UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JUL 9 1981
MASS. DIST.

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| WAMPANOAG TRIBE OF GAY HEAD, AND WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., Plaintiffs, | CIVIL ACTION NO. 74-5826-MC |
| v. | |
| TOWN OF GAY HEAD, et al., Defendants. | 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.



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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 Passamaquoddy 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.
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> <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).

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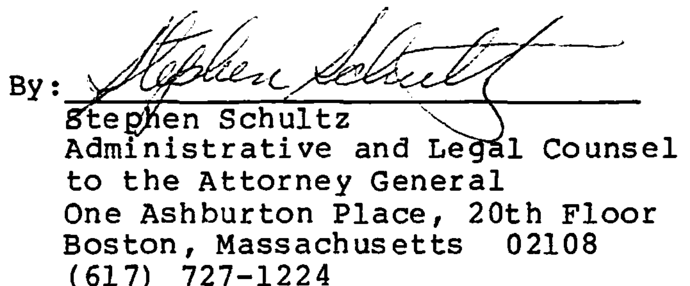
2/ In this case, the resources of the Commonwealth might lead to fuller development of the facts and legal issues than the private parties and town could develop on their own.

BY THE COMMONWEALTH OF MASSACHUSETTS' ATTORNEYS,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: 

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Date: July 9, 1981

ATTACHMENT A

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COUNSEL TO
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June 29, 1981

Attorney General Francis X. Bellotti
Commonwealth of Massachusetts
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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).