UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASHPEE WAMPANOAG TRIBE, Plaintiff, v. RYAN ZINKE, in his official capacity as Secretary of the Interior and the U.S. DEPARTMENT OF THE INTERIOR, Defendants.	Civil Action No. 1:18-cv-02242-PLF

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Tami Azorsky (D.C. Bar No. 388572)
Kenneth J. Pfaehler (D.C. Bar No. 461718)
V. Heather Sibbison (D.C. Bar No. 422632)
Suzanne R. Schaeffer (D.C. Bar No. 429735)
DENTONS US LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: 202.496.7500

Attorneys for Plaintiff Mashpee Wampanoag Tribe

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INTRODUCTION

On October 29, 2019, briefing on the cross motions for summary judgment in this case was completed. The Court has before it full summary judgment briefing, informed by a full administrative record, on the question of whether the Secretary of the Interior's September, 7, 2018 Decision[1] was arbitrary, capricious and contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 706. The September, 7, 2018 Decision erroneously finds that the Mashpee Wampanoag Tribe ("Tribe" or "Mashpee") was not under federal jurisdiction in 1934 and thus does not qualify under the first definition of Indian in the Indian Reorganization Act[2] (IRA), meaning that the Secretary of the Interior did not have authority to acquire trust title to the Tribe's land. To the contrary, as the Tribe has shown in its summary judgment briefing, before and continuing through 1934, the federal government took actions on behalf of the Mashpee Tribe and its members that established federal obligations, responsibility for and authority over the Tribe. The Secretary ignored or discounted this evidence in violation of the Administrative Procedure Act, and departed from the Department's administrative precedent and case law precedent.

The motions are *sub judice*. But rather than waiting the short additional time until the Court rules, on Friday, March 27 at 4:00 p.m. the Department advised the Tribe that it is going to take the matter into its own hands by immediately taking the land out of trust and disestablishing the Tribe's reservation. With no prior warning, Bureau of Indian Affairs Director Darryl

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[1] Letter from Assistant Secretary-Indian Affairs Tara Sweeney to the Honorable Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe (Sep. 7, 2018), Administrative Record at AR0005088-5115 (referred to herein as the "Decision"). Citations to the Administrative Record, which was submitted to the Court in connection with the motion for summary judgment, are made in the form "AR."

[2] Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §§ 5108, 5110, 5129.

LaCounte informed the Tribe that Secretary of the Interior David Bernhardt had ordered him to take the Tribe's reservation lands "out of trust" and revoke the Tribe's reservation proclamation.[3] When asked when this would happen, Director LaCounte said "not today," "but soon." Cromwell Decl. ¶ 13.

The Department was unable to explain the procedure by which this would occur. *Id.* ¶ 15. The Secretary's order contravenes, without explanation, the longstanding policy of the Department not to take land out of trust while litigation is pending, and not to do so in any event without a court order directing such action. *Id.* ¶ 13. These actions by the Tribe's federal trustee, in violation of its duties and the Administrative Procedure Act (APA), 5 U.S.C. § 706, and without the trustee even being able to explain the process it intends to follow, will leave the Tribe with no reservation and no land in trust. *Id.* ¶ 16. The impacts would be devastating for the Tribe. *Id.* ¶¶ 17-26. The Mashpee's sovereignty, jurisdiction, economy, health, culture and spiritual life would be dealt an irrecoverable blow if the Secretary has his way. If the Secretary's arbitrary and unilateral directive is not enjoined, the harms run the gamut from the loss of access to crucial economic development, education, social services and health programs, to a reduced ability to battle the COVID-19 virus, to the loss of a crucial economic project that will never come back, to the likely consequential loss of the Tribe's ancestral lands and spiritual home. *Id.*

Balanced against these staggering harms, the Secretary is not harmed by entry of an injunction. The Tribe is seeking a temporary restraining order and a preliminary injunction to maintain the *status quo* pending resolution of this civil action and any appeals. That is all. Specifically, the Tribe seeks to enjoin the Secretary of the Interior from taking its land

[3] Declaration of the Honorable Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe, in Support of Emergency Motion for a Temporary Restraining Order and a Preliminary Injunction, March 30, 2020, at paragraph 13. The declaration is cited herein as "Cromwell Decl."

out of trust and from rescinding the 2015 reservation proclamation designating the trust land as the Tribe's reservation until this action can be decided. The Secretary is subject to a short delay at most. The status quo ante that has existed for over four years is maintained until this Court can rule. This is not harm, much less irreparable harm. The Tribe's request for emergency relief is therefore fully consistent with Section 705 of the APA. *District of Columbia v. US Dep't of Agriculture*, --- F. Supp. 3d --- 2020 WL 1236657 at *8 (D.D.C. March 13, 2020) (quoting 5 U.S.C. § 705) ("Section 705 of the APA authorizes 'the reviewing court' to stay 'the effective date of an agency action' pending judicial review 'to prevent irreparable injury.'").

The Secretary's current directive to take the Tribe's land out of trust is arbitrary, capricious, an abuse of discretion and contrary to law. It is unexplained and outside of any procedural framework. It is contrary to longstanding Departmental policy and practice. The Secretary's directive is a violation of his solemn trust duty to act in the best interests of the Mashpee. If it transpires, this federally recognized tribe will become landless once more, treated as a second-class tribe with lesser rights than other federally recognized tribes, and rendered entirely unable to exercise its inherent right to self-government, be self-sufficient and provide for its people. This is neither in the interest of the Mashpee Tribe, who once fed our starving Pilgrim forbears, nor in the public interest of the United States and its citizens. The Tribe respectfully requests the Court to enjoin the Secretary of the Interior from taking the Tribe's lands out of trust and revoking the December 2015 reservation proclamation pending a decision on the merits.

FACTUAL AND PROCEDURAL BASIS FOR THE MOTION

The facts underlying this motion are not disputed. The Tribe received formal acknowledgment of its federal recognition in 2007. *See* 72 Fed. Reg. 8007 (Feb. 22, 2007). Having received this acknowledgement, the Tribe was entitled to apply to have land placed in trust and proclaimed a reservation pursuant to the Secretary's authority under the IRA. In 2007 the Tribe submitted a "fee-to-trust" application requesting that the Department acquire land in trust as the Tribe's reservation.[4] The Tribe's application, as last amended in November 2012, requested that the Department acquire and accept into trust about 170 acres in Mashpee, Barnstable County, Massachusetts, and about 151 acres in Taunton, Bristol County, Massachusetts (the "Trust Land"). AR0005230. On September 18, 2015, finding that the Secretary had authority to acquire land in trust for the Tribe because it met the IRA's second definition of "Indian,"[5] Interior granted the Tribe's application and announced it would acquire these lands in trust for the Tribe's reservation.[6] On November 10, 2015, the Department acquired trust title to the lands for the benefit of the Tribe and shortly thereafter proclaimed the land to be the Tribe's reservation. *See* 81 Fed. Reg. 948 (Jan. 8, 2016).

On February 4, 2016, a small number of Taunton residents (the "Littlefield Plaintiffs") challenged the 2015 ROD in the U.S. District Court for the District of Massachusetts. *Littlefield v. U.S. Dep't of the Interior*, Case No. 16-CV-10184 (D. Mass. 2016) (*Littlefield*). The Littlefield Plaintiffs argued, *inter alia*, that the second definition of Indian necessarily incorporates the first definition. The parties cross-moved for summary judgment, and on July 28, 2016, the District Court agreed with the Littlefield Plaintiffs on this one narrow issue.

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[4] AR0005089.
[5] 25 U.S.C § 5129.
[6] AR0005223-5362. This decision is referred to herein as the "2015 ROD."

Littlefield, 199 F. Supp. 3d 391, 400 (D. Mass. 2016) (ECF 87) (as clarified by Order dated October 12, 2016 (ECF 121)). As Interior had not made a determination on the first definition, the court remanded the matter to the Secretary for further proceedings. On December 8, 2016, both the Department of the Interior and the Tribe appealed the *Littlefield* decision to the United States Court of Appeals for the First Circuit. *Littlefield, et al. v. U.S. Dep't of the Interior*, Case No. 16-CV-10184 (D. Mass. 2016) (ECF 131; ECF 132).

Meanwhile, on December 6, 2016, the Department invited the parties to submit evidence or argument whether the Tribe was under federal jurisdiction in 1934. AR0005091-92. On December 21, 2016 and January 5, 2107, the Tribe submitted evidence and argument to the Department. The *Littlefield* plaintiffs responded on February 13, 2017 and the Tribe filed its reply on February 28, 2017.

On March 1, 2017, Secretary Ryan Zinke took office. Following political pressure (*see, e.g.*, AR0004508-4510), and over the Tribe's objections, on April 27, 2017, the Secretary abandoned his appeal in *Littlefield* without explanation. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 34 (1st Cir. Feb. 27, 2020).

On June 19, 2017, Secretary Zinke released a "draft" decision finding that the Tribe was not under federal jurisdiction in 1934. AR0004667-4699. The regulations governing the Secretary's implementation of IRA Section 5 do not provide for the provision of a "draft" decision. *See generally* 25 CFR Part 151. The Secretary then unilaterally ordered supplemental briefing, and such briefing was produced and provided by the Tribe, the Wampanoag Tribe of Gay Head (which supported the Tribe's position) and the Littlefield Plaintiffs. On September 7, 2018, Interior issued a new Decision that addressed whether the Secretary had authority to acquire the land in trust for the Tribe based on whether the Tribe meets the IRA's first definition

of Indian. This Decision concluded that the Tribe was not under federal jurisdiction in 1934 and so did not qualify under the first definition. AR0005088-5115. The Tribe's summary judgment briefs set out in detail the Tribe's argument why this Decision was conclusory and erroneous. Notably, in the Decision, Interior specifically stated that its "analysis and decision on remand is strictly limited to the question of the Tribe's jurisdictional status in 1934, and does not otherwise revisit or alter the remainder of the Department's analysis of the second definition of 'Indian' in the 2015 [decision]." AR0005115.

On September 27, 2018, the Tribe filed this action challenging the September 7, 2018 Decision. The questions at issue in this action are whether the Tribe was under federal jurisdiction in 1934 pursuant to the first definition of Indian in the IRA, and whether the September 7, 2018 Decision's analysis of those questions was arbitrary, capricious, and contrary to law in violation of the APA. 5 U.S.C. § 706. The Littlefield Plaintiffs intervened in this action. All parties cross-moved for summary judgment. As of October 29, 2019, the cross-motions for summary judgment were fully briefed. Nothing in the Tribe's complaint in the D.C. case or the summary judgment briefing implicates the Secretary's interpretation of the second definition of Indian that was at issue in the appeal from the Massachusetts federal district court decision. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 34 (1st Cir. Feb. 27, 2020).

On February 27, 2020, a panel of the First Circuit Court of Appeals affirmed the July 28, 2016 district court decision in *Littlefield*. The First Circuit emphasized that it was not addressing Interior's position with respect to the application of the first definition to the Tribe. The district court conclusively resolved a separable legal issue when it granted summary judgment to the

plaintiffs on their first cause of action, holding that the BIA exceeded its authority by construing the second definition of "Indian" as it did. 951 F.3d at 36.

On March 27, 2020, at 2:00 p.m., Bureau of Indian Affairs ("BIA") Acting Eastern Regional Director Glenn Melville called the Chairman of the Mashpee Tribe to tell him that a call would occur at 4:00 p.m. with him, other BIA representatives and attorneys from the Department of the Interior's Office of the Solicitor regarding the Tribe's ongoing litigation and the status of the Tribe's trust land. Cromwell Decl. ¶ 12. Chairman Cromwell insisted that the Tribe's attorneys be included if the Department's counsel were taking part. *Id.* The conference call took place at 4:00 p.m. *Id.* ¶ 13. Acting Regional Director Melville was accompanied by BIA Director Darryl LaCounte, Deputy Eastern Regional Director Kim Bouchard, Associate Solicitor-Indian Affairs Eric Shepard, and Assistant Solicitor John Hay. *Id.* Mashpee Vice Chairwoman Jessie Baird, Mashpee General Counsel Rebekah Salguero and attorneys V. Heather Sibbison, Suzanne Schaeffer, and Rose Petoskey also participated for the Tribe. *Id.*

During the call, BIA Director LaCounte stated that he had been ordered by the Secretary of the Interior to take the Tribe's reservation lands "out of trust" and revoke the Tribe's reservation proclamation. *Id.* ¶ 14. Director LaCounte said that to accomplish this he would "record" the "court mandate" from the First Circuit to take the land out of trust. *Id.* In response to a question from Ms. Sibbison about when this would occur, Mr. LaCounte stated that it would not happen "today," but soon. *Id.*

In response, Ms. Sibbison observed that the Tribe and the Department are still litigating this case, that it has been the longstanding policy of the Department not to alter the status of trust land during pending litigation, that the Department had made commitments to the Tribe not to take the land out of trust while litigation is pending, and that there is no court order directing

such action. *Id.* None of the officials from the Department offered a response to this statement. *Id.*

Chairman Cromwell inquired whether Tribal leadership could have a phone meeting with the Secretary as soon as possible, since the Secretary had issued the directive to take the Tribe's land out of trust and disestablish the reservation. Director LaCounte said he would make that request. *Id.* ¶ 15. Ms. Sibbison then asked whether the Department has a defined administrative process for taking land out of trust, and whether it includes a time frame and opportunity to challenge the decision analogous to the Department's process for putting land in trust, and further requested that the Department inform the Tribe of that process. *Id.* ¶ 16. None of the Department officials substantively responded. *Id.*

On March 30, 2020 at 12:33 pm the Department provided the Tribe with a copy of Secretary Bernhardt's Order, dated March 27, 2020. *Id.* ¶ 17. The Secretary's Order is based on the ongoing litigation relating to the 2015 Departmental decision as to whether the Secretary had authority to take the Tribe's land in trust under the IRA's second definition of Indian. He finds that since the First Circuit had issued "a formal mandate in accordance with its judgment," and since the Tribe did not "petition for a panel rehearing or rehearing *en banc*" that "the Department must take steps to rescind the Decision." The Secretary's Order fails to acknowledge that the Tribe's right to file a Petition for *Certiorari* in that case is not due until May 26, 2020, and further fails to acknowledge that the instant litigation regarding the question of whether the Secretary had authority to place the land in trust under the IRA's first definition is ongoing.

The Secretary, who should be acting as the Tribe's trustee, has issued an Order that is in violation of his trust duties and the APA, that was issued without consultation with the Tribe, and that wholly ignores the ongoing litigation in this Court. Emergency relief is needed to allow the

Tribe to obtain a final judicial determination on whether the Secretary had authority take the land into trust, whether under the IRA's first *or* second definition; without such relief, the Tribe will be irreparably harmed. *Id.* ¶ 17.

LEGAL STANDARD

The "'standard that applies to preliminary injunctions also applies to temporary restraining orders.'" *Gillard v. McWilliams*, 315 F. Supp. 3d 402, 412 (D.D.C. 2018) (quoting *Experience Works, Inc. v. Chaco*, 267 F. Supp. 93, 96 (D.D.C. 2003)). "The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical." *Spencer Trask Software & Info. Servs., LLC v. RPost Intl, Ltd.*, 190 F. Supp. 2d 577, 580 (S.D.N.Y. 2002); *see also, e.g., Echo Design Group, Inc. v. Zino Davidoff S.A.*, 283 F. Supp. 2d 963, 966 (S.D.N.Y. 2003).

Courts apply the following familiar four-factor test when deciding whether to grant a preliminary injunction: (1) the likelihood of the movant's success on the merits; (2) the risk of irreparable harm absent equitable relief; (3) the balance of the equities; and (4) the public interest. *See, e.g., Winter v. Natural Res. Def Council, Inc.*, 555 U.S. 7, 20 (2008); *District of Columbia v. U.S. Dep't of Agriculture*, No. 20-119, 2020 WL 1236657, at *8 (D.D.C. Mar. 13, 2020).

If a movant "makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success [on the merits]." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (citing *WMATC v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977)); *see also, e.g., Akiachak Native Community v. Jewell*, 995 F. Supp. 2d 7, 13 (D.D.C. 2014) (same) (citing *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)); *Citigroup Global Mkts.,*

Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35, 37-38 (2d Cir. 2010) (movant need not show it is likely to succeed on the merits if it can demonstrate the existence of "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief"). Although this "sliding-scale" approach remains binding precedent in this Circuit, the D.C. Circuit has "suggested, without deciding, that *Winter* should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Karem v. Trump*, 404 F. Supp. 3d 203, 209 (D.D.C. 2019) (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 26 (D.D.C. 2016) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011); *Davis*, 571 F.3d at 1292 (D.C. Cir. 2009)).

In this case, the Tribe seeks a temporary restraining order and a preliminary injunction to maintain the *status quo* pending resolution of this civil action and any appeals. Specifically, the Tribe seeks to enjoin the Secretary from taking its lands out of trust or rescinding the 2015 proclamation that makes them the Tribe's Reservation until this action has been decided. Section 705 of the APA gives the Court authority to stay the Department's action pending judicial review. "Section 705 of the APA authorizes 'the reviewing court' to stay 'the effective date of an agency action' pending judicial review 'to prevent irreparable injury.'" *District of Columbia v. U.S. Dep't of Agriculture*, No. 20-119, 2020 WL 1236657 at *8 (D.D.C. Mar. 13, 2020) (quoting 5 U.S.C. § 705). "The factors governing issuance of a preliminary injunction also govern issuance of a § 705 stay." *Id.* (citing *Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016); *Humane Soc'y of United*

States v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)).

ARGUMENT

I. The Tribe Meets the Standard for Entry of a Temporary Restraining Order and a Preliminary Injunction

A. The Tribe Has Shown a Likelihood of Success on the Merits

If a movant "makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success [on the merits]." *Davis*, 571 F.3d at 1291-92. The Tribe has demonstrated that it has a likelihood of success on the merits of the summary judgment motions. Its briefs on the summary judgment motion used the administrative record to show, with undisputed evidence, that before and continuing through 1934, the federal government took actions on behalf of the Mashpee Tribe and its members that established federal obligations, responsibility for and authority over the Tribe. This evidence included federal census roles, acknowledgements by federal officials, inclusion in federal reports from the 1820s through 1935, the attendance of Tribal members at federal Indian schools, the receipt of federal Indian education funding, federal management of funds as trustee for tribal members, the provision of federal health care and social services to Tribal members, and actions by the federal government to protect Tribal lands and resources. *See, e.g.*, ECF Doc. 30-1 at 15-19.

The Tribe demonstrated that the Secretary ignored or discounted this evidence in violation of the APA, and departed from the Department's administrative precedent and case law requirements with respect to it. *See, e.g., id.* at 20-40 and ECF 35 at 13-40. The Tribe showed that the Secretary failed to consider the evidence as a whole, failed to apply the Indian law canon of construction, and failed to follow controlling case law. *See, e.g., id.* at 40-44. The Tribe also

showed that the standards proffered by the Secretary and the Littlefield Plaintiffs for demonstrating that a tribe was "under federal jurisdiction" in 1934 contravene administrative precedent and applicable case law. *See, e.g,,* ECF Doc. 30-1 at 3-6 and ECF 35 at 2-13. Therefore the Tribe has more than established "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Citigroup Global Mkts.*, 598 F.3d at 35, 37-38.

B. The Tribe Will Be Irreparably Harmed Absent An Injunction

"As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits. Rather, a court must also consider whether the movant has shown that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Benisek v. Lamone*, 138 S.Ct. 1942, 1943-44 (2018) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 32 (2008)). As detailed in the accompanying Declaration of Chairman Cromwell, the Tribe will suffer devastating irreparable harm if an injunction does not issue and its trustee removes the Tribe's land from trust status and withdraws the reservation proclamation.

The acquisition of the land in trust and designation of the land as the Tribe's reservation acknowledges and confirms the Tribe's inherent right of self-development and economic self-sufficiency. It provides the Tribe and its members greatly enhanced governmental, spiritual, cultural and economic opportunities. These opportunities are about to be snatched away, along with the Tribe's reservation, before this Court even has an opportunity to rule. The significance of the reservation to the Tribe cannot be overstated: these are the lands of the Tribe's ancestors, the lands where they are buried, and a place of immense spiritual and cultural importance to the Tribe. Cromwell Decl. ¶ 17.

If the Department moves forward and removes the Tribe's land from trust and reservation status, it will have significant immediate negative consequences and visit irreparable harm on the Tribe and its members. The most obvious harm is the loss of sovereign authority over the Tribe's historic lands, preventing the Tribe from exercising its right to self-governance and self-determination. *Id.* ¶ 18. The loss of the Tribe's sovereign rights and its cultural and community connections is so fundamental to the Tribe's existence that it cannot be calculated in terms of money. *Id.*

Removing the Trust Land from trust status also would raise significant jurisdictional questions, impose further economic harm on the Tribe and its members, and potentially endanger the health and well-being of tribal members due to the loss of federal funding tied to trust and reservation status, which the Tribe can least afford during this time when the coronavirus epidemic is sweeping across the country. *Id.*

If the land is removed from trust status, the Tribe will be responsible for paying property taxes on the land, likely including back taxes, which could total hundreds of thousands of dollars which the Tribe cannot afford. *Id.* ¶ 20. Because the Tribe currently has no available revenue stream and is struggling to keep its government operating, these lands could very well be subject to foreclosure for non-payment of taxes and the Tribe will lose them. *Id.* The loss of the reservation would be truly irreparable harm because these are the Tribe's ancestral lands, central to the Tribe's spiritual and cultural identity. *Id.* ¶ 18. The removal of the land from trust also would negatively affect the Tribe's ability to repay its existing debt, and its ability to obtain financing for alternative economic development projects. *Id.* ¶ 20.

In addition, removal of trust status could adversely impact an innocent third party. If the Secretary is allowed to remove the land from trust status before a final decision on the merits,

and the courts ultimately find that the Secretary all along *did* have authority to take the land in trust (and therefore did *not* have authority to "take it out") -- the resulting confusion and uncertainty could harm a third party that had acquired the land through tax foreclosure. *Id.* ¶ 20, 25.

A host of tribal grant and funding programs only available to tribes and tribal members that have trust or reservation land also will be lost. For example, the Tribe has been approved for funding from the Administration for Children and Families Child Care Development Fund for construction of a childcare facility on the Tribe's reservation land. The Tribe plans to begin construction this spring. *Id.* ¶ 22. To receive this funding, the Tribe must build the facility to serve children living on or near reservation land. *Id.* Therefore, this funding likely will be revoked if the Tribe's reservation is taken out of trust and the reservation status is withdrawn. *Id.* Another example is the Mashpee Tribal Historic Preservation Office (THPO), which would be at risk if the Tribe's land is removed from trust, as federal funding eligibility for the THPO program is limited to federally recognized tribes with a reservation and/or tribal trust lands. *Id.*

Other reservation or trust-land based funding programs that will be jeopardized by the removal of the Trust Lands from trust and revocation of the reservation proclamation would include the: (i) Indian Business Development Program (to establish or expand Indian-owned economic enterprises on or near reservations), (ii) Financial Assistance and Social Service Programs (federal social services for Indians on or near reservations, including Direct Assistance, Tribal Work Experience, Burial Assistance, Disaster Assistance, Emergency Assistance and Adult Care Assistance), (iii) Employment Assistance for Adult Indians (residing on or near reservations), (iv) Vocational Training for Adult Indians (residing on or near reservations), (v) Food Distribution Program on Indian Reservations (FDPIR) (food assistance

for low-income Indian households on a reservations), (vi) Johnson O'Malley Education Contracts (preference given to contracts that serve Indians on or near reservation), (vii) Tribal Transportation Program (assistance for roads and bridges within exterior boundary of Indian reservations), (viii) Bureau of Justice Assistance Tribal Justice System Grants (grants to support tribal justice systems, tribes must exercise jurisdiction over Indian lands), (ix) Treatment as a State under the Clean Water Act and Clean Air Act (must have reservation or trust lands), and (x) Special Domestic Violence Criminal Jurisdiction (Tribal exercise of jurisdiction over certain non-Indians on trust land or reservation where crime occurs). *Id.* ¶ 23. Should the Department remove the Mashpee land from trust and reservation status, the Tribe and its members would no longer be eligible for these funds, and would be unable to apply for any of these funding programs. *Id. No replacement for any of these programs is available to the Tribe.*

One particularly important program in light of the COVID-19 outbreak is the FDPIR program, which received additional funding in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, H.R. 748, to help low-income tribal members, like those at Mashpee, who face even greater challenges in retaining their jobs and feeding their families. In the midst of the virulent COVID-19 pandemic, these funds too no longer will be available if Mashpee's lands are no longer held in trust as a reservation. *Id.* ¶ 24. This is immediate irreparable harm that would endanger the health of the Tribe's members.

Removal of the land's trust and reservation status also will cause significant jurisdictional issues and confusion. If the land is not in trust, the Tribal police will no longer have law enforcement jurisdiction over violations on the land. *Id.* ¶ 25. The police department has several grants pending for which it will no longer qualify. *Id.* Should Interior take this action, it is unclear what the fate of the police department and its personnel will be, and the Tribe will have

spent a significant amount of money to establish an emergency response department that cannot function. *Id.* There will be similar confusion with respect to Tribal Court jurisdiction. *Id.*

Similar issues would arise in connection with the Tribe's nearly completed construction of affordable housing for tribal members on its trust land in Mashpee, which is being accomplished under tribal law. *Id.* ¶ 26. If the Tribe's land is removed from trust and reservation status, the land would revert to local and State jurisdiction and would not meet local zoning requirements. *Id.* Not only will this prevent Tribal members from moving into much-needed low-income housing in the late summer or early fall, but it would also mean that the Tribe has spent $12 million dollars, relying on low-income housing credits, to build housing that cannot be occupied. *Id.*

If the Department removes the land's trust protection, the Tribe will lose BIA services related to forestry and wildfire management for the approximately 100 acres of forest land located within the Tribe's Reservation. *Id.* ¶ 27. BIA funding for the protection of the Tribe's forest resources from forest insects, disease, wildfires, and trespass also would not be available. *Id.* In an affidavit of then-Regional Director of BIA's Eastern Regional Office, Bruce W. Maytubby,[7] BIA itself highlighted harm when he acknowledged that taking the land out of would "substantially impact BIA funding and services related to forestry and wildfire management." *Id.*

If the Department removes the land's trust protection, the uncertainty and loss of federal funding already described will exacerbate the extremely difficult situation in which the Tribe finds itself as it tries to marshal whatever extremely limited resources it can find to protect its members from the growing spread of the COVID-19 virus. Cromwell Declaration at ¶ 29. The

[7] Affidavit of Bruce W. Maytubby in Opposition to Plaintiffs' Motion for Preliminary injunction of Writ, June 17, 2016, given in *Littlefield v. Dep't of Interior*, D. Mass. Civ. A. No. 1:16-cv-10184-WGY, ECF Doc. No. 38-1. A copy is attached hereto as Exhibit 1, and the affidavit is cited herein as "Ex. 1, Maytubby Aff."

sovereignty, jurisdictional, economic, health, cultural and spiritual harms faced by the Tribe if the Secretary has his way will be cumulative, irreparable, and irrecoverable.

C. The Equities Are Entirely on the Side of the Tribe

"When balancing the equities, the Court must 'consider the effect on each party of the granting or withholding of the requested relief.'" *Ctr. for Pub. Integrity v. United States Dep't of Defe.*, 411 F. Supp. 3d 5, 14 (D.D.C. 2019) (motion granted) (quoting *Natural Res. Def. Council*, 555 U.S. at 24). The devastating and irreparable effects on the Tribe if the Secretary is allowed to remove the trust protections from the Tribe's land are clear. The effect on the Secretary, on the other hand, is negligible to non-existent.

The Tribe is seeking a temporary restraining order and a preliminary injunction to maintain the *status quo* pending resolution of this civil action and any appeals. That is all. Specifically, the Tribe seeks to enjoin the Secretary from removing his trust protection of the land and from rescinding the 2015 proclamation that designates the land as the Tribe's reservation until this action can be decided. The Secretary is subject to a short delay at most. The status quo that has existed since the land was originally placed into trust in 2015 is maintained until this Court can rule. There is no harm here, much less irreparable harm.

Indeed, the Department has admitted *harm to the Department* should the land be taken out of trust. In then-Regional Director Maytubby's earlier affidavit, the Department candidly conceded that if it moves to take the land out of trust "BIA would have to effectively unwind all the environmental and title work" that it has completed, "an extraordinary step" for which "there are no clear procedural steps to guide this process." Ex. 1, Maytubby Aff. ¶ 5. "Reversing the trust transfer before a final decision on the merits would nullify the countless hours of labor that BIA staff have already spent on finalizing the trust transfer" (*id.* ¶ 6), while leaving open the possibility, even the likelihood, that all that work would have to be re-done. "It would create

confusion as to the appropriate agency process for implementation, particularly given that these parcels must be re-accepted into trust if a favorable decision on the merits is later issued." *Id.*

Balancing the effect on each party of granting or withholding the requested injunctive relief, then, is not close. The scale is tipped entirely to the side of the Tribe. The Tribe is overwhelmingly and irreparably harmed; the hardship placed on the Secretary is not even minimal. *Cf. Ctr. for Pub. Integrity*, 411 F. Supp. 3d at 14. Balancing the equities mandates entry of the temporary restraints and preliminary injunction sought by the Tribe.

D. The Public Interest Favors an Injunction, Especially Because The Secretary's Decision to Take the Land Out of Trust While Litigation Is Ongoing Would Contravene Longstanding Administrative Policy and Violates the Administrative Procedure Act

"The public interest is served when administrative agencies comply with their obligations under the APA." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (motion granted) (quoting *N. Mariana Islands v. U.S.*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009)). The APA requires courts to set aside as unlawful agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To comply with the APA, a federal agency must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also, e.g., Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 920 (D.C. Cir. 2017).

Here, the Department has provided the Tribe with no reasonable explanation as to the Department's basis for taking the Tribe's reservation land out of trust, much less the articulation required by *State Farm*. Nor has the Department cited to any authority for taking such an action, other than a reference to the mandate of the First Circuit, which says nothing about taking the

land out of trust. *Littlefield*, Docket No. 150. Nor does the First Circuit's decision does not direct the Department to take the land out of trust, and in fact emphasized that it was not addressing Interior's position with respect to the application of the first definition of Indian in the IRA -- the issue in this case. *Littlefield*, 951 F.3d at 34-36.

The Department has failed to provide the Tribe with any detail regarding the administrative process the Department will follow to take the land out of trust, or whether the Tribe will have any opportunity to challenge. Cromwell Decl. ¶ 16. Counsel for the Tribe asked the question, and has not received an answer -- *apparently because there is no process*. "This would be an extraordinary step, and there are no clear procedural steps to guide this process." Ex. 1, Maytubby Aff. ¶ 5 (referring to issuance of an injunction to take land out of trust).

This is impermissible under the APA. The APA mandates that an agency give a reasoned explanation for its actions, including a requirement that the agency adequately explain its result. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d at 920 (citing *State Farm*, 463 U.S. at 42-52). The court must consider whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 U.S. at 43 (citations omitted)*; see also Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989). If the agency has not articulated any reasonable explanation of its action, the Court cannot determine that the agency complied with the APA.

Moreover, the Secretary's decision to take the Mashpee Trust Land out of trust while this case is ongoing contravenes the longstanding policy of the Department not to take land out of trust while litigation is pending without a court order directing such action. As recently as September 11, 2018, after the Department announced its September 7, 2018 Decision, Bureau of Indian Affairs spokeswoman Nedra Darling reaffirmed with respect to the Mashpee Trust Land

that "[c]onsistent with our practices and procedures, the department will continue to hold the tribe's land in trust until a final court order is imposed."[8] Ms. Sibbison squarely raised this issue on the March 27 call, and the Department has still has not addressed this point. Cromwell Decl. ¶ 16. A hallmark of arbitrary and capricious agency action is an agency's departure from prior agency interpretations or established precedent without reasonable explanation:

> One of the core tenets of reasoned decisionmaking announced in *State Farm* is that 'an agency changing its course ... is obligated to supply a reasoned analysis for the change.' 'Reasoned decision making ... necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent,' and an agency that neglects to do so acts arbitrarily and capriciously.

Jicarilla Apache Nation v. U.S. Dep't of Interior, 613 F.3d 1112, 1119-20 (D.C. Cir. 2010) (internal citations omitted). An agency cannot ignore relevant precedent. *Id.* at 1120 (citing *LeMoyne–Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004)); *see also Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). Unexplained inconsistency or departures from agency policy and past practices must, at a minimum, be explained. *See Am. Wild Horse Pres. Campaign,* 873 F.3d at 923.

The public interest disfavors the Secretary's high-handed and unexplained disregard of the Department's standard practice and the requirements of the APA. The public interest also disfavors the Secretary's disregard of any semblance of honoring his trust obligations to the

[8] Tanner Stening, *Interior: Mashpee tribe's land remains in trust pending appeal*, CAPE COD TIMES (Sept. 11, 2018), https://www.capecodtimes.com/news/20180911/interior-mashpee-tribes-land-remains-in-trust-pending-appeal. *See also Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 81 (D.D.C. 2013) (discussing the lack of clarity about "whether a transfer into trust can be reversed").

Tribe. Taking the land out of trust would be an "obstruction of the BIA's and federal government's fundamental policies of tribal self-determination and tribal economic growth." Ex. 1, Maytubby Aff. ¶ 7. The Secretary's directive to take remove the trust protection from the Tribe's land is not the interest of the Mashpee Tribe, of Indian Country generally, nor of the American people.

CONCLUSION

For all the reasons set forth above and in the accompanying declarations of Cedric Cromwell, plaintiff Mashpee Wampanoag Tribe respectfully requests the Court to enter temporary restraints and a preliminary injunction prohibiting Respondents and their employees, agents, servants, attorneys and all other persons in active concert or participation with them from taking any steps to alter the *status quo ante* with respect to the approximately 170 acres in the Town of Mashpee, Massachusetts and the approximately 151 acres in the Town of Taunton, Massachusetts, that were taken into trust by the Department of the Interior for the benefit of the Mashpee Wampanoag Tribe on November 10, 2015, including (a) taking any steps or initiating any procedures to take the land out of trust or attempt to return the land to fee ownership status, including without limitation any steps to change, alter or re-record the title to the trust land, whether in the Indian Lands Title Records Office or in Barnstable or Bristol Counties, Massachusetts or elsewhere, or (b) rescinding, revoking, withdrawing, vacating or otherwise terminating the proclamation that the trust land is the Tribe's Reservation (*see* 81 Fed. Reg. 948 (Jan. 8, 2016)) or making any proclamation or announcement to the contrary, until such time as

judgment is entered in this civil action and all appeals of such judgment are complete or the time for appeal has expired.

Dated: March 30, 2020

Respectfully submitted,

/s/ *Kenneth J. Pfaehler*
Tami Lyn Azorsky (D.C. Bar No. 388572)
Kenneth J. Pfaehler (D.C. Bar No. 461718)
V. Heather Sibbison (D.C. Bar No. 422632)
Suzanne Schaeffer (D.C. Bar 429735)
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006
Tel.: 202.496.7500
Fax.: 202.496.7756
tami.azorsky@dentons.com
kenneth.pfaehler@dentons.com
heather.sibbison@dentons.com
suzanne.schaeffer@dentons.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, I electronically filed the foregoing Emergency Motion for a Temporary Restraining Order and a Preliminary Injunction with the Clerk of the Court of the U.S. District Court for the District of Columbia by using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ *Kenneth J. Pfaehler*
Kenneth J. Pfaehler