

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KG URBAN ENTERPRISES, LLC

*Plaintiff,*

v.

DEVAL L. PATRICK, in his official capacity as governor of the Commonwealth of Massachusetts, and

CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMISSION, in their official capacities,

*Defendants.*

**CASE NO. 1:11-cv-12070-NMG**

**ORAL ARGUMENT REQUESTED**

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

John R. Casciano, BBO #634725

John J. Duffy\*

Jody Cummings\*

STEPTOE & JOHNSON LLP

1330 Connecticut Ave., NW

Washington, DC 20036

202-429-3000

[jcasciano@steptoe.com](mailto:jcasciano@steptoe.com)

[jduffy@steptoe.com](mailto:jduffy@steptoe.com)

[jcummings@steptoe.com](mailto:jcummings@steptoe.com)

Scott D. Crowell\*

Scott Wheat\*

Lael Echo-Hawk\*

CROWELL LAW OFFICES

TRIBAL ADVOCACY GROUP

10 N. Post St., Suite 445

Spokane, WA, 99201

509-474-1265

[scottcrowell@hotmail.com](mailto:scottcrowell@hotmail.com)

[scottwheat@me.com](mailto:scottwheat@me.com)

[laeleh@gmail.com](mailto:laeleh@gmail.com)

*\*(pro hac vice pending)*

*Attorneys for Defendants-Intervenors*

*The Wampanoag Tribe of Gay Head (Aquinnah) and The Aquinnah Gaming Corporation*

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The defendants-intervenors, The Wampanoag Tribe of Gay Head (Aquinnah) and The Aquinnah Gaming Corporation, a wholly-owned economic instrumentality of the Tribe (together “Aquinnah”) submit this memorandum in support of their motion to intervene.

## I. INTRODUCTION

Aquinnah has moved to intervene in this litigation to protect its ability to negotiate a Class III gaming compact with the State of Massachusetts pursuant to § 91 of the Massachusetts Gaming Act.<sup>1</sup> As a federally recognized Indian tribe with trust lands located within the Commonwealth, Aquinnah has the right to engage in gaming activity pursuant to the Indian Gaming Regulatory Act of 1998, 25 U.S.C. § 2701 et seq. (“IGRA”). According to the Commonwealth, § 91 was enacted to effectuate the State’s obligations under IGRA, including the State’s obligation to negotiate compacts for Class III gaming with tribes that have Indian lands within the Commonwealth. Plaintiff KG Urban argues that § 91 of the Act, which authorizes the Massachusetts Gaming Commission to forego issuance of a Region C license if the Commonwealth enters into a Class III Compact with a federally recognized Indian tribe, constitutes an impermissible race-based classification in violation of the federal and state equal protection clauses.

In its August 1, 2012 decision, the First Circuit expressed serious doubt that § 91 would survive federal or state equal protection scrutiny unless § 91 can be considered “authorized” by IGRA. Op. p. 42. The Panel expressed concern that IGRA appears only to authorize Class III Compacts for federally recognized tribes with “Indian lands” located within the Commonwealth. In this litigation, the Commonwealth has maintained that it only intends to negotiate a Compact

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<sup>1</sup> Aquinnah’s proposed Answer in Intervention is attached, marked as “Exhibit 1,” and incorporated by this reference.

with the Mashpee Wampanoag Tribe, which currently does not have “Indian lands” within the Commonwealth. Under these circumstances, the Panel determined:

It would be difficult to conclude that the IGRA “authorizes” the Massachusetts statute under these circumstances – where there are no Indian lands in Region C at present within the meaning of IGRA. . . . KG does not dispute that if a federally recognized tribe in Massachusetts currently possessed “Indian lands” within the meaning of IGRA, § 91 would fall within the scope of the IGRA’s authorization and thus be subject to only rational basis review.

*KG Urban Enterprises, LLC v. Patrick*, F.3d, 2012 WL 3104195, 17 (1st Cir. 2012). Aquinnah is that tribe.

Aquinnah has a significant interest in preventing the near certain demise of § 91. This Court already has determined that the Act “. . . establishes the procedures by which IGRA-authorized compacting may take place under Massachusetts law . . . § 91 of the Gaming Act advances the congressional directive that tribes and states negotiate compacts to govern gaming on tribal lands.” Aquinnah must intervene because the relief requested by KG Urban would deny Aquinnah’s ability to invoke § 91 to secure an IGRA-compliant compact with the Commonwealth.

Nor can Aquinnah rely on KG Urban or the Commonwealth to protect its interests. KG Urban maintains that its substantial investments in New Bedford will only be spared if § 91 is declared unconstitutional. Meanwhile, the Commonwealth has erroneously maintained throughout this litigation that Aquinnah has “waived” its right to game on its existing trust lands.

The First Circuit’s August 1, 2012 decision places Aquinnah’s eligibility to game on its existing trust lands directly at issue in a case in which the parties have exhibited their hostility towards Aquinnah’s substantial interests. Under these circumstances, the Court should allow Aquinnah to intervene as a matter of right.

## II. ARGUMENT

### A. Aquinnah Should be Granted Intervention as a Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) provides in relevant part:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(a)(2). A party seeking to intervene under Fed. R. Civ. P. 24(a)(2) must satisfy the following prerequisites: (1) a timely motion for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the actions threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that existing parties inadequately represent its interest. *Public Service of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). Courts have long employed a flexible approach when applying these prerequisites to the facts and circumstances of each case. *See, e.g., Id.* at 204. (“the inherent imprecision of Rule 24(a)(2)’s individual elements dictates that they be read not discretely, but together and always in keeping with a commonsense view of the overall litigation”); *International Paper Co. v. Town of Jay*, 887 F.2d 338, 343-44 (1st Cir. 1989) (application of Rule 24(a)(2) “involves the pragmatic balancing of a range of factors that arise in varying factual situations”).

#### 1. Aquinnah’s Motion to Intervene is Timely.

Four factors must be considered when evaluating the timeliness of an intervention motion: (1) the length of time the prospective intervenors knew or reasonably should have known of their interest before they petitioned to intervene; (2) the prejudice to existing parties

due to the intervenor's failure to petition for intervention promptly; (3) the prejudice the prospective intervenors would suffer if not allowed to intervene; and (4) the existence of unusual circumstances mitigating for or against intervention. *R&G Mortgage Corp. and R-G Premier Bank of Puerto Rico v. Federal Home Loan Mortgage Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). The determination of timeliness lies within the sound discretion of the district court. *NAACP v. New York*, 413 U.S. 345, 366 (1973).

The core purpose of the timeliness requirement is to prevent prejudice to the parties. *Caterino v. Barry*, 922 F. 2d 37, 41 (1st Cir. 1990). See also, *Fiandaca v. Cunningham*, 827 F.2d 825, 834 (1st Cir. 1987) (the purpose of the timeliness requirement is to ensure that existing parties to the litigation are not prejudiced by the failure of would-be intervenors to act in a timely fashion). Consequently, "in stressing the importance of timely filing of a petition to intervene, courts have repeatedly emphasized that the concept of timeliness of a petition is not measure, like a statute of limitations, but rather derives meaning from assessment of prejudice in the context of particular litigation." *Puerto Rico Telephone Co. v. Sistema De Retiro De Los Empleados Del Gobierno Y La Judicatura*, 637 F.3d 10, 15 (1st Cir. 1987).

When assessing potential prejudice to the existing parties, the stage of the litigation is highly relevant, including the absence of discovery and lack of substantive legal progress. *R & G*, 584 F.3d at 7. In *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60 (1st Cir. 2008), the First Circuit upheld the district court's determination that the petitioner timely intervened nine months after the complaint was filed because the case had not progressed substantively during that time and because the need to intervene was not apparent at the time the complaint was filed. *Id.* at 64-65.

Under the circumstances in this case, Aquinnah's motion to intervene is timely. Similar to *Geiger*, Aquinnah's need to intervene did not manifest until the First Circuit issued its August 1, 2012 opinion determining that § 91 will avoid strict scrutiny review only if there exists at least one Indian tribe in the Commonwealth eligible to enter into a Compact pursuant to IGRA. Further, given the early stage of this litigation, allowing Aquinnah to intervene will not prejudice the parties. No discovery has been conducted and very little substantive legal progress has been made. Denial of Aquinnah's motion, however, will result in immense prejudice to the Tribe because Aquinnah is uniquely situated to demonstrate its eligibility to game on its existing trust lands. Without intervention, § 91 will likely be struck and Aquinnah will be deprived of the Act's intended benefits.

**2. Aquinnah has a Significant Legal Interest in the Subject Matter of the Action, the Disposition of which Will Impair Aquinnah's Ability to Protect Its Interests.**

For an applicant to justify intervention as of right, its interests must be "significantly protectable." *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F. 2d. 39, 41 (1st Cir. 1992). While the "there is no precise and authoritative definition of the interest required to sustain a right to intervene" the intervenor's claims must bear a "sufficiently close relationship to the dispute between the original litigants" and that "[t]he interest must be direct, not contingent." *Id.* at 42. "[T]he determination of whether an interest is sufficient for Rule 24(a)(2) purposes is colored to some extent by the third factor – whether disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest." *Id.* This is a very "practical test" of adverse effect. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110-11 (1st Cir. 1999) (holding that the possibility that the litigation could end with an injunction adversely affecting intervenors' interests was sufficient to meet this requirement).

Section 91 marks the first time the Commonwealth has agreed, by statute, that tribes can game under IGRA and provides a procedure by which eligible tribes may negotiate an IGRA-compliant compact with the Commonwealth. Aquinnah is a federally recognized Indian tribe with existing “Indian lands” as defined by IGRA that are located within the exterior boundaries of the Commonwealth. The remedy KG Urban seeks would effectively deprive Aquinnah of the right to negotiate and enter into an IGRA-compliant compact with the Commonwealth.<sup>2</sup> The Court of Appeals noted that “[a]t the heart of this case are the provisions of the IGRA which make clear that tribal gaming can only be conducted by an ‘Indian tribe’ on ‘Indian lands,’ as both terms are defined in the IGRA.” *Id.*, No. 12-1233 at 5. It is undisputed that the Mashpee Tribe does not have Indian lands as defined by IGRA. However, the factual issue regarding whether the Aquinnah’s land is Indian lands as defined by IGRA has not been decided by this Court. KG Urban itself has acknowledged that if a tribe in the Commonwealth possessed Indian lands, § 91 would be authorized by IGRA and subject only to rational basis review.

- a. *As a Tribe Eligible to Negotiate a Compact with the Commonwealth under IGRA, Aquinnah has a Substantial Interest in Maintaining § 91.*

Aquinnah is a federally recognized Indian tribe with “Indian lands” as defined by IGRA located within the exterior boundaries of the Commonwealth of Massachusetts. In 1974, the Tribe filed a suit against the town of Gay Head to recover almost 4,000 acres of land. *Wampanoag Tribal Council of Gay Head v. Gay Head*, No. 74-5826 (D. Mass filed December 26, 1974). The lawsuit claimed that action taken by Massachusetts under legislation enacted in 1870 to incorporate the Indian district of Gay Head as a town, terminate Indian title to the land

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<sup>2</sup> Because states may invoke 11th Amendment immunity against claims by alleging a failure to negotiate an IGRA compact in good faith, § 91 is critical to Aquinnah’s efforts to negotiate a gaming compact with the Commonwealth. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995).

and transfer some of the land to the town, and allot the remaining land to the Indian residents, violated the Non-Intercourse Act. Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138. Sen. R. 100-238, 3 (July 27, 1987). The lawsuit resulted in the Tribe, the town, the Commonwealth and the intervenor Taxpayers Association signing of the “Joint Memorandum of Understanding Concerning Settlement of the Gay Head Massachusetts Indian Land Claims” (“MOU”), in which the Commonwealth agreed to convey certain parcels of land to the Tribe in exchange for the Tribe extinguishing all aboriginal title and claims. The Commonwealth signed the agreement on November 22, 1983. On September 18, 1985, the General Court enacted “An Act to Implement the Settlement of Gay Head Indian Land Claims”, Mass. Gen. Laws ch. 278, § 5 (1985). Thereafter, in 1987 Congress enacted the “Massachusetts Indian Land Claim Settlement Act”, Public Law 100-95, 25 U.S.C. §1771 et seq. (“Settlement Act”).

The Settlement Act included parcels identified as the Common Lands, the Cook Lands, and the Strock Estate and provided an appropriation of \$2,250,000, to be matched by the Commonwealth, to be expended to acquire those lands. 25 U.S.C. §1771f (8), 25 U.S.C. §1771a(b). The Settlement Act defines the Common Lands and the Strock Estate as “Settlement Lands,” excluding the Cook Lands from the definition. 25 U.S.C. § 1771f (6), (8) (referencing MOU Section 4; Section 6). The Settlement Act mandated the United States to acquire the Settlement Lands “into trust” for the benefit of the Tribe, while the Cook Lands remained fee lands subject to taxation and foreclosure. 25 U.S.C. § 1771d. The United States placed the Settlement Lands into trust on December 21, 1988, and March 2, 1993.

The Settlement Act also placed the following restrictions on the Tribe’s jurisdiction over land within the Town of Gay Head:

Except as otherwise expressly provided in this subchapter 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 (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. This particular language appears to be the basis of the Commonwealth's position that the Tribe is unable to game on its Settlement Lands. What has been overlooked, however, is the effect of IGRA on the Settlement Act.

In *State of Rhode Island v. Narragansett Tribe of Indians*, 19 F.3d 685, 700 (1st Cir. 1994), the First Circuit was required to determine IGRA's effect upon the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 et seq. Similar to the Massachusetts Indian Land Claim Settlement Act, the Rhode Island Indian Claims Settlement Act vests state and local authorities with the jurisdiction to enforce its gaming laws over the Narragansett. The court noted that the literal terms of the two statutes created incoherence by subjecting Indian gaming to two mutually exclusive regulatory environments. Because the court could find no feasible way to give full effect to both acts, it concluded that an implied repeal had transpired. *Id.* at 704-5. Accordingly the court held that IGRA repealed the jurisdictional limitations included in the Rhode Island Indian Claims Settlement Act that relate to gaming activities on the Narragansett Tribe's settlement lands. *Id.* The court also determined that any reestablishment of those jurisdictional restrictions on Narragansett gaming activities would require an IGRA compact. *Id. See also, Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (state criminal jurisdiction over gaming that previously existed under Public Law 280 was nullified by the passage of IGRA and can only be re-established by a mutually-agreed upon Tribal-state compact under IGRA).

In *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996), the First Circuit was called upon to determine IGRA's effect upon the Maine Indian Claims Settlement Act. Unlike the Rhode Island Claims Settlement Act, the Maine Indian Claims Settlement Act contains a "saving clause." Section 16(b) of the Maine Indian Claims Settlement Act states:

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

25 U.S.C. §§ 1735(b) (emphasis added). The court distinguished *Narragansett* because "... in contradistinction to the situation that obtained in Rhode Island, section 16(b) satisfactorily harmonizes the Settlement Act and the Gaming Act, and prevents any incoherence."

*Passamaquoddy*, 75 F.3d at 791.

As with the Rhode Island Indian Claims Settlement Act, the Massachusetts Indian Land Claim Settlement Act does not contain a savings clause. Therefore, as in *Narragansett*, there is not a way to reconcile the Massachusetts Settlement Act and IGRA to give full effect to both acts and it must be concluded that an implied repeal has transpired. If Congress had intended to save the restrictions against Aquinnah's jurisdiction over gaming activity on its Settlement Lands from repeal by subsequent federal legislation, Congress would have included a savings clause similar to the Maine Indian Claims Settlement Act.

As with this case, the court in *Narragansett* was also required to determine whether the tribe exercised sufficient governmental jurisdiction over its Settlement Lands to qualify as "Indian lands" under IGRA. *Narragansett*, 19 F.3d at 702-3. In reviewing the Rhode Island Indian Claims Settlement Act, the First Circuit noted that "Indian sovereignty is 'a backdrop against which the applicable ... federal statutes must be read,'" and that jurisdiction is an integral

aspect of retained sovereignty. *Id.* (quoting *McClanahan v. State Tax Commission*, 411 U.S. 164, 172 (1973)). The court determined that “so long as the portion of jurisdiction encompassed by the natural rights of the Narragansetts is substantial enough to satisfy the Gaming Act’s ‘having jurisdiction’ prong, our inquiry is satisfied.” *Id.* Second, the court must evaluate whether a statute, treaty or agreement expressly strips the Tribe of jurisdiction. *Id.* Finally, the Settlement Act must be analyzed against other settlement acts to determine whether the federal acts contemplated and presumed some quantum of tribal jurisdiction was always retained by the tribes, even when the settlement acts granted concurrent jurisdiction to the states. *Id.* at 702. In applying these factors against the Rhode Island Indian Claims Settlement Act, the First Circuit determined that the Narragansett’s exercise of concurrent jurisdiction over its settlement lands met IGRA’s jurisdictional requirements. *Id.*

The First Circuit also determined that Narragansett was, in fact, exercising governmental jurisdiction over its Settlement Lands. *Id.* at 702. The Narragansett had established a housing authority; recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development; obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having “a governing body carrying out substantial governmental duties and powers,” and as being capable of administering an effective program of water regulation; taken considerable advantage of the Indian Self-Determination and Education Assistance Act (“ISDA”); administers health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like. *Id.* The court determined that “these activities adequately evince that the

Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test.” *Id.*

Under the Massachusetts Indian Land Claim Settlement Act, Aquinnah maintains concurrent jurisdiction with the Commonwealth over its Settlement lands.<sup>3</sup> As with Narragansett, Aquinnah has consistently exercised governmental authority over its Settlement Lands. For instance, Aquinnah: administers federal programs under the ISDA through its “self-governance” annual funding agreement with the United States; has developed a tribal court, and; has enacted and enforced numerous ordinances, including a land use ordinance, zoning ordinance, Tribal Historic Preservation ordinance, tribal judiciary ordinance, a building, health fire and safety ordinance, and a gaming ordinance.<sup>4</sup> Aquinnah also has entered into Memoranda of Agreement with federal and state agencies including the U.S. Environmental Protection Agency, the National Parks Service, the Massachusetts National Guard, the Town of Aquinnah, the Massachusetts Department of Social Services and Public Health, the Massachusetts Bureau of Substance Abuse Services, and the Massachusetts Juvenile Court.<sup>5</sup>

Here, the First Circuit’s decisions in Narragansett and Passamaquoddy compel a determination that Aquinnah retains sufficient jurisdiction under IGRA for its Settlement Lands to qualify as “Indian lands” under IGRA. In enacting IGRA, Congress repealed the restrictions on Aquinnah’s gaming rights contained in the Massachusetts Claims Settlement Act. Further, consistent with Narragansett under the Rhode Island Indian Claims Settlement Act, the

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<sup>3</sup> The legislative report accompanying the Settlement Act states that “... the tribe will be able to assume concurrent jurisdiction over its own members with the State and the town as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town.” Sen. R. 100-238, 5.

<sup>4</sup> Collectively marked as “Exhibit 2,” attached and incorporated by this reference.

<sup>5</sup> The Memoranda are collectively marked as “Exhibit 3,” attached and incorporated by this reference.

Massachusetts Indian Land Claim Settlement Act provides for Aquinnah's retention of concurrent jurisdiction over its Settlement Lands, and Aquinnah in fact exercises that jurisdiction.

Because its Settlement Lands qualify as "Indian lands" under IGRA, Aquinnah has a significant stake in defending § 91 against KG Urban's equal protection claims. IGRA entitles Aquinnah to a gaming compact with the Commonwealth, and § 91 is the vehicle by which to arrive at that compact – which is particularly valuable in the wake of the Supreme Court's decision in *Seminole*. Because Aquinnah is eligible under IGRA to negotiate a compact with the Commonwealth, § 91 was clearly intended to benefit the Tribe. As such, Aquinnah should be allowed to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2).

### **3. The Parties do not Adequately Represent Aquinnah's Interests.**

"An intervenor need only show that representation may be inadequate, not that it is inadequate." *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992). See also, *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Further, "the burden of making that showing should be treated as minimal." *Id.* at 538 n.10. However, where the applicant is seeking to intervene as a defendant and the government is defending a statute, the First Circuit starts with a "rebuttable presumption "that the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999). Rebuttal requires a "strong affirmative showing" that the government is not fairly representing the applicant's interest, *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998), or a demonstration of adversity of interest, collusion, or nonfeasance. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999). See also, *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49,

54 (1st Cir. 1979). This “trilogy” is not, however, exclusive. The First Circuit recognized that it is unlikely that there are only three circumstances that would make governmental representation inadequate. *Id.*

In this litigation, the Governor has repeatedly demonstrated his adversity to Aquinnah’s gaming rights. *See e.g., KG Urban Enterprises, LLC v. Patrick, \_\_F.3d\_\_,* 2012 WL 3104195, 9 n.10. (“while the Aquinnah possess a small parcel of land, the Commonwealth has taken the position that they have waived their right to conduct gaming on that land”). Furthermore, under the unique facts, circumstances, and litigation posture of this case, only Aquinnah can adequately represent its interests, because the Tribe’s defense to KG Urban’s constitutional claims turn on evidence only Aquinnah can provide. *See Mass. Food Assoc. v. Mass. Alcoholic Beverages Control Comm’n.*, 197 F.3d 560, 567, *cert denied*, 529 U.S. 1105 (2000) (distinguishing between a case where intervenors sought only to offer other legal arguments to sustain the constitutionality of the statute and a case where the complaint was framed so as to require an evidentiary determination and the intervenors had information that could only be presented by their participation as parties). Aquinnah’s interests cannot be adequately represented by KG Urban, who has requested a remedy that would eviscerate Aquinnah’s ability to game in the Commonwealth. Aquinnah accordingly should be allowed to intervene to assert its eligibility to game under IGRA as a defense to KG Urban’s equal protection challenge to § 91.

#### **B. Aquinnah Should be Granted Permissive Intervention.**

If the Court determines that Aquinnah is not entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a), the Court should exercise its discretion to grant Aquinnah permissive intervention under Fed. R.Civ. P. 24(b). Rule 24(b) provides in relevant part, “on timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Unlike intervention as of right, the applicant

need not show a protectable interest, instead, Rule 24(b)(1)(B) gives the court discretion to allow intervention “when an applicant’s claim or defense and the main action have a question of law or fact in common.” *Daggett*, 172 F.3d at 112-13. The Court must also consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b). Permissive intervention is allowable where there are independent jurisdictional grounds for the applicant’s proposed claims and defenses. *Int’l Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 346 (1st Cir. 1989). See also, *Moosehead Sanitary Dist. v. S.G. Philips Corp.*, 610 F.2d 49, 52 n.5 (1st Cir. 1979). “[T]he district court can consider almost any factor rationally relevant but enjoys very broad discretion in granting or denying the motion.” *Daggett*, 172 F.3d at 113. See also *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 83-84 (D. Me. 1988), *aff’d*, 884 F.2d 629 (1st Cir. 1989).

Here, the First Circuit’s August 1, 2012 decision places Aquinnah’s eligibility to game under IGRA squarely at issue. Aquinnah is the only potential party that can provide the Court with the evidence and argument necessary to determine whether § 91 is authorized under IGRA. *Daggett*, 172 F. 3d at 113 (“the fact that the applicants may be helpful in fully developing the case is a reasonable consideration in deciding on permissive intervention”). Further, given the lack of substantive legal progress in this litigation – including lack of discovery - the Tribe’s intervention would not unduly delay or prejudice the parties. Rather, the Tribe’s participation would assist the Court in developing the case.

Finally, Aquinnah’s defense to KG Urban’s equal protection claim falls within this Court’s 28 U.S.C. § 1331 jurisdiction. Aquinnah’s defense rests on the assertion of substantial rights arising from federal law, namely the Massachusetts Indian Land Claim Settlement Act, 25 U.S.C. § 1771, et seq. and IGRA, 25 U.S.C. §§ 2701 et seq. As a Tribe eligible to game under

IGRA with existing Indian lands within the Commonwealth, Aquinnah is the intended beneficiary of § 91. KG Urban’s equal protection claims imperil Aquinnah’s ability to negotiate an IGRA-compliant compact with the Commonwealth and further imperil Aquinnah’s ability to game pursuant to § 91.

### **III. CONCLUSION**

Under the First Circuit’s August 1, 2012 decision, without a determination that a tribe in the Commonwealth possesses Indian lands as defined by IGRA, § 91 is not “authorized” by federal law and will be subject to strict scrutiny review and likely struck down as unconstitutional. As the only tribe with existing trust lands in the Commonwealth, Aquinnah’s eligibility to game on those lands is directly at issue. Without Aquinnah’s intervention to demonstrate its eligibility to game on its Settlement Lands, Aquinnah’s ability to obtain a compact pursuant to § 91 will evaporate, leaving the Tribe to once again tread in Seminole’s wake. Finally, the current parties have demonstrated they will not adequately represent Aquinnah’s interests. The Court accordingly should permit Aquinnah to intervene to protect its significantly protectable interest in the outcome of this litigation.

Dated this 7th day of September, 2012.

Respectfully Submitted,

STEPTOE & JOHNSON LLP

/s/ John R. Casciano

John R. Casciano, BBO #634725  
1330 Connecticut Ave., NW  
Washington, DC 20036  
202-429-3000  
jcasciano@steptoe.com

John J. Duffy\*  
jduffy@steptoe.com

Jody Cummings\*  
jcummings@steptoe.com

CROWELL LAW OFFICES  
TRIBAL ADVOCACY GROUP  
10 N. Post St., Suite 445  
Spokane, WA, 99201  
509-474-1265

Scott D. Crowell\*  
scottcrowell@hotmail.com

Scott Wheat\*  
scottwheat@me.com

Lael Echo-Hawk\*  
laeleh@gmail.com

*\*(pro hac vice pending)*

Attorneys for Defendants-Intervenors  
The Wampanoag Tribe of Gay Head  
(Aquinnah) and The Aquinnah Gaming  
Corporation

**CERTIFICATE OF SERVICE**

I, John R. Casciano, hereby certify that this Memorandum in Support of Motion to Intervene, filed through the ECF System, will be sent electronically to registered participants as identified on the Notice of Electronic Filing on September 7, 2012.

/s/ John R. Casciano  
John R. Casciano

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC

*Plaintiff*

vs.

DEVAL L. PATRICK, in his official capacity as governor of the Commonwealth of Massachusetts, and

CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMMISSION, in their official capacities.

*Defendants.*

CASE NO. 1:11-CV-12070-NMG

[PROPOSED]  
ANSWER OF INTERVENORS  
THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) AND THE AQUINNAH GAMING CORPORATION

The Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Gaming Corporation, a wholly-owned economic instrumentality of the Tribe (collectively referred to as the “Tribe” or “Aquinnah”), by and through its counsel, hereby answer the complaint of Plaintiff KG Urban Enterprises, LLC (“KG Urban) as follows. Except as expressly admitted all allegations are denied.

1. Aquinnah denies that Mass. St. 2011, c. 194 (the “Massachusetts Gaming Act” or “the Act”), contains any “race-based set asides.” The remainder of Paragraph 1 contains a characterization of Plaintiff’s lawsuit to which no response is required.

2. Aquinnah denies that the Act contains any “racial set aside provisions for Indian tribes.” Aquinnah lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations set forth in Paragraph 2.

3. Aquinnah denies that the Act contains “racial set asides.” The remainder of Paragraph 3 consists of a characterization of Plaintiff’s lawsuit to which no response is required.

4. Aquinnah lacks information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 4.

5. Admitted.

6. Paragraph 6 sets forth legal conclusions to which no response is required.

7. Paragraph 7 sets forth legal conclusions to which no response is required.

8. Paragraph 8 sets forth legal conclusions to which no response is required.

9. Aquinnah admits the allegations set forth in the first sentence. The remainder of Paragraph 9 sets forth legal conclusions to which no response is required.

10. Paragraph 10 sets forth legal conclusions to which no response is required.

11. Paragraph 11 sets forth legal conclusions to which no response is required.

12. Paragraph 12 sets forth legal conclusions to which no response is required.

13. Paragraph 13 sets forth legal conclusions to which no response is required.

14. Paragraph 14 sets forth legal conclusions to which no response is required.

15. Paragraph 15 sets forth legal conclusions to which no response is required.

16. Paragraph 16 sets forth legal conclusions to which no response is required.

17. Paragraph 17 sets forth legal conclusions to which no response is required.

18. Paragraph 18 sets forth legal conclusions to which no response is required.

19. Paragraph 18 sets forth legal conclusions to which no response is required.

20. Aquinnah admits Paragraph 20.

21. Aquinnah admits that its existing trust lands are located on Martha's Vineyard.

The remainder of Paragraph 21 contains Plaintiffs' vague characterization of the Commonwealth's legal position, and as such are legal conclusions to which no response is required. To the extent there are other factual allegations contained in Paragraph 21, they are vague and unclear and therefore Aquinnah lacks sufficient information to admit or deny.

22. The first sentence of Paragraph 22 vaguely characterizes the Commonwealth's legal position, and as such are legal conclusions to which no response is required. The remainder of Paragraph 22 likewise consists of legal conclusions to which no response is required. To the extent there are other factual allegations contained in Paragraph 22, they are vague and unclear and therefore Aquinnah lacks sufficient information to admit or deny

23. Paragraph 23 sets forth legal conclusions to which no response is required.

24. Paragraph 24 sets forth legal conclusions to which no response is required.

25. Paragraph 25 sets forth legal conclusions to which no response is required.

26. Paragraph 26 sets forth legal conclusions to which no response is required.

27. Paragraph 27 sets forth legal conclusions to which no response is required.

28. Paragraph 28 sets forth legal conclusions to which no response is required.

29. The first sentence of Paragraph 29 consists of unsupported speculation and Aquinnah lacks sufficient information to form a belief as to its truth or falsity. The remainder of Paragraph 29 sets forth legal conclusions to which no response is required.

30. Paragraph 30 sets forth legal conclusions to which no response is required.

31. The first three sentences of Paragraph 31 consist mostly of legal conclusions to which no response is required. The remainder of the first three sentences contains vague

allegations for which Aquinnah lacks sufficient information to admit or deny. Aquinnah denies the allegation in the last sentence of Paragraph 31.

32. Aquinnah denies the allegation in Paragraph 32 that § 16, sec. 68(a) of the Act constitutes a “race-based set-aside.” Aquinnah admits that the Act requires at least one member of the committee to be “a representative of a federally recognized Indian tribe in the Commonwealth.”

33. Paragraph 33 sets forth legal conclusions to which no response is required.
34. Paragraph 34 sets forth legal conclusions to which no response is required.
35. Paragraph 35 sets forth legal conclusions to which no response is required.
36. Paragraph 36 sets forth legal conclusions to which no response is required.
37. Paragraph 37 sets forth legal conclusions to which no response is required.
38. Paragraph 38 sets forth legal conclusions to which no response is required.
39. Paragraph 39 sets forth legal conclusions to which no response is required.
40. Paragraph 40 sets forth legal conclusions to which no response is required.
41. Paragraph 41 sets forth legal conclusions to which no response is required.
42. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 42.  
43. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 43.  
44. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 44.  
45. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 45.

46. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 46.

47. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 47.

48. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 48.

49. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 49.

50. Aquinnah lacks sufficient information to admit or deny the allegations set forth in Paragraph 50.

51. Aquinnah denies that there are “race-based set-asides” in the Act. The remainder of Paragraph 51 sets forth legal conclusions to which no response is required.

52. Aquinnah denies the first sentence of Paragraph 52. Aquinnah lacks sufficient information to admit or deny the allegations in the second sentence of Paragraph 52. The remainder of Paragraph 52 contains vague speculation to which Aquinnah lacks sufficient information to admit or deny.

53. Denied.

54. Aquinnah incorporates and reasserts its responses to the preceding paragraphs as if fully set forth herein.

55. Paragraph 55 sets forth legal conclusions to which no response is required.

56. Aquinnah denies that the Act contains “racial preferences for Indian tribes.” Aquinnah lacks sufficient information to admit or deny the remaining allegations set forth in Paragraph 56.

57. Denied.
58. Paragraph 58 sets forth legal conclusions to which no response is required.
59. Paragraph 59 sets forth legal conclusions to which no response is required.
60. Paragraph 60 sets forth legal conclusions to which no response is required.
61. Paragraph 61 sets forth legal conclusions to which no response is required.
62. Paragraph 62 sets forth legal conclusions to which no response is required.
63. Paragraph 63 sets forth Plaintiff's characterization of some parts of the Act, but contains no factual allegations to which any response is required.
64. Aquinnah denies that the Act contains "race-based set-asides" and denies that the Act is subject to strict scrutiny review.
65. Denied.
66. Aquinnah incorporates and reasserts its responses to the preceding paragraphs as if fully set forth herein.
67. Paragraph 67 sets forth legal conclusions to which no response is required.
68. Paragraph 68 sets forth legal conclusion to which no response is required.
69. Denied.
70. Aquinnah denies that the Act is subject to strict scrutiny review. The remainder of Paragraph 70 contains legal conclusions to which no response is required.
71. Denied.
72. Aquinnah incorporates and reasserts its responses to the preceding paragraphs as if fully set forth herein.
73. Paragraph 73 sets forth legal conclusions to which no response is required.
74. Paragraph 74 sets forth legal conclusions to which no response is required.

75. Paragraph 75 sets forth legal conclusions to which no response is required.
76. Paragraph 76 contains legal conclusions to which no response is required.
77. Paragraph 77 contains legal conclusions to which no response is required.
78. Aquinnah lacks sufficient information to form a belief as to the truth or falsity of the factual assertions set forth in the first sentence of Paragraph 78. The remainder of Paragraph 77 sets forth legal conclusion to which no response is required.
79. Paragraph 79 contains legal conclusions to which no response is required.
80. Aquinnah admits that, under the Supremacy Clause, IGRA controls in the event of a conflict between IGRA and the Act. Aquinnah denies that grounds stated in Paragraph 80 compel a determination of such a conflict and thus denies the remaining allegations set forth in Paragraph 80.

**Defense to Counts I and II (¶¶ 54-71)**

Because Aquinnah is a federally-recognized tribe with existing “Indian lands” in the Commonwealth for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., the Massachusetts Gaming Act’s provisions relating to Indian tribes are “authorized” by federal law and therefore subject to rational basis, as opposed to strict scrutiny review.

Dated this 7<sup>th</sup> day of September, 2012.

Respectfully Submitted,

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John R. Casciano, BBO #634725  
Steptoe & Johnson LLP  
1330 Connecticut Ave., N.W.  
Washington, DC 20036  
202-429-6268  
[jcasciano@steptoe.com](mailto:jcasciano@steptoe.com)

John Duffy  
*(pro hac vice pending)*  
Steptoe & Johnson LLP  
1330 Connecticut Ave., N.W.  
202-429-8020  
[jduffy@steptoe.com](mailto:jduffy@steptoe.com)

Jody Cummings  
*(pro hac vice pending)*  
Steptoe & Johnson LLP  
1330 Connecticut Ave., N.W.  
202-429-8096  
[jcumming@steptoe.com](mailto:jcumming@steptoe.com)

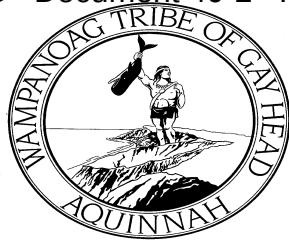
Scott D. Crowell  
*(pro hac vice pending)*  
Crowell Law Offices- Tribal  
Advocacy Group  
10 N. Post St., Suite 445  
Spokane, WA, 99201  
509-474-1265  
[scottcrowell@hotmail.com](mailto:scottcrowell@hotmail.com)

Scott Wheat  
*(pro hac vice pending)*  
Crowell Law Offices-Tribal  
Advocacy Group  
10 N. Post St., Suite 445  
Spokane, WA, 99201  
509-474-1265  
[scottwheat@me.com](mailto:scottwheat@me.com)

Lael Echo-Hawk  
*(pro hac vice pending)*  
Crowell Law Offices-Tribal  
Advocacy Group  
10 N. Post St., Suite 445  
Spokane, WA, 99201  
[laeleh@gmail.com](mailto:laeleh@gmail.com)  
509-474-1265

Attorneys for Defendant-Intervenor  
the Wampanoag Tribe of Gay Head  
(Aquinnah)

# **EXHIBIT 2**



**Wampanoag Tribe of Gay Head (Aquinnah)**

**TRIBAL HISTORIC PRESERVATION OFFICE (THPO) ORDINANCE**

**Enacted By: Resolution 2004-06**

**March 6, 2004**

**Summary.** This ordinance establishes the Tribal Historic Preservation Office of the Wampanoag Tribe of Gay Head (Aquinnah); defines the Office's powers and duties; delegates authority to the Office and to the Officer as head of the Office, including authority to develop rules to carry out this Ordinance; designates the Aquinnah Wampanoag Tribal Historic Preservation Officer for purposes of the National Historic Preservation Act and the Repatriation Officer for the purposes of the Native Graves Protection and Repatriation Act and the Massachusetts Unmarked Burial Act; directs the Office to establish a Aquinnah Wampanoag Register of Heritage Places; establishes a cultural resources revenue account; establishes a clearance requirement for undertakings that may affect cultural resources on Aquinnah Wampanoag Tribal lands; prohibits certain kinds of activities that may affect cultural resources; authorizes the establishment of a permit program to control activities that are prohibited unless a permit has been issued; authorizes civil and criminal penalties for the enforcement of this Ordinance; authorizes administrative appeals procedures and judicial review; and provides a limited waiver of sovereign immunity authorizing actions with Tribal Council (Tribal Court when established) for injunctive relief (but not for money damages) to ensure that Tribal agencies and enterprises comply with the procedural requirements of the Ordinance.

**WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)  
TRIBAL HISTORIC PRESERVATION (THPO) ORDINANCE**

**PART 1. GENERAL PROVISIONS**

- Section 101. Title and Summary
- Section 102. Findings
- Section 103. Policy
- Section 104. Definitions
- Section 105. Severability
- Section 106. Effective Dates

**PART 2. THPO PROGRAM ADMINISTRATION**

- Section 201. THPO
- Section 202. Officer
- Section 203. Delegation of Authority
- Section 204. THPO Revenue Account
- Section 205. Cultural Resource Monitoring Branch
- Section 206. Aquinnah Cultural Center
- Section 207. Cultural & Historic Commission
- Section 208. Repatriation Officer
- Section 209. Rulemaking Authority and Procedures
- Section 210. Hearings
- Section 211. Public Meetings

**PART 3. PROTECTION OF CULTURAL RESOURCES**

- Section 301. Aquinnah Wampanoag Register of Heritage Places
- Section 302. National Register of Historic Places
- Section 303. Clearance Requirement for Undertakings
- Section 304. Prohibited Activities
- Section 305. Permit Requirements
- Section 306. Exceptions and Waivers
- Section 307. Classes of Permits
- Section 308. Permit Application Procedures
- Section 309. Suspension and Revocation of Permits

**PART 4. ENFORCEMENT**

- Section 401. Investigations
- Section 402. Notices of Violation
- Section 403. Cease and Desist Orders
- Section 404. Criminal Penalties
- Section 405. Trespass
- Section 406. Civil Penalties
- Section 407. Civil Forfeitures
- Section 408. Referrals to Federal and Other Authorities
- Section 409. Civil Actions in Federal Court

**PART 5. APPEALS AND JUDICIAL REVIEW**

- Section 501. Petitions for Relief
- Section 502. Administrative Appeal Hearings
- Section 503. Judicial Review
- Section 504. Actions To Perfect the WTGH (A)'s Title in Seized Property

## PART 1. GENERAL PROVISIONS

### Section 101. Title and Summary

(a) This Ordinance may be cited as the "Tribal Historic Preservation Ordinance."

(b) This ordinance establishes the Tribal Historic Preservation Office (THPO) of the Wampanoag Tribe of Gay Head (Aquinnah); defines the Office's powers and duties; delegates authority to the THPO and to the Officer as head of the Office; establishes the Cultural and Historic Commission (CHC) with the authority to develop rules to carry out this Ordinance; designates the Aquinnah Wampanoag Tribal Preservation Officer (THPO) for purposes of the National Historic Preservation Act (NHPA) and the Repatriation Officer for the purposes of the Native American Graves Protection and Repatriation Act (NAGPRA) and the Massachusetts Unmarked Burial Act; directs the Office to establish an Aquinnah Wampanoag Register of Heritage Places; establishes a cultural resources revenue account; prohibits certain kinds of activities that may affect cultural resources; authorizes the establishment of a permit program to control activities that are prohibited unless a permit has been issued; authorizes civil and criminal penalties for the enforcement of this Ordinance; authorizes administrative appeals procedures and judicial review; and provides a limited waiver of sovereign immunity authorizing actions in Tribal Council (Tribal Court when established) for injunctive relief (but not for money damages) to ensure that Tribal agencies and enterprises comply with the procedural requirements of the Ordinance.

### Section 102. Findings

The Tribal Council of the WTGH (A) finds and declares that:

(a) The spirit and direction of the WTGH (A) [herein after referred to as WTGH (A)] are founded upon and reflected in its cultural heritage;

(b) The cultural heritage of the WTGH (A) must be preserved as a living part of community life and development and of the spiritual and religious life of the WTGH (A);

(c) Many cultural resources which hold significance for the WTGH (A), both within the boundaries of the Aquinnah Wampanoag tribal lands and on other lands traditionally used by the Tribe, have been damaged or destroyed, sometimes inadvertently and sometimes intentionally;

(d) Preserving and caring for cultural resources will provide spiritual, cultural, educational, aesthetic, inspirational, social, environmental and economic benefits for current and future generations of the WTGH (A);

(e) Present governmental programs, tribal and non-tribal, to preserve the WTGH (A)'s cultural resources are inadequate and do not ensure that future generations will have a genuine opportunity to appreciate and enjoy the rich cultural resources of the WTGH (A) in light of the increasing pace of activities and projects that can adversely affect cultural resources (such as economic development projects, sanitation and public health developments, road building and housing construction);

(f) Increased knowledge about Aquinnah Wampanoag cultural resources, along with the establishment of better means of identifying and fostering the preservation of cultural resources, will improve the planning processes used by tribal, federal, state and other government agencies and will facilitate the expeditious implementation of economic development projects;

(h) Although the federal and state government agencies have played major roles in cultural resource preservation, and both these levels of government must continue to play their proper roles, it is essential that the WTGH(A) expand and accelerate its cultural resource preservation programs and activities;

(i) The Tribal Council possesses the authority to enact legislation to establish programs to preserve cultural resources as an aspect of the inherent sovereignty of the WTGH (A), in accordance with the Constitution of the WTGH (A);

(j) The inherent sovereignty of Indian tribes to enact legislation for the preservation of cultural resources is recognized in federal law, including statutes such as the Archaeological Resources Protection Act, National Historic Preservation Act, and Native American Graves Protection and Repatriation Act;

(k) Under international human rights law, the WTGH (A) has the right to maintain its cultural integrity, and the enactment of tribal legislation to preserve cultural resources is a critical step that the Tribal Council can take to maintain the cultural integrity of the WTGH (A).

### **Section 103. Policy**

It shall be the policy of the WTGH (A) to:

(a) Recognize, support, and perpetuate the traditional stewardship by Aquinnah Wampanoag people of culturally significant resources that are located on lands traditionally used by Aquinnah Wampanoag people but not currently within the territorial jurisdiction of the WTGH (A);

(b) Preserve and care for cultural resources that are within the jurisdiction or control of the WTGH (A) in a spirit of stewardship and for the inspiration of present and future generations;

(c) Encourage the preservation and use of historic buildings and structures located within the Aquinnah Wampanoag Tribal Lands;

(d) With respect to cultural resources that are not within the jurisdiction or control of the WTGH(A) but which are significant for Aquinnah Wampanoag cultural heritage, to encourage those governmental agencies that do have jurisdiction and other entities that have control to manage such resources in a spirit of stewardship and for the inspiration of present and future generations of Aquinnah Wampanoag and non-Aquinnah Wampanoag people;

(e) Preserve and manage cultural resources in ways that contribute to meeting the spiritual, cultural, educational, aesthetic, inspirational, social, environmental, economic and other needs of present and future generations;

(f) Provide leadership and technical assistance in the preservation, protection, and conservation of cultural resources by building an exemplary cultural resources management program, by sponsoring educational programs for the general public and training programs for tribal employees, by consulting and cooperating with other governmental agencies, and by making contributions to academic journals and other appropriate publications;

(g) Cooperate with other Indian tribes, federal and state agencies, private organizations and individuals in the preservation and management of cultural resources;

## Section 104. Definitions

The following definitions apply for purposes of this Ordinance and rules issued by the CHC to carry out this Ordinance. Rules issued by the CHC may clarify the definitions in this section and may include definitions for additional terms, *provided* that any such additional definitions shall be generally consistent with the use of such terms in federal cultural resources law and *provided* that any intentional minor differences in the use of such terms shall be explained in the rules. Additional terms shall be recommended to Tribal Council for adoption into the definitions of this Ordinance.

- (a) "Archaeological resources" means any material remains of human life or activities which are at least 100 years of age and which are of archaeological interest, as further clarified in federal regulations (43 C.F.R. § 7.3(a)); *provided*, for purposes of this Ordinance the term does not include human remains and funerary objects.
- (b) "Cultural Resource" means any product of human activity or any object or place given significance by human action or belief. Places that may be cultural resources include building and other structures, landforms, archaeological sites, traditional cultural properties, and districts that are eligible, or potentially eligible, for listing on the Aquinnah Wampanoag Register of Heritage Places or the National Register of Historic Places. Objects that may be cultural resources include artifacts and other physical remains of human activity, natural objects given significance by human action or belief, human remains and "cultural items" as defined in the Native American Graves Protection and Repatriation Act (funerary objects, sacred objects and objects of cultural patrimony), and archaeological resources. Objects may be eligible for the Aquinnah Wampanoag Register of Heritage Places or the National Register of Historic Places if they are in some way connected to a specific place.
- (c) "Cultural and Historic Commission" or "CHC" means the commission established pursuant to Section 207 of this Ordinance.
- (d) "Aquinnah Wampanoag Register" means the Aquinnah Wampanoag Register of Heritage Places established pursuant to Section 301 of this Ordinance.
- (e) "Wampanoag traditional ancestral lands" means all lands historically or traditionally used by the Wampanoag people, *except* for those lands that are currently within the boundaries of the Aquinnah Wampanoag Tribal Lands or otherwise included in the term "Aquinnah Wampanoag tribal lands" as used in this Ordinance.
- (f) "Aquinnah Wampanoag tribal lands" means all lands over which the WTGH (A) has jurisdiction, including all land within the exterior boundaries of the Aquinnah Wampanoag Tribal Lands and all other Aquinnah Wampanoag Indian country, as that term is defined in 18 U.S.C. § 1151.
- (g) "Heritage resource" or "heritage property" means any cultural resource or property that has been determined eligible for listing in the Aquinnah Wampanoag Register of Heritage Places.
- (h) "Indian" or "Indian person" mean any enrolled member of a federally recognized Indian tribe and any other person who is considered an Indian for purposes of the Indian Civil Rights Act (25 U.S.C. § 1301(4)) and criminal jurisdiction under the federal Major Crimes Act (18 U.S.C. § 1153).

- (i) "National Register" means the National Register of Historic Places established pursuant to the National Historic Preservation Act and administered by the National Park Service (36 C.F.R. parts 60, 63).
- (j) "Repatriation" means the expeditious return to the WTGH (A) of human remains, associated funerary objects, objects of cultural patrimony, and sacred objects and other objects possessed or controlled by persons and entities other than the Tribe and its members pursuant to the Native Graves Protection and Repatriation Act (NAGPRA). In the event that the WTGH (A) comes into possession or control of items to which other tribes or individuals have rights of ownership or control, the term also means the expeditious return of such items to such tribes or persons.
- (k) "Repatriation Officer" means the officer charged under tribal law with the responsibility for administering the tribal repatriation program.
- (l) "Responsible agency official" means the official of a federal, tribal or state agency who has decision making authority over a particular undertaking proposed, or under consideration, by such an agency.
- (m) "Responsible person" means the individual in private capacity or official in a non-governmental organization who has decision-making authority over a particular undertaking.
- (n) "State Historic Preservation Officer" or "SHPO" means the officer or state government agency charged under state law with responsibility for administering a state historic preservation program.
- (o) "Traditional Cultural Place" or "Traditional Cultural Property" means, as defined by the National Park Service in National Register Bulletin 38, a place that is eligible for the National Register because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and are important in maintaining the continuing cultural identity of the community. As used in this Ordinance this term also includes such a place if it has been determined eligible for the Aquinnah Wampanoag Register regardless of whether or not it has been determined eligible for the National Register.
- (p) "Tribal Historic Preservation Office" or "Officer" means the officer charged under Tribal law with the responsibility for administering the Tribal Historic Preservation Program.
- (q) "Tribal Historic Preservation Officer" or "Office" means the officer or Tribal program charged under Tribal law with the responsibility for administering the Tribal Historic Preservation Program.
- (r) "Tribal Land Use Commission" or "LUC" means the Commission established pursuant to the Aquinnah Wampanoag Land Use Ordinance.
- (s) "Undertaking" means:
  - (1) "undertaking" as defined in the National Historic Preservation Act (16 U.S.C. § 470w(7)): "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including:

"(A) those carried out by or on behalf of a Federal agency;

"(B) those carried out with Federal financial assistance;  
"(C) those requiring a Federal permit, license, or approval; and  
"(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency"; and

(2) Any project, activity or program carried out under the authority of, or with permission from, an agency, enterprise or other entity created by the WTGH (A), including any "development" for which a permit is required under the Aquinnah Wampanoag Land Use Ordinance, regardless of whether or not there is federal agency involvement sufficient to bring the project, activity or program within the coverage of paragraph (1) of this definition, *provided* that the Officer, through the issuance of rules by the CHC, may establish procedures to avoid the application of this term to projects, activities and programs that do not have the potential to result in changes in the character and use of cultural resources.

(3) The Officer, through the issuance of rules by the CHC, may establish that certain kinds of actions are "exempted categories" which generally shall not be treated as "undertakings" for purposes of this Ordinance based on a determination that the potential effects on cultural resources of undertakings within any such category are foreseeable and likely to be minimal. The CHC's rules for exempted categories shall include a procedure for determining, for a particular action that fits within an exempted category, whether the particular action may affect cultural resources, and, if such a determination is made, the action shall be treated as an "undertaking." Actions that would otherwise be treated as "undertakings" under paragraph (1) of this definition may be included in exempted categories only to the extent that the Advisory Council on Historic Preservation authorizes such treatment, through the Council's regulations or pursuant to an agreement between the Advisory Council and WTGH (A).

## **Section 105. Severability**

If any portion of this Ordinance or the application thereof to any person, court or circumstances is held invalid by an Aquinnah Wampanoag tribal court or federal court, the invalidity shall not affect other provisions of this Ordinance which can be given effect without the invalid provisions or application and to this end, the provisions of this Ordinance are severable.

## **Section 106. Effective Dates**

The permit requirements in Part 3 of this Ordinance become effective on the date that rules to establish a permit program, issued pursuant to Section 208, become effective. All other provisions of this Ordinance become effective upon enactment by the Tribal Council.

## **PART 2. TRIBAL HISTORIC PRESERVATION OFFICE ADMINISTRATION**

### **Section 201. Tribal Historic Preservation Office**

(a) *Establishment.* The Tribal Historic Preservation Office (Office) is hereby established.

(b) *Mission.* The Office shall be the WTGH (A)'s lead agency for the identification, protection, preservation and management of cultural resources within Aquinnah Wampanoag tribal lands and Wampanoag traditional ancestral lands.

(c) *Programs.* The Office shall develop and administer all programs necessary to achieve the purposes of this Ordinance, consistent with direction from the Cultural and Historical Commission and Tribal Council and WTGH (A) Administration, including programs to:

(1) Advise the Aquinnah Wampanoag Tribal Council, the Cultural and Historic Commission, and other departments, programs, authorities, enterprises, and other instrumentalities of the WTGH (A), federal, state and local government agencies, private organizations and individuals on matters pertaining to the cultural resources in order to achieve the purposes of this Ordinance on Aquinnah Wampanoag tribal lands and on Wampanoag traditional ancestral lands;

(2) Assume functions of the State Historic Preservation Officer on Aquinnah Wampanoag tribal lands as provided by agreement with the National Park Service;

(3) Represent the Tribe in consultations with federal agencies and the SHPO for cultural resources located on Wampanoag traditional ancestral lands;

(4) Recommend to Tribal Council interagency memoranda of agreement (MOAs) and programmatic agreements (PAs) to facilitate and advance the purposes of this Ordinance;

(5) Compile, update and maintain a cultural resources data base for Aquinnah Wampanoag Tribal lands and Wampanoag traditional ancestral lands, including but not limited to Wampanoag Confederation's Repatriation database and the development of the Aquinnah Wampanoag Register of Heritage Places and;

(6) Provide appropriate education to the public (Aquinnah Wampanoag and non-tribal members) regarding the importance of preservation, protection and management of the cultural resources on Aquinnah Wampanoag Tribal lands and Wampanoag traditional ancestral lands;

(7) Protect Aquinnah Wampanoag cultural resources on Aquinnah Wampanoag tribal lands by enforcing the prohibitions and administering the permit requirements of Part 3 of this Ordinance;

(8) Support the Repatriation Officer in seeking the repatriation of human remains and cultural items from federal agencies and "museums" (as that term is defined in the Native American Graves Protection and Repatriation Act) and other persons and establish procedures, in consultation with the CHC, for determining the appropriate disposition of repatriated items;

(9) Manage collections of cultural resources excavated from Aquinnah Wampanoag tribal lands and Wampanoag traditional ancestral lands; and

(10) Prepare a strategic plan for Cultural Resources and Historic Preservation on behalf of the WTGH (A) and provide a copy of this Plan to the CHC for recommendation to the Tribal Council. The Office shall submit a report to General Membership on an annual basis, including a brief report summarizing the Office's accomplishments during the preceding year and issues that merit consideration by the CHC, the Tribal Council, and the General Membership

(d) *Appropriations and Funding.* This Ordinance authorizes the Office to seek and obtain the funds necessary to support the Office's programs from all appropriate sources, and to establish THPO Revenue

Account(s) pursuant to Section 204 of this Ordinance. Under the supervision of the fiscal accounting department of the WTGH (A), the Officer will manage and supervise the Office in the expenditure of funds to achieve its mission and carry programs under this ordinance.

## **Section 202. Officer**

(a) *Executive Direction.* The Office shall be supervised by the Officer (hereinafter referred to as "Officer"), who shall be hired and compensated in accordance with WTGH (A) Tribal Personnel Policies and Procedures. The Officer shall report directly to the Cultural & Historic Commission or their designee

(b) *Responsibilities.* The Officer shall have the overall responsibility for carrying out this Ordinance. Specific responsibilities of the Officer shall include, but not be limited to, the following:

(1) Serve as the Officer for purposes of the National Historic Preservation Act;

(2) Serve as the agent of the WTGH (A) for receiving notice to the WTGH (A) in matters relating to cultural resources.

(3) Consult, coordinate, and negotiate agreements with other Aquinnah Wampanoag tribal agencies and entities, and with state agencies, federal agencies, and agencies of other Indian tribes regarding cultural resources;

(4) Serve as a representative of the Office and, if appropriate, the WTGH (A) in any action in any court or any administrative proceeding involving the validity or enforcement of this Ordinance or involving other legal matters relating to cultural resources;

(5) Review undertakings and administer a permit program pursuant to Part 3 of this Ordinance;

(6) Develop, in consultation with the Cultural & Historic Commission, plans and programs to protect and preserve the cultural resources of the WTGH (A);

(7) Seek funding from appropriate sources with the approval of the CHC and negotiate and administer grant and contractual agreements to ensure that the obligations assumed by the Office in such agreements are carried out;

(8) Develop a program to oversee the quality of cultural resources work carried out pursuant to permits issued under Part 3 of this Ordinance and to monitor the quality of similar work carried out on Wampanoag traditional ancestral lands pursuant to permitting authority of other governmental agencies;

(9) Develop and maintain Office archives containing records, publications, and other material relating the cultural heritage of the WTGH (A); and

(10) Develop rules and other formal policy statements and guidance documents for adoption by the CHC, to carry out this Ordinance, in accordance with Section 208.

## **Section 203. Delegation of Authority**

The Tribal Council hereby delegates to the Office and the Officer the authority necessary to carry out this Ordinance, subject to such review and oversight of the Cultural and Historic Commission.

## **Section 204. THPO Revenue Account**

The Office is authorized, in cooperation with the WTGH (A) Finance department, to establish THPO Revenue Account(s). All revenue from sources such as contracts, cooperative agreements, and grants shall be deposited into this account for disposition in accordance with the terms of such contracts, cooperative agreements, and grants. Revenue from fees, fines, civil penalties, civil forfeitures and other sources under this Ordinance shall be deposited into this account(s) and shall be expended in accordance with Aquinnah Wampanoag budgetary procedures to help achieve the purposes of this Ordinance.

## **Section 205. Cultural Resource Monitoring Branch**

The Officer is authorized to administer a Cultural Resource Monitoring Branch within the Office to provide or arrange for archaeological services for other departments of tribal government, tribal enterprises, and the private sector and to charge reasonable fees to cover the costs of providing such services. If the Officer and Aquinnah Cultural Center Board are in agreement, the tribal chartered Aquinnah Cultural Center, Inc. may act as the non-profit corporation for the purposes of providing archaeological services. Otherwise if, in the Officer's judgment, it would be preferable for the Tribal Council to charter a non-profit tribal corporation to provide archaeological services, the Officer shall be authorized to act as the corporation's executive Officer.

## **Section 206. Aquinnah Cultural Center**

(a) The Officer is authorized to collaborate with the Aquinnah Cultural Center Board of Directors in the establishment and the ongoing operations of the Aquinnah Cultural Center (ACC).

## **Section 207. Cultural and Historic Commission**

(a) In carrying out their responsibilities under this Ordinance, the Officer, Repatriation Officer and the employees of the Office shall be guided by the wisdom and expertise of the CHC.

(b) The CHC shall act as the tribal historic preservation and repatriation review board and is authorized by the Tribal Council to assist the Officer with the identification, evaluation and protection of the tribal land with important historic and archaeological resources under the National Historic Preservation Act, as well as assist the Repatriation Officer in the repatriation of human remains, associated funerary objects, sacred objects, and objects of cultural patrimony under the Native Graves Protection and Repatriation Act.

(c) The Commission shall be composed of no more than five (5) Aquinnah Wampanoag tribal members, including, but not limited to, the Tribal Chief and Medicine Man who are chosen for life in the traditional Aquinnah Wampanoag manner and serve on the Commission indefinitely, as well as a representative from Tribal Council and the Aquinnah Cultural Center Board of Directors who shall serve for the duration of their appointed term, as well as a tribal member at large appointed by the Tribal Council for a three year term. If necessary to carry out this Ordinance and subject to the signing of a mutual agreement, more than one member of the ACC Board of Directors may serve on the Cultural and Historical Commission. The CHC reports to the Tribal Council.

The Medicine Man/ Chief/ elders are the WTGH (A)'s traditional cultural authorities who provide advice to the CHC. In addition the CHC shall work with professionally qualified consultants to obtain advice when making decisions about certain cultural/ historical resource in accordance with the activity profiles and performance standards set forth in Appendix B.

Upon enactment of this Ordinance the Officer, in consultation with the members of the CHC described in paragraph (e) of this section, shall develop:

- (1) A Policy Statement on the Roles and Responsibilities of the CHC; and
- (2) A Procedure for Appointments to the CHC, if not already established through by-law.

(d) In addition to such other roles and responsibilities as the Tribal Council determines are appropriate for the CHC. The CHC shall perform a role similar to that performed by a State Review Board under regulations issued by the National Park Service regarding nominations of properties to the National Register of Historic Places. (36 C.F.R. parts 60, 61).

(e) The Policy Statement and Procedure for Appointments shall take effect upon approval by the Tribal Council.

(f) The Policy Statement may include provisions for the payment of compensation to the members of the CHC and Repatriation Officer for their service to the WTGH (A) in this capacity.

## **Section 208. Repatriation Officer**

(a) *Repatriation Officer.* The Tribal Council shall appoint a qualified enrolled tribal member to serve as the Aquinnah Wampanoag Repatriation Officer for the proposes of the Native American Graves Protection and Repatriation Act (NAGPRA) and the Massachusetts Unmarked Burial Law, Massachusetts General Laws (Ch. 659 of the Acts of 1983 and Ch. 386 of the Acts of 1989). The Repatriation Officer shall report directly to the Officer.

(b) *Responsibilities.* The Repatriation Officer shall have the overall responsibility for carrying out duties under the Native American Graves Protection and Repatriation Act (NAGPRA), and the Massachusetts Unmarked Burial Law, but not be limited to, the following:

- (1) Provide an authoritative source of tribal law and custom relating to repatriation;
- (2) Consult with federal agencies and museums;
- (3) Present repatriation requests to federal agencies and museums; and
- (4) Act on all tribal repatriation matters and act as legal signatory.

## **Section 209. Rulemaking and Other Policy Documents**

(a) *Rulemaking Authority.* The CHC is authorized to issue rules to carry out this Ordinance. For some provisions of this Ordinance, the issuance of rules is mandatory: the Ordinance expressly requires the CHC to issue rules, and those provisions cannot be carried out until rules have been issued. In addition, the CHC is authorized to issue rules to carry out other provisions of this Ordinance if, in the CHC's judgment, rules would be advisable to help clarify the Ordinance and to provide guidance to the affected public.

(b) *Rulemaking Procedure.* The development of rules is intended to be a process in which persons whose interests will be affected by the rules have an opportunity to understand how the rules will affect their

interests and to make their views known. The Officer is responsible for ensuring that, unless the expedited procedure in paragraph (d) of this section applies, the following steps are taken:

(1) A proposed rule shall be made available to the public, including an explanation of the rule in plain language. A notice of the availability of the proposed rule shall be posted at the offices of the Tribal Council and may be published in the tribal newspaper and mailed to persons known to be interested in the rule.

(2) A comment period of forty-five (45) days shall be provided during which interested persons may file written comments on the proposed rule.

(3) A final rule shall be made available to the public, which shall include a summary of comments received and a brief discussion of the Officer's response to comments received, although the Officer need not respond to every point raised in the comments. A notice of the availability of the final rule shall be posted at the office of the Tribal Council.

(4) A final rule shall be placed on the agenda for a scheduled meeting of the Tribal Council and shall become effective upon approval by the Tribal Council. The Tribal Council shall act in a timely fashion when making a decision on a final rule.

(c) *Additional Procedures for Rulemaking.* The Officer may use additional methods to inform the public and seek the views of concerned persons, such as informal community meetings and more formal public hearings. If the Council, through resolution or ordinance, imposes additional procedural requirements that clearly are intended to apply to rulemaking under this Ordinance, the Officer shall comply with such requirements.

(d) *Procedures, Standards, Guidelines and Policy Statements.* The Officer may develop and carry out various kinds of policy and guidance documents other than rules that the Officer deems necessary or advisable to carry out this Ordinance, upon review and adoption by the Cultural and Historical Commission. Such document may include procedures, standards, guidelines and policy statements. Unless specifically required by this Ordinance or by other formal action of the Tribal Council, such documents generally do not require Tribal Council approval before taking effect. The Officer shall provide a copy of any such document to the Tribal Council.

## **Section 210. Hearings**

The Officer and the CHC are authorized to hold legislative hearings as part of the rulemaking process, administrative hearings on permit applications and appeals, and enforcement hearings on alleged violations of this Ordinance.

(a) *Rulemaking hearings.* In developing rules, the CHC may hold a hearing in which Aquinnah Wampanoag tribal members and others who may be affected by rules to be developed are given the opportunity to express their views. Notice of rule-making hearings shall be provided at least thirty (30) days prior to the date of the hearing and the text of the proposed rules, with explanatory materials, also shall be made available to the public at least thirty (30) days prior to the date of the hearing.

(b) *Administrative hearings.* When considering whether to approve an application for a permit pursuant to Part 3 of this Ordinance, the Officer generally will make the initial decision based upon the written application. The Officer is authorized to hold administrative hearings to gather information to be used in making the initial permit decision. The CHC shall hold an administrative hearing when an affected party has requested review of a permit decision pursuant to Section 502 of this Ordinance. In an administrative hearing, the burden is on the applicant to demonstrate to the CHC that the issuance of a permit would be consistent with the Ordinance and the Office's rules. A written transcript shall not be required, but the applicant shall be entitled to a written decision. The Officer shall issue rules establishing procedures for administrative hearings adopted by the CHC.

## **Section 211. Public Meetings**

The Officer is authorized to hold public meetings whenever doing so would help carry out the policies of this Ordinance. Public meetings generally are less formal than public hearings and do not require the preparation of a transcript or other record. Public meetings can be used to encourage community involvement in the rulemaking process or to inform the public about the Aquinnah Wampanoag cultural heritage resources program or for any other worthwhile purpose in the judgment of the Officer.

## **PART 3. PROTECTION OF CULTURAL HERITAGE RESOURCES**

### **Section 301. Aquinnah Wampanoag Register of Heritage Places**

(a) *Creation of the Register.* The Officer shall create, expand, maintain and administer an Aquinnah Wampanoag Tribal Register of Heritage Places (hereinafter referred to as the "Aquinnah Wampanoag Register") comprising places, buildings, districts, objects, and structures significant in Aquinnah Wampanoag history, culture, archaeology, engineering, and architecture in consultation with the CHC. The Officer shall issue rules to establish criteria for eligibility and procedures for determining eligibility and nominating places to be listed on the Aquinnah Wampanoag Register adopted by the CHC. Eligibility for the Aquinnah Wampanoag Register shall not be limited to places that are located on Aquinnah Wampanoag tribal lands but, rather, may also include places located on Aquinnah Wampanoag traditional ancestral lands.

(b) *Inventory, Evaluation, and Registration.* The Officer shall establish a program to locate, inventory and evaluate cultural resources on Aquinnah Wampanoag tribal lands and Aquinnah Wampanoag traditional ancestral lands. In accordance with rules issued pursuant to paragraph (a) of this Section, upon a determination that a place is eligible for the Aquinnah Wampanoag Register, the Officer may formally add the place to the Register or the Officer may maintain a separate listing of places that have been determined eligible but have not been formally listed.

(c) *Cultural and Historic Commission.* The rules issued by the Officer pursuant to paragraph (b) shall include a procedure through which the Officer shall consult with the CHC in determining whether any particular place is eligible for the Aquinnah Wampanoag Register and, if it is eligible, whether or not it should be formally listed. The consultations leading up to such determinations may be closed to the public if, in the judgment of the Officer or the CHC, confidentiality is advisable to protect the cultural resources at issue and the traditional uses of such resources by tribal members, *provided* that members of the Tribal Council and persons designated by them may participate in such consultations. In the event of a disagreement between the Officer and the CHC, the Officer shall defer to the judgment of the CHC and issue the CHC's determination for the Office.

(d) *Appeals.* A determination by the Officer on the eligibility of a place for the Aquinnah Wampanoag Register may be appealed pursuant to Section 503.

### **Section 302. National Register of Historic Places**

(a) *Inventory, Evaluation, and Nomination.* The Officer shall establish a program to locate, inventory and evaluate cultural resources on Aquinnah Wampanoag tribal lands and Aquinnah Wampanoag traditional ancestral lands that appear to be eligible for the National Register of Historic Places, and to determine whether such properties should be formally nominated to the National Register in consultation with the CHC. In establishing and carrying out this program, the Officer shall consider (1) places that are eligible for both the Aquinnah Wampanoag Register and the National Register, and (2) places that are eligible for the National Register but which are not significant in Aquinnah Wampanoag history, culture, archaeology, engineering, and architecture and thus are not eligible for the Aquinnah Wampanoag Register.

(b) *Cultural and Historic Commission.* The program established by the Officer shall include a role for the CHC similar to that performed by State Review Boards in regulations issued by the National Park Service governing nominations to the National Register (36 C.F.R. part 60).

(c) *Appeals.* Determinations by the Officer to nominate a property to the National Register, or not to nominate a property, may be appealed to the Keeper of the National Register in accordance with regulations issued by the National Park Service (36 C.F.R. part 60). Such determinations shall *not* be subject to appeal or judicial review pursuant to Sections 503 and 504 of this Ordinance.

### **Section 303. Clearance Requirement for Undertakings**

(a) *Clearance Requirement.* Before carrying out any undertaking that may affect cultural resources located on Aquinnah Wampanoag tribal lands, the responsible agency official or responsible person proposing the undertaking must provide the Officer with a reasonable opportunity to review the undertaking and determine the effects the undertaking is likely to have on cultural properties. The undertaking shall not proceed unless and until the Officer has given the responsible agency official or responsible person written clearance to proceed. Such written clearance may include mitigation measures, which shall be binding on the responsible agency official or responsible person.

(b) *Relationship to Land Use Ordinance.* If the undertaking constitutes "development" under the Aquinnah Wampanoag Land Use Ordinance, the responsible agency or responsible person proposing the undertaking must apply to the Tribal Land Use Commission (LUC) for a permit, pursuant to the requirements of the ordinance. The LUC will consult with the Officer regarding the effects the undertaking is likely to have on cultural resources and will include in the permit any conditions required by the Officer.

(c) *Discovery Situations for Development under a LUC Permit.* If cultural resources are discovered during the course of development pursuant to a LUC permit, the LUC will consult with the Officer regarding such cultural resources and will include any modification to the permit required by the Officer. Depending on the likely effects that the undertaking may have on such cultural resources, the LUC may consider suspending or revoking the permit, subject to the procedural protections of notice and hearing provided in Section 309 of this Ordinance and the judicial review provision of Section 503.

(d) *Procedure.* The Officer is authorized to issue rules to carry out the consultation requirement of this Section adopted by the CHC. In these rules the Officer may provide that certain kinds of activities that normally do not adversely affect cultural resources may be excluded from the clearance requirement or may be addressed through programmatic agreements with responsible agencies. In the absence of rules issued by the Officer, the procedure for conducting this consultation shall follow the procedure set out in the regulations issued by the Advisory Council on Historic Preservation for the Section 106 consultation process under the National Historic Preservation Act (36 C.F.R. part 800), with the Officer performing the role of the SHPO,

*provided*, that, as provided in paragraph (a) of this Section, unless and until the Officer issues clearance, the responsible agency official or responsible person cannot lawfully proceed with an undertaking.

(e) *Relationship to Permit Requirements.* The clearance requirement established by this Section is in addition to any permit requirements pursuant to Section 305 of this Ordinance, or pursuant to the Aquinnah Wampanoag Land Use Ordinance, that may also apply. For many kinds of undertakings it may be necessary to obtain one or more permits under Section 305 in order to gather sufficient information to make final plans for the undertaking and/or to adequately mitigate adverse effects on cultural resources prior to seeking clearance from the Officer for the undertaking itself.

(f) *Hearings and Appeals.* If the Officer denies clearance for an undertaking, the person or agency proposing the undertaking may request a hearing pursuant to Section 502 of this Ordinance. Any final decision made by the Officer is subject to judicial review pursuant to Section 503 of this Ordinance.

## **Section 304. Prohibited Activities**

The prohibitions in this Section apply to cultural resources located on or within Aquinnah Wampanoag tribal lands.

(a) No person or agency shall carry out an undertaking without first obtaining clearance from the Officer, or a permit from the Land Use Commission, as the case may be, pursuant to Section 303 of this Ordinance.

(b) No person shall disturb, take, excavate, remove, damage, destroy, desecrate or alter any cultural resource or conduct any investigation relating to any cultural resource, or make an exploratory excavation to determine the presence of any cultural resource without first obtaining a permit from the Officer pursuant to this Ordinance, or a permit from the LUC, as the case may be, unless an exemption from the permit requirement applies.

(c) No person shall sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange or transport any cultural resource in violation of:

- (1) the prohibitions in paragraph (b) of this Section;
- (2) the conditions of any permit issued pursuant to tribal or federal law; or
- (3) any rule, ordinance or other provision of tribal or federal law in effect at the time of the prohibited conduct.

(e) No person who is not a tribal member shall conduct historical, cultural or other research, oral or written, scientific or non-scientific, or make recordings of any kind, regardless of the technology used, without first obtaining a permit pursuant to this Ordinance.

(f) Any person who receives a letter of inquiry from the Officer pursuant to Section 401 of this Ordinance shall respond truthfully within the time specified in such letter; any person who gives false information in response to a letter of inquiry is in itself a violation of this Ordinance.

## **Section 305. Permit Requirements**

Any person, other than a person who is exempt from permit requirements by Section 306 of this Ordinance, proposing to visit or inspect cultural resources, undertake cultural resources inventory, alter, collect, excavate, or remove cultural resources or engage in ethnographic research, or to conduct any other activity that would otherwise be prohibited by Section 304, shall apply to the Officer for a Aquinnah Wampanoag Tribal Cultural Resources Permit, or to the LUC for a Land Use Permit, as the case may be. As provided in Section 308, the Officer shall issue rules to establish permit application procedures adopted by the CHC.

## **Section 306. Exceptions and Waivers**

(a) The prohibition against, and permit requirement for, visitation of cultural resources shall not apply to enrolled members of the WTGH (A) or to Aquinnah Wampanoag tribal employees engaged in properly authorized official activities.

(b) The prohibition against, and permit requirement for, alteration, collection, disturbance, excavation or removal of cultural resources or for the conduct of ethnographic research does not apply to:

- (1) Aquinnah Wampanoag tribal members engaging in activities directly related to the practice of traditional Aquinnah Wampanoag religion or traditional cultural practices.
- (2) Tribal employees engaged in properly authorized official business, relating to cultural resource management approved in accordance with rules and/or guidance documents issued by the Officer and approved by the CHC.

(c) The Officer may waive otherwise applicable permit requirements on a case-by-case basis to allow access to cultural resources by traditional practitioners from other Indian tribes. The waiver policy shall be established by the CHC.

(d) The Officer may waive otherwise applicable permit or clearance requirements on a case-by-case basis in the event of an emergency or natural disaster. The waiver policy shall be established by the CHC.

(e) *Persons Not Exempted.* Employees of federal or state agencies are not exempted from the permit requirement. In addition, persons serving as agents for the WTGH (A) who are not employees of the WTGH (A) (such as consultants, advisors, and others who provide services under contract), are not exempt from the permit requirements of this Ordinance. Through the issuance of rules, the Officer may establish expedited procedures for such persons to obtain permits.

## **Section 307. Classes of Permits**

(a) There shall be four classes of permits.

(1) Class A permits shall be issued for activities involving casual visitation and inspection of cultural resources. Class A permits may also be issued to traditional practitioners who are members of other Indian tribes in the event that such persons choose to apply for a permit rather than to ask the Officer for a waiver of the permit requirement.

(2) Class B permits shall be issued for cultural resources inventory activities involving no disturbance of the cultural resources.

(3) Class C permits shall be issued for cultural resources investigations involving alteration, collection, excavation, removal or any disturbance of cultural resources. If expressly authorized, a Class C permit may allow the excavation of human remains. It is the intent of the Tribal Council that the issuance of a Class C permit will eliminate the need for tribal members and tribal employees to obtain a permit from the Bureau of Indian Affairs under the Archaeological Resources Protection Act (ARPA). In issuing rules to establish a program for issuing Class C permits, the Officer shall ensure that the tribal permit program is adequate to eliminate, to the extent possible, the otherwise applicable requirement to obtain an ARPA permit and, to the extent that eliminating the ARPA permit requirement is not possible, to expedite compliance with the requirements of ARPA.

(4) Class D permits shall be issued for activities involving research into the cultural resources of the WTGH (A), including ethnographic, historical, cultural or other research. Any form of recording that results from any such research must conform to the terms and conditions of a permit.

(b) Permits shall normally only be issued on a case-by-case basis, except that Indian preference firms may be granted blanket Class B permits. The CHC may waive this requirement and issue blanket permits whenever it finds that the issuance of a blanket Class B permits would be in the best interests of the WTGH (A).

(c) Permits shall not be issued for a period of more than twelve months, except when longer periods are required to allow for the completion of a single project. In rules for permit programs under this Ordinance, the CHC is authorized to establish other categories in which a permit may be issued for a period of longer than twelve months.

## **Section 308. Permit Application Procedures**

(a) *Rules.* The Officer shall establish procedures for permit applications through the issuance of rules adopted by the CHC. When such rules have been adopted, the CHC may issue a permit to any qualified person, subject to appropriate terms and conditions, and subject to the full payment of any permit fees assessed by the CHC.

(b) *Fees.* The rules shall include an appropriate schedule of fees for the various classes of permits, and may provide for the Officer to grant a waiver of fees in appropriate cases. The CHC shall reconsider the fee schedule on a periodic basis, at least every three years, and may revise the schedule whenever in its judgment revisions are warranted, provided that any change in the fee schedule must be in accordance with Section 208.

(c) *Special Provisions for Class C Permits.* In issuing rules for Class C permits, the Officer shall take into consideration the requirements for permits under the Archaeological Resources Protection Act (43 C.F.R. part 7, 25 C.F.R. part 262), in order to ensure that a tribal permit is adequate to eliminate the need for an ARPA permit to the extent possible and, in circumstances in which an ARPA permit is required, to expedite ARPA compliance.

(d) *Hearings and Appeals.* If an application for a permit is granted or denied, the applicant or any interested person may request a hearing from the Officer pursuant to Section 502. Final decisions made by the CHC are subject to judicial review pursuant to Section 503.

(e) *Relationship to Land Use Ordinance.* The issuance of any permit pursuant to this Ordinance shall not constitute "development" under the Aquinnah Wampanoag Land Use Ordinance and shall not require a development permit; rather, the issuance of a permit under this Ordinance, if required for a development project, will be required prior to the consideration of an application for a development permit by the Land Use Commission.

## **Section 309. Suspension and Revocation of Permits**

### **(a) Suspension or Revocation for Cause.**

(1) The Officer may suspend a permit for cause upon determining that the permit holder has failed to meet a term or condition of the permit or has violated any prohibition of this Ordinance or the rules issued to carry out this Ordinance.

(2) The Officer may revoke a permit for cause upon determining that:

- (A) The permit holder has failed to correct the situation that led to the suspension of the permit within the time specified in the notice of suspension;
- (B) The permit holder has been convicted of a criminal violation of this Ordinance or of other tribal or federal law in a matter directly related to the activities covered by the permit;
- (C) A civil penalty has been assessed against the permit holder pursuant to this Ordinance or pursuant to other tribal or federal law in a matter directly related to the activities covered by the permit; or
- (D) The permit holder has engaged in activities that would be grounds for the suspension of a permit, and the permit holder has previously had a permit suspended for cause.

(b) *Suspension or Revocation Without Fault.* The Officer may suspend or revoke a permit for reasons not relating to the conduct of the permit holder upon determining that continuation of work under a permit would not be in the best interests of the WTGH (A) or would be in conflict with legal requirements or land management policies not in effect when the permit was issued. Such a suspension or revocation is made without liability to the WTGH (A), its employees and agents. Such a suspension or revocation shall not prejudice the ability of the permit-holder to hold or obtain other permits.

(c) *Notice of Hearing.* The Officer shall provide written notice to the permit holder of the suspension or revocation, the cause of the suspension or revocation and, in the case of a suspension, the requirements that must be met before the suspension will be lifted. The permit holder may request a hearing before the CHC after issuance of the initial decision regarding the suspension or revocation. Such hearing shall be held within 30 days after receipt of the written request, or as soon thereafter as reasonably practical. The CHC may affirm, modify or reverse his initial decision based upon the evidence presented at the hearing.

(d) *Effective Date.* Suspension of a permit shall be effective immediately unless a later date is specified in the notice of suspension. Revocation of a permit shall be effective 30 days after issuance of the notice of revocation, unless a later date is specified. If the permit holder requests a hearing, then: (1) an order of suspension shall remain in effect pending the final determination by the Officer on appeal, unless the Officer in his sole discretion orders otherwise; (2) an order of revocation, if upheld, shall be effective thirty (30) days after the final determination by the Officer on appeal.

## PART 4. ENFORCEMENT

### Section 401. Investigations

The Officer is authorized to investigate compliance with permits issued pursuant to this Ordinance and to investigate activities that are being carried out without a permit in possible violation of this Ordinance. As part of an investigation, the Officer may serve any person with a letter of inquiry. Any such letter of inquiry shall inform the person to whom it is addressed that: answers must be provided to the Officer within 60 days; failure to respond may result in the imposition of civil penalties; information provided may be used in law enforcement proceedings; and giving false information is in itself a violation of this Ordinance.

### Section 402. Notices of Violation

(a) If the Officer has reason to believe that a violation of this Ordinance has occurred, or is occurring, the Officer is authorized to issue a Notice of Violation to the person(s) apparently responsible for the violation. If the apparent violation occurred, or is occurring, on land in which a person other than the alleged violator holds a property interest, a Notice of Violation shall also be issued to the holder of such an interest.

(b) A Notice of Violation shall include:

- (1) a concise statement of facts believed to constitute a violation;
- (2) specific reference(s) to the provision(s) of this Ordinance and/or the rules to carry out this Ordinance allegedly violated;
- (3) the proposed amount of a civil penalty pursuant to Section 406 of this Ordinance (possibly accompanied by a proposal to reduce or waive collection of the amount if the violator takes certain actions to mitigate damage) or a statement that a penalty may be assessed in an amount to be determined after further investigation;
- (4) a statement that the amount of the civil penalty may be doubled if the violation continues to occur after the Notice of Violation has been served on the alleged violator; and
- (5) an explanation of rights to petition for relief, request an administrative hearing, and seek judicial review of any final determination pursuant to Part 5 of this Ordinance.

(c) A Notice of Violation may include a Summons to appear before the Officer at an enforcement hearing at a specified time and date. If such a Summons is included it shall advise the alleged violator that failure to appear will constitute a violation of this Ordinance, which may result in the imposition of civil penalties.

(d) A Notice of Violation may be served on an alleged violator by the Officer or by an employee of the Office or, at the request of the Officer, by a Tribal law enforcement officer.

(e) A Notice of Violation may be served on a permit holder before the Officer issues a notice of suspension or revocation of a permit pursuant to Section 309.

### Section 403. Cease and Desist Orders

(a) If the Officer has reason to believe that an ongoing and continuing violation is occurring, or that there is a substantial likelihood that a violation will occur in the near future, the Officer is authorized to petition the Tribal Council (Tribal Court when established) for a Cease and Desist Order to prevent the violation from continuing or occurring. The Officer's petition shall include a brief statement of facts, according to the Officer's

information and belief, and a brief explanation of how the alleged facts, if true, constitute a violation of this Ordinance.

(b) The Tribal Council (Tribal Court when established) is authorized to issue a Cease and Desist Order upon a showing by the Officer that:

- (1) probable cause exists that a violation is occurring, or is likely to occur in the near future; and
- (2) the violation has resulted in, or is likely to result in, damage to cultural resources.

(c) If the petition concerns a violation for which the Officer has issued a Notice of Violation, a showing by the Officer that the conduct has continued after the Notice of Violation was served on the alleged violator shall be sufficient to establish probable cause that a violation is occurring, or is likely to occur in the near future.

(d) The consideration by the Court of a petition by the Officer for a Cease and Desist Order shall not require that notice of the hearing be provided to the alleged violator.

(e) A Cease and Desist Order shall include:

- (1) a concise statement of facts believed to constitute a violation of this Ordinance;
- (2) specific reference(s) to the provision(s) of this Ordinance and/or the rules to carry out this Ordinance allegedly violated;
- (3) A statement that the Tribal Council (Tribal Court when established) has determined that there is probable cause to believe that a violation has occurred or is likely to occur in the near future;
- (4) a statement that the alleged violator must Cease and Desist the conduct that constitutes a violation and that failure to comply with the Cease and Desist Order is in itself a violation of this Ordinance;
- (5) the proposed amount of a civil penalty pursuant to Section 406 of this Ordinance (possibly accompanied by a proposal to reduce or waive collection of the amount if the violator takes certain actions to mitigate damage) or a statement that a penalty may be assessed in an amount to be determined after further investigation;
- (6) a statement that the amount of the civil penalty may be tripled if the violation continues to occur after the Cease and Desist Order has been served on the alleged violator; and
- (7) an explanation of rights to petition for relief, request an administrative hearing, and seek judicial review of any final determination pursuant to Part 5 of this Ordinance.

(f) A Cease and Desist Order may be served on an alleged violator by the Officer or by an employee of the Office or, at the request of the Officer, by a Tribal law enforcement officer.

#### **Section 404. Criminal Penalties**

(a) *Tribal Criminal Penalties.* It is a criminal offense for an Indian person to violate any of the prohibitions of Section 304 of this Ordinance or to knowingly counsel, procure, solicit, or employ any other person to violate any of the prohibitions of Section 304. Upon conviction in Tribal Council (Tribal Court when established), such a criminal offense may be punishable by restitution, community service, a fine not to exceed \$5,000, and/or imprisonment for a term not to exceed one year. For the purposes of this Ordinance, each act committed on Aquinnah Wampanoag tribal lands that constitutes a criminal offense shall be considered a separate offense. A person convicted of such an offense may also be subject to civil penalties.

(b) *Federal Criminal Penalties.* Any person who commits an act on Aquinnah Wampanoag tribal lands that would be a criminal offense under this Ordinance if committed by an Indian may also be subject to criminal prosecution under federal law.

## **Section 405. Trespass**

Any nonmember of the WTGH (A) who violates any prohibition in Section 304 of this Ordinance without having obtained the relevant permit has committed trespass. Nonmember Indians may be subject to prosecution in Tribal Council (Tribal Court when established); non-Indians may be subject to civil actions in federal court; all persons may be subject to civil actions in Tribal Council (Tribal Court when established) for damages. Any law enforcement action taken on grounds of trespass may be separate from enforcement actions taken under other provisions of this Ordinance. The circumstances relating to the trespass may be taken into consideration in the event that civil penalties are imposed.

## **Section 406. Civil Penalties**

(a) *Conduct Subject to Civil Penalties.* Individuals who violate the prohibitions in Section 304 of this Ordinance shall be subject to civil penalties, which may be assessed by the Officer, in accordance with rules adopted expressly for this purpose. A permit holder who engages in conduct that violates the terms and conditions of his or her permit is considered to violate the prohibitions in Section 304.

(b) *Procedure for Assessing Penalties.* Following the procedure set out in Section 208, the Officer shall issue rules for the assessment of civil penalties. In developing these rules, the Officer may draw upon the procedures used by the Department of the Interior for assessing civil penalties under the Archaeological Resources Protection Act (43 C.F.R. §§ 7.15, 7.16) and the Native American Graves Protection and Repatriation Act (43 C.F.R. § 10.12). At a minimum, the procedure shall include:

- (1) *Notice of Violation*, in accordance with Section 402 of this Ordinance;
- (2) *Response Period* of at least forty-five (45) days after service of the Notice (or service of the proposed penalty amount if not included in the Notice) for the alleged violator to respond to the Notice of Violation, during which the alleged violator may seek informal discussions with the Officer or may file a Petition for Relief pursuant to Section 501;
- (3) *Assessment of Penalty*, by the Officer after the expiration of the Response period or after consideration of a Petition for Relief, unless the Officer determines that, based on all the available information, no violation has occurred;
- (4) *Notice of Assessment*, which shall be formal notification to the violator of the amount due, how to pay it, and appeal rights pursuant to Part 5 of this Ordinance.

(c) *Penalty Amounts.* Rules to carry out this Section shall include guidelines for the Officer to use in assessing civil penalties. The Officer shall take appropriate measures to inform the public regarding civil penalties under this Ordinance.

(1) For violations relating to failure to obtain Class A, B, or D permits, the civil penalty amounts may be set at relatively nominal amounts for first time offenders, but shall be at least comparable to the fees that would be charged for such permits. The rules shall provide for penalty amounts to be substantially increased for second and third offenses.

(2) With respect to Class C permits, the Officer shall develop a system for determining penalty amounts that reflects consideration of the following factors:

- (A) Costs of restoration and repair of damaged cultural resources and the archaeological or commercial value of cultural resources that are destroyed or otherwise not recovered;
- (B) Enforcement and administrative costs associated with the assessment and collection of the civil penalty;
- (C) Cost of disposition of cultural resources, including as appropriate, cost of curation in perpetuity;
- (D) Costs associated with documentation, testing and evaluation of the cultural resource in order to assess the characteristics of the cultural resource and plan for its restoration; and
- (E) Costs of any additional mitigation measures the Officer deems appropriate to implement;
- (F) An amount based on the loss to the WTGH (A) of the use of cultural resources for cultural and religious practices;
- (G) For any second offense, a factor allowing the total penalty amount to be doubled or tripled, in the Officer's judgment depending upon the nature of the offense.
- (H) A factor allowing the total amount of the penalty to be doubled in the event that conduct constituting a violation continued after service of a Notice of Violation and tripled if such conduct continued after service of a Cease and Desist Order.

(c) *Referral to Federal Authorities for Civil Penalties.* In lieu of, or in addition to, imposing civil penalties under this Ordinance, the Officer may refer matters to federal authorities. Any penalties collected by the federal government and paid to the WTGH (A) (pursuant to 43 C.F.R. § 7.17(c)) shall be deposited in the THPO Revenue Account established pursuant to Section 204 of this Ordinance.

## **Section 407. Civil Forfeitures**

(a) *Seizure and Forfeiture of Personal Property.* In the event that a Tribal Law Enforcement Officer is present at the scene of any violation of this Ordinance, whether or not in the process of serving a Notice of Violation and/or Cease and Desist Order, the Officer is authorized to seize all items of personal property that apparently have been involved in the violation. Title to such property shall be deemed to vest in the WTGH (A) at the time of the commission of the unlawful activity, provided that the Officer brings an action with the Tribal Council (Tribal Court when established) to perfect the WTGH (A)'s title and the Tribal Council (Tribal Court when established) issues a ruling in favor of the Office. If the former owner is present at the time of seizure, the Officer shall obtain the necessary information to provide such person information on the procedure to seek the return of such property; if not present at the time of seizure, a notice shall be posted and other reasonable steps taken to provide notice to the former owner.

(b) *Action To Perfect the Office's Title in Seized Property.* The Officer may file an action with the Tribal Council (Tribal Court when established) seeking to perfect the WTGH (A)'s title to any personal property seized. Any such action shall be considered by the Tribal Council (Tribal Court when established) in accordance with Section 504 of this Ordinance. The former owner of seized property shall be referred to as a "claimant." If the Officer fails to file such an action within 60 days after the date of seizure, the items of personal property that were seized shall be returned to the claimant. At any time that an action to perfect the WTGH (A)'s title in seized property is pending, the Officer is authorized to return the seized property to its former owner upon timely payment of any and all related civil penalties that may have been assessed against the violator.

(c) *Use by Office.* Any forfeited property title to which has vested in the WTGH (A) pursuant to an order of the Tribal Council (Tribal Court when established) shall be made available for the use of, or disposition by, the Office upon the expiration of the period for filing an appeal in Tribal Court of Appeals (when

established). At any time up until the property is made available for the use of the Office, the Officer is authorized to return the property to the former owner if any and all civil penalties assessed against the former owner have been paid.

(d) *Seizure under Federal Law.* The Officer is authorized to cooperate with federal officials with respect to the forfeiture of items of personal property in connection with violations of the Archaeological Resources Protection Act. Any such items that are transferred to the WTGH (A) (pursuant to 43 C.F.R. § 7.17(c)) shall be made available for the use of, or disposition by, the Office.

(e) *Seizure of Cultural Resources.* Cultural resources located within Aquinnah Wampanoag tribal lands are presumed to be the property of the WTGH (A) unless tribal customary law provides otherwise. Thus unless a person who has excavated or otherwise removed a cultural resource from its proper setting is the holder of a permit authorizing such action, a presumption arises that a violation of this Ordinance has occurred. In the event that a Tribal Law Enforcement Officer is present at the scene of any apparent violation of this Ordinance at which cultural resources have been damaged, excavated, or removed from their proper settings, the Officer shall take appropriate steps to protect the cultural resources from further damage, which may include seizing the resources and holding them in police custody.

## **Section 408. Referrals to Federal and Other Authorities**

When, in the judgment of the Officer after consultation with the CHC, it would serve the interests of the WTGH (A), the Officer is authorized to provide information to, and cooperate with, federal agencies, state agencies, and other Indian tribes in the enforcement of cultural resources laws within Aquinnah Wampanoag Tribal lands and Aquinnah Wampanoag traditional ancestral lands.

## **Section 409. Civil Actions in Federal Court**

When, in the judgment of the Officer after consultation with the CHC, it would serve the interests of the WTGH (A) to file a civil action in federal court to seek protection or recognition of the WTGH (A)'s rights and interests under federal law relating to cultural resources, the Officer shall so provide CHC recommendation to Tribal Council for action. The Tribal Council must authorize filing of such an action. In the event that the Officer and the Tribal Chairperson both conclude that the matter is an emergency, the Chairperson shall conduct a telephone poll of the Tribal Council pursuant to Article XII section 5 of the Constitution of the WTGH (A).

## **PART 5. APPEALS AND JUDICIAL REVIEW**

### **Section 501. Petitions for Relief**

A person who has been served with a Notice of Violation that includes a proposed civil penalty may file a Petition for Relief with the CHC. The person filing such a Petition may request that no penalty be assessed or that the penalty amount be reduced. The Petition shall include reasons in support of the request. Any such Petition must be filed within forty-five (45) days of the date on which the Notice of Violation was served (or from the date that the penalty amount was proposed, if later). The CHC's decision in response to a Petition for Relief shall be conveyed to the Petitioner in the Notice of Assessment issued pursuant to Section 406.

## **Section 502. Administrative Hearings**

(a) *Hearings Before the CHC.* The CHC is authorized to conduct adjudicatory hearings regarding clearances under Section 303, permit applications under Section 308, suspensions or revocations of permits under Section 309, notices of violation under Section 402, and any other instances in which a hearing is authorized pursuant to this Ordinance or rules issued to implement this Ordinance. The Officer will assume responsibility for presenting the Office's case at the hearing. The Tribal Administration may provide legal counsel to assist Office staff and/or the Office may provide its own legal counsel. The person whose permit or actions are the subject of the hearing or who has requested the hearing may be represented by legal counsel at that person's own expense.

(c) *Rules.* The CHC shall issue rules governing the conduct of administrative hearings. The rules shall specify the steps in the hearing process, identify who may, request a hearing, establish notification requirements and time limits for action on the part of all parties, enumerate documentation requirements, and include any other elements the CHC determines are necessary to carry out the purposes of this section. In addition, these rules shall ensure that parties to hearings are afforded administrative due process, including:

- (1) notice of the time and place of the hearing;
- (2) an opportunity to present reasons in support of the ruling that the appellant seeks;
- (3) an unbiased tribunal; and
- (4) a written decision including reasons in support of the decision.

## **Section 503. Judicial Review**

(a) *Review of Administrative Hearings.* Any person who participated in an administrative hearing and who is adversely affected by the outcome of the hearing under the rules promulgated pursuant to Section 502 of this Ordinance shall be entitled to review of the action in with the Tribal Council (Tribal Court when established). Such an appeal must be filed in writing with the Tribal Council (Tribal Court when established) within thirty (30) days of notification of the decision based on the administrative hearing.

(b) *Review of Decisions without Administrative Hearings.* Any person who is entitled to a hearing before a Hearing before the CHC shall have a right to judicial review of the original decision. Such an appeal must be filed in writing with the Tribal Council (Tribal Court when established) within thirty (30) days. In such a case, any person who would be directly and adversely affected by a decision of the CHC, or by the judicial modification or reversal of a decision by the CHC may file an appeal with the Tribal Council (Tribal Court when established). In the event the original party files an appeal, any person who could have appealed in his/her own right may participate in the appeal as an intervener. In the event that the person entitled to a hearing does not file an appeal within the allotted thirty (30) days, any person who could have appealed as an intervener may petition within ten (10) days after the expiration of the time allowed for filing by a person originally entitled to a hearing.

(c) *Standards for Review.* The Tribal Council (Tribal Court when established) shall review decisions after administrative hearings based on the pleadings and the administrative record. The Tribal Council (Court when established) shall not make its own inquiry into the facts. In all cases, the Tribal Council (Court when established) may review questions of law on a *de novo* basis. The Tribal Council (Court when established) shall not set aside or reverse a decision of the CHC unless the Council (Court when established) finds that the decision:

- (1) is not supported by substantial evidence;
- (2) was issued without compliance with the requirements of this Ordinance or rules issued pursuant to this Ordinance;
- (3) is arbitrary and capricious;
- (4) deprived the appellant of any right guaranteed by Article III of the Constitution of the WTGH (A); or
- (5) deprived the appellant of due process of law or other rights that the appellant may have under the Indian Civil Rights Act (25 U.S.C. 1301-1341).

(d) *Cultural and Historic Commission.* In any case arising under this Ordinance, the Tribal Council (Tribal Court when established) may seek advice from the CHC on questions relating to tribal cultural traditions.

(e) *Private Right of Action in Tribal Council (Tribal Court when established).* In any case in which a person or governmental agency subject to this Ordinance, including an agency or instrumentality of the WTGH (A), has carried out an undertaking without first obtaining clearance from the Officer pursuant to Section 303, and the Officer has not initiated enforcement by issuing a Notice of Violation or by petitioning the Tribal Council (Tribal Court when established) for a Cease and Desist Order, any person who is directly and adversely affected by the violation of the Section 303 clearance requirement may file an action in Tribal Council (Tribal Court when established) seeking an Order to enjoin the undertaking and to compel the alleged violator to apply for and obtain clearance from the Officer prior to resuming the undertaking. In any such case, the person filing the action shall bear the burden of showing, by a preponderance of the evidence that a violation of Section 303 has occurred. If the Tribal Council (Tribal Court when established) determines that injunctive relief is warranted in such a case, and issues an appropriate Order, action taken by the Officer on an application for clearance after the issuance of such an Order by the Tribal Council (Tribal Court when established) shall be subject to hearing and judicial review in the same manner as other determinations by the Officer.

(f) *Waiver of Sovereign Immunity.* This section of the Ordinance constitutes a limited waiver of tribal sovereign immunity for actions in Tribal Council (Tribal Court when established) against agencies and officers of the WTGH (A), *provided* that any such actions shall be limited to injunctive relief.

(g) *Tribal Court of Appeals.* A decision by the Tribal Council (Tribal Court when established) adjudicating a dispute arising under this Ordinance may be appealed to the Tribal Court of Appeals (when established) in accordance with such rules as that Council (Court when established) may prescribe.

#### **Section 504. Actions To Perfect the WTGH (A)'s Title in Seized Property.**

(a) *Action Filed by the Officer.* The Officer is authorized to file an action with the Tribal Council (Tribal Court when established) to perfect the WTGH (A)'s title in any property that has been seized pursuant to Section 406 of this Ordinance. Any such action must be filed within 60 days from the date on which the seizure occurred.

(b) *Burden of Proof.* The Officer bears the initial burden of establishing probable cause that any item of personal property seized was associated with or involved in unlawful activity. If the Officer meets this initial burden, the claimant bears the burden of showing, by a preponderance of the evidence that the item of personal property is not subject to forfeiture. This burden can be met by disproving probable cause or by establishing innocent ownership of the property.

(c) *Appeals.* A decision by the Tribal Council (Tribal Court when established) in a civil forfeiture action under this Ordinance may be appealed to the Tribal Court of Appeals (when established) in accordance with such rules as that Court may prescribe.

**Wampanoag Tribal Code  
Wampanoag Tribe of Gay Head (Aquinnah)  
Title 1: Aquinnah Wampanoag Judiciary Establishment Ordinance**

**Adopted November 19, 2000**

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) recognizes that the establishment of a tribal judicial system (tribal judiciary) will strengthen the economic and cultural health of the Tribe and enhance its ability to exercise self-governance; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) recognizes that the establishment of a tribal judiciary offers the Tribe the opportunity to more fully exercise a vital component of inherent tribal sovereignty; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) recognizes that tribal sovereignty and tribal self-determination cannot be fully recognized without first exercising control over such matters as may be vital to tribal interests; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) desires to deal fairly and equitably with all persons; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) desires to administer in a just and impartial manner all applicable laws, ordinances, resolutions, regulations, and policies; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) recognizes that the Tribe would best be served by a judicial system separate and independent of the legislative and executive branches of tribal government; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) desires that the tribal judiciary be culturally relevant and built upon the indigenous justice principles of the Aquinnah Wampanoag; and

**WHEREAS:** The Wampanoag Tribe of Gay Head (Aquinnah) desires to preclude state and/or federal infringement of tribal sovereignty in all matters essential to the Tribe's self-government; and

**WHEREAS:** Article XIII of the Wampanoag Constitution specifies that a Tribal Judiciary can be created by Tribal Ordinance; and

**NOW THEREFORE BE IT RESOLVED:** That the Wampanoag Tribe of Gay Head (Aquinnah) hereby enacts the following Aquinnah Wampanoag Judiciary Establishment Ordinance as Title 1 of the Wampanoag Tribal Code.

**Wampanoag Tribal Code**  
**Wampanoag Tribe of Gay Head (Aquinnah)**  
**Title 1: Aquinnah Wampanoag Judiciary Establishment Ordinance**

**Chapter 1: Preliminary Provisions**

**Section 1-1-1 Constitutional Authority**

This Judiciary Establishment Ordinance is adopted pursuant to the authority vested in the Wampanoag Tribe of Gay Head (Aquinnah) under Article XIII of the Constitution of the Wampanoag Tribe of Gay Head (Aquinnah).

**Section 1-1-2 Prior Inconsistent Laws Repealed**

Any and all applicable laws, ordinances, resolutions, regulations, and policies of the Wampanoag Tribe of Gay Head which conflict in any way with the provisions of this Judiciary Establishment Ordinance are hereby repealed only to the extent that they are inconsistent with, conflict with, or are contrary to the spirit and/or purpose of this Judiciary Establishment Ordinance.

**Section 1-1-3 Amendment of Wampanoag Tribal Code**

This Judiciary Establishment Ordinance (Title 1 of the Wampanoag Tribal Code) shall be amended only by a majority vote of the General Membership of the Tribe in attendance at a regularly called membership meeting. The enrollment and election ordinances shall continue to be adopted or amended as set forth in the Constitution of the Tribe. All other ordinances or titles of the Wampanoag Tribal Code may be adopted or amended by the Tribal Council subject to the right of the General Membership to override as set forth in the Constitution of the Tribe.

**Chapter 2: Purpose, Construction, and Definitions**

**Section 1-2-1 Purpose**

This Title shall be liberally interpreted and understood to accomplish the following express purposes:

- A. To exert jurisdiction over all matters essential to the Tribe's goal of self-determination and self-governance; and
- B. To provide orderly procedures for resolving conflicts that reflect tribal traditions as well as the prevailing community standards, and that afford all affected persons a fair, prompt and impartial hearing; and
- C. To establish a judicial system for the interpretation of Wampanoag Tribal Law and such other law as may properly come before the Tribal Judiciary; and
- D. To ensure that all matters shall be conducted in a manner so as to afford all persons who appear before the Wampanoag Judiciary all rights guaranteed by the Constitution of the Wampanoag Tribe of Gay Head (Aquinnah), including Article III (Civil Rights); and
- E. To ensure that the sovereignty of the Wampanoag Tribe of Gay Head (Aquinnah) is recognized in all matters affecting the welfare of the Tribe.

**Section 1-2-2 Construction**

This Title is exempted from the rule of strict construction. It shall be read and understood in a manner that gives full effect to the purposes for which it is enacted. Whenever there is

uncertainty or a question as to the interpretation of certain provisions of this Title, tribal law or custom of the Wampanoag Tribe of Gay Head (Aquinnah) shall be controlling and where appropriate may be based on the written or oral testimony of a tribal elder, tribal historian, or other appropriate person.

### **Section 1-2-3        Definitions**

The following definitions shall apply to the Wampanoag Tribal Code:

- A. "Chief" shall the Chief of the Wampanoag Tribe of Gay Head (Aquinnah) as set forth in Article IV of the Wampanoag Constitution or his/her successors.
- B. "Constitution" shall mean the Constitution of the Wampanoag Tribe of Gay Head (Aquinnah).
- C. "Declaratory judgment" shall mean a judicial action that states the rights of the parties or answers a legal question without awarding any damages or ordering that anything be done.
- D. "Elders' Council" shall mean the elders of the Tribe working towards consensus in the traditional Wampanoag manner.
- E. "Injunctive relief" shall mean a court order either forbidding a party from taking an action or directing a party to take an action.
- F. "Judgment" shall mean a formal court order that imposes a decision upon the parties.
- G. "Member" shall include a person whose name appears on the membership roles of the Wampanoag Tribe of Gay Head (Aquinnah).
- H. "Peacemaker" shall mean a member of the Chief's Council functioning either in the role of a mediator/judge seeking to reach a settlement between the parties and/or an arbitrator/judge with the authority to impose a judgment upon the parties.
- I. "Settlement" shall mean an agreement voluntarily reached between the parties.
- J. "Title" shall mean an ordinance of the Tribe as organized by subject matter (or codified) in the Wampanoag Tribal Code.
- K. "Tribal Council" shall mean the Tribal Council of the Wampanoag Tribe of Gay Head (Aquinnah).
- L. "Tribal Judiciary" shall mean the Chief's Council and the Court of Appeals.
- M. "Tribe" shall mean the Wampanoag Tribe of Gay Head (Aquinnah).
- N. "Wampanoag" shall mean the Wampanoag Tribe of Gay Head (Aquinnah).
- O. "Wampanoag Tribal Code" shall mean the Judiciary Establishment Ordinance and all other ordinances of the Wampanoag Tribe of Gay Head (Aquinnah).

## **Chapter 3: Establishment of Tribal Judiciary**

### **Section 1-3-1        Chief's Council**

There is hereby established a Wampanoag trial level court to be known as the Chief's Council. The Chief's Council shall be a court of general jurisdiction and a court of record.

### **Section 1-3-2        Wampanoag Court of Appeals**

There is hereby established a Wampanoag Court of Appeals.

## **Chapter 4: Jurisdiction**

### **Section 1-4-1        Tribal Policy**

It is hereby declared as a matter of tribal policy that the Wampanoag Tribe of Gay Head (Aquinnah) shall exercise jurisdiction to the fullest extent possible.

### **Section 1-4-2        Jurisdiction Generally**

The Wampanoag Tribal Judiciary shall exercise jurisdiction over all matters within the power and authority of the Tribe including controversies arising out of the Constitution of the Tribe; laws, statutes, ordinances, resolutions, and codes enacted by the Tribe; and such other matters arising under enactments of the Tribe or the customs and traditions of the Tribe. Failure to legislate in any particular area shall not be deemed a cession of authority to any other government's jurisdiction. This jurisdiction shall extend over the Tribe and its territory, persons who enter its territory, its members, and persons who interact with the Tribe or its members wherever found.

### **Section 1-4-3        Jurisdiction by Stipulation of Parties**

The Tribal Judiciary shall have jurisdiction over all actions wherein the parties are subject to the jurisdiction of the Tribal Judiciary and over all other actions that are brought before the Tribal Judiciary by stipulation of parties not otherwise subject to the jurisdiction of the Tribal Judiciary.

## **Chapter 5: Sovereign Immunity**

### **Section 1-5-1        Sovereign Immunity Generally**

The Wampanoag Tribe of Gay Head (Aquinnah) is immune from suit except to the extent that the Tribe expressly waives sovereign immunity.

### **Section 1-5-2        Limited Tribal Judiciary Waiver**

Any official or employee of the Wampanoag Tribe of Gay Head (Aquinnah) acting within the scope of their duties shall be immune from suit. Officials and employees who act beyond the scope of their duties and authority shall be subject to suit in law and equity for declaratory judgment and prospective injunctive relief in the Wampanoag Tribal Judiciary for purposes of enforcing rights and duties established by the Wampanoag Constitution or other applicable laws. In order to enforce the provisions of the Wampanoag Constitution and other applicable laws, the Wampanoag Tribe shall be subject to suit in law and equity for declaratory judgment and prospective injunctive relief in the Wampanoag Tribal Judiciary. Administrative remedies must be exhausted prior to initiating suit in the Wampanoag Tribal Judiciary. No money damages shall be available in suits under this section.

### **Section 1-5-3 No Waiver in State or Federal Court**

The Wampanoag Tribe of Gay Head (Aquinnah) does not waive or limit any rights that it may have to be immune from suit in the courts of the United States or of any state.

## **Chapter 6: Applicable Law**

In all actions, the Tribal Judiciary shall first apply the applicable laws, ordinances, resolutions, customs and traditions of the Wampanoag Tribe of Gay Head (Aquinnah). Where doubt arises as to the customs and traditions of the Tribe, the Tribal Judiciary may request the written or oral testimony of a tribal elder, tribal historian, or other appropriate person. In any dispute not covered by the tribal law, the Tribal Judiciary may use the laws of other tribes, the United States, the State of Massachusetts or other states as a guide.

## **Chapter 7: Chief's Council**

### **Section 1-7-1            Role of Chief**

The Chief of the Wampanoag Tribe of Gay Head (Aquinnah) shall serve as the Chief Peacemaker and the Chief Administrator for the Tribal Judiciary. The Chief shall be responsible for the overall administration of the Chief's Council and the Court of Appeals, including the hiring and firing of administrative personnel for the Tribal Judiciary. The Chief shall administratively supervise all peacemakers, judges, and other court personnel. The Chief shall be responsible for the assignment of cases and the management of the Tribal Judiciary's calendar and business. The Chief shall appoint a Rules Committee for the Chief's Council. The Chief may designate another person to serve as the Chief Peacemaker and/or Chief Administrator for the Tribal Judiciary in his or her absence. The Elders' Council may appoint an acting Chief Peacemaker and/or Chief Administrator for the Tribal Judiciary in the event of the Chief's incapacity or death.

### **Section 1-7-2            Composition and Role of Chief's Council**

The Chief's Council shall be composed of a group of three (3) or five (5) Wampanoag tribal members serving as peacemakers for an individual matter as chosen by the Chief from a pool of peacemakers. The Chief shall select a separate panel for each matter based upon the parties involved in the case, the subject matter, the geographic location of the parties, and other relevant factors. The panel may select a Presiding Peacemaker for each matter. All assigned peacemakers, including the Chief, shall have an equal vote on the merits of each matter.

### **Section 1-7-3            General Qualifications for Chief's Council**

Any adult who has the respect of the Wampanoag Tribe; an ability to work with tribal and community members; a reputation for integrity, honesty, humanity, and an ability to resolve local problems shall be eligible to be appointed to the Chief's Council. Tribal Council members shall not be eligible to serve except as provided under section 1-8-2 of this Title.

### **Section 1-7-4 Goal of Peacemaking Towards a Settlement**

The primary objective of Chief's Council proceedings shall be to peacemake or mediate a settlement between the parties. If a settlement between the parties is reached, the agreement may be confirmed and recorded as a formal settlement order of the Chief's Council. In their efforts to mediate disputes among persons involved in the peacemaking process, the peacemakers may:

- A. Attempt to get the parties to agree as to the nature of the problems affecting them and to agree on what should be done to resolve those problems;
- B. Use tribal religious or other traditional ways of mediation and community problem solving;
- C. Instruct or lecture individuals on the traditional tribal teachings relevant to their problem or conduct;
- D. Compel persons involved in a dispute, affected by it or in any way connected with it to meet and discuss the problem being worked on and to participate in all necessary peacemaking efforts; and
- E. Use any reasonable means to obtain the peaceful, cooperative, and voluntary resolution of a dispute, but no force, violence, or the violation of civil rights or tribal law or custom will be permitted.

### **Section 1-7-5 Authority to Impose Judgment**

The Chief's Council shall be authorized to render or impose a judgment whenever the peacemaker panel for an individual matter determines that the matter is at an impasse or the Chief determines that the subject matter is inappropriate for mediation.

## **Chapter 8: Tribal Judiciary Procedures**

### **Section 1-8-1 Qualifications, Selection, Tenure, and Removal of Chief's Council Peacemakers and Court of Appeals Judges**

The Rules Committee or the Chief's Council and/or the Rules Committee of the Court of Appeals shall propose rules concerning the qualifications, selection, tenure, removal, and other issues related to the appointment of the peacemakers and judges. The Elders' Council shall have the authority to adopt these rules as proposed or to amend these rules as determined necessary by the Elder's Council. The Chief shall hold a permanent position on the Chief's Council and, as such, is not covered by the provisions concerning the appointment of peacemakers and judges of the Tribal Judiciary.

### **Section 1-8-2 Appointment of Special Peacemakers/Judge(s)**

If the Chief determines that the interests of justice would best be served by the appointment of a special peacemaker/judge or by a panel of less than three peacemakers, the Chief may make such appointment. A Tribal Council member may be appointed as a special peacemaker so long as the Tribe is not the defendant. A person who is not a tribal member may be appointed a special peacemaker/judge.

### **Section 1-8-3 Tribal Judiciary Training**

All persons selected to serve in the Tribal Judiciary shall be provided with adequate training prior to hearing matters either on the Chief's Council or the Court of Appeals. The training shall include training on Indian law, tribal courts, tribal custom and tradition, and the substantive law to be handled by the Chief's Council. The Chief's Council peacemakers shall also receive training on the role of a peacemaker or mediator. The judges of the Court of Appeals shall also receive training on the appellate process.

### **Section 1-8-4 Oath of Office**

Before assuming office each appointed peacemaker and judge shall take an oath to support and protect the Constitution of the Tribe and to administer justice in all matters coming before them with integrity and fairness without regard to the persons before them. The Chief shall administer the oath.

### **Section 1-8-5 General Role of Peacemakers and Judges**

The peacemakers and judges of the Tribal Judiciary shall have judicial immunity and shall administer justice and discharge all duties imposed upon them by law and shall hear, mediate, and/or decide matters of a judicial nature and enter judgments and orders disposing of such matters as set forth in this Title.

### **Section 1-8-6 Powers of Peacemakers and Judges**

All peacemakers and judges shall have the power to:

- A. Preserve and enforce order in their presence and in proceedings before them when they are engaged in the performance of their official duties;

- B. Compel obedience to their lawful orders;
- C. Compel the attendance of persons to testify in a proceeding before them as provided by law;
- D. Administer oaths to persons in proceedings before them; and
- E. Punish for contempt to assure the effectual exercise of these powers.

#### **Section 1-8-7              Duties of Peacemakers and Judges**

- A. All peacemakers and judges shall have the duty to:
- B. Enter all appropriate orders and judgments;
- C. Keep all appropriate records as may be required;
- D. Perform any and all other duties as may be required for the operation of the Tribal Judiciary; and
- E. Perform any of the duties and powers of a peacemaker and/or judge in appropriate instances.

#### **Section 1-8-8              Disqualifications, Conflict of Interest; Codes of Ethics**

The following shall apply to all peacemakers and judges of the Tribal Judiciary:

- A. No peacemaker or judge shall hear any matter when he or she has a direct financial, personal or other interest in the outcome of such matter. A peacemaker or judge should attempt to prevent even the appearance of partiality or impropriety.
- B. Any party of interest in such matter or the peacemaker or judge may raise the question of conflict of interest. If the peacemaker or judge concerned, the Chief, or the Court of Appeals determines that disqualification is appropriate, then another peacemaker or judge shall be assigned to hear the matter.
- C. Any peacemaker or judge otherwise disqualified because the peacemaker or judge is related to one or more of the parties as: husband, wife, son, daughter, father, mother, brother, sister, grandfather, grandmother, or any other legal dependent or guardian relationship may hear a case if all parties are informed of the relationship on the record in open Court and of their right to have a different peacemaker or judge hear the case, and consent to further action by that peacemaker or judge in the case in open Court upon the record, or in a writing filed in the record, in spite of the conflict of interest.
- D. The Rules Committee of the Chief's Council and/or the Rules Committee of the Court of Appeals may propose Codes of Ethics for the Tribal Judiciary. The Elders' Council shall have the authority to adopt these rules as proposed or to amend these rules as determined necessary by the Elder's Council.

#### **Section 1-8-9              Rulemaking Authority**

The Rules Committee of the Chief's Council and/or the Rules Committee of the Court of Appeals may from time to time prescribe Rules of Procedure, Rules of Evidence, Rules of Practice, and/or other Court Rules for the conduct of judiciary business. All procedural rules for the Tribal Judiciary shall be meant to provide formal support, structure, and enforcement to traditional Wampanoag methods of resolving disputes through mediation and the use of traditional ways. These rules shall be interpreted liberally and informally with the goal of

providing a fair, informal, cost-effective, and traditional means of resolving disputes. The rules shall be used and applied in as close accordance with Wampanoag custom and tradition as possible.

## **Chapter 9: Enforcement**

### **Section 1-9-1 Enforcement of Court Orders**

Any law enforcement officer of the Tribe may enforce the provision of the Wampanoag Tribal Code. In addition, any law enforcement officer empowered to enforce tribal, state, or federal laws whose assistance has been requested by any Wampanoag law enforcement officer is hereby empowered to enforce the provisions of the Wampanoag Tribal Code.

### **Section 1-9-2 Authority to Execute and Serve Warrants and other Process**

Any person authorized to enforce the provisions of the Wampanoag Tribal Code may execute and serve warrants and other process issued by the Tribal Court in the same manner as any law enforcement officer may serve and execute warrants and other process under tribal, state, or federal law.

### **Section 1-9-3 Authority to Stop and Question Persons and Seize Property**

Any person authorized to enforce the provisions of the Wampanoag Tribal Code may stop and question any person upon reasonable belief that there is a violation of the provisions of the Wampanoag Tribal Code. Any person authorized to enforce the provisions of the Wampanoag Tribal Code may seize and hold any property needed as evidence or any property authorized to be seized pursuant to the remedial provisions of the provisions of the Wampanoag Tribal Code.

## **Chapter 10: Court of Appeals**

### **Section 1-10-1 Right of Appeal**

If a settlement is reached between the parties during the Chief's Council, then there shall be no right of appeal. However, if a judgment is rendered or imposed by the Chief's Council, then the parties shall have a right of appeal to the Wampanoag Court of Appeals.

### **Section 1-10-2 Time to Appeal and How to Appeal**

A party who wishes to appeal a final judgment order of the Chief's Council shall file a notice of appeal within fifteen (15) business days from the date of judgment. The notice of appeal shall specify the action being appealed and shall contain a short statement of the reasons for the appeal.

### **Section 1-10-3 Appellate Pool**

A pool of twelve (12) judges shall be selected to serve as the appellate pool for the Court of Appeals. The Elders' Council shall appoint six (6) tribal elders or other tribal members to serve in the appellate pool. The Chief shall appoint six (6) tribal court judges and/or Native American lawyers to serve in the appellate pool. The entire twelve (12) member appellate pool shall serve as the Rules Committee for the Court of Appeals.

### **Section 1-10-4 Appellate Panel**

The Court of Appeals shall consist of a panel of three (3) judges randomly selected from the appellate pool to hear an individual appeal. One member of the appellate panel shall be randomly selected from the tribal members that have been appointed by the Elders' Council to the appellate pool. One member of the appellate panel shall be randomly selected from the tribal court judges and/or Native American lawyers that have been appointed by the Chief. The

third member of the appellate panel shall be randomly selected from the remaining members of the appellate pool. No voting Tribal Council member may sit on an appellate panel. No peacemaker or judge may sit on an appellate panel that is considering the same matter for which the peacemaker or judge participated in the deliberations or the judgment in an earlier Chief's Council proceeding.

**Section 1-10-5                      Appellate Procedures**

The Rules Committee of the Court of Appeals may from time to time prescribe Rules of Appellate Procedure for the conduct of appellate court business as well as the form and filing of appeals, briefs, pleadings, and other matters that will make the Court of Appeals function more efficiently. The Chief may manage the appellate panel so long as the Chief did not directly take part in the matter in the deliberations or the decision in an earlier Chief's Council proceeding. If the Chief did directly take part in the matter in the deliberations or the decision in an earlier Chief's Council proceeding, then the Elders' Council shall designate another person to manage the appellate panel.

**Section 1-10-6                      Record on Appeals**

The Court of Appeals shall review the permanent record of the Chief's Council. No new evidence or testimony shall be presented, except where no permanent record is available or when in the discretion of the Court of Appeals the hearing of new evidence or testimony is necessary to ensure a fair appeal. Upon the request of either party, the Court of Appeals shall allow oral arguments.

**Section 1-10-7                      Court's Action on Appeals**

In any appeal properly before it, the Court of Appeals shall have full authority to affirm, reverse, modify, or vacate any action of the Chief's Council and may enter such order as is just or remand the case for the entry of a specified judgment, for a new trial, or for such further action as shall be just.

**Section 1-10-8                      Appellate Decisions**

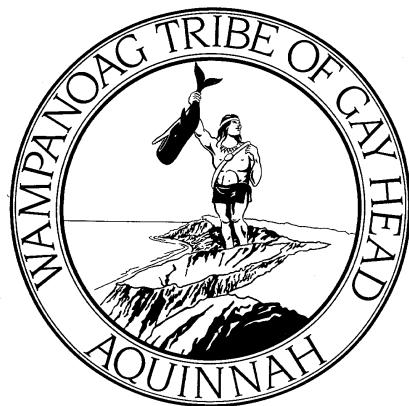
All decisions and opinions of the Court of Appeals shall be rendered in writing to the parties in interest, the Chief's Council, filed in the Tribal Secretary's office, transmitted to the official reporter of the decisions of the Tribal Judiciary, and recorded on a form approved by the Court of Appeals for such purpose. The form shall provide for recording the date of the decision or opinion, the case number, the names of the parties before the Tribal Judiciary, the issues presented of appeal, the relevant facts upon which the decision on appeal was made or as found by the Court of Appeals to be true in an original action, the decision of the Court of Appeals, and the legal principles and reasoning supporting the decision. The majority or dissent in lieu of the form may file a written Court or Appeals opinion containing the above information. The decision form or Court of Appeals opinion shall be placed in the file of the case on appeal as an official document of the case.

**Chapter 11: Effective Date**

This Judiciary Establishment Ordinance shall be effective on May 1, 2001.

## LAND USE ORDINANCE

**Wampanoag Tribe of Gay Head (Aquinnah)**



Adopted May 19, 1999  
Tribal Council Resolution 99-10

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## CHAPTER 1. DECLARATION OF PURPOSE AND POLICY

### Section 1. Purpose

The Wampanoag Tribe of Gay Head (Aquinnah) ("the Tribe") is acknowledged by the United States Secretary of the Interior as a federally recognized Indian tribe. The United States Congress has ratified and confirmed the government to government relationship between the Tribe and United States through the Settlement Act of 1987 (Public Law 100-95). Through the policies and procedures established herein the Tribal Council of the Wampanoag Tribe of Gay Head (Aquinnah) commits to make rational and comprehensive land-use decisions for the Tribal Lands. Further when making these decisions the Tribal Council shall consider promoting, promote tribal self-governance, traditional tribal spiritual and natural values, economic development, and the health, safety, and welfare of the Tribe.

The Tribal Council declares that the goal of this Land Use Ordinance is to guide and facilitate, in a timely and efficient manner, tribal development that may affect the environment and the general health, safety and welfare of the Tribe. Further, the Tribal Council declares that the policies and procedures established herein shall apply to all Land Use activities and projects on the Wampanoag Tribe of Gay Head (Aquinnah) Tribal Lands. In order to protect the cultural and natural resources of the Tribe all Tribal Lands shall be closed to the general public.

### Section 2. Policies

The Tribe recognizes the critical importance of establishing sound, uniform Land Use procedures to govern development of or upon Tribal Lands, thus ensuring the overall welfare of the Tribe and maintaining environmental quality throughout all Land Use activities or projects. In all Land Use activities and projects, the Tribe shall:

- a. diligently advocate achievement of self-determination and self-governance;
- b. protect and enhance both human and natural resources for succeeding generations;
- c. promote beneficial Land Uses without environmental degradation, risk to health or safety, or other undesirable and unintended consequences;
- d. preserve the Tribe's historical, cultural, and natural resources; and
- e. facilitate timely, efficient and safe development of approved and permitted Land Use activities.

## CHAPTER 2. DEFINITIONS

**"Administrative Order"** means a proceeding in the name of the Commission by the Field Inspector/ Enforcement Agent against the Permittee, including Commission Order, Cease and Desist Order, Show Cause Order, Consent Order, and Fines.

**"Appellant"** means the Person appealing a decision of the Field Inspector/ Enforcement Agent or Commission to the Appeal Board.

**"Applicant"** means the Person applying for permission to conduct a Land Use activity or project or any Person designated by the Tribal Council as responsible for conducting any activities and projects that require approval under this ordinance.

**"Commercial and/or Governmental-Community Use"** means any structure or activity that is not for Residential Use as defined herein.

**"Commission"** means the Wampanoag Tribe of Gay Head (Aquinnah) Land Use Commission.

**"Dwelling Unit"** means a dwelling, having no more than one principal entrance and one kitchen, designed, built and used for occupancy primarily by one and the same family.

**"Field Inspector/ Enforcement Agent"** means person(s) authorized by the Commission to inspect, investigate and enforce compliance with any Tribal Land Use Regulation.

**"Land Use"** means activities or projects involving the alteration of land or construction of structures.

**"Permit"** means the whole or any part of any license, certificate, approval or similar form of permission which may be required of any person by provisions of this Land Use Ordinance.

**"Permittee"** means the person listed on a permit as being responsible for any Land Use activity or project.

**"Permit Administrator"** means Tribal program staff assigned by the Land Use Commission to administer the permitting process.

**"Person"** means any Tribal Member, Tribal employee, individual, partnership, firm, company, subcontractors or contractors, corporation, association, organization, estate, governmental entity or any other legal entity or its representative, agents or assigns. Use of the singular shall also include the plural.

**"Residential Use"** means any structure or activity with a primary purpose of providing sleeping and eating quarters for people residing therein or any structure or activity directly adjacent to the same. Structures shall be limited to no more than four dwelling units in one structure.

**"Settlement Act"** means the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987.

**"Structure"** means a combination of materials assembled at a fixed location to give support or shelter. A structure includes any building. A fence or a wall over 6 feet high is considered a structure.

**"Tribal Council"** means the governing body of the Wampanoag Tribe of Gay Head (Aquinnah).

**"Tribal Land Use Regulations"** means the standards and procedures prescribed by Tribal programs in accordance with this Ordinance and approved by the Wampanoag Tribe of Gay Head (Aquinnah) Tribal Council. Tribal Land Use Regulations shall include all Tribal programs standards and procedures existing upon the effective date of this Ordinance and those adopted after the effective date of this Ordinance.

**"Tribal programs"** means the duly established governmental departments, divisions, agencies or enterprises of the Wampanoag Tribe of Gay Head (Aquinnah).

**"Tribal Lands"** means the Wampanoag Tribe of Gay Head (Aquinnah) Settlement Lands and trust lands.

**"Tribal policies"** means the policies set forth in this Ordinance.

## **CHAPTER 3. LAND USE COMMISSION**

### **Section 1. Establishment**

A Land Use Commission (the "Commission") is hereby established which shall operate as an administrative and enforcement arm of the Wampanoag Tribe of Gay Head (Aquinnah) Tribal Council.

### **Section 2. Authority**

The Commission shall have the authority to regulate all Land Use activities and projects on Tribal Lands. The Commission shall have the authority to review for compliance with this Ordinance and Tribal Land Use Regulations any and all Land Use activities and projects on Tribally owned fee lands. The Commission shall have the specific authority to:

- a. oversee the promulgation of, and assist in the development of, Tribal Land Use Regulations for Tribal Council's review and approval;
- b. coordinate and supervise the timely and efficient review and processing of permit applications;
- c. issue Permits and Certificates of Occupancy or Completion;
- d. review and monitor all Land Use activities and projects on Tribal Lands;
- e. enforce compliance with a permit through Tribal policies and Tribal Land Use Regulations; and
- f. enforce compliance with Tribal policies and Tribal Land Use Regulations by issuing Administrative Orders to any Land Use activity or project that has not been issued a permit, which may include an assessment of a fine or penalty.

### **Section 3. Composition of the Commission**

The Tribal Council shall appoint a Land Use Commission composed of seven (7) members, including three (3) Tribal members at large and representatives from each of the four (4) following Tribal programs: Natural Resource; Planning; Housing Authority; and Trust Services. The Commission shall elect annually a chair to serve for a one-year term. The members of the Commission shall collectively, as a result of training and experience, be well qualified to analyze and interpret environmental trends, regulations, planning and construction designs, building and safety codes; and to appraise the scientific, economic, social, aesthetic, and cultural needs and interests of the Tribe in light of the policies set forth herein. Members of the Commission that are appointed at large shall serve for staggered three year terms and shall be compensated, as determined by the Tribal Council. The first at large members of the Commission shall be appointed as follows: one member shall be appointed to a three-year term, one member shall be appointed to a two year term, and one member shall be appointed to a one year term. Thereafter, upon the completion of their terms, all members shall be appointed to three year terms. The members of the Commission who represent Tribal

Programs shall be appointed for the duration of their position to their respective Tribal Programs.

#### **Section 4. Cooperation with Tribal Programs**

The Commission shall coordinate, as appropriate to the circumstances, with the Tribal programs having a responsibility for any Land Use activity or project. The Tribal programs shall have the following duties:

- a. develop Tribal Land Use Regulations, in consultation with the Commission, to be submitted to the appropriate Standing Committee of the Tribal Council for review and recommended action to the Tribal Council;
- b. assist the Commission in implementing and enforcing Tribal policies and Tribal Land Use Regulations;
- c. assist in reviewing permit applications and making findings and recommendations to the Commission as to whether the proposed Land Use activity or project complies with Tribal policies and Tribal Land Use Regulations; and
- d. assist in monitoring Land Use activities and projects to ensure compliance with Tribal policies and Tribal Land Use Regulations

### **CHAPTER 4. PRELIMINARY SCREENING AND APPROVAL PROCEDURE**

#### **Section 1. Letter of Intent**

Any person who desires to undertake a Land Use activity on Tribal Lands shall submit a letter of intent and meet with the Permit Administrator to discuss the proposal. If the Land Use activity involves new construction or the alteration or disturbance of more than 400 square feet of land in an area that has been surveyed and found cleared of archaeological resources or 25 square feet of land in an area that has not been surveyed for archaeological resources or new construction, a permit shall be required under this ordinance. Exempted Land Use activities are listed in Chapter 5, Section 1. The Permit Administrator shall refer the person to appropriate Tribal programs and regulations for consultation before submitting an application. If the Land Use activity involves a lease of Tribal lands, the letter of intent shall also be submitted to the Tribal Council, which shall hold a preliminary discussion of the proposed Land Use activity with the Applicant prior to submission of a formal application.

#### **Section 2. Residential Use**

Any letter of intent from a person desiring to undertake a Residential Use shall be forwarded to the Aquinnah Wampanoag Tribal Housing Authority (AWTHA) for recommendation and then to the Tribal Council to obtain a contingent agreement to lease land if necessary (see Chapter 5, Section 7). initial approval of the Residential Use by the AWTHA The letter of intent for Residential Use shall include a brief written description of the proposed Residential Use and the location of the Residential Use. If the AWTHA recommends grants initial approval of the Residential Use, the applicant shall submit a permit application to the Permit Administrator Land Use Commission in accordance with Chapter 5 of this Ordinance.

### **Section 3. Commercial and/or Governmental-Community Use**

- a. Any letter of intent from a person who desires to undertake a Commercial and /or Governmental-Community Use shall be forwarded to the Land Use Commission for recommendation and then to the Tribal Council to obtain a contingent agreement to lease land if necessary (see Chapter 5, Section 7)-initial approval of the proposed use. The letter of intent for a Commercial and /or Governmental-Community Use shall include the following information:
  - 1) a brief written description of the proposed use.
  - 2) the location of the proposed use.~~3). a budget, if the use involves the expenditure of tribal funds, for the cost of developing plans and specifications for the proposed use.~~
  - ~~3)~~ any other information reasonably required by the Land Use Commission Tribal Council.
- b. ~~Initial approval by the Tribal Council shall consist of preliminary approval of the proposed use and the budget. If the Tribal Council Land Use Commission grants initial approval of the recommends the use, a permit application shall be submitted to the Land Use Commission Permit Administrator in accordance with Chapter 5 of this Ordinance.~~

## **CHAPTER 5. PERMIT PROCESS AND PROCEDURE**

### **Section 1. Permit Required**

Any person who undertakes any Land Use activity or project on Tribal Lands shall obtain a permit from the Commission as provided herein as well as any other permits required by applicable federal, ~~state, or local~~ law. The following land use activities shall be exempt from this permit requirement, provided that they are conducted in areas that have been surveyed for archaeological resources and found not to have such resources:

- 1) fences,
- 2) mailboxes,
- 3) other customary roadside fixtures,
- 4) signs not exceeding 3 square feet,
- 5) gardens,
- 6) landscaping,
- 7) outdoor decorations.

Land Use Permits for individual single-family residences, including additions, accessory structures, and other structures or land alterations incidental to a individual single-family residence, shall be issued by the Permit Administrator after consultation with appropriate Tribal programs. All other Land Use Permits shall be issued by the Commission.

### **Section 2. Permit Application**

- a. An application for a Land Use Permit shall be made on an approved form designated by the Commission. The Applicant shall submit a permit application and any studies, reports, or other reasonable information requested by the Permit Administrator, the Commission or Tribal programs.
- b. Every application shall contain, at a minimum, the following information:
  - 1) the name and title of the Applicant;
  - 2) the location of the proposed activity;

- 3) a concise and factual description of the proposed activity including:
  - (A) any proposed physical construction;
  - (B) any use of natural resources; and
  - (C) any potential impacts to the environment, whether adverse or beneficial.
- 4) a detailed site plan if necessary or appropriate;
- 5) a period of time for which the permit is requested;
- 6) a reference to the Tribal Land Use Regulations governing the proposed Land Use activity or project;
- 7) a complete set of detailed plans and specifications, including but not limited to, any proposed structures showing compliance with building, fire, and safety codes; and
- 8) in the case of a phased Land Use activity or project, the Applicant shall submit a complete set of detailed plans and specifications for the portion of the Land Use activity or project to be undertaken immediately upon approval of the application.

### **Section 3. Permit Review Fees**

Upon the submission of the permit application, the Applicant shall pay a non-refundable permit review fee according to the following schedule:

- a. A permit fee of \$1 per \$1,000 of the total estimated cost of the Residential Land Use activity or project; and
- b. A permit fee of \$3 per \$1,000 of the total cost estimated of the Commercial/Governmental-Community Land Use activities or projects.

### **Section 4. Permit Review**

- a. Permit Administrator shall review the permit application and determine whether the permit application is complete. If a permit application is complete, the Permit Administrator shall refer the application to the appropriate Tribal programs.
  - 1) In the case of applications for individual single-family dwellings and accessory structures, the Tribal programs shall have 20 days to submit responses to the referral and the Permit Administrator shall grant or deny the application within 30 days of receipt of a complete application.
  - 2) In the case of all other applications, the Permit Administrator shall follow the procedures described in the remainder of Section 4, Section 5, and Section 6.
- b. The Tribal programs shall review the application and submit written report to the Commission within 60 days. ~~—then direct the appropriate Tribal programs to review the application for the submission of written findings to the Commission in or within 60 days.~~ The Permit Administrator may request review of permit applications by Tribal offices, agencies or programs whose regulations are enforced under this Ordinance, including the following: Planning; Health and Human Services; Housing; Natural Resource; Trust Services, and any subsequently established Tribal programs. The written report findings shall address whether or not the activity or project proposed by the applicant complies with Tribal policies, the Tribal Master Plan, and the Tribal Land Use Regulations. The written report findings shall provide specific recommendations indicating how the proposed Land Use activity or project should be tailored to ensure such compliance.
- c. Within one (1) week of receiving the application, ~~T~~he Permit Administrator or the Tribal program(s) may request the Applicant to submit additional information, studies or reports to assist in the review of the permit application. The additional information must be relevant to the purposes and policies of this Ordinance. If the additional information

is requested, the Permit Administrator shall notify the Applicant of the requested information and shall set a reasonable time period for the submission of the information.

- d. ~~Within one (1) week of receiving the application or additionally requested information, the Permit Administrator and Tribal programs shall submit written findings on the permit application.~~ If additional review time is requested, by the Permit Administrator, applicant or the Tribal programs, the Commission may grant ~~one an~~ extension(s) of time not to exceed two (2) weeks.
- e. The Permit Administrator shall provide the written report findings to the Applicant and the Commission. ~~within one (1) week of receipt thereof from the Tribal Programs~~

## **Section 5. Commission Decision**

- a. The Commission shall schedule a meeting to discuss the application and may hold a Hearing when it deems appropriate, to review, approve, modify or deny permit applications, but no later than 30 days from the receipt of the written report. In the case of all Commercial/ Governmental-Community Land Use activities or projects, the Commission shall hold a hearing. At least ten (10) days before the hearing, the Permit Administrator shall provide written notice of the hearing to the Applicant, owners and occupants of lands located within 300 feet of the proposed activity or project (including owners of land abutting Tribal Land), the Town of Aquinnah, and Tribal programs through the Tribal newsletter circulated to the Tribal membership. adjoining the land upon which the proposed Land Use activity is to be located, Tribal programs, as well as in the tribal newsletter for the Tribal membership.
- b. At the Hearing, the Commission shall determine, based on the written findings and discussion with the Tribal programs, whether the permit application requires any changes to conform to the requirements of this ordinance. If additional information becomes available or is requested by the Commission in order to make a decision, the Commission shall set a reasonable time period for the submission and review of the information. If no changes are required, the Commission shall approve the application. In cases where the Commission requires either minor or major changes to the Land Use activity as proposed:
  - 1) if the Applicant agrees with recommended changes, the Applicant shall incorporate such changes into his/her application and the application shall be scheduled for final review by the Commission.
  - 2) if the Applicant does not agree with the recommended changes, the Applicant shall have an opportunity to review the written findings and recommendations with the Commission at the next scheduled Commission meeting. The Applicant shall provide a narrative detailing why the Applicant does not agree with the requirements, at least one week prior to the meeting.
- c. The Commission shall approve or deny the application and render a written decision and notify the parties within 15 days of the close of the Hearing. Commission meetings shall require a quorum of at least 5 members and approval shall require a simple majority of votes five votes in favor of the applicant. The Commission's decision may specify terms and conditions to be included in the permit. By mutual agreement of the Applicant and the Commission, the time period for rendering a written decision may be extended by a maximum of 45 days.
- d. If the permit application is denied by the Commission, the Applicant may either submit a new application or appeal the Commission's decision pursuant to Chapter 11 of this Ordinance.

## **Section 6. Bonding Requirements**

The Commission may require the posting of a performance guarantee or payment bond, in an amount and of duration satisfactory to the Commission to assure and guarantee the completion of site improvements including, but not limited to, grading, regrading, drainage, pollution prevention, site remediation, environmental controls, erosion control, lighting, screening, planting, building or safety improvements and other reasonable conditions indicated on a site plan which shall assure compliance with this Ordinance, or applicable Tribal Program Regulations.

- a. A performance guarantee or payment bond ~~or irrevocable letter of credit shall be delivered satisfactory~~ to the Wampanoag Tribe of Gay Head (Aquinnah), ~~in the form of a certified check, pledge of a bank book, fully insured by an agency of the United States Government; with irrevocable power of attorney and acknowledged by the bank in which the funds are deposited; or a corporate surety bond,~~ shall be required to insure the completion of required improvements and utilities ~~in the event the Applicant shall fail to install same within two five (25) years from the date of the bond.~~ The term of the performance guarantee or payment bond may be extended by the Commission ~~upon approval of a petition from the applicant to the Commission and~~ subject to agreement of such extension by the surety company as appropriate.
- b. The Applicant and/or owner may apply to the Commission for a reduction in bond when 50% of the cost of required improvements for the project have been completed and may apply to the Commission for further reduction in the bond when 75% of the cost of required improvements for the project have been completed and mechanics lien releases are obtained. Requests for such reduction shall be made in writing to the Commission with a fully executed copy of the Commission's Performance Guarantee/ Payment Bond Form attached thereto, and may be granted or withheld, although not unreasonably, at the Commission's sole discretion.
- c. Prior to the release of the performance guarantee or payment bond, the Applicant and/or owner shall present a maintenance bond equal to at least 10% of the initial performance guarantee or payment bond. Such bond shall be for a period of one (1) year and shall guarantee the improvements installed.

## **Section 7. Tribal Council Site Lease Approval**

~~The Tribal Council may grant a contingent agreement to lease but shall not grant a lease of Tribal lands until a permit has been granted under this Land Use Ordinance. The Applicant shall not commence the Land Use until both the permit and the site lease have been approved.~~

~~Once a permit has been issued for a Land Use, the Permittee shall obtain Tribal Council approval for the necessary site lease before commencing the permitted Land Use.~~

## **CHAPTER 6. PERMIT CONDITIONS**

### **Section 1. Permit Terms and Conditions**

Upon approving a permit application, the Commission may include terms and conditions that are reasonably necessary and appropriate for ensuring compliance with Tribal policies and Tribal Land Use Regulations.

### **Section 2. Permit Modification**

- a. If significant and material changes have occurred since the approval of the permit, the Permittee may file a permit modification application describing the changes, the proposed modifications to the permit, and any necessary information regarding the implementation of such changes.
- b. The permit modification application shall demonstrate that the proposed changes comply with the Tribal policies and Tribal Land Use Regulations.
- c. The Permit Administrator shall review the permit modification application with the Permittee and inspect the project, if applicable. The Commission, based on the Field Inspector/ Enforcement Agent's recommendations, may either approve the application and modify the permit or deny the application.
- d. If the permit modification application is denied or if the Commission imposes conditions which are deemed excessive by the Permittee, the existing permit shall remain in full force and effect and the Permittee may request a hearing with the Commission to review the decision.

### **Section 3. Permit Duration and Extension**

- a. Permits shall lapse if the permitted project or activity is not completed or fully operational within the time specified in the permit, not to exceed two five years. If a Permittee requires an extension of time in order to complete any activity under an approved permit, the Permittee shall file an extension request no later than 45 days prior to the expiration of the Permittee's existing permit.
- b. The Permit Administrator shall review the permit extension request with the Permittee and inspect the project. The Commission shall either approve the extension under such terms and conditions as the Commission deems necessary or appropriate or request that the Permittee obtain a permit modification.
- c. If at any time during the permit period or after the permit lapses, there is an unsafe condition on the premises, the Permit Administrator or Field Inspector/Enforcement agent shall take appropriate actions authorized by this Ordinance to remedy such conditions.

## **CHAPTER 7. CERTIFICATE OF OCCUPANCY OR COMPLETION**

### **Section 1. Certificate Required**

No Land Use activity or project shall be occupied, used, or operated, in whole or in part, until a Certificate of Occupancy or Completion (hereafter "CO") has been issued by the Field Inspector/ Enforcement Agent stating that the Land Use activity or project complies with all building, fire and safety codes, and the terms and conditions of the permit.

### **Section 2. CO Application**

- a. Upon the completion of the project, the Permittee shall apply for a CO. Within one (1) week of receiving the CO application, the Field Inspector/ Enforcement Agent shall review the CO application and inspect the project with the Permit Administrator, appropriate Tribal programs and Permittee.
- b. Within one (1) week of reviewing the CO application, the Field Inspector/ Enforcement Agent may either approve the CO application, and issue a CO, or notify the Permittee in writing of the measures required to attain compliance with the terms and conditions of the permit.

- c. Upon completion of the required compliance measures, the Permittee shall submit a revised CO application demonstrating evidence of compliance.
- d. The Field Inspector/ Enforcement Agent may, at his/her discretion, issue a Temporary or a Partial CO if the project is substantially complete and the completed portion of the project has satisfied the required compliance measures. The temporary CO shall specify the time-frame within which the remaining required compliance measures shall be completed. The partial CO shall specify the portion of the structure that may be occupied or used. Failure to complete the required compliance measures within the established time-frame may result in enforcement action.
- e. If the Permittee fails or refuses to comply with the terms and conditions of the permit, or if the project fails to meet the Tribal policies or Tribal Land Use Regulations, the Field Inspector/ Enforcement Agent shall not issue a CO and the project shall not be occupied, used, or operated in any way. The Field Inspector/ Enforcement Agent shall set forth his/her reasons for such denial in a detailed written decision, and shall send a copy of his/her decision to the Permittee.
- f. The Permittee may appeal the Field Inspector/ Enforcement Agent's decision pursuant to Chapter 11 of this Ordinance.

## **CHAPTER 8. VARIANCE**

### **Section 1. Application**

Any person or Permittee who requires a variance from a specific Tribal Land Use Regulation shall file a variance application with the Permit Administrator setting out the specific regulation for which the variance is requested and the justification for the requested variance.

### **Section 2. Criteria**

The Commission may grant a variance if the person or Permittee provides sufficient evidence that:

- a. the granting of a variance shall not undermine the purposes and policies of this Ordinance; and
- b. the proposed variance shall not adversely effect the environment, the general health, safety and welfare of the Tribe or Tribal Lands; and
- c. denying the variance shall cause the person or Permittee to suffer hardship out of proportion to the benefit intended by the Tribal policies or Tribal Land Use Regulations; and
- d. the Tribal Land Use Regulation from which a variance is sought can be properly mitigated or the affect of the variance is neutral.

## **CHAPTER 9. MONITORING**

### **Section 1. Authority to Inspect, Sample, Meter, Monitor**

- a. The Field Inspector/ Enforcement Agent shall have the right to enter the property or facilities, once having provided 48 hour written notice, unless the Land Use activity is jeopardizing public safety or in the case of an emergency, of any person, Permittee, or owner engaged in a Land Use activity or project on Tribal Lands to determine whether or not the project complies with this Ordinance. The Field Inspector/ Enforcement Agent shall have access to all specified parts of the property or facility for the

purposes of inspection, sampling, records examination and copying, and any additional duties required by this Ordinance. ~~The Field Inspector/ Enforcement Agent shall make best efforts to provide adequate notice prior to the inspection, however, lack of notice shall not prevent the Field Inspector/ Enforcement Agent from gaining access to the facility or the property.~~

- b. Where access to the property or facility is restricted by any security measure or device, the person or Permittee shall promptly allow access to the Field Inspector/ Enforcement Agent upon presentation of proper identification.
- c. The Field Inspector/ Enforcement Agent and appropriate Tribal program(s) shall have the right to install or require the installation of such devices, as are necessary, to conduct sampling, metering, and/or monitoring of the project at the Permittee's expense. The sampling, metering and monitoring equipment shall be maintained at all times in a safe and proper operating condition at the Permittee's expense.
- d. Any refusal or unreasonable delay in allowing the Field Inspector/ Enforcement Agent access to the project shall be deemed a violation of this Ordinance, and may subject the Permittee to fines and penalties as provided herein.

## **Section 2. Records and Monitoring**

All Permittees shall maintain monitoring records substantiating the information supplied in the permit application, including but not limited to, self-monitoring compliance reports and any other information or records required by the permit or Tribal Land Use Regulations.

## **Section 3. Reporting Requirements**

- a. Sampling Violations. If the sampling indicates a violation of the permit or any Tribal Land Use Regulation, the Permittee shall notify the Field Inspector/ Enforcement Agent within 24 hours of the violation or as soon as the Permittee is aware of the violation. The Permittee shall submit to the Commission, within two weeks of initially becoming aware of the violation, a written summary describing the violation, including but not limited to, the sampling analysis results. The Permittee shall not be required to re-sample if the Commission or appropriate Tribal programs performs its own sampling or monitoring.
- b. Potential Problems. In the event of an imminent and substantial harm to the environment, the general health, safety, and welfare of the Tribe, any person or Permittee shall notify the Field Inspector/ Enforcement Agent within 4 hours of the incident or as soon he/she becomes aware of the incident. Such notice shall include the location, the type of imminent and substantial harm to the environment, the general health, safety, and welfare of the Tribe, and any corrective or remediation actions undertaken.
  - 1) Within five (5) days of the imminent and substantial harm to the environment, the general health, safety, and welfare of the Tribe, the Permittee shall submit a detailed written report to the Commission describing the nature and cause of the emergency.
  - 2) Notice shall not exempt Permittee from any fines, civil or criminal penalties, or any other liability which may result from the incident.
  - 3) The Permittee may request the assistance of the Commission to provide corrective or remedial actions.

## **CHAPTER 10. ENFORCEMENT**

## **Section 1. Enforcement Authority of the Commission**

The Commission, in conjunction with the Field Inspector/ Enforcement Agent, shall have the authority to enforce compliance with any Tribal Land Use Regulation and to investigate or inspect suspected violations of a permit or non-compliance or of any Land Use activity or project. Whenever the Field Inspector/ Enforcement Agent determines, after an investigation, that reasonable grounds exist to find that the Permittee has violated any permit term or condition or any applicable Tribal Land Use Regulation or Commission Order, the Field Inspector/ Enforcement Agent may institute appropriate Administrative Orders proceedings in the name of the Commission against the Permittee.

## **Section 2. Commission Orders**

The Field Inspector/ Enforcement Agent shall have the authority to issue Cease and Desist Orders ("CDO"), Show Cause Orders ("SCO"), or Consent Orders.

### **Section 3. Cease and Desist Order**

- a. The Field Inspector/ Enforcement Agent may issue a Cease and Desist Order whenever he/she determines that reasonable grounds exist to find that a Land Use activity, activities or lack of activity presents a violation of any permit term or condition, any Tribal Land Use Regulation or Commission Order, and that imminent and substantial harm to the environment, cultural resources, the general health, safety, and welfare of the Tribe is likely to occur without the cessation of such activity.
- b. The Field Inspector/ Enforcement Agent may, without a prior hearing, issue a written CDO to the Permittee to cease such activity within a specified time period, and the Permittee shall immediately take all necessary steps or measures to comply with the CDO.
- c. The Field Inspector/ Enforcement Agent, or his/her designated representative, shall serve the Permittee with the CDO.
- d. The CDO shall be scheduled for a Hearing in accordance with Chapter 11, Section 1., at the Commission's next scheduled meeting or at least within 30 days of the alleged violation, to determine the status of the alleged violation, any necessary remediation, or whether any other action or enforcement measure should be applied.

### **Section 4. Show Cause Order**

- a. The Field Inspector/ Enforcement Agent may issue a SCO whenever he/she determines that reasonable grounds exist to find that a certain activity, activities or lack of activity presents a violation of any permit term or condition, any Tribal Land Use Regulation or Commission Order.
- b. The Field Inspector/ Enforcement Agent may issue a written SCO to any Permittee directing such Permittee to appear before the Commission to review the status of the alleged violation, respond to and explain the alleged violation, and determine whether any remediation or additional permit terms and conditions are necessary, or any other action or enforcement measure should be applied.
- c. The SCO shall be scheduled for a Hearing, in accordance with Chapter 11, Section 1., at the Commission's next scheduled meeting or at least within 30 days of the alleged violation, to determine the status of the alleged violation, any necessary remediation, or whether any other action or enforcement measure should be applied.
- d. If the Permittee fails to appear at the Hearing, the Commission may issue a Cease and Desist Order or institute other enforcement action.

## **Section 5. Consent Order**

The Field Inspector/ Enforcement Agent may issue a Consent Order whenever it is determined that a Land Use activity, activities, or lack of activities presents a violation of any permit term or condition, any Tribal Land Use Regulation or Commission Order, and the Permittee admits to the alleged violations and is willing to resolve the matter without formal Commission involvement. The Field Inspector/ Enforcement Agent may require the performance of any necessary remediation, other reasonable action, or enforcement measure as part of the Consent Order.

## **Section 6. Fines**

- a. The Commission shall have the authority to issue fines to any Permittee who is found to have violated any permit term or condition, Tribal Land Use Regulation or Commission Order in an amount not to exceed \$500.00 for each day during which the violation occurs. The fines assessed may include recovery of the cost of remediating or mitigating a violation. No fine shall exceed \$10,000, except that there shall be no limit on the amount of a fine levied to recover actual remediation costs.
- b. In determining the amount of the fine, the Commission may consider the following factors:
  - 1) the reasonable costs and expenses of the Commission in investigating, controlling, and abating such violations;
  - 2) the fines established by the Tribal Land Use Regulations;
  - 3) the actual and potential impact or damages to the environment, or the general health, safety, and welfare of the Tribe;
  - 4) any measures taken to prevent or mitigate the violation;
  - 5) any previous violations or failure to comply with any permit term or condition, the Tribal Policies or Tribal Land Use Regulations, or a Commission Order;
  - 6) making compliance less costly than non-compliance;
  - 7) the deterrence of future potential violations;
  - 8) whether the failure to comply was intentional, willful or knowing and not the result of an error;
  - 9) any other factor(s) that may be relevant to determining the amount of the fine, provided that such factor shall be set forth in the written notice of assessment of the fine.
- c. If a Tribal program is assessed a fine, payment shall be made to the General Fund of the Tribe which shall be designated as revenue of the Land Use Commission:
  - 1) the Tribal programs shall pay the fine to the Commission within thirty (30) days from the date the fine is assessed;
  - (2). ~~if the fine is not paid within thirty (30) days, the Finance Department shall be authorized to automatically withdraw the amount of the fine from the Tribal program's budget.~~
- d. If a Tribal Member or a Non-Tribal entity is assessed a fine, payment shall be made as follows:
  - 1) the Tribal Member or the Non-Tribal entity shall pay the fine to the Commission within thirty (30) days from the date the fine is assessed;
  - 2) if the fine is not paid within thirty (30) days, an additional fine of ten percent (10%) of the original fine shall be assess every thirty (30) days. ~~until the ninetieth (90th) day, at which time the Commission may issue a Cease and Desist Order.~~

## CHAPTER 11. APPEAL PROCESS AND PROCEDURE

### Section 1. Right to a Hearing

Any Permittee who has been the subject of enforcement action may request a Hearing with the Commission at the Commission's next scheduled meeting to discuss the reasons for such action.

### Section 2. Right to Appeal

- a. Any Applicant who has been denied a permit or any person who has been the subject of an enforcement action may file an appeal with the Appeal Board within two (2) weeks of the Commission's decision
- b. An appeal is commenced by filing a Notice of Appeal with the Permit Administrator. The Notice of Appeal shall state the reasons for the appeal and the specific request for relief.

### Section 3. Appeal Board

- a. The Appeal Board shall convene as necessary, to address the matters on appeal.
- b. The Appeal Board shall be composed of three (3) Tribal Council Members, and one (1) AWTHA Board Member, and one (1) Tribal member at large, along with a Tribal Attorney who shall serve only as counsel to the Board. The composition of the Appeal Board shall be appointed by rotate among the membership of the Tribal Council and the AWTHA Board. Those Board members sitting on the Tribal Council or the AWTHA Board shall withdraw themselves from Tribal Council meetings or AWTHA Board meetings which consider land use permitting or leasing. The tribal attorney shall be selected on the basis of professional qualifications in land use matters and familiarity with tribal ordinances and customs. No individual who has personally been involved in, carried out any part of an investigation, or has had any prior review of the issue on appeal, may serve on the Appeal Board. The staff to the Appeal Board shall be comprised of existing staff of the Tribal Government. Members of the Appeal Board shall be appointed for staggered three year terms and shall be compensated, as determined by the Tribal Council. The first members of the Appeal Board representing the Tribal Council shall be appointed as follows: one member shall be appointed to a three-year term, one member shall be appointed to a two year term, and one member shall be appointed to a one year term. Thereafter, upon the completion of their terms, all members shall be appointed to three year terms.

### Section 4. Record on Appeal

- a. All records on file with the Permit Administrator that pertain to the appeal shall constitute the record on appeal.
- b. The Commission that issued the permit or enforcement action shall photocopy or reproduce the record on appeal and distribute it to the Appellant, the Appeal Board, and the Tribal program whose regulations may be at issue.

### Section 5. Appeal Hearing

- a. Upon receiving the Notice of Appeal, the Commission shall set a Hearing for the matter on the Appeal Board's next scheduled meeting or at least within thirty (30) days from receiving the Notice of Appeal. The Permit Administrator shall provide written notice to

- the Appellant and the appropriate Tribal program of the time and place for the Hearing.
- b. At the Appeal Hearing, the Commission and the Appellant may provide a presentation of the facts as established by the record. The presentation shall be limited to a review of the record on the issue from which the appeal has been taken. The Appeal Board may ask questions and request relevant and reasonable additional information of any of the parties.
  - c. The Appeal Board shall review the record and evidence presented to determine whether or not the Commission actions or decisions were consistent with Tribal policies and Tribal Land Use Regulations ~~or were arbitrary and capricious~~.
  - d. If the Appeal Board finds that the Commission's decision was not consistent with Tribal policies and Tribal Land Use Regulations arbitrary and capricious, the Appeal Board shall remand the matter back to the Commission with its conclusions and conditions for further action consistent with the Appeal Board's decision.
  - e. The Appeal Board shall render its final decision within three (3) weeks from the conclusion of the Appeal Hearing. The Appeal Board shall set forth written findings of facts and conclusions, and may establish such conditions for the permit or Land Use activity or project as it deems necessary and appropriate.
  - f. The Appeal Board's decision shall be appealable to ~~Superior Court or Tribal Council or~~ Tribal Court when established.

## **CHAPTER 12. EFFECTIVE DATE AND APPLICATION**

### **Section 1. Effective upon Enactment of Tribal Council**

This Ordinance shall be effective upon enactment by the Tribal Council.

### **Section 2. Publication and Distribution of Tribal Land Use Regulations**

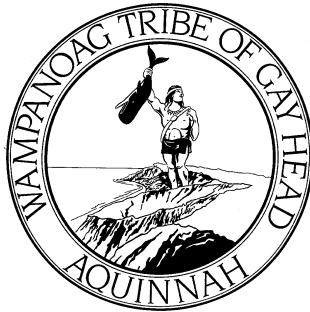
The Commission shall distribute copies of this Ordinance and all Tribal Land Use Regulations to every Tribal department and program and shall make them available upon request at the Tribal Offices.~~to any person responsible for any known or anticipated Land Use activities or projects~~

### **Section 3. Application to Existing Activities and Projects**

This Ordinance shall apply to any and all Land Use activities or projects on Tribal Lands that are commenced after the effective date of this Ordinance. Any existing building or structure or any previously permitted development on Tribal Lands shall not be required to obtain a permit pursuant to Chapter 5. Nonetheless, the operation of any existing Land Use activities or projects, including buildings and structures, shall be required to comply with all other provisions of this Ordinance.

### **Section 4. Amendment**

This Ordinance and associate Land Use Regulations may be amended from time to time by the Tribal Council upon recommendation from the Land Use Commission. The Commission shall distribute copies of amended Ordinance and Tribal Land Use Regulations to every Tribal department and program and shall make them available upon request at the Tribal Offices.



## **REGULATIONS FOR PROTECTING TRIBAL LANDS**

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### **CHAPTER 1. DECLARATION OF PURPOSE**

#### **Section 1. Purpose**

The Wampanoag Tribe of Gay Head (Aquinnah) (the “Tribe”) hereby declares that the purpose of this regulation is to promote tribal self-government, traditional tribal spiritual and natural values, economic development, and the health, safety, and welfare of the Tribe in order to make rational and comprehensive land-use decisions for the Tribal Lands. The Tribe’s sovereign rights include the responsibility to properly manage the Tribal Lands which have an abundance of unique natural, environmental, cultural, and historical resources. The Tribe has been the stewards of its land and water and is promulgating this regulation to balance the need to protect the Tribe’s resources for future generations with the need for social and economic growth.

#### **Section 2. Jurisdiction**

This Land Use Regulation is established pursuant to the Land Use Ordinance adopted pursuant to Tribal Council Resolution 99-10 on May 19, 1999. The regulation applies to all Wampanoag Tribe of Gay Head (Aquinnah) Tribal Lands.

#### **Section 3. Authority**

The Wampanoag Tribe of Gay Head (Aquinnah), pursuant to its inherent sovereignty and federal law, and as required by the Settlement Act, possesses the authority for the regulation of land use, environmental quality, and cultural and historic preservation within the boundaries of the Wampanoag Tribe of Gay Head (Aquinnah) Tribal Lands. The Tribal Council adopts this Regulation in furtherance of the sovereign right of self-governance of the Wampanoag Tribe of Gay Head (Aquinnah).

### **CHAPTER 2. LAND USE PROTECTION AND MANAGEMENT PROGRAM**

The Tribe's Land Use goal through this regulation is to take a proactive approach to land use management by preventing or minimizing impacts to the Tribal Land's natural, environmental, cultural, and historic resources. This regulation addresses land use protection by promulgating standards which address the Tribal activities and enterprises that have the potential to effect or impact the Tribe's resources.

In an effort to protect the Tribe's resources the following standards attached hereto are incorporated into this regulation:

- . Zoning**
- . Wetlands/ Water Resource Protection**
- . Building Codes**
- . Subsurface Sewage Disposal (Title V)**
- . Health Codes**

## ZONING REGULATIONS

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### **DECLARATION OF PURPOSE**

The Wampanoag Tribe of Gay Head (Aquinnah) (the “Tribe”) hereby declares that the purpose of this regulation is to promote tribal self-government, economic development, and the health, safety, and welfare of the Tribe in order to make rational and comprehensive land-use decisions for the Tribal Lands.

The Wampanoag Tribe of Gay Head (Aquinnah) hereby incorporates by reference the regulations under the 1983 Town of Gay Head Zoning By-law authorized by M.G.L. c.40A.

## **WETLAND/ WATER RESOURCE PROTECTION REGULATIONS**

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### **DECLARATION OF PURPOSE**

The Wampanoag Tribe of Gay Head (Aquinnah) (the “Tribe”) hereby declares that the purpose of the regulations is to protect the wetlands, related water courses, and adjoining land areas on Tribal Lands by prior review and control of activities deemed to have significant adverse impact or significant cumulative adverse effect upon wetland values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, prevention of water pollution, fisheries, shellfish, wildlife habitat, recreation, agriculture, and aquaculture values.

The Wampanoag Tribe of Gay Head (Aquinnah) hereby incorporates by reference the regulations under the Commonwealth of Massachusetts Wetland Protection Act (310 CMR 10, M.G.L. c. 131, s.40).

## BUILDING CODES

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### **DECLARATION OF PURPOSE**

The Wampanoag Tribe of Gay Head (Aquinnah) (the "Tribe") hereby declares that the purpose of the regulation is to insure public safety, health and welfare insofar as they are effected by building construction, through structural strength, adequate means of egress, sanitary conditions, light and ventilation, energy conservation and fire safety, to life and property from all hazards incident to the design, construction, reconstruction, alteration, repair, demolition, removal, use or occupancy of buildings, structures or premises.

The Wampanoag Tribe of Gay Head (Aquinnah) hereby incorporates by reference the regulations under the Commonwealth of Massachusetts State Building Code (780 CMR, M.G.L 30A, s. 6,c. 233, s. 75).

## **SUBSURFACE SEWAGE DISPOSAL (TITLE V)**

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### **DECLARATION OF PURPOSE**

The Wampanoag Tribe of Gay Head (Aquinnah) (the “Tribe”) hereby declares that the purpose of the regulation is to protect the environment and the well being of the Tribe over which the Commission takes cognizance and responsibility including, but not limited to, standards for the disposal of sewage.

The Wampanoag Tribe of Gay Head (Aquinnah) hereby incorporates by reference the regulations under the Commonwealth of Massachusetts State Environmental Code (30 CMR 15, MGL c. 21A s. 13).

## **HEALTH CODES**

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### **DECLARATION OF PURPOSE**

The Wampanoag Tribe of Gay Head (Aquinnah) (the “Tribe”) hereby declares that the purpose of the regulation is to protect the Tribe and general welfare, to maintain the quality of groundwater and surface water, to prevent pollution of potable water supplies, and to maintain the viability of fishing and shellfishing areas.

The Wampanoag Tribe of Gay Head (Aquinnah) hereby incorporates by reference the regulations under the Commonwealth of Massachusetts State General Law (MGL c. 111 s. 31).

**WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)  
TRIBAL ZONING ORDINANCE**

**NO. 98-02**

Pursuant to the authority vested in the Wampanoag Tribe of Gay Head/Aquinnah (hereinafter referred to as "the Tribe"), the Tribal Council hereby establishes the following Tribal Zoning and Land Use Ordinances.

It is hereby declared that:

**ARTICLE I – FALL RIVER AIRPORT LANDS**

All lands acquired by the Tribe within what is now commonly known as the former Fall River Municipal Airport Site are hereby zoned as follows:

All lands acquired by the Tribe within the site must be used exclusively for the purposes authorized by the Urban Renewal Plan which governs the use of all lands within the former Fall River Municipal Airport.

ENACTED: this 4<sup>th</sup> day of April 1998

**THE WAMPANOAG TRIBE OF GAY HEAD/AQUINNAH**

Beverly M. Wright, Chairperson

APPROVED: this 4<sup>th</sup> day of April 1998

**WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)  
BUILDING, HEALTH, FIRE AND SAFETY ORDINANCE**

NO. 98-01

Pursuant to the authority vested in the Wampanoag Tribe of Gay Head/Aquinnah (hereinafter referred to as "the Tribe"), the Tribal Council hereby establishes the following Tribal Building, Health, Fire and Safety Ordinances which shall apply solely to all building and businesses owned or operated by the Tribe on lands which are now or hereinafter acquired by the Tribe within the area currently known as the Fall River Municipal Airport.

**ARTICLE [I]– BUILDING CODE**

It is hereby declared that all construction, renovation, demolition and/or improvement to structures within said site must meet or exceed the standards and specifications of BOCA Base Building Code, Fifth edition, 1970 as the same is modified by the Buildings and Building Regulations of the City of Fall River, Massachusetts; Provided however, that all permits shall be awarded and all inspections and enforcement: activities shall be conducted in accordance with applicable federal law.

**ARTICLE II – ADDITIONAL BUILDING STANDARDS AND SPECIFICATIONS**

It is hereby declared that all construction, renovation, demolition and/or improvements of structures within said site must meet or exceed the standards and specifications currently contained in the Massachusetts Department of Public Safety's: (1) Board of Boiler rules, (2) Board of Elevator Regulations, (3) Board to Facilitate Regulations Governing the Use of Public Buildings by the Physically Handicapped; (4) Board of Fire Prevention Regulations, including the Massachusetts Electrical Code, Department of Public Utilities, and (5) the Massachusetts Department of Labor Industries' Industrial Bulletin #12, (6) the Massachusetts Code for the Installation of Gas Appliances and Gas Piping; and (7) The Massachusetts Board of State Examiners of Plumbers, as those standards and specifications are applied within the boundaries of the City of

Fall River, Massachusetts. Provided, however, that all permits shall be awarded and all inspection activities and enforcement activities shall be conducted in accordance with applicable federal law.

### ARTICLE III – HEALTH STANDARDS

It is hereby declared that all activities conducted on said lands must meet or exceed the Health Standards improvised by Sec. 9-61 through and including Sec. 9-134 of the Fall River Revised Ordinances. Provided, however, that all related permits, all inspection activities and all enforcement actions shall be conducted in accordance with applicable federal law.

### ARTICLE IV – FIRE SAFETY STANDARDS

It is hereby declared that all construction and all activities conducted on said lands must meet or exceed the safety standards imposed by the Fire Code and Standards established by Section 6-66 through and including Section 6-170 of the Fire Protection and Prevention Code of the City of Fall River, Massachusetts. Provided, however, that all related permits and, all inspection and enforcement actions shall be conducted in accordance with applicable federal law.

ENACTED: this 4<sup>th</sup> day of April 1998

THE WAMPANOAG TRIBE OF GAY HEAD/AQUINNAH

Beverly M. Wright, Chairperson

APPROVED: this 4<sup>th</sup> day of April 1998

# **EXHIBIT 3**

MEMORANDUM OF UNDERSTANDING

between

The Wampanoag Tribe of Gay Head-Aquinnah

and

The Massachusetts Army National Guard

for

Cultural Resource Planning and Management

WHEREAS the Massachusetts Army National Guard (MAARNG) owns, uses and controls land for the purposes of federal military training and related activities and conducts training and support operations on lands other than those owned or controlled by the MAARNG in the State of Massachusetts, AND

WHEREAS the Massachusetts National Guard recognizes the status of the Wampanoag Tribe of Gay Head-Aquinnah (TRIBE) as a Sovereign Nation and a federally recognized Indian Tribe, AND

WHEREAS the MAARNG recognizes that it has an obligation pursuant to federal law, policy and executive orders to provide timely and meaningful opportunities for the tribes participation and input on MAARNG activities or determinations that impact, or may potentially impact, the Tribe, AND

WHEREAS the MAARNG and the Wampanoag Tribe of Gay Head-Aquinnah AGREE that the military training activities of the Massachusetts Army National Guard may from time to time affect cultural resources affiliated with the Wampanoag Tribe of Gay Head-Aquinnah, and its non-federally recognized sister Tribe, The Mashpee Wampanoag, including Traditional Cultural Properties, properties of traditional religious and cultural importance, sacred sites, human remains and associated cultural items, AND

WHEREAS the MAARNG recognizes the Wampanoag Tribe of Gay Head-Aquinnah's, here after referred to as the Wampanoag Tribe, special expertise with respect to the cultural resources set forth in the foregoing paragraph, AND



WHEREAS the MAARNG seeks to work cooperatively with the Wampanoag Tribe in managing affiliated cultural resources on land under MAARNG's ownership and control and on lands other than those owned or controlled by MAARNG but used for training and support operations by MAARNG, and in meeting all legal requirements, policies, guidance applicable to conservation, protection and management of Tribal cultural resources; AND

WHEREAS the Wampanoag Tribe and MAARNG have consulted on a government-to-government basis and mutually agree on the principles set forth in this document, NOW, THEREFORE: the MAARNG and the Tribe agree that the following principles and procedures will guide conservation, protection and management of affiliated cultural resources on land under the ownership or control of the MAARNG and on other lands other than those owned or controlled by the MAARNG but used for training and support activities:

The MAARNG, in consultation with the Wampanoag Tribe, shall establish procedures for Such procedures will be incorporated into the MAARNG Integrated Cultural Resource Management Plan (ICRMP) and shall follow and adhere to the regulations and guidelines in regard to federally recognized Indian Tribes as published in AR 200-4 and DA-PAM 200-4 and all other applicable federal laws, policies, guidance and executive orders.

— The MAARNG shall consult with the Wampanoag Tribe in development of the Massachusetts Army National Guard's Integrated Cultural Resources Management Plan (ICRMP). The Tribe shall have a timely and meaningful opportunity for review, comment and input at all phases of plan development that include issues pursuant to Wampanoag cultural resources, including scoping sessions, as well as, suggested levels and locations for surveys.

The MAARNG will not complete the ICRMP without first soliciting, considering, and responding to the written comments of the Wampanoag Tribe. The FINAL ICRMP shall, to the greatest extent practicable, reflect the mutual agreement of the MAARNG and the Wampanoag Tribe regarding management of affiliated cultural resources. During the course of ICRMP preparation and implementation, the following procedures will be followed to avoid conflicts over management of affiliated cultural resources:

The MAARNG shall require their contractor(s) TO provide a monthly report to the Wampanoag Tribe's Designated Historic Preservation Officer and the Tribal Chairperson, summarizing cultural resource management activities and other undertakings as may be applicable, to Traditional Cultural Properties or potential cultural properties locations and findings of such, both pre-historic and historic during the annual field survey period or when any undertakings or action takes place which may or will affect Traditional Cultural Properties, properties of traditional, religious, and cultural importance, sacred sites, human remains or associated cultural items.

The MAARNG will provide an annual report to the Wampanoag Tribe, but not limited to, dispositions, treatment, and curation, that includes the site locations and all other pertinent information on sites including, present and ongoing surveys conducted by their archaeology contractor.

The Wampanoag Tribe agrees to make A good faith effort to respond within thirty (30) days or less, where feasible and warranted, to requests for information from MAARNG for, consultation, or concurrence in relation to issues of Traditional Cultural Properties, sacred sites, burials or human remains.

The Wampanoag Tribe agrees to protect the confidentiality of site locations by limiting access to such information to the Wampanoag Tribe's Designated Historic Preservation Officer, Tribal Chairperson, and the Tribal Council. The MAARNG agrees to protect the confidentiality of site locations by limiting access to such information to only necessary National Guard operations, the SHPO, and the Wampanoag Tribe, to the greatest extent allowed by law.

The MAARNG recognizes that present and future surveys cannot identify all surface and subsurface Traditional Cultural Properties, properties of traditional, religious and cultural importance, sacred sites, human remains and associated cultural items, and that such properties may be discovered through future cultural resource management activities or other training related ground disturbing activities. The Wampanoag Tribe agrees that the process created pursuant to this agreement shall be followed, and will not exceed thirty (30) days without further agreement of the parties.

If the MAARNG, at any time, unintentionally discovers, or seeks to intentionally excavate human remains, it will immediately notify the Wampanoag Tribe's Designated Historic Preservation Officer and Tribal Chairperson along with appropriate law enforcement and other local and state agencies, cease activities that could impact such remains, consulting with the Wampanoag Tribe on a government-to-government basis in recognition of the Sovereign status of the Wampanoag, and secure and safeguard the site. Activities in the vicinity of the site shall then cease until such time as the Wampanoag Tribe's Designated Historic Preservation Officer and National Guard Cultural Resource Officer can arrange for mutual inspection of the site and proper disposition.

The MAARNG shall at each site ensure that human remains and cultural items (i.e. associated and unassociated grave goods, sacred objects, and objects of cultural patrimony) are secured, treated and repatriated in accordance with the provisions of the Native American Graves Protection and Repatriation Act, its implementing regulations and Army Regulation 200-4 and DA-PAM 200-4.

The MAARNG agrees, for purposes of compliance with Section 106 of the National Historic Preservation Act, that the Wampanoag Tribe shall be included as a concurring party and signatory on all Memoranda of Agreement and Programmatic Agreements, or similar documents, for undertakings affecting Tribally affiliated Traditional Cultural Properties, properties of traditional, religious and cultural importance, sacred sites, human remains and associated cultural items. The MAARNG shall consult with the Wampanoag Tribe, on all no effect, beneficial effect, no adverse effect, and adverse effect determinations for undertakings with potential to impact Traditional Cultural Properties and sacred sites.

The parties to this agreement designate and mutually recognize and endorse the following points of contact for purposes of carrying out any communication and consultation necessary for implementation of the principles and processes of this agreement.

Matthew J. Vanderhoop  
Tribal Historic Preservation Officer  
Wampanoag Tribe of Gay Head-Aquinnah

Cultural Resource Management Officer  
Massachusetts Army National Guard

The afore mentioned points of contact shall refer matters arising under this agreement to higher National Guard and Tribal Authority as the occasion and/or protocol demand. Should the MAARNG point of contact change, the MAARNG agrees that it shall contact the Wampanoag Tribe and inform the Tribal Chairperson regarding the appointment of a new point of contact. The Wampanoag Tribe agree that should their point of contact change, they shall inform the Massachusetts Army National Guard and the Adjutant General regarding the appointment of a new point of contact.

Flora and Fauna identified by species and locations must be included in any survey leading to or incorporated in development of an ICRMP. Such information shall be shared with the Wampanoag Tribe's Designated Historic Preservation Officer and the Tribal Chairperson and held confidential by the Massachusetts Army National Guard when such flora and fauna are of cultural importance to the tribe.

Although the DOD Secretary's Professional Qualifications and Standards do not apply to a federally recognized Indian tribe that has agreed to provide expertise, information or technical assistance regarding Traditional Cultural Properties and Sacred Sites, the Wampanoag Tribe agrees to this provision.

Consultation between the Massachusetts Army National Guard Cultural Resource Officer and the Wampanoag Tribe and their Designated Historic Preservation Officer shall be conducted to review no effect, beneficial effect, no adverse effect, and adverse effect determinations to a Traditional Cultural Property or Sacred Site or a nomination to the National Register of Historic Places. Such consultation shall give signatory authority to any Memorandum of Agreement or Programmatic Agreement as is referenced in AR 200-4 and DA-PAM 200-4. The Massachusetts Army National Guard AGREES that in all consultations, including review of individual undertakings pursuant to 36 CFR 800, the Tribe shall be invited to concur or not to concur in any Memorandum of Agreement, Programmatic Agreement or other pertinent documents that have the potential to affect Wampanoag Cultural Resources.

The Massachusetts Army National Guard ICRMP will be developed in a context, regarding Traditional Cultural Properties and Sacred Sites that reflect Tribal Cultural Values.

Nomination/eligibility to National Register of Historic Places.

While the Wampanoag Tribe Indians acknowledge that the only person delegated statutory authority to sign National Register of Historic Places nominations is the Deputy Assistant Secretary of the Army, the Tribe does, however, reserve the right, as it is expressed in the National Historic Preservation Act and Sections 60.11 and 60.12 of 36 CFR 60, to concur or not to concur in preparation of recommendations for nomination to the National Register of Historic Places in consultation with the MAARNG when such is related to, or in regard of, those elements which are Traditional Cultural Properties, Sacred Sites, or of Traditional Cultural Value to the tribe, and further reserves the right of appeal as referenced in 36 CFR 60.

Nominations to the National Register of Historic Places on Traditional Cultural Properties and Sacred Sites can only be submitted if mutually agreed upon by both the MAARNG and the Wampanoag Tribe.

It is neither the intent, nor is in the interest of the Wampanoag Tribe of Gay Head-Aquinnah, to act as representatives of any other federally recognized Indian tribe without their express authorization in writing. It is understood that this document may be employed in whole or in part, MADE into separate agreements made by other federally recognized Indian tribes and the Massachusetts Army National Guard and/or the other elements of the Department of Defense or any other federal agency.

MAARNG agrees that Traditional Cultural Properties will be defined by the Wampanoag Tribe and include but are not limited to:

Any pre-historic or historic site location and its components, which relate, or may relate to the Wampanoag Tribe and their ancestral kin groups, clans, or tribes.

Artifacts with surface or sub-surface locations.

Man-made or natural features including dwellings, mounds and other earth works.

Certain trees, shrubs, and plants.

Certain stones, minerals, and fossils.

Animal parts either terrestrial or marine.

MAARNG AGREES THAT Sacred Sites can only be designated on a case by case basis by the Wampanoag Tribe Designated Historic Preservation Officer and with the concurrence of the Wampanoag Tribal Chairperson and Tribal Council, as they may relate to the Wampanoag Tribe.

MAARNG agrees that Executive Order 13007 expresses in general the parameters of sacred sites and expresses the accommodations that must be made for access, use and protection of such scared sites.

The parties agree that this Memorandum of Understanding shall take effect on the date it is signed by the Adjutant General of the Massachusetts Army National Guard and the Chairperson of the Wampanoag Tribe as properly witnessed and shall remain in effect until 01 January 2010 unless properly terminated by either party. This Memorandum of Understanding may be extended and/or amended past that date by accord of both parties.

If at any time during implementation of this Memorandum of Understanding, either party raises an objection, both agree to appropriate consideration and consultation intended to resolve the objection.

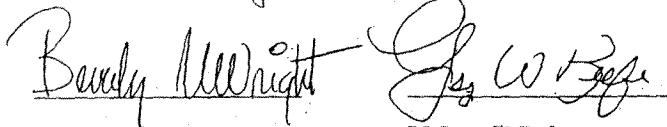
The Massachusetts Army National Guard and/or the Wampanoag Tribe of Gay Head-Aquinnah may terminate this Memorandum of Understanding by providing sixty-(60) working days notice to the other signatory party by Registered Mail. After such notification, but prior to the date of termination, both parties shall within ten (10) working days of notification, set a mutual date to consult and seek a satisfactory solution that would avoid termination.

Nothing in this agreement prohibits or reduces either party's right to full lawful remedy or recourse for failure to comply with any and all terms agreed to herein.

NOW THEREFORE, it is agreed that the MAARNG and the Wampanoag Tribe of Gay Head-Aquinnah will jointly cooperate to achieve the principles and purposes set forth in this Memorandum of Understanding.

Signed this 30<sup>th</sup> day of Aug 2001.

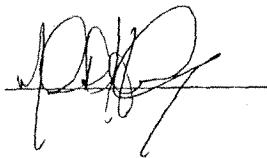
Signed this 30<sup>th</sup> day of Aug, 2001



Beverly Wright  
Chairperson  
Wampanoag Tribe of Gay Head-Aquinnah

BG George W. Keefe  
The Adjutant General  
Massachusetts Army National Guard

Witnesses:



**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE  
ENVIRONMENTAL PROTECTION AGENCY, REGION 1;  
THE U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT; AND  
THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)  
PERTAINING TO CULTURAL RESOURCES CONSULTATION  
FOR THE  
NEW BEDFORD HARBOR SUPERFUND SITE,  
NEW BEDFORD, MASSACHUSETTS AND VICINITY**

**WHEREAS**, the United States, acting through the United States Environmental Protection Agency (EPA), Region 1, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), as amended, 42 U.S.C. §§ 9601 *et seq.*, published a Record of Decision (hereinafter "ROD") for the Upper and Lower Harbor Operable Unit for the New Bedford Harbor Superfund Site in Bristol County, Massachusetts which called for the dredging and removal of contaminated sediments from New Bedford Harbor (the Remedial Action); and

**WHEREAS**, the U.S. Army Corps of Engineers (Corps), New England District, is providing assistance and expertise to the EPA for implementation of the Remedial Action in Acushnet, Fairhaven, and New Bedford, Massachusetts as set out in Interagency Agreement No. DW96940189-01-1 and Amendment thereto; and

**WHEREAS**, in accordance with the ROD; Corps Engineer Regulations 1105-2-100 (Native American Considerations), paragraphs C-4, Cultural Resources, subparagraphs e. (1)-(3)(f); and the National Historic Preservation Act of 1966 (NHPA), as amended, and implementing regulations 36 CFR 800, EPA and the Corps have formally initiated consultation with the Wampanoag Tribe of Gay Head (Aquinnah) (hereinafter called the Tribe); and

**WHEREAS**, the Tribe is a Federally Recognized Tribe whose ancestral lands and those of its non-federally recognized sister Tribe, the Mashpee Wampanoag, are located within the proposed Remedial Action area; and

**WHEREAS**, Section 106 of the NHPA and 36 CFR 800 require that Federal agencies consult with Native American tribes or entities that may attach cultural or religious significance to historic properties that may be affected by an undertaking; and

**WHEREAS**, Federal policy and law requires that the Tribe be given a timely, full and meaningful opportunity to take part in preserving aspects of the cultural environment that have the greatest importance to the Tribe;

**NOW THEREFORE**, EPA, the Corps, and the Tribe agree to abide by the following stipulations for the preservation of cultural resources for the duration of the Remedial Action, until the cleanup is completed:

## STIPULATIONS

1. The parties acknowledge that the Remedial Action has begun, commencing with cultural resources surveys and subsurface testing; and that the Tribe has been and will continue to be given the opportunity to identify historic properties within the Remedial Action area that may be of religious, sacred, or spiritual significance to the Tribe. Upon identification of Tribal historic properties, EPA and the Corps, recognizing that an Indian tribe may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites, will ensure that the confidentiality of this information is addressed and maintained pursuant to 36 CFR 800.11(c) and to the fullest extent provided by law.
2. In the event that historic properties are identified, and in accordance with 36 CFR 800.5, EPA, the Corps, and the Tribe will apply the Criteria of Adverse Effect to properties within the area of potential effects. An adverse effect is found when an undertaking may alter, directly or indirectly any of the characteristics of a historic property that qualify the property for inclusion in the National Register. If an adverse effect is found, further consultation will take place between EPA, the Corps, the Tribe, the Massachusetts State Historic Preservation Officer (MA SHPO), and other consulting parties that will assist EPA to develop and evaluate alternatives or modifications to the Remedial Action that could avoid, minimize or mitigate adverse effects.
3. The Tribe will ensure that the identification of sacred, spiritual, or other ancestral properties or sites within the Remedial Action impact area is conducted in a timely fashion prior to construction so that proper resource avoidance, impact minimization, or mitigation may be conducted.
4. The Tribe will have a Cultural Resource Monitor (CRM), who will observe the archeological work in accordance with the site-specific health and safety plan. The CRM will coordinate with the Corps, EPA, and their contractors access and activities around the Site. EPA agrees to provide the CRM with any personal protective equipment (ppe) required to access contaminated areas of the site. The CRM will report to the Tribal Historic Preservation Officer (THPO). The THPO will communicate any Tribal questions or concerns about the Remedial Action to the Corps Tribal Coordinator (hereafter Tribal Coordinator).
5. In the event of any discovery of cultural resources, the Tribal Coordinator, the THPO, EPA and the Corps New Bedford Resident Engineer will be contacted and further consultation will take place per 36 CFR 800.13. EPA, the Corps, the MA SHPO, and other consulting parties will consult with the Tribe. Based on this consultation EPA will implement necessary actions to resolve adverse effects prior to construction affecting such sacred, spiritual, or other ancestral properties or sites within the remedial impact area. The CRM and the Tribal Coordinator will be notified and the Tribe will be given an opportunity to respond. EPA shall take into account the Tribe's recommendations regarding cultural resources in implementing the Remedial Action under CERCLA.

6. The location of the discovery shall be reported solely to the CRM, the THPO, and the appropriate Corps, EPA and MA SHPO representatives.
7. In the event that a cultural resource is encountered that qualifies as a historic property as defined in Section 106 of the NHPA, a site-specific mitigation plan will be developed and commented on by all consulting parties pursuant to the Section 106 process.
8. Any cultural artifacts found would be temporarily curated by the archaeological Contractor until such time as a permanent repository is identified.
9. In the event that human skeletal remains are uncovered, all work within the surrounding area of the find shall immediately cease and the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*) and Massachusetts General Laws, including but not limited to Chapter 9 sections 26A and 27C, for human burials shall apply. EPA, the Corps, and the Tribe will be contacted immediately about the discovery and the location. The Massachusetts State Police and the Regional Medical Examiner will then be notified. If said remains are determined to be more than 100 years old, the State Archaeologist, Massachusetts Commissioner on Indian Affairs, and the THPO will then be contacted upon notification.
10. Upon identification of the human remains as Native American, the Tribe shall be consulted further to determine the proper course of action and disposition of the remains, including reinterment, if desired, by the Tribe in accordance with the Native American Graves Protection and Repatriation Act. The Tribe shall provide input in designing emergency burial relocation, if necessary, and shall serve as the liaison with the Wampanoag Confederation and Tribal Councils. The Tribe shall be given an opportunity to carry out religious ceremonies and rituals attendant upon reinterment of the remains. The Tribe shall be responsible for the timely and expeditious treatment and disposition of the remains.
11. At any time during the implementation of the measures stipulated herein should any objection to any such measure or manner of implementation be raised, all parties shall take the objection into account and consult as needed to resolve the objection. If further consultation is not productive and the objection is not resolved, the comments of the Advisory Council on Historic Preservation (Council) will be sought as stipulated in 36 CFR 800.2(b)(2). The Council, as the Federal agency established to implement and oversee the Section 106 process, may decide to become involved or may be invited to consult by any of the consulting parties as a means of resolving conflicts and completing the Section 106 process.
12. Execution and implementation of this Memorandum of Understanding evidences that EPA and the Corps have complied with their Section 106 responsibilities with the Tribe for all individual undertakings of the Remedial Action. Should any party to this Memorandum determine that some portion of it cannot be met, is not being met or believes a change is necessary, that party shall immediately notify the other parties in writing and request the parties consult to consider an amendment or addendum to this Memorandum which would ensure full compliance. Such amendment or addendum shall be executed in the same manner as the original Memorandum.

U.S. Army Corps of Engineers, New England District

By: Brian E. Osterndorf  
Colonel Brian E. Osterndorf, District Engineer

Date: July 1, 2002

U.S. Environmental Protection Agency, Region 1

By: Patricia L. Meaney  
Patricia L. Meaney, Director, EPA Region 1,  
Office of Site Remediation and Restoration

Date: July 9, 2002

Wampanoag Tribe of Gay Head (Aquinnah),

By: Beverly M. Wright  
BEVERLY M. WRIGHT  
CHAIRPERSON

Date: 6/5/02

**Commonwealth of Massachusetts**

**The Massachusetts Family Recovery Collaborative**

**Memorandum of Understanding**

**A Collaborative Agreement among the Massachusetts  
Departments of Social Services and Public Health, Bureau of Substance Abuse  
Services, Massachusetts Juvenile Court, and the Wampanoag Tribe of Gay Head  
(Aquinnah)**

**Commonwealth of Massachusetts**

**Memorandum of Understanding  
A Collaborative Agreement among the Massachusetts  
Departments of Social Services and Public Health, Bureau of Substance Abuse  
Services, Massachusetts Juvenile Court, and the Wampanoag Tribe of Gay Head  
(Aquinnah)**

**I. Declaration**

The Department of Social Services (DSS), Department of Public Health/Bureau of Substance Abuse Services (DPH/BSAS), the Administrative Office of the Trial Court – Juvenile Department (Court), and the Wampanoag Tribe of Gay Head Aquinnah (Tribe) do hereby enter into this Memorandum of Understanding (MOU) for the purpose of developing an integrated, coordinated system of care for families where parental substance use disorders result in the maltreatment and/or neglect of children or increase the risk of such maltreatment or neglect, with the goal of improved well-being of children and strengthened families. These entities, hereinafter referred to as the “parties,” constitute the Family Recovery Collaborative (Collaborative).

**II. Background and Purpose**

The parties enumerated above recognize that a majority of families brought before the Juvenile Court pursuant to Mass. G.L. c. 119 present with substance use disorders (SUDs) that impair parents’ ability to safely and adequately meet their children’s basic needs and that only a minority of these parents are able to enter into and complete substance abuse treatment within the time frame established by Massachusetts’ law and regulation and federal law pursuant to the Adoption and Safe Families Act. Unavailability of appropriate services that can be accessed by parents within a reasonable period of time is a substantial roadblock to strengthening and/or reuniting families. The parties further recognize that children are negatively affected by their parents’ substance abuse and experience greater risk of emotional, behavioral and social difficulties as a result. Individuals dealing with substance abuse are similarly faced with its negative impact on their parenting and the risk of government intervention and possible loss of custody of their children. Finally, the parties also recognize that many families within the target population participate in services from multiple agencies and providers but service delivery is often fragmented. Many of these families also experience mental health issues, trauma, and domestic violence, requiring multiple services and systems to provide a seamless system of care.

Building upon their history of cross-system planning efforts, the parties sought and were awarded a Technical Assistance grant from the National Center for Substance Abuse and Child Welfare (NCSACW) in 2005. This MOU is one of the products of the collaboration

among the parties conducted under the auspices of the NCSACW grant, and represents the agreement of the parties to put into effect the recommendations of the Family Recovery Collaborative team.

The purpose of this Memorandum of Understanding is two-fold:

1. To serve as the template for developing and implementing collaborative policy and practice among participating systems; and
2. To delineate the roles and responsibilities of the parties, as well as the parameters of information sharing, communication, problem resolution, and resource allocation.

### **III. Priorities and Goals of Collaborative Efforts**

The priorities of the Family Recovery Collaborative are to address the issues confronting the children and families who are affected by substance use disorders. This population includes:

1. Families involved with DSS and the Juvenile Court where parents or caregivers have substance use disorders;
2. Children, youth, and families identified by DSS who are not court-involved but where parents or caregivers have substance use disorders;
3. Children, youth, and families in substance use treatment who are not involved with DSS but whose substance use disorder places them at risk for DSS involvement.

The goals of Family Recovery Collaborative are to:

1. Develop and implement an integrated system of care for families where substance use disorders are present such that these families, when identified by a system participant, receive immediate access to substance abuse service providers and collateral support services to engage parents and maintain children's safety and welfare. Services will also be sought to address a parent's mental health, trauma, and domestic violence treatment needs if identified.
2. Increase the systems' capacity to better serve families impacted by substance use disorders by (a) having DSS workers screen for substance use disorders and Indian Child Welfare Act (ICWA) eligibility at intake/assessment; (b) having contracted substance abuse service providers screen for child well-being and impact of parental substance use on child functioning; and (c) encouraging judges, probation officers, attorneys, and court clinicians to collaborate with and support parents in their treatment efforts;
3. Improve communication and information exchange among systems, practitioners, communities, consumers and families by developing and implementing standardized releases of information and informed consent forms;
4. Develop and implement a system of multidisciplinary training in SUDs, screening protocols, evidence-based interventions, children's mental health, child development and well-being, the impact of substance use on parenting, and culturally and gender-appropriate service delivery;

5. Improve access to culturally and gender appropriate services; and
6. Develop ongoing mechanisms of program evaluation to improve service quality, effectiveness, and sustainability to meet the needs of families across systems.

#### **IV. Statement of Shared Values**

The Family Recovery Collaborative establishes the following shared values and guiding principles:

- No one organization or system can address all of the substance use problems facing families and communities. Ensuring child safety and family health requires collaboration and partnership among families, professionals, agencies, organizations, and communities.
- Effective collaboration requires that individuals, families, systems, and communities value differences and diverse perspectives but seek to establish a common purpose that creates a shared vision for their community.
- Families experiencing alcohol and other drug problems often share histories of violence and trauma. Our systems should seek to work together in an integrated approach to minimize the possibility of further trauma and abuse.
- Every parent who has an alcohol or other drug problem should have a fair shot at recovery with timely and comprehensive treatment within their community. Every child who is experiencing his/her own alcohol and/or other drug problems, either directly or indirectly, should also have fair access to treatment and recovery.
- Services should be family-focused and needs-driven, utilizing best practices. Services should respect culture and language at all levels. Service standards must be quality-driven and maintained through a commitment to life-long learning.
- The needs of the children, youth, and families of the Wampanoag Tribe and other Native American families of federally recognized tribes residing in the Commonwealth are understood to be unique and complex because of their sovereign status and the historic failure by the American government to address these needs. Service delivery to this population should not only conform to the requirements of the Indian Child Welfare Act but also be culturally competent and delivered by well-trained providers.
- Every child has a right to be free of abuse and neglect, and a child's developmental needs take precedence over the timing of parental recovery.
- Safety and permanency are the birthright of every child in our community. The goals of the child welfare system and its partners are to support safe, nurturing, and permanent families for children within their community – where possible within the biological family and where not possible with another permanent family. In all

circumstances, compliance with the requirements of the Adoption and Safe Families Act of 1997 is paramount.

## **V. Initial Priorities and On-going Planning Efforts**

The parties agree to develop an integrated system of care based upon the following priorities and plans, and acknowledge that these priorities represent the minimal level of service delivery and infrastructure development.

### **A. Initial Priorities for Practice**

Initial priorities established in the approved Scope of Work include the following products:

#### **1. Screening and Assessment**

- (a) The parties shall choose screening questions/ protocols and integrate them into the intake/assessment policies and practices of both DSS workers and substance abuse providers. DSS social workers shall be trained to screen for substance use disorders, their impact on the child/ren in the family, and Indian Child Welfare Act eligibility during the intake/assessment phase for all new cases, document the outcome of these screenings, and make referrals according to interagency protocols to be devised by the parties. In addition, substance abuse practitioners shall include child and parenting focused questions in substance abuse assessment procedures and shall document the results of such screening in all case records. Policies to support consistent family-centered practice and data collection mechanisms shall be included in both substance abuse and child well-being screening procedures. The Juvenile Court should be consistently aware of substance abuse dynamics and the effects of SUDs on children and parents. The Court should support and encourage recovery efforts of parents and collaboration among systems.
- (b) The parties agree to develop and implement procedures for the sharing of information across agencies, including the judicial system to the extent permissible by due process and other legal considerations, that are consistent with applicable state and federal law. Such procedures shall include an informed consent process for participating parents that addresses the purpose of the screening and/or intervention, confidentiality of DSS, mental health, and substance abuse information and exceptions thereto, the purpose of sharing information across agencies, the use of such information in pending or future court proceedings, the right to revoke consent at any time, the right to ask and have questions answered prior to giving consent, and the expiration date of the consent. Children age 12 or older can consent to their own drug dependence treatment and therefore informed consent about the release of confidential treatment information must be obtained in the same manner from these children/adolescents. See G.L. c. 112, § 12E.

## 2. Client Engagement and Retention in Care

The chief priority for Client Engagement and Retention is the procurement of immediate access to substance abuse services for parents and children who are identified by DSS through a mandated report or by a voluntary request for services and substance abuse is determined, after screening, to be an issue affecting the parent's capacity to safely and adequately care for his/her child/ren. Formal collaboration between DSS and DPH/BSAS to develop a system of funded pre-treatment (engagement) and treatment options for identified parents shall be explored and each agency shall seek resources to underwrite these services. The goal of these services is for parents to engage and remain in community substance abuse treatment services to achieve recovery. One strategy to achieve this goal is for a parent to receive contact from a Child Welfare/Substance Abuse Specialist (e.g., a trained peer support person who is well-established in his/her recovery) at the time of entry into the system, that is, when the family engages with DSS to determine the family's strengths and needs. This Specialist shall refer and, if necessary, bring the parent to an appropriate substance abuse treatment program that has agreed to give first priority to parents involved in the DSS and Juvenile Court systems. If the parent must wait to enter a program, the Specialist shall serve as the maintenance resource for the parent until the parent is admitted.

Family engagement and retention practices shall be based upon best practice and/or evidence-based models for intervention with parents whose use of substances is impairing their ability to adequately parent their children and with children whose lives are negatively impacted by their parents' substance use. Where possible, the parties will strive to ensure that parents and children have access to necessary services in their communities. All best practice and evidence-based models must have demonstrated capacity for use with varying cultural groups as well as demonstrated sensitivity to gender issues in SUD treatment. The parties shall strive to engage practitioners with demonstrated cultural competence with the goal of developing a workforce that is reflective of the cultural diversity of the communities that they serve.

The parties shall develop systems of data collection to track important variables such as time from referral to service delivery, length of treatment, and treatment outcomes. The overall purpose of data collection is to assist in ongoing program assessment and monitoring of the efficacy of screening and intervention strategies. The parties agree to review and integrate the results of such assessment and monitoring into their ongoing planning and cross-systems collaborations.

### 3. Training and Staff Development

The parties shall establish a collaborative system of ongoing training to address the training and professional development needs of practitioners in the child welfare, substance abuse, tribal, and juvenile court systems as well as those who care for children affected by parental substance abuse. Input from consumers and the recovery community shall be sought in the development and implementation of this training.

### B. On-going Planning

The parties agree to extend their collaboration beyond the expiration of the NCSACW Technical Assistance Grant on March 31, 2006, and develop a multiyear plan to implement and support the products of the grant. The parties recognize that it will take time to bring about the systemic change and collaboration envisioned by this project. The multiyear plan shall address the Ten Elements of System Linkage developed by NCSACW. The ten elements are:

- Underlying Values and Principles of Collaborative Relationships
- Daily Practice – Client Screening and Assessment
- Daily Practice – Client Engagement and Retention in Care
- Daily Practice – Services to Children of Substance Abusers
- Joint Accountability and Shared Outcomes
- Information Sharing and Data Systems
- Training and Staff Development
- Budgeting and Program Sustainability
- Working with Related Agencies
- Working with the Community and Supporting Families

The Massachusetts State Application for the In-Depth Technical Assistance Program was developed utilizing the Ten Elements of System Linkage provided by NCSACW, and it is on file for reference. The multiyear plan will also address relevant cross-system issues raised by the State Team.

Each party shall identify a staff person as the agency liaison who will be the point person for oversight of implementation, sustainability, and further development of the Multiyear Plan. This point person shall serve as the party's liaison, and will actively participate in meetings and subcommittee work of the Family Recovery Collaborative. Further, the parties agree to share equally in the administrative support of the project, including but not limited to hosting a quarterly meeting, providing administrative support for the distribution of meeting notices, taking and distributing meeting minutes, providing meeting space and refreshments, sharing costs of product development and dissemination, and any other similar support activity mutually agreed to by the parties. In recognition that the resources available to the parties are not equally distributed, a party may seek to offer a substitute in-kind service in lieu of, for example, hosting a meeting.

## **VI. Roles and Responsibilities for Implementing Collaborative Practice**

### **A. Lead Agency Designation and Committees**

The parties agree to participate and be mutually responsible for the implementation of the provisions of this agreement. In addition, there are specific roles and responsibilities as delineated in the approved work plan.

#### **1. Lead Agency**

For the purposes of the NCSACW In-depth Technical Assistance Program, DSS shall serve as lead agency. In this capacity, DSS shall be responsible for coordinating the Core and State Team meetings, in addition to coordinating all information and reporting requirements of the project with NCSACW. All parties agree to provide DSS with appropriate materials and a timely response to meet deadlines for meetings and other requirements and DSS agrees to meet its obligations and deadlines in a timely manner.

#### **2. Oversight Committee**

Oversight accountability for the project rests with the Commissioners of Social Services and Public Health, Chief Justice of the Juvenile Court, and Wampanoag Tribal Council Chairman as signatories to this agreement.

#### **3. Core Team**

System representatives from DSS, DPH/BSAS, the Court, and the Tribe comprise the Core Team and shall act in an executive capacity for the State Team.

#### **4. State Team**

The State Team is the main body of the Massachusetts Family Recovery Collaborative. It is comprised of state, tribal, and local system representatives, and includes providers, consumers, community agencies, and advocacy groups.

#### **5. Work Groups**

Work groups are composed of State Team members and other individuals as required to develop and implement specific products outlined in the work plan or as may otherwise be identified. Each work group will be Co-chaired by a member of the Core Team and a member selected by the work group.

### **B. Joint and/or mutual roles and responsibilities among the parties of this agreement include:**

#### **1. Information Exchange and Confidentiality**

- a. DSS and DPH/BSAS, in collaboration with the Juvenile Court and the tribe, will develop a mutually agreed upon Release of Information and Informed Consent Form that will comply with the Federal and State Confidentiality laws.

- b. DSS and DPH/BSAS programs will obtain releases of information in accordance with Federal, State, and tribal regulations to allow exchange of information beyond accessing services or responding to child or family emergencies. The requirements regarding confidentiality of records in DSS and DPH/BSAS will be summarized and communicated to providers in each agency.
  - c. Service agreements will be developed between participating agencies to allow the transfer of initial referral information, particularly to facilitate access to the appropriate service or respond to child or family emergencies.
2. Resource Allocation

Except as otherwise noted, nothing in this agreement shall be construed as obligating agencies to expend funds or be involved in any obligation for future payment of money or provision of resources. This instrument is neither a fiscal nor a funds-obligation document. Any endeavor involving reimbursement or contribution of funds between the parties to this instrument will be handled in accordance with applicable laws, regulations, and procedures including those for federal procurement, assistance, and printing. Such endeavors shall be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority.

The foregoing paragraph notwithstanding, and subject to other federal and/or state provisions, the parties do agree to seek and/or commit resources that enhance priority access to substance use services by families engaged in the child welfare system, maximize cross system funding opportunities and fund leveraging between the parties, and ensure a commitment to resource sustainability.

3. Conflict Resolution

The parties shall develop and disseminate protocols for resolving conflict between the parties. In general, disputes should be resolved at the level closest to the conflict. In addition to consumer rights and grievance procedures, these protocols shall delineate the process for resolving conflict among the system partners, based upon resolution at the lowest possible level and containing provisions or procedures for conflict resolution in the event such efforts are unsuccessful.

## **VII. General Terms and Conditions of Agreement**

### **A. Term of Agreement**

The term of this agreement shall commence on the date on which all parties sign this agreement and remain in full force and effect unless terminated in writing by agreement of all parties. Any party may terminate its participation in this agreement by giving forty-five (45) days written notice to the other parties. This agreement may be renewed or renegotiated upon written mutual consent of the parties.

**B. Amendments**

This agreement may be amended by mutual consent of the parties. Amendment within the scope of this Memorandum shall be made by formal consent of all parties, by the issuance of a written amendment, signed and dated by the parties.

**C. Meetings and Communications**

Meetings and communications among the parties of this agreement shall be conducted in the following manner:

1. The State Team shall meet, at a minimum, on a semi-annual basis or more frequently as required. The purpose for State Team meetings is to facilitate ongoing inter-agency planning and collaboration, and will be used to identify needs, seek input, and develop strategies for improved policy and practice. The agenda and format for State Team meetings shall be developed by the Core Team and shall be sent to the State Team in advance of the State Team meeting. Responsibility for the logistical requirements of these meetings shall rotate among the parties.
2. The Core Team shall meet at least monthly or more frequently as required to review the provisions and operations set forth in this agreement. These meetings shall be held either in person or through teleconference, and minutes will be distributed and kept on file by DSS.
3. Work Groups shall meet as needed. Agendas for the work groups shall be developed by the Co-chairs and sent to work group members in advance of the meeting. Minutes of the work group meetings shall be sent to the Core Team and kept on file by the Co-chairs and DSS.
4. The Commissioners of the Departments of Social Services and Health, Chief Justice of the Juvenile Court, and the Chair of the Wampanoag Tribal Council shall convene at least once prior to the termination of this agreement to receive a report from the Departments and to determine what future actions, if any, need to be taken.

**D. Approvals**

This document has been reviewed and approved as to form and content.

**E. Notice**

Notice to the parties in connection with this agreement shall be given by service in person or by first class mail addressed as follows:

Commissioner Harry Spence  
Department of Social Services  
24 Farnsworth Street  
Boston, MA 02210

Commissioner Paul Cote  
Department of Public Health  
250 Washington Avenue  
Boston, MA 02108

Chief Justice Martha P. Grace  
Administrative Office of the Trial Court – Juvenile Department  
3 Center Plaza, Suite 520  
Boston, MA 02108

Donald Widdiss, Tribal Chairman  
20 Black Brook  
Aquinnah, MA 02535

## IX. Signatures

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first written below.

BY:

Commissioner Harry Spence  
Department of Social Services

\_\_\_\_\_

Date

BY:

Commissioner Paul Cote  
Department of Public Health

\_\_\_\_\_

Date

BY:

Chief Justice Martha P Grace  
Juvenile Court

\_\_\_\_\_

Date

BY:

Donald Widdiss, Chairman of the Tribal Council  
Wampanoag Tribe of Gay Head (Aquinnah)

\_\_\_\_\_

Date

**TRIBAL ENVIRONMENTAL AGREEMENT  
BETWEEN THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)  
AND  
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**I. PREAMBLE**

This Agreement, dated 2/17/04, is executed between the Wampanoag Tribe of Gay Head (Aquinnah), a Federally-recognized Indian Tribe, and the United States Environmental Protection Agency (U.S. EPA) in order to better achieve the parties' mutual environmental goals. This Agreement provides the framework for a government-to-government relationship in support of President Clinton's May 14, 1998 Executive Order 13084 concerning consultation and coordination with Indian Tribal governments, and President Clinton's April 29, 1994 directive on government-to-government relations with Native American Tribal governments. Both of these directives supplement the Administrator's Indian Policy of 1984 (reaffirmed by Administrator Whitman on July 11, 2002 and incorporated herein).

The parties will work cooperatively to develop and build strong environmental protection programs. The U.S. EPA will assist the Tribe in its long and short term planning and program implementation efforts. This Agreement outlines media specific tasks that need to be addressed and specific issues of common concern.

To assist the Wampanoag Tribe in building strong environmental protection programs, the Administrator's representative, the Regional Administrator of U.S. EPA, New England Region (EPA New England), will identify and seek to remove impediments to working directly and effectively with the Tribe consistent with U.S. EPA's Federal trust responsibility and Indian Policy.

The U.S. EPA recognizes and respects the governmental sovereignty of the Wampanoag Tribe and all of the authorities and powers vested in its duly elected Chairperson and Council. The U.S. EPA also recognizes that in order to have an effective working relationship with the Wampanoag Tribe, it must respect the Tribe's values and culture.

**II. PARTIES**

The parties to this Agreement include the U.S. EPA, represented by its Regional Administrator, and the Wampanoag Tribe, a sovereign government represented by its Chairperson and operating under Tribal laws.

### **III. PURPOSE**

The purposes of this Agreement are to promote strong environmental protection in Indian Country, to implement the Agency's Indian Policy that promotes a government-to-government relationship and the recognition of Tribal sovereignty in the environmental protection of Tribal resources, and to develop an understanding of Tribal environmental needs.

This Agreement reflects the parties' intention to build equal partnerships by working collectively as the Tribe establishes priorities for environmental protection.

This Agreement also is intended to build confidence and trust between the parties, enhance and improve their communications, and assist in their efforts to cooperatively develop, implement, and maintain a full range of comprehensive Tribal environmental programs. To this end, the U.S. EPA will work to provide the Tribe with access to resources related to the implementation of this Agreement.

### **IV. GUIDING PRINCIPLES**

In establishing this Agreement, the following principles are agreed to:

1. The U.S. EPA Administrator convened the Tribal Operations Committee, which is comprised of U.S. EPA senior management and Tribal leaders. The mission of this committee is to advance environmental protection and human health and safety, and to improve the conditions of Tribal health and the environment in Indian Country. The Tribal Operations Committee provides information to the parties concerning, among other things, the resource needs of Tribes.
2. All principles included in the U.S. EPA's Indian Policy shall apply, including but not limited to, the Federal trust responsibility, the government-to-government relationship, and Tribal sovereignty.
3. The government-to-government relationship shall be directly between the U.S. EPA and the Wampanoag Tribe.
4. This Agreement will be implemented with the goal of promoting stability in funding, capacity building, infrastructure development and other factors for long-term Tribal environmental program implementation.

5. The U.S. EPA recognizes that the Tribe's cultural/traditional ecological knowledge and expertise can be helpful in its decision-making processes. The U.S. EPA recognizes and respects Tribal environmental decisions based on traditional knowledge and will consider this knowledge, as appropriate, in the Agency's decision-making processes.
6. This Agreement is intended to promote flexibility and ensure common sense approaches while addressing the Tribe's needs. Environmental justice principles used in U.S. EPA's decision-making processes call for a recognition of Tribal cultural concerns, such as subsistence needs and traditional practices and uses of natural resources.
7. The parties recognize that implementation of this Agreement will require a comprehensive educational effort extending to all of EPA New England to promote an understanding of the unique relationship between the parties and the government-to-government relationship affirmed in this Agreement.
8. While implementing this Agreement, the Agency is committed to on-going, timely, and open communications with the Tribe. All efforts will be made to provide timely advice on available grants and other sources of available funding, training, and on-going meetings that affect the Wampanoag Tribe (including the transfer of "state of the art" technologies).

#### **V. ADDITIONAL CONSIDERATIONS**

It is the understanding of both parties that the Tribe's long term goal is to address, implement, and maintain, where deemed necessary by the Tribe, the full range of U.S. EPA's activities and programs.

EPA New England, along with acting consistently with the principles of this Agreement, will act in accordance with the laws and treaties of the United States.

The parties recognize that natural laws coupled with a cultural understanding determine the Tribe's approach to Tribal ecosystems and environmental protection.

The Wampanoag Tribe and the U.S. EPA recognize that a system of accountability within each other's organization is critical to the successful implementation of this Agreement. Therefore, the Chairperson and/or his designee and the EPA New England Regional Administrator will direct appropriate staff to follow the principles and guidelines of the Agreement in

working with corresponding representatives, be accountable for their actions, and act in a professional manner consistent with this Agreement.

In order to successfully implement the Agreement, the Wampanoag Tribe and the U.S. EPA will each ensure that their organizations, decision-making processes and relevant personnel are known to each other.

This agreement does not change any laws or rights of the parties, or create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person. Additionally, nothing in this Agreement shall be construed as obligating either party to the expenditure of funds in excess of appropriations authorized by law, or as otherwise committing either party to actions for which it lacks statutory or legal authority.

Goals, objectives and/or work plans relating to implementation of the principles of the Agreement are identified and attached as part of this Agreement.

## **VI. COMMUNICATION**

The parties agree that in support of their common interests, documents and other information generated by the parties in furtherance of the U.S. EPA's trust and statutory responsibilities may be shared between the parties. The U.S. EPA agrees to coordinate and consult with the Tribe on environmental matters that may impact upon the Tribe, and the Tribe agrees to provide views, advice, comments, recommendations, evaluations and other assistance as requested by the U.S. EPA to assist it in the performance of its duties.

To the extent permitted by law, the parties agree to protect documents in their possession or control that have been exchanged among the U.S. EPA (and any of its subdivisions or contractors), other Federal agencies, the Tribe, and the parties' technical representatives (including any attorneys and consultants to the U.S. EPA, other Federal agencies, or the Tribe). The affected documents may include those provided by the Tribe and used by the U.S. EPA in the deliberative and decision-making processes necessary to carry out its statutory functions and responsibilities. In the event disclosure of a document to a party outside this agreement is required by law, each party agrees to notify the other party of such release prior to the proposed date of disclosure.

## **VII. LONG-TERM ENVIRONMENTAL GOALS OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)**

### **EPA's GOVERNMENT PERFORMANCE AND RESULTS ACT GOALS**

#### **Goal 1: Clean Air**

Objective 1.1 Maintain and Improve Outdoor Air Quality

Regional Sub objectives:

- Ozone
- Particulate Matter
- Other Criteria Air Pollutants
- Air Toxics

Objective 1.2 Indoor Air

Regional Sub objective:

- Indoor Air Quality

Objective 1.3 Atmospheric Change

Regional Sub objectives:

- Climate Change
- Stratospheric Ozone

Objective 1.4 Radiation

Regional Sub objectives: To be Determined

Objective 1.5 Science/Research

Regional Sub objectives:

- Science to Support Air Programs
- Air Pollution Research

#### **Goal 2: Clean and Safe Water**

Objective 2.1 Protect Human Health

National Sub objective 2.1.1 Water Safe to Drink

Regional Sub objectives:

- Delivery of Safe Drinking Water
- Protection of Drinking Water Sources From Contamination

National Sub objective 2.1.2 and 2.1.3 Fish Safe to Eat and Water Safe for Swimming

Regional Sub objectives:

- Restore and Protect Water Quality to Support, Fishing, Shell Fishing and Swimming Uses

Objective 2.2 Protect Water Quality

Regional Sub objectives:

Restore and Protect Water Quality on a Watershed Basis

Protect and Enhance the Physical, Chemical, and Biological Components of Estuarine and Marine Ecosystems

Objective 2.3 Science and Research

Regional Sub objectives:  
Sound Science to Support Decision Making

### **Goal 3: Preserve and Restore the Land**

Objective 3.1 Preparedness and Response

Regional Sub objectives:

- Preparedness
- Response
- Prevention

Objective 3.2 Prevention and Conservation

Regional Sub objective:

- Reduce Solid Waste and Promote Recycling

Objective 3.3 Cleanup

Regional Sub objectives:

- Control Site Risks
- Make Land Available for Reuse

### **Goal 4: Healthy Communities and Ecosystems**

Objective 4.1 Chemical, Organism and Pesticide Risks

Regional Sub objective:

- Reduce Human Exposure to Toxic Substances

Objective 4.2 Community Health

Regional Sub objectives:

- Urban and Sensitive Populations
- Smart Growth
- Facilitate the Restoration and Redevelopment of Brownfields Properties

Objective 4.3 Ecosystems

Regional Sub objectives:

- Freshwater Ecosystems
- Wetland Ecosystems
- Estuarine and Marine Ecosystems
- Terrestrial Ecosystems

Objective 4.4 Homeland Security

Regional Sub objective:

- Enhance the Region's Capability To Prevent, Detect, Protect, and Recover From Acts of Terror

Objective 4.5 Science/Research

Regional Sub objective:

- Sound Science

### **Goal 5: Compliance & Environmental Stewardship**

Objective 5.1 Improve Compliance

Regional Sub objective:

- Increase Compliance of the Regulated Community

Objective 5.2 Improve Environmental Performance Through Pollution Prevention

Regional Sub objectives:

- Reduce Environmental Impacts Through Superior Performance
- Improve Environmental Performance Through Pollution Prevention and Innovation
- Implement NEPA-

Objective 5.3 Build Tribal Capacity

Regional Sub objective:

- Tribal Environmental Quality

FOR THE WAMPANOAG TRIBE OF  
GAY HEAD (AQUINNAH)

Dated: 2/17/04

Beverly M. Wright  
CHAIRPERSON  
WAMPANOAG TRIBE OF GAY HEAD  
(AQUINNAH)

FOR THE UNITED STATES

Dated: 2/17/04

Barry L. /for  
REGIONAL ADMINISTRATOR  
EPA NEW ENGLAND

**OPERATIONAL PLAN**  
**Amended November 3, 2011**

**Pursuant To the Agreement Between  
The Wampanoag Tribe of Gay Head (Aquinnah)  
And Town of Aquinnah, Massachusetts**

**I. INTRODUCTION**

Pursuant to the Agreement, the Tribe and Town have agreed to coordinate services to ensure the highest level of public services (including but not limited to police, fire, emergency medical and natural disaster) throughout the town, including Tribal lands, in the event of a disaster, fire, emergency or non-emergency situations.

**A. Purpose**

The purpose of the Plan is to outline the procedures to be followed by both the Town and the Tribe in the event of emergency and non-emergency response within the Town

**B. General Considerations**

1. **Communication System:** Emergency calls made to 911 and non-emergency calls to 693-1212 are received by the Dukes County Communications Center, under the direction of the Dukes County Sheriff's Department. The center takes all emergency and non-emergency calls involving police, fire, medical and other public safety issues, and directs them immediately to the appropriate service.

2. **Entity with Primary Responsibility in a Given Emergency:** Upon receiving an emergency or non-emergency call which requires response within the Town, including Tribal Lands, the Dukes County Communications Center shall contact the appropriate entity to respond:

- a. **Police:** Town Police Department
- b. **Fire:** Town Fire Department
- c. **Medical:** Tri-Town Ambulance Service
- d. **Natural Disaster:** Participating Agencies: Tribal Emergency Management, Town Emergency Management,

Dukes County Emergency Management, Massachusetts Emergency Management Agency (M.E.M.A.), Federal Emergency Management Agency (F.E.M.A.)

- e. **Emergency Management Director:** Appointed representative responsible for the planning, preparation and response to natural disasters and/or emergencies of a specific nature or threat.

## II DEFINITIONS

### A. As used in this Plan:

1. **Agreement:** Agreement between the Tribe and the Town, ratified on June 5, 1995.

2. **Assistant Harbor Master:** Appointed person(s) with the limited authority for supervising the operations of the town harbor and executing the regulations respecting the use of the Town harbors and waterways. Authority and scope of service is determined by the Harbor Master and Selectmen of the Town.

3. **Building Inspectors:** The Town personnel responsible for preliminary, interim and final inspections during construction and renovation of a structure.

4. **Citation:** Penalty for violations of the Town by-laws or Commonwealth of Massachusetts criminal laws.

5. **Chief of Police:** Highest ranking Officer of the police department, appointed by the Selectmen of the Town responsible for the activities and personnel of the police department.

6. **Child Welfare Social Worker:** Employee of the Tribe who has the authority to administer the Indian Child Welfare Act, 25 U.S.C. 1990 et seq., as it relates to the care, protection and custody of Tribal children.

7. **Deputy Shellfish Constable:** Appointed person(s) with the limited authority to initiate, promote and manage shellfisheries in the Town of Aquinnah waters, promote studies as necessary to enhance the value of such shellfisheries. Enforce all statutes, ordinances, by-laws, rules and regulations relative to shellfish in the Town.



Authority and scope of service is determined by the Shellfish Constable.

**8.Designee:** Tribe or Town representative empowered to carry out the responsibilities of another Tribe or Town representative.

**9.Director of Natural Resources:** Employee of the Tribe responsible for the activities, equipment and personnel of the Natural Resources Department.

**10.Emergency Management Director:** Appointed representative of either the Tribe or Town; responsible for the planning, preparation and response to natural disasters and/or emergencies of a specific nature or threat.

**11.Fire Chief:** Fire fighter, appointed by the Selectmen of the Town responsible for the activities and personnel of the fire department.

**12.Harbor Master:** Town official responsible for supervising the operations of the town harbor and executing the regulations respecting the use of the Town harbors and waterways.

**13.Highway Superintendent:** Employee of the Town of Aquinnah responsible for the maintenance and repair of town owned roads, easements and ways.

**14.Housing Authority:** Aquinnah Wampanoag Tribal Housing Authority, Inc. created by the Tribe with responsibility to develop, maintain and operate housing projects and appurtenances.

**15.Housing Authority Director:** Employee of the Housing Authority responsible for the activities, equipment and personnel of the Housing Authority.

**16.Judiciary:** Aquinnah Wampanoag Judiciary of the Wampanoag Tribe of Gay Head (Aquinnah)

**17.Natural Resources Department:** Tribe department that maintains environmental programs, including the Ranger program on Tribal Lands, as well as beyond the boundaries of Tribal land.



18. **Officer in Charge (O.I.C):** Town police or Fire officer responsible for an event or function.

19. **Operational Plan Committee:** Committee composed of representatives of the Town and Tribe who meet annually to review and revise the Plan. The committee members from the Tribe are the Chairperson, Natural Resources Director, Emergency Management Director and Housing Authority Director. Representatives from the Town are the Chairman of the Board of Selectmen, Police Chief, Fire Chief, Emergency Management Director

20. **Plan:** Operational Plan which constitutes the entirety of this document.

21. **Ranger:** Conservation Ranger, employee of the Tribe, that authority to enforce the Tribe's Laws and all other criminal violations for which local enforcement is not prohibited by 18 U.S.C. 1152 and 1153.

22. **Shellfish Constable:** Town employee with the authority to initiate, promote and manage shellfisheries in the Town of Aquinnah waters, promote studies as necessary to enhance the value of such shellfisheries. Enforce all statutes, ordinances, by-laws, rules and regulations relative to shellfish in the Town.

23. **Special Officer: Tribe Employees:** Conservation Ranger(s) and/or Natural Resources Department employee(s) who have completed the minimum hours required for Reserve Intermittent Officer Training through the Municipal Police Training Committee and have been appointed Special Officer(s) by the Town Selectmen.

24. **Town:** Town of Aquinnah, Massachusetts

25. **Tribal Lands:** lands for which the Tribe has established legal title or access to, particularly those lands held in trust status. These lands include, but are not limited to: the Gay Head Cliffs and its egresses, the Common Lands, Herring Creek and other properties leased or held by the Tribe in fee simple ownership.

26. **Chairperson:** The duly elected Chairperson of the Tribe;



or, in the absence of the Chairperson, his/her appointed designee.

27. **Tribe:** Wampanoag Tribe of Gay Head (Aquinnah)

### III. LAW ENFORCEMENT ACTIVITY

#### A. Coordination of Resources/Activities between Town Police and Tribe Programs

##### 1. Crime Prevention and Public Education

- a. The Town and the Tribe shall cooperatively plan and conduct crime prevention and educational programs for both tribal and non-tribal residents of the Town.

##### 2. Emergency Preparedness

- a. The Tribe shall make equipment, vehicles and vessels available at all times to support emergency responses to the Town at the request of the on duty police officer in charge of the Town of Aquinnah.
- b. The Town shall provide a designated space at the West Basin dock for a Tribe-owned vessel. The vessel(s) shall be available at all times for operators approved by the Director of Natural Resources, Chief of Police and Town Harbor Master for patrol, research and response activities.

##### 3. Regular Meetings

- a. **Chief of Police and Director of Natural Resources:** The Chief of Police and Director of Natural Resources shall meet on a regular basis as appropriate to review actions taken by their respective departments and personnel pursuant to this Plan, and to develop and recommend amendments or alterations to the Plan, as necessary.

- i. May - November (Summer Season and Hunting Season): Meetings shall be held weekly.

- ii. December - April: Meetings shall be held as deemed



necessary by the Chief of Police and the Director of Natural Resources.

b. **Chief of Police and Human Services Director:** The Chief of Police and Director of Human Services shall meet as appropriate to review actions taken by their respective departments and personnel pursuant to this Plan; and to develop and recommend amendments to the Plan, as necessary

c. **Fire Chief and Director of Natural Resources:** The Fire Chief and Director of Natural Resources shall meet on a regular basis to review actions taken by their respective departments and personnel pursuant to this Plan, and to develop and recommend amendments to the Plan, as necessary.

#### 4. Town Police Activities

##### A. Town of Aquinnah Police Department

1. Town Police Officers shall have powers to enforce all applicable Town and state laws while on Tribal Lands.
2. Town Police shall routinely patrol the roads on Tribal Lands as designated patrol areas in the same manner and frequency as they patrol municipal roads.
3. Town Police shall respond to emergency and non-emergency calls from, and provide law enforcement services to dwellings and persons on Tribal Lands of the same nature and extent as are provided to other dwellings and persons on non-Tribal Lands.
4. Town Police shall respond to incidents on Tribal Lands observed during routine patrols or otherwise in performance of their duties as authorized the Plan.
5. Following an emergency incident or exigent circumstance on Tribal Lands the Officer in Charge (O.I.C.) shall notify the Chairperson or authorized designee as soon as possible, but no later than 24 hours. The Chairperson shall

disseminate the information as appropriate. Written notice shall be made available to the Tribe within 48 hours.

5. a. For any law enforcement action on Tribal Lands, the Chief shall provide verbal or written notice to the Chairperson (or her/his authorized designee) prior to the action taking place, except where there is:
  - (i). Reasonable fear of flight by a suspect as a result of prior notice;
  - (ii). Reasonable belief that the success of the action would be jeopardized as a result of prior notice;
  - (iii). Reasonable belief that officer safety would be compromised as a result of prior notice;
  - (iv). reasonable belief of imminent danger to life or property as a result of prior notice;
  - (v). Unplanned pursuit of a suspect from non-Tribal Lands to Tribal Lands; or
  - (vi). Other emergency or exigent circumstances that would make prior notice impractical.
- b. For any law enforcement action on Tribal Lands where prior notice is not provided under paragraph (a):
  - (i). The Chief shall provide verbal notice to the Chairperson (or her/his authorized designee) as soon as reasonably possible, but in no event more than 12 hours after the completion of the law enforcement action, and
  - (ii). The Chief shall provide a written report to the Chairperson (or her/his designee) within 48 hours after the completion of the law enforcement action. Such report shall describe the law enforcement action on Tribal lands and shall include an explanation and justification as to why prior notice was not provided.
- c. If, after receiving the written report described in subparagraph (b)(ii), the Tribe is not satisfied with the explanation and justification

for the failure to provide prior notice, the Chairperson shall notify the Chief and the Board of Selectmen. A meeting between the Board, the Chief, and the Chairperson shall be held as soon thereafter as reasonably possible, at which time the Tribe's objection to the failure to provide prior notice shall be discussed in an effort to reach agreement on the matter and avoid future disputes.

6. The Tribe may formally request the assistance of Town police officers from the Chief of Police or O.I.C. to assist with Tribe functions or special events and the Officer(s) shall be paid by the event sponsor or by the Tribe.

**B. Wampanoag Tribe of Gay Head (Aquinnah) Rangers**

1. Rangers perform the following duties: patrol Tribal Lands, enforce Tribal laws, protect, enhance and preserve the lands, waters, air and sustenance foods of the Tribe.
2. Rangers shall receive their daily assignments from the Director of Natural Resources.
3. The Director of Natural Resources shall inform the police of the vicinity in which the Rangers will be performing their assignments.
4. Rangers shall be issued uniforms by the Tribe, which reflect their identity as employees of the Tribe.
5. Rangers shall be issued law enforcement equipment and supplies at the expense of the Tribe which meet the standards of the Aquinnah Police Department.
6. Rangers shall carry and dispense emergency medical supplies approved for use by the Tri-Town Ambulance Service.

**C. Rangers as Special Officers**

1. When acting as Special Officers, Rangers are performing under the supervision and direction of the Chief of Police



or Officer In Charge.

2. Rangers shall not represent themselves as Town Police Officers and shall not display a Town Officer badge unless instructed to do so by the Chief of Police or Officer in Charge.
3. Rangers in performance of their duties shall be authorized to issue citations at the discretion of the Chief of Police.
4. The Town may formally request the assistance of the Ranger(s) in writing to the Director of Natural Resources. Verbal request is acceptable in times of an emergency.
5. Special Events: When requested by the Chief of Police, or designee thereof, to assist with special events, the Special Officer shall be paid by the event sponsor or by the Town.
6. Rangers shall not carry a firearm in performance of their duties as a Special Officer unless directed by the Chief of Police.

#### IV. FIRE

##### A. **Town of Aquinnah Fire Department**

###### 1. **Emergency Response on Tribal Lands**

- a. Fire Department personnel shall respond to emergency calls from, and provide fire emergency services to dwellings and persons on Tribal Lands.
- b. Fire Department personnel responding to requests for assistance on Tribal Lands shall be fully qualified under all applicable local, state and federal laws and regulations.
- c. Fire Department personnel shall follow the Standard Operating Procedure as adopted by the Fire Department when responding to emergencies on Tribal Lands.
- d. When responding to fire emergencies of the Housing Authority dwellings or property, the Fire Department shall utilize the fire cisterns, as appropriate.

2. **Emergency Response on Non-Tribal Lands**

- a. The Housing Authority and the Tribe shall make available its fire cisterns to the Town as needed by the Fire Department in performing its duties.
- b. During a fire emergency on non-Tribal Lands, the Fire Department shall first utilize the cistern closest to State Road in order to maximize the safety and welfare of the Housing Authority tenants. The Fire Department shall notify the Housing Authority Director of the Fire Department's use of the fire cisterns within 24 hours.
- c. If the emergency requires additional cistern water use, the Fire Department shall work in cooperation with the Housing Authority Director in order to secure the safety and welfare of the Housing Authority tenants.
- d. The Town shall provide Police Officers to monitor and secure the area of activity.
- e. The Town shall replace any water used from cisterns of the Housing Authority in response to fire emergencies on non-Tribal Lands.
- f. The Housing Authority and the Town shall cooperate in the care and maintenance of the cisterns and shall each be responsible for any damage caused to the fire cisterns by their own personnel.

V. **EMERGENCY MEDICAL SERVICES**

A. **Town Emergency Medical Personnel**

1. The Town has entered into an agreement with the towns of Chilmark and West Tisbury, Massachusetts to provide ambulatory services, referred to as Tri-Town Ambulance for emergency medical services within the respective towns, and a portion of Tribal Lands are located within the Town; Tri-Town Ambulance shall respond to emergency calls from, and provide emergency medical services to persons on Tribal Lands.

**B. Utilization of Tribal Personnel in Cooperation with Town Emergency Medical Services**

1. Upon completion of the requisite certification requirements to achieve status as an EMT for the Commonwealth of Massachusetts a Ranger responding to a medical emergency call does so as a volunteer EMT for the Tri-Town Ambulance and shall follow Region 5 Policies as adopted by Cape & Islands E.M.S. and the Standard Operating Procedure for medical emergencies as adopted by the Tri-Town Ambulance.

**C. Communication/Radio**

1. The Natural Resources Department shall maintain Tribal communication equipment. Department staff, when authorized by Town and/or state officials, shall utilize the communications center and direct radio contact with Town personnel.

**VI. NATURAL DISASTER ASSISTANCE**

**A. Emergency Management**

1. In the event of a natural disaster in the Town, which includes Tribal Lands, the Town Emergency Management Director or designee shall follow procedures as assigned by the responsible State or Federal Agency.
2. The Town Emergency Management Director shall respond to emergency calls and provide emergency services to Tribal Lands.
3. The Tribe's Emergency Management Director shall assign the use of any available personnel, equipment or facilities to support Tribe and Town protection of life and property in the event of a natural disaster.
4. The Town may seek reimbursement for services provided during a natural disaster or emergency event. The Tribe Emergency Management Director shall seek reimbursement for any allowable costs incurred by the Town, Tribe, and/or Housing Authority through the appropriate State or Federal Agencies



5. Shelter - The Tribe shall make available any suitable structure for the shelter of both Tribe and Town members.

## **VII. Public Safety**

### **A. Roadway Maintenance**

1. The Tribe shall make equipment used for road maintenance available to the Town, if available, upon request.
2. The Town shall make equipment used for road maintenance available to the Tribe, if available, upon request.
3. A log shall be maintained by the Director of Natural Resources indicating equipment used, duration of use and maintenance performed.
4. Requests for equipment use shall be made directly between the Director of Natural Resources and Highway Superintendent. Employees shall be responsible for securing approval from their respective employer.

### **B. Resource Protection**

1. The Town shall annually review and consider Tribe Natural Resources Department staff for appointments as Deputy Shellfish Constables to assist with the propagation and protection of fish and shellfish resources in the Town.
2. The Tribe shall make Natural Resources Department staff available, when possible, to support the propagation, restoration and enhancement of fish and shellfish resources in Town waters.
3. The Town shall annually review and consider Tribe Natural Resources Department staff for appointments as Assistant Harbormasters.
4. The Tribe shall make Natural Resources Department staff and equipment available, when possible, to assist with the management of the harbor and vessels in the Town.

**C. Inspection Services & Enforcement**

1. The Tribe shall utilize permit and inspection services as provided by the Town Building Inspector's office for new construction and renovation projects that would generally require a building permit under applicable law. Utilization of such services shall not preclude the Tribe from establishing its own inspection office in the future.
2. Building Inspectors are granted the power to enforce applicable laws and codes on Tribal Lands
3. The Town recognizes the primacy of the Land Use Commission for overall land use permitting on the Tribe's Trust Lands and shall not require that Projects be reviewed by the Town Permitting/Review Boards (including, but not limited to, the Conservation Commission, Planning Board, Board of Health and Zoning Board of Appeals), except as provided for in this Agreement or any other agreement between the Town and Tribe.

**IX. Judiciary and Town of Aquinnah**

1. The Chief of Police and/or his designees shall assist the Tribe's Judiciary to process fingerprint identification and other services in accordance with Tribal, state and federal laws and statutes.

**X. AMENDMENT TO OPERATIONAL PLAN**

1. This Plan shall be amended from time to time as deemed necessary by the Operational Plan Committee.
2. The Operational Plan Committee shall meet as necessary to review actions taken by their respective departments and personnel pursuant to the Plan.
3. The Operational Plan Committee shall draft the recommended amendments to the Plan and submit them to their respective government officials for their review.

IN WITNESS WHEREOF, the parties have executed the Agreement on the date and year first written by authority of the Wampanoag Tribe of Gay Head (Aquinnah) and the Town of Aquinnah, Massachusetts.

TOWN OF AQUINNAH

*Jim Newman*

Jim Newman  
Chairman  
Board of Selectmen

Date: 11/03/11

WAMPANOAG TRIBE OF  
GAY HEAD(AQUINNAH)

*Cheryl Andrews-Maltais*

Cheryl Andrews-Maltais  
Chairwoman

11/03/11

Date:

**INTERGOVERNMENTAL AGREEMENT  
BETWEEN THE  
WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)  
AND  
COMMONWEALTH OF MASSACHUSETTS**

**AGREEMENT AUTHORITY**

This Agreement is made and entered into this 17<sup>th</sup> day of December, 1997, by and between the Wampanoag Tribe of Gay Head (Aquinnah), hereinafter referred to as "the Tribe" and the Commonwealth of Massachusetts, acting through its Department of Social Services hereinafter referred to as "the Department."

This Agreement is entered into by the Tribe pursuant to the WTGH(A) Resolution 9313 of the Tribal Council on April 21, 1993, 25 U.S.C. Section 1771 et seq. and 25 U.S.C. Section 1919(a). 25 U.S.C. Section 1919(a) authorizes states and Indian tribes to enter into agreements concerning the care and custody of Indian children and the jurisdiction over child custody proceedings.

This Agreement is entered into by the Commonwealth of Massachusetts through its Department of Social Services under 25 U.S.C. Section 1919(a).

This Agreement is predicated on a government to government relationship in the spirit of cooperation, coordination, communication and goodwill.

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## CHAPTER I. INTRODUCTION

### I. PARTIES

The following entities are the parties to the Agreement and shall be defined for the purposes of this Agreement as follows:

a. "Tribe" shall mean the Wampanoag Tribe of Gay Head (Aquinnah) acting through its Tribal Council, Human Services Department and from time to time any other Tribal agency or organization authorized by the Tribal Council to participate in child welfare matters and any successor agencies, officials or organizations that may have regulatory jurisdiction over child welfare matters.

b. "Department" shall mean the Commonwealth of Massachusetts's Department of Social Services, and any successor agency thereof that may have regulatory jurisdiction over child welfare matters.

### II. PURPOSE AND POLICY

This Agreement is to be construed in the full spirit of cooperation with the overriding goal of carrying out the stated policy of the Indian Child Welfare Act of 1978, namely, to assure recognition of the cultural and social standards prevailing in the Gay Head Wampanoag community, to promote the stability, security and way of life of Tribal families, to respect and nurture the heritage of Gay Head Wampanoag children, and to protect and promote the best of interest of said children.

Furthermore, by entering into this Agreement, the Tribe and the Department hope to achieve the following:

a. Provide a framework for advancing a cooperative partnership between the Tribe and the Department in the delivery of child welfare services to Gay Head Wampanoag children. The responsibilities established by this Agreement must be fulfilled in a conscientious manner if its objectives are to be realized.

b. Deliver child welfare services in a manner which seeks to foster and support the Tribe's culture, tradition and history, for example, through encouraging the participation of Gay Head Wampanoag children in activities sponsored by the Tribe, and by making Tribal publications such as newsletters available to persons caring for Gay Head Wampanoag children.

### III. DEFINITIONS

For the purposes of this Agreement, except as may be specifically provided otherwise, the term:

a. "Act" shall mean the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1901 et seq as from time to time amended.

b. "Child custody proceeding" shall mean and include;

1. "Foster care placement" shall mean any action removing a Gay Head Wampanoag child from his/her Parent(s) or Native American custodian for temporary placement in a foster home or other substitute care arrangement where the Parent or custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

2. "Termination of parental rights" shall mean any action which may result in the termination of the legal relationship between the Gay Head Wampanoag child and his or her Parent(s);

3. "Pre-adoptive placement" shall mean the temporary placement of a Gay Head Wampanoag child in a foster home, or other substitute care arrangement, after the termination of parental rights, but prior to or in lieu of adoptive placement; and

4. "Adoptive placement" shall mean the permanent placement of a Gay Head Wampanoag child for adoption, including any action resulting in a final decree of adoption.

c. "Extended family member" shall mean a person who has reached the age of eighteen and who is the Gay Head Wampanoag child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

d. "Good cause" shall mean that the Department shall not deviate from the placement preferences set forth in Chapter II, Section V. of this Agreement unless:

1. a deviation is requested by the Parent(s);

2. the Gay Head Wampanoag child has physical, emotional or mental needs which cannot be addressed in a family foster care setting, but require treatment in a residential treatment setting; or

3. despite a diligent search, a suitable home within the preference order cannot be located.

e. "Gay Head Wampanoag child" shall mean any unmarried person who is under the age of eighteen (18) and is either (1) a member of the Tribe, or (2) eligible for membership in the Tribe and is the biological child of a member of the Tribe.

f. "Indian" shall mean any person who is a member of a Native American tribe, or who is an Alaska Native or a member of a Regional Corporation.

g. "Native American" shall mean that person identified as Indian as that term is defined in 25 U.S.C. Section 1903, 4(3).

h. "Native American custodian" shall mean any Native American person (1) who has legal custody of a Gay Head Wampanoag child under Tribal law or custom or under state law or, (2) to whom temporary physical care, custody and control has been transferred by the Parent of such child.

i. "On or Near Reservation" shall mean within the geographical boundaries of the island of Martha's Vineyard.

j. "Parent(s)" shall mean (1) the biological Parent(s) of a Gay Head Wampanoag child, or (2) any Native American person who has lawfully adopted a Gay Head Wampanoag child, including adoption under Tribal law or custom. An unwed father whose paternity has not been acknowledged or established is specifically excluded from this definition.

k. "Residence" or "domicile" shall mean the Gay Head Wampanoag child's primary place of residence for not less than six (6) months preceding any court action.

l. "Reservation" or "Tribal lands" shall mean the lands as defined in 18 U.S.C. Section 1151 and any lands, not covered under such section, title to which is either held by the Tribe or the United States in trust for the benefit of the Tribe.

m. "Tribal member" shall mean a person who is enrolled as a member of the Tribe or is eligible for membership in the Tribe as determined by the Tribal Council in accordance with the standard set forth in the Tribal Constitution and any other Tribal ordinance pertaining to enrollment.

n. "Tribal organization or agency" shall mean any group, association, partnership, corporation or other legal entity owned and controlled by the Tribe, or operating under the auspices of the Tribe.

o. "Tribe" shall mean the Wampanoag Tribe of Gay Head (Aquinnah).

p. "Wampanoag Tribe of Gay Head (Aquinnah) Child Protection Team" shall mean the Tribal agent sanctioned by WTGH(A) Resolution 9411 and mandated to participate in child welfare matters and to assist in the coordinating of services for Gay Head Wampanoag children and families who are at risk, primarily due to abuse and/or neglect.

q. "Wampanoag Tribe of Gay Head (Aquinnah) Tribal Council" shall mean the duly elected authority responsible for the business affairs of the Tribe or its duly appointed agent.

#### IV. JURISDICTION

The Department shall exercise exclusive jurisdiction over all of the Tribe's child custody proceedings, whether the child resides or is domiciled within or outside, On or Near the Reservation, until such time as this Agreement is amended to reflect the Tribe's willingness to assume jurisdiction over child custody proceedings pursuant to the Act. The Department shall exercise such jurisdiction consistent with the provisions of the Act and in accordance with State law to the extent it is consistent with the Act.

## CHAPTER II. GENERAL PROVISIONS

### I. FULL FAITH AND CREDIT

Full faith and credit shall be given to the public acts, records and judicial proceedings of the Tribe concerning the Tribe's child custody proceedings to the same extent full faith and credit is given to the public acts, records and judicial proceedings of any other state.

### II. NOTICE REQUIREMENT

#### a. Notice to the Tribe

1. Subject to the provisions of Section III. of this Chapter, the Department shall notify the Tribe's child welfare social worker of the pendency of any of the following actions or events which involve a child whom the Department has reason to believe is a Gay Head Wampanoag child: proceedings under G.L. Chapter 119, §§ 23C, 24, and 26; and G.L. Chapter 210, § 3; changes of or removals from foster care placements; judicial proceedings to review foster care or pre-adoptive placements; and surrenders for adoption.

2. All notices to be given to the Tribe under this Agreement shall be forwarded to: Wampanoag Tribe of Gay Head (Aquinnah) Child Welfare Social Worker, 20 Black Brook Road; Gay Head, Massachusetts, 02535-9701. The name of said person shall be confirmed in writing and attached to this Agreement as Addendum A.

Notice of any of the proceedings enumerated in the foregoing Paragraph 1 shall be given by telephone within twenty-four (24) hours of the initiation thereof. Telephone notice shall be followed by written notice. Any written notice given pursuant to Section IX a of this Chapter shall be by certified mail/return receipt requested.

3. If the Tribe declines to intervene in a case of which it has received notice hereunder, it shall so notify the Department in accordance with Section II b of this Chapter. Thereafter, the Department shall not be required to provide the Tribe with notice of any further proceedings in that case, unless the Tribe requests otherwise in writing.

#### b. Notice to the Department

Except for notice under Chapter II, Section IX b hereof, notice to the Department under this agreement shall be in writing and mailed by first class mail, postage prepaid, to the Area Director whose office is handling the matter in question.

Any notice given pursuant to said Chapter II, IX b shall be certified mail/return receipt requested, to the Office of the Deputy Commissioner for Field Operations and Support, Department of Social Services, 24 Farnsworth Street, Boston, Massachusetts, 02210.

#### c. Notice to the Parent(s) or Native American Custodian

In accordance with applicable statute, regulation and practice, the Department shall notify the Parent(s) or Native American custodian of the pendency of any of the following actions which involve their Gay Head Wampanoag child: proceedings under G.L. Chapter 119 §§ 23C, 24 and 26; G.L. Chapter 210 § 3, and proceedings to review foster care and preadoptive placements.

d. If either the Tribe or the Department changes the method by which the other shall give notice to it hereunder, including a change in the person to whose attention the notice should be sent, it shall notify the other of such change, in writing, no later than five (5) working days after the effective date of said change.

e. In all proceedings and events in which written notice is required, the notice shall be written in clear and understandable language. The notice shall include the following, if available and applicable: the name of the child; a copy of the petition, complaint or other document by which the proceeding was initiated; the name of the petitioner and the name and address of the petitioner's attorney; a statement of the right of the Parent(s) or Native American custodian(s) to appear, and of the right of the Tribe to intervene, in the proceeding; the location, mailing address and telephone number of the court in which the proceeding is pending (the "presiding court"); a statement that if the Parent(s) or Native American custodian(s) are unable to afford counsel, the presiding court may appoint counsel to represent them pursuant to the Act and State Law; a statement that, pursuant to Section 1912 of the Act, the Parent(s) or Native American custodian(s) and the Tribe may request of the presiding court an additional twenty days to prepare for the proceedings; a statement regarding the potential legal consequences of an adjudication of the future custodial rights of the Parent(s) or Native American custodian(s); and a statement ensuring confidentiality in accordance with Department regulation, state law, federal law and this Agreement.

f. Receipt of notice is evidenced by the return receipt retained by the Tribe or the Department.

### III. CONFIDENTIALITY

The Tribe, and its agents, shall keep confidential and shall not release any information disclosed by the Department pursuant to Section II. of this Chapter. Notwithstanding the foregoing, the Tribe's child welfare social worker may release such information to the WTGH(A) Child Protection Team member(s) who is coordinating services for the subject Gay Head Wampanoag child, Parent(s), or Native American custodian. In addition, the Tribe's child welfare social worker or the WTGH(A) Child Protection Team member(s) involved may release to the subject child's Parent(s) or Native American custodian only such information as they require in order to assert their rights under the Act or this Agreement.

In accordance with its regulations and applicable State law, the Department shall maintain the confidentiality of all information it receives from the Tribe's child welfare social worker or any Wampanoag Tribe of Gay Head Aquinnah Child Protection Team members, or which it otherwise possess, with regard to any Gay Head Wampanoag child, Parent(s) or Native American custodian.

### IV. REFERRALS

a. Any employee or agent of the Tribe may refer to the Department any Gay Head Wampanoag child whom the Tribe determines to be in need of social services. If the Department accepts such a referral, it shall assess the needs of the referred child in accordance with its regulations and shall notify the Tribe what, if any, services it has available to meet that child's needs.

The Department shall offer any available services which the Department deems to be clinically appropriate for the particular child.

To assist the Department in assessing the referred child's needs, the Tribe's referral should include the following information: the names, ages and addresses of the child and his immediate family and household members; the legal status of the child; the events which, in the Tribe's judgement, precipitated the need for services; details of any family disruptions or out-of-home placements of the child; a history of services provided to the child or his/her family.

If the Department determines that a foster care placement is necessary and practicable, the Department shall follow the placement preferences set forth in Section V of this Chapter, and shall consider any proposals offered by the Tribe relative to visitation. In accordance with the Department's regulations, the child's Parent(s) or legal custodian may terminate any voluntary foster care placement of a Gay Head Wampanoag child.

b. Any employee or agent of the Tribe working in a profession enumerated in G.L. Chapter 119, § 51A, shall, in accordance with that statute, report to the Department any situation in which said agent or employee, in his or her professional capacity, has reasonable cause to believe that a child is suffering from any condition set forth in said G.L. Chapter 119, § 51A.

#### IV. PLACEMENTS

a. Each Gay Head Wampanoag child accepted for foster care or adoptive placement shall be placed in the least restrictive setting which meets any special needs the child may have. Except when the special needs of the child require otherwise, the placement shall be in a setting which approximates a family, and should be within reasonable proximity of the child's residence. In any foster care or pre-adoptive placement, preference shall be given, in absence of good cause to the contrary, to placement with:

1. A member of the Gay Head Wampanoag child's extended family;
2. A foster home specified by the Tribe and licensed or approved by the Department in accordance with applicable regulation and statute;
3. A so called "child-specific" foster home specified by the Parent(s) and licensed or approved by the Department in accordance with applicable regulation and statute;
4. A Native American foster home licensed by an authorized non-Native American licensing authority; or
5. A foster home selected by the Department.

The burden of establishing good cause for deviating from these placement preferences (as that term is defined in Chapter I, Section III d) shall be on the party recommending such deviation.

b. Where either the Department or the Tribe recommends a deviation from the placement preferences set forth above it shall prepare a detailed summary of the reasons therefore, and shall submit that summary to the other party in the manner set forth in Section IV hereof.

c. In any adoptive placement of a Gay Head Wampanoag child, preference shall be given, in the absence of good cause to the contrary, to placement with: (a) a member of the Gay Head Wampanoag child's extended family; (b) a member of the Tribe; (c) a Native American family; or (d) a family selected by the Department and approved by the Tribe.

d. In accordance with applicable regulation and statute, the Department shall conduct a homestudy of the person or persons seeking to adopt a Gay Head Wampanoag child. In conducting these homestudies, the Department shall seek guidance from the person designated by the Tribe as an expert in Tribal culture. The designated expert shall add to the homestudy process insight into Tribal culture, history and social mores, and

1. shall be consulted by the Department in determining how to ensure that a foster care placement will promote the Gay Head Wampanoag child's continued participation in tribal and cultural activities. In addition, in selecting the foster care, preadoptive, or adoptive placement of a Gay Head Wampanoag child, the Department shall consider this person's opinion of the placement, but shall not be bound by that opinion and shall, in any event, follow the placement preferences set forth in Section V. of this Chapter. The name of the person referenced in this paragraph shall be confirmed in writing and attached to this Agreement as Addendum B. Said tribally designated person can be contacted by mailing notice to WTGH(A) Child Welfare Social Worker, 20 Black Brook Road, Gay Head, MA 02535-9701.

## VI. SERVICES

In accordance with its regulations, the Department shall perform an assessment of the needs of the Gay Head Wampanoag child and his or her Parent(s) or Native American custodian. On the basis of its assessment, the Department will offer available services that the Department deems to be clinically appropriate.

## VII. RECORD KEEPING

All record keeping shall be in compliance with the Act or with this Agreement. To the extent permitted under federal and state law, records shall be made available upon the request of either party.

## VIII. RESOLUTION OF ALLEGED VIOLATIONS OF THE AGREEMENT

Before proceeding to a court of law, the Department and the Tribe shall first attempt to resolve alleged violations of this Agreement through mediation or non-binding arbitration. Exclusive jurisdiction for the legal resolution of any such disputes shall be in the courts of the Commonwealth of Massachusetts.

## IX. REVIEW AND TERMINATION OF AGREEMENT

a. This Agreement is to be reviewed at the request of any of the parties. All modifications of this Agreement shall be in writing and by mutual consent of the parties.

b. Either party can revoke this Agreement with one hundred eighty (180) days written notice to the other party.

WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)

By: Beverly M. Wright  
Beverly M. Wright, Chairperson

DEPARTMENT OF SOCIAL SERVICES

By: Linda K. Carlisle  
Linda K. Carlisle, Commissioner

**ADDENDUM A**

WTGH(A) CHILD WELFARE SOCIAL WORKER:

Deborah Medders  
20 Black Brook Road  
Gay Head, MA 02535-9701  
508-645-9265  
508-645-3790 facsimile

17 December 1997

**ADDENDUM B**

**EXPERT IN TRIBAL CULTURE:**

Helen Manning  
c/o WTGH(A) Child Welfare Social Worker  
20 Black Brook Road  
Gay Head, MA 02535-9701  
508-645-9265  
508-645-3790 facsimile

**17 December 1997**