
121 (one-half interest)		August 5, 1997	$ 55,000
137	2.9	October 31, 1997	$260,000
111, 112	5.8	November 10, 1997	$150,000
121 (one-half interest)	2.3	November 10, 1997	Gift
TOTAL	**33.4**		**$2,612,500**

[over]

Current Opportunity -

Today, *six key lots are being targeted for acquisition, as shown on the attached map.* They are, on the south side of Moshup Trail, **Lot 122** and **Lot 123**. On the north side of Moshup Trail, they are **Lot 128, Lot 126, Lot 109** *and* **Lot 110**.

Projected Cost -

Lots 122 and 123, abutting the Atlantic Ocean at the center of the Project's ocean-front boundaries, are critical to the effort to conserve unbroken habitat and ocean views throughout the project. An offer has been made on Lot 122 and efforts are being made to contact and negotiate with the owners of Lot 123. It *is anticipated that these lots can be acquired for about $110,000 in* total.

Discussions have also been held with the owner of Lots 109 and 110, who has indicated his interest in selling the land to the Project, perhaps at a discounted price. These lots, which abut conservation property on three sides, together with Lots 118, 126 and 128, will complete the northern tier of the Project. It is anticipated that Lots 109 and 110 can be acquired for less than $100,000.

Lots 126 and 128 are landlocked and their value is, therefore, limited. Were access to be established, and were the lots otherwise buildable, the value would be substantial — as much as $400,000 each. The Vineyard Conservation Society is currently in litigation with would-be developers of landlocked property to the north of the project area, who seek to force access to Moshup Trail over land acquired by the Moshup Trail Project. We strongly believe that this attempt will fail. However, the owners of Lots 126 and 128, *who may well benefit from a decision favorable to the developers,* are reluctant to agree to a sale of their property before the litigation is concluded. Discussions with them will continue to determine whether there is a price, which reflects the uncertainty *inherent in the litigation,* that is mutually agreeable.

We extend our sincere appreciation to you for contributing to the success of this Project to date and invite you to continue your support. The result, so close at hand, will be the preservation of one of the world's flagship natural and scenic areas.

Funding for the Moshup Trail Project has been made available through the generosity of many private donors, the Edey Foundation, the Abraham and Ruth Krieger Foundation, the New York Community Trust, the Scheuer Family, the David H. Smith Foundation, the Sheriff's Meadow Foundation, the Sweet Water Trust, the Vineyard Conservation Society, and the Commonwealth of Massachusetts Executive Office of Environmental Affairs.

EXHIBIT X

70

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

DIVISION OF CONSERVATION SERVICES

SELF-HELP PROGRAM

PROGRAM AGREEMENT

Made this 10 day of October between the Town of Gay Head, hereinafter referred to as the **PARTICIPANT**, and the Commonwealth of Massachusetts acting by and through the Secretary of the Executive Office of Environmental Affairs, hereinafter referred to as the **COMMONWEALTH**

WHEREAS, the **PARTICIPANT** has established a Conservation Commission under Massachusetts General Laws chapter 40, section 8C and has made application to the **COMMONWEALTH** for assistance under the Massachusetts Self-Help Program, so-called under Massachusetts General Laws chapter 132A, section 11, as it may be amended, for a project briefly described as follows: (describe project and include description of property) **Moshups Trail, SH #2, reimbursement @ 62%.**

This project shall consist of the acquisition, in fee simple, of 20+/- acres of land along Moshups Trail, by the Town of Gay Head for conservation purposes.

hereinafter the **PROJECT**.

WHEREAS, the **COMMONWEALTH** has reviewed said application and found the **PROJECT** to be in conformance with the purposes of Massachusetts General Laws chapter 132A, section 11 (and any other relevant statutes of state program).

WHEREAS, the **COMMONWEALTH** has approved said application and has obligated certain funds in the amount Five hundred thousand dollars, and zero cents ($500,000.00).

1. **WITNESSETH:** the **COMMONWEALTH** and the **PARTICIPANT** mutually agree to perform this agreement in accordance with the Massachusetts Self-Help Program, so-called, and Massachusetts General Laws chapter 132A, section 11 and chapter 40, section 8C.

2. The **PARTICIPANT** agrees to perform the **PROJECT** described previously by authorizing its **CONSERVATION COMMISSION** to manage, maintain, and operate the **PROJECT** in accordance with the terms of and the obligations contained in the **PARTICIPANT'S** preliminary and final applications and any other promises, conditions, plans, specifications, estimates, procedures, project proposals, maps,

and assurances made part thereof, and with any special terms and conditions attached hereto, all of which are incorporated by reference. All significant deviations from the **PROJECT** shall be submitted to the **COMMONWEALTH** for prior approval.

3. The **PARTICIPANT** agrees that the facilities of the **PROJECT** shall be open to the general public and shall not be limited to residents of the **PARTICIPANT**. The **PARTICIPANT** shall prominently display on t/he **PROJECT** a sign designated by the **COMMONWEALTH** indication the **PROJECT** received Self-Help funds.

4. The **PARTICIPANT** acknowledges Article 97 of the Massachusetts Constitution which states, in part, that: "Lands and easements taken or acquired for such (conservation) purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court." The **PARTICIPANT** hereby agrees that any property or facilities comprising the **PROJECT** willnot be used for purposes other than those stipulated herein or otherwise disposed of, unless the **PARTICIPANT** receives the appropriate authorization from the General Court, the approval of the Secretary of Environmental Affairs,and any authorization required by the provisions of Massachusetts General Laws chapter 41, section 15A.

5. The **PARTICIPANT** further agrees that despite any such authorization and approval, in the event the property or facilities comprising the **PROJECT** are used for purposes other than those described herein, the **PARTICIPANT** shall provide other property and facilities of equal value and utility to be available to the general public for conservation and recreational purposes provided that the equal value and utility and the proposed use of said other property and facilities is specifically agreed to by the Secretary of Environmental Affairs.

6. Failure by the **PARTICIPANT** to comply with this **PROJECT** agreement may, at the option of the **COMMONWEALTH** suspend or terminate all obligations of the **COMMONWEALTH** hereunder.

7. Finally, since the benefit desired by the **COMMONWEALTH** from the full compliance by the **PARTICIPANT** is the existence, protection, and the net increase of conservation lands and public outdoor facilities which have been preserved in their natural state insofar as is practicable and because such benefit exceeds to an immeasurable and unascertainable extent the amount granted by this agreement, the **PARTICIPANT** agrees that payment by the **PARTICIPANT** to the **COMMONWEALTH** of money would be an inadequate remedy for a breach by the **PARTICIPANT** of this agreement, and agrees therefor that, as an alternative or an additional remedy, specific performance of the **PARTICIPANT'S** obligation under either Article 2 or Article 5 may be enforced by the **COMMONWEALTH**

8. The **PARTICIPANT** agrees to record a copy of this agreement at the Dukes Registry of Deeds at the same time the deed for the land comprising the **PROJECT** is recorded.

COMMONWEALTH OF MASSACHUSETTS

BY [signature]
Secretary, Environmental Affairs

PARTICIPANT

[signature]
BY 11/1/95 Selectmen
Chief Executive Officer

CONSERVATION COMMISSION
BY [signature]
[signature]
[signature]
[signature]
[signature]

Attached hereto evidence of authority to execute this contract on behalf of the **PARTICIPANT**: In the case of a municipality, a certified copy of the vote or votes of the governing body authorizing the **PROJECT**, appropriating the municipality's funds therefor, and authorizing execution of this agreement by the Officer, Board, or Commission whose signature(s) appear above.

Commonwealth of Massachusetts

Dukes County March 14, 1996

Then personally appeared the above-named William P. Sargent and acknowledged the foregoing instrument to be his free act and deed and the free act and deed of the Gay Head Conservation commission, before me

[signature]
Notary Public
My commission expires November 27, 199[illegible]

Edgartown, Mass March 15 1996
at 3 o'clock and 47 minutes P M
received and entered with Dukes County Deeds
book 672 page 436
Attest: [signature] Register

DEED

MACDONALD HASKELL of New York, New York

for consideration paid, and in full consideration of **THREE HUNDRED SIXTY THOUSAND ($360,000.00) DOLLARS**

hereby grant to the Town of Gay Head through its Conservation Commission for administration, control and maintenance under the provisions of M.G.L. c. 40, § 8C as amended, of 65 State Road, Gay Head, Massachusetts

with quitclaim covenants

The land with the improvements thereon in Gay Head, Massachusetts more particularly bounded and described as follows:

PARCEL ONE

A certain parcel of land situated in Gay Head, County of Dukes County, Commonwealth of Massachusetts, being Lot 549 Indian Lands, shown on a Plan entitled "map of Gay Head showing the partition of the Common Lands as made by Joseph T. Pease and Richard L. Pease, Commissioners" on file with the records of Dukes County Probate Court.

For title see Parcel 8 as set forth in deed dated March 1, 1990, recorded in the Dukes County Registry of Deeds in Book 536, Page 825.

PARCEL TWO

A certain parcel of land situated in Gay Head, County of Dukes County, Commonwealth of Massachusetts, being that portion of Lot 550 which lies NORTHERLY of Moshope's Trail, as shown on map of Indian Lands entitled "map of Gay Head showing the partition of the Common Lands as made by Joseph T. Pease and Richard L. Pease, Commissioners" on file with the records of Dukes County Probate Court.

Meaning and intending to convey parcels set forth as Lots numbered 134 and 135 as shown on Gay Head Assessors Map 12.

The above-described premises are conveyed together with the benefit of a Grant of Easement from Denys Wortman, Jr., Trustee of Wortman Vineyard Realty Trust to this Grantor dated February 23, 1995 and recorded in the Dukes County Registry of Deeds in Book 650, Page 426.

For Grantor's title, see deed from Denys Wortman, Jr., Trustee of Wortman Vineyard Realty Trust dated February 23, 1995 and recorded with the Dukes County Registry of Deeds in Book 650, Page 425.

Property Address: Moshup trail, Gay Head, Massachusetts

Witness my hand and seal this 15th day of March, 1996.

Macdonald Haskell

COMMONWEALTH OF MASSACHUSETTS

County of Dukes County, ss. March 15, 1996

Then personally appeared the above-named Macdonald Haskell, and acknowledged the foregoing instrument to be his free act and deed, before me

Notary Public

My Commission Expires: 3/10/2000

DEEDS REG 08
DUKES

03/15/96

MARTHA'S VINEYARD LAND BANK FEE

☐ PAID: $

☒ EXEMPT: $ 2

18336 3.15.96 8L

NO. DATE CERTIFICATION

TAX 1641.60
CASH 1641.60

6798A000 15:42
EXCISE TAX

N:\u0\96\feb\haskell.dee

Edgartown, Mass. March 15 1996
at 3 o'clock and 48 minutes P M
received and entered with Dukes County Deeds
book 672 page 439

Attest: Diane E. Powers Register

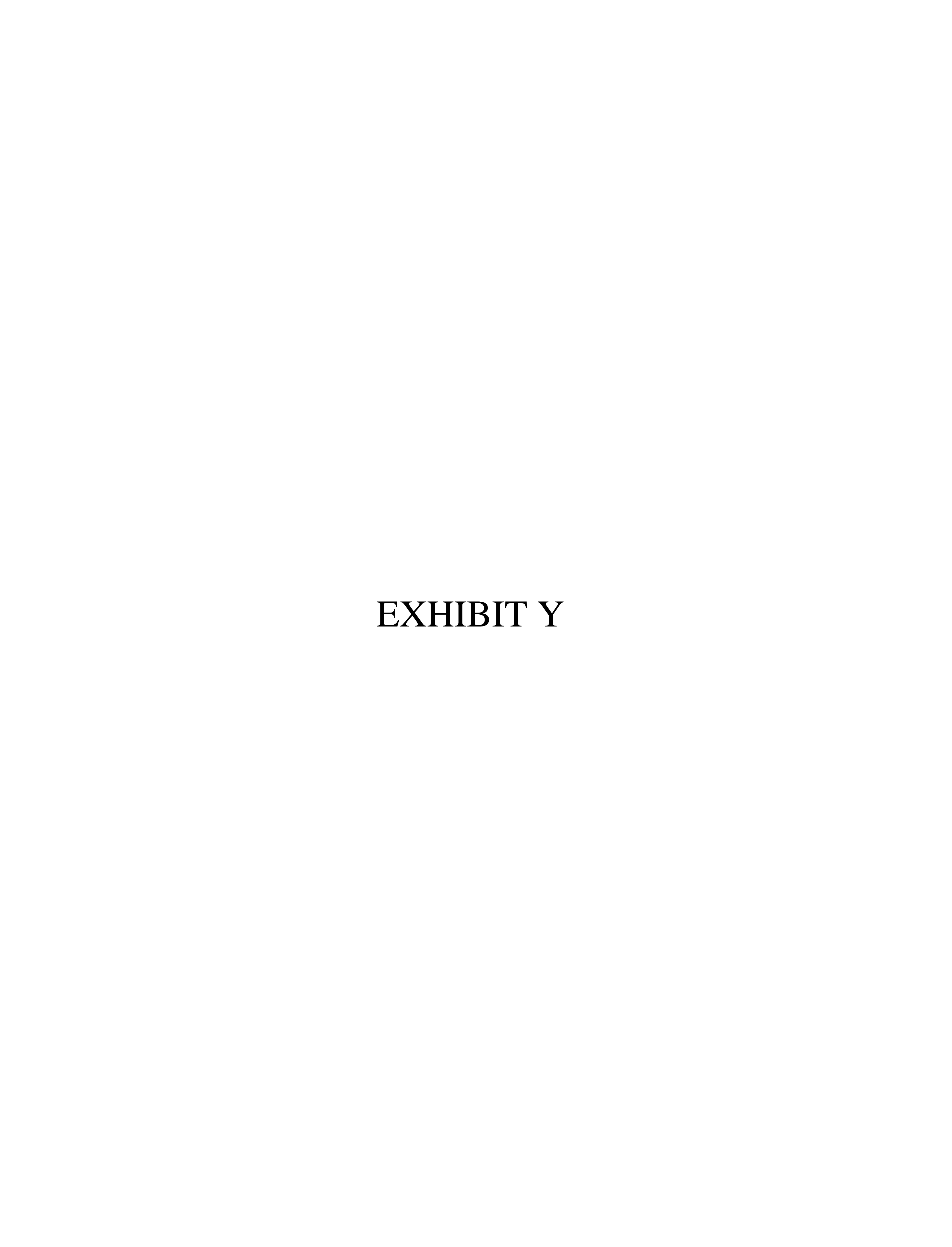
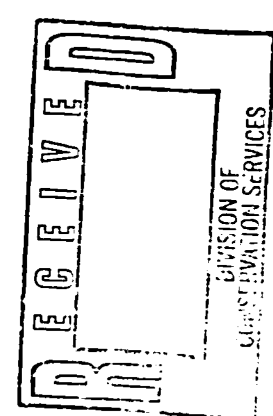


EXHIBIT Y

TOWN OF GAY HEAD
POST OFFICE BOX 128
GAY HEAD, MASSACHUSETTS 02535



May 29,1996

Mr. Joel Lerner
Division of Conservation Services
Executive Office of Environmental Affairs
100 Cambridge St.
Boston, MA 02202

Dear Joel,

Enclosed you will find Gay Head's 1996 application for Self-Help Funds. The Gay Head Conservation Commision is very excited to continue a project that has met with great success this past year, largely due to the support of the Commonwealth.

As of this writing, we have prevented three new houses from being built on rare coastal heathland habitat and preserved the stunning vistas along Moshup Trail forever. The closing on the fourth property should take place in a matter of days.

It has been a gratifying year, for all of it's struggles, and we look forward to wrapping up the project in 1996-97. If we can successfully acquire the lots in this year's application, we will have protected all the presently buildable land in the project area. This would be quite an achievement in two year's time and the Town of Gay Head deeply appreciates the support of your office.

I trust that the application is comprehensive, but if you have any questions, don't hesitate to contact me.

Sincerely,

Mary Elizabeth Pratt, Chair. G.H.C.C.

508-645-9915
FAX 508-645-9054

TOWN OF GAY HEAD
RR#1 • BOX 128
STATE ROAD
GAY HEAD, MASSACHUSETTS 03535

August 9, 1995

This is to certify that the Town of Gay Head has established a municipal Conservation Commission under the provisions of the Massachusetts General Laws at Chapter 40 Section 8C.

As of this date, the names of Conservation Commission members are as follows:

Mary Elizabeth Pratt
William P. Sargent
William Vanderhoop, Jr.
Vernon Welch
Priscilla Wren
Caroline Worthington

Respectfully submitted,

Jeananne Jeffers
Town Clerk

7.99: Appendices

APPENDIX A

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DIVISION OF CONSERVATION SERVICES
SELF-HELP CONSERVATION PROGRAM
CHAPTER 132A, SECTION 11

S.H. # ____________

APPLICATION FORM

1. MUNICIPALITY: Gay Head DATE: 5/25/96

2. LOCATION OF PROPERTY: (Indicate geographic locus in community, etc).

Moshup Trail

3. DOES PROPERTY ABUT ANY OTHER PUBLIC OR QUASI-PUBLIC LAND(S)?

YES X NO ____

If "YES" size of property and ownership

Size (Acres)	Ownership
13.6 (1996)	Several (see attached list)

4 PRESENT OWNER OF THE PROPERTY TO BE ACQUIRED:

see attached list ____________
Name Address

ASSESSORS SHEET NUMBER: ________ LOT NUMBER: ________

5 TOTAL ACRES TO BE ACQUIRED: 13.6 PROPOSED COST: $ 604,000

APPRAISED VALUES 1) ________ 2) ________

6. COVER, Acres in: A. Forest ________ B. Open ________

C. Wetland 2.5 D. Water ________

E. Agricultural Land ________

11 acres of coastal heathland

7. TOPOGRAPHY, Acres in A. Flat 2 B. Hilly ________

C. Rolling 11.5 D. Mountain !

8. WATERFRONT, Linear A. Ocean ~~268 ft.~~ B. Lake ________

C. River ________ D. Stream 1500 ft. of stream frontage through the property.

7.99: continued

9. ZONING AND PRESENT USE OF PROPERTY: rural/residential
vacant land

10. BUILDINGS OR STRUCTURES ON PROPERTY? YES ______ NO X

A. If YES", how many, estimated value and current use: ______

B. Intended use of improvements, if applicable? ______

11. BRIEFLY DESCRIBE PROPERTY NOTING ANY UNIQUE FEATURES:

see attached description

12. IS PROPERTY ACCESSIBLE BY PUBLIC TRANSPORTATION?

YES X NO ______ NAME OF CARRIER M.V. Sightseeing
M.V. Transit Autho

WHAT IS THE FREQUENCY OF THE SERVICE:

daily in summer

13. DOES PROPERTY HAVE FRONTAGE ON A STREET(s)? YES X NO ______

If "YES", name of street(s): Moshup Trail

(On plot plan (Attachment #5) please indicate access point(s)

14 INDICATE ANY CURRENT OR PROPOSED RESTRICTION ON PROPERTY:
(Zoning Restrictions. Deed Restrictions. Conservation Restrictions, Rights of Way)

zoning, Martha's Vineyard Commission District of
Critical Planning Concern

15. IS CLEAR TITLE AVAILABLE? YES X NO ______ UNKNOWN ______

16 IS ACQUISITION BY EMINENT DOMAIN ______ FRIENDLY NEGOTIATION X

GIFT ______ If by Gift please describe in detail ______

17 HAS YOUR COMMUNITY VOTED TO OVERRIDE ITS DEBT LIMIT IN THE LAST TWO MUNICIPAL FISCAL YEARS FOR OPEN SPACE PURCHASES? YES ______ NO X

Attach certified copies of municipal vote(s). Current fiscal year's vote may be calculated in your answer.

7.99: continued

18. DOES PROJECT HAVE TOWN MEETING OR CITY COUNCIL APPROVAL? Phase I was approved at Town Meeting, 12/7/95
(Attach copy of vote or proposed article)

YES ______ NO ______

19. ARE YOU APPLYING TO ANY OTHER AGENCY FOR ACQUISITION FUNDS?

YES X (possibly) NO ______

If "YES", what agency D.E.M.

20. IS YOUR COMMUNITY ELIGIBLE FOR CONSIDERATION AS ONE OF EXTREME CRITICAL NEED (FINANCIAL HARDSHIP)? YES X NO ___ See statistics in Open Space plan and attachment to application

If yes and you are seeking the 10 point bonus rating, see definitions above and required attachments.

21. IS THE PROJECT ONE OF PARTICULAR ENVIRONMENTAL SENSITIVITY? YES X NO __

If yes and you are seeking the 10 point bonus rating see definitions and required attachements above.

22. DESCRIBE PURPOSE OF ACQUISITION AND PROPOSED USE:

PaRT OF A LARGE ACQUISITION PROGRAM TO PRESERVE THE EXTRAORDINARY SCENIC & ecological resources of the Moshup Trail area of Gay Head (see attached)

23. RECREATION PLAN (Cite Pages): AT PRESENT THE LAND IS ENJOYED BY THOUSANDS OF RESIDENTS & visitors as they pass by on foot, by car, or bike. Once the parcels are assembled the plan ~~is to create mature trails in non-sensitive areas.~~

24. PROPOSED DURATION OF PROJECT: FROM 5/95 TO 5/97

25. A. IS/ARE THERE ANY MAJOR STATE PUBLIC INSTITUTION(S) IN YOUR COMMUNITY? YES ______ NO X

If "YES" identify the institution(s): ______

B. IS YOUR COMMUNITY BEING CONSIDERED FOR THE SITING OF A MAJOR STATE PUBLIC INSTITUTION? YES ______ NO X. Describe: ______

If "YES", has your community voted to accept the facility? Yes ___ No ___

Attach vote or agreement with appropriate state agency.

7.99: continued

26. SIGNATURE OF ALL CONSERVATION COMMISSION MEMBERS:

CHAIRMAN:	ADDRESS:
[illegible signature]	Moshup Trail Gay Head, MA 02535
[illegible signature]	P.O. Box 82 Chilmark MA 02535
[illegible signature]	Box 161A, Gay Head, MA. 02535
[illegible signature]	State Rd. Gay Head, MA.
[illegible signature]	Lobsterville Rd, Gay Head MA 02535

27. COMMISSION MEMBER FAMILIAR WITH PROPOSAL THAT DIVISION PERSONNEL SHALL CONTACT FOR FIELD EXAMINATION OF PROPERTY:

Name	Address	Phone Number Business or Daytime
MITZI PRATT	MOSHUP TRAIL GAY HEAD MA 02535	508 645 3035

DESCRIPTION OF PROPERTIES

The area along Moshup Trail is primarily rolling glacial moraine with windblown sand, creating sand dunes which overlay the glacial till in many places. The area is pocketed with many small wetlands and streams, often tucked into hollows around the dunes. This mix of geological features results in an extraordinary diversity of habitats, some unique on the Island and very unusual in southern New England. The natural community has been classified as a coastal heathland, although one of the most interesting and ecologically important features of the area is the occurrence of widely different plant communities in very close proximity to one another. The coastal heathland community is considered globally endangered with somewhere between 2-3,000 acres remaining on Long Island, Nantucket, Martha's Vineyard and Cape Cod.

Northern harriers (listed as a threatened species in Massachusetts) hunt all along Moshup Trail, and nest sites have been identified in three of the last four years. Small cranberry bogs and swales harbor several beautiful species of orchids, including Arethusa bulbosa, which is also listed as a threatened species in Massachusetts and occurs in only a few locations on Martha's Vineyard. Several other state listed rare species are found in the area along Moshup Trail, including considerable Nantucket shadbush, sandplain blue-eyed grass, sandplain flax and spotted turtles.

Lot By Lot Property Description

Malonson (Map 12, Lots 106,107,108)

The construction of Moshup Trail in 1954 fragmented or obliterated many wetlands along its three mile length. The Malonson property is a case in point. Lot 108 to the north of the Trail is a mix of shrub swamp, moraine, and dune. The shrub swamp on Lot 107 is fed by groundwater from the north of the Trail passing under the road through glacial gravels, reaching the sea as a small brook on Lot 106. The Arethusa orchid (listed as "Threatened" by MNHESP), has been found on the border between Lots 107 and 120.

Lot 106 is the only parcel currently being considered for acquisition which has ocean frontage. The topography of Lot 106 is steep rolling moraine with actively eroding 30 foot bluffs. Atop the moraine is a large unvegetated dune, probably of early postglacial origin, typical of many in the area.

Blackwell (Map 12, Lot 137)

This parcel lies at the extreme westerly border of the Project area. It abuts Lot 135 (Haskell), purchased by the Town with Self Help funds (1995). Through it flows the major stream in the Project and its associated wetlands. It is most important as feeding habitat for the Northern Harrier which has nested for the past two years on a nearby lot. It is under purchase and sale agreement to Michael Corbo who intends to build a seasonal residence on the lot.

Attaquin (Map 12, Lot 126)

This lot abuts the northerly side of Flanders (Lot 125) purchased by the Town with Self Help funds (1995). It has a wide range of habitats, from dunes to wetlands and includes morainal hills with a grove of Black Oak trees. It is also of prime importance as Harrier feeding habitat and it is an integral part of the land purchase block. This is one of the prime building lots in the area with an elevation of 53 feet above sea level. There is currently no access to this property.

Vanderhoop (Map 12, Lot 128)

This lot abuts the easterly side of Lot 135 (Haskell), purchased with Self Help funds (1995). It contains a great variety of habitats from sand dune to woodland and is a part of a large open treeless area frequented by foraging Harriers. The largest American Holly tree in the project area is found on this property. This lot is also a prime building site with an elevation of 48 feet. It currently has no access.

Summary Of The Moshup Trail Project Acquisitions

Phase I of the Project called for the acquisition of 20 acres of land in five ownerships at an estimated cost of $ 1.65 million. As of 5/25/96, three ownerships totalling 9.8 acres have been purchased for $ 1,185,000. and a fourth ownership is under agreement for $ 440,000. Negotiations with the fifth owner are still in progress and this property will be incorporated into Phase II of the Project.

Phase II of the Project involves 13.6 acres in four ownerships at an estimated cost of $ 604,000.

To date a total of $ 505,000. in gifts has been received since the Project began. This, coupled with the 1995 Self Help grant of $ 500,000. brings the total funds raised to date for acquisition to $ 1,005,000. The fundraising activities are on-going and the Coalition anticipates raising an additional $ 500,000. to $ 1,000,000. in donations towards the Project during the summer months.

Meanwhile, low interest or no interest loans are being used to bridge the purchases as they occur. To date the Coalition has loans totalling $ 400,000. and anticipates additional borrowing may be necessary in order to complete Phase II purchases.

	1995 ACQUISITION	= 14.5 acres
	PROPOSED 1996 ACQUISITION	= 13.4 acres
	GIFTS IN PROCESS	= 2.2 acres

APPROXIMATE LOCATIONS
OF PROPERTIES INCLUDED
IN SELF-HELP APPLICATION