UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASHPEE WAMPANOAG TRIBE, Plaintiff, v. DAVID BERNHARDT, in his official capacity as Secretary of the Interior, and U.S. DEPARTMENT OF THE INTERIOR Defendants and DAVID LITTLEFIELD *et al.*, Intervenor-Defendants.	Civil Action No. 1:18-cv-02242-PLF

INTERVENOR-DEFENDANTS *LITTLEFIELD* PLAINTIFFS' OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The Tribe's request for a preliminary injunction should be denied for the same reason that its claim should ultimately be rejected: the Tribe cannot prove that the Secretary acted contrary to law by following the Supreme Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009). The Mashpee Wampanoag Tribe of Massachusetts is effectively the same as the Narrangansett Tribe of Rhode Island, whose claim to "Indian" status was rejected in *Carcieri.* The two tribes share geography on either side of Narragansett Bay and nearly identical histories under colonial rule and state jurisdiction. The well-documented histories of both tribes demonstrate that the federal government chose not to exercise responsibilities over these tribes and did not consider them "wards of the federal government" in 1934. As the Supreme Court noted in *Carcieri*, the Narragansett "w[ere], and always had been, under the jurisdiction of the New England States, rather than the Federal Government." *Id.* at 384. The same holds true for the Mashpees. Thus, the only way to set aside the Secretary's September 7, 2018 Remand Decision ("Remand Decision") is to set aside *Carcieri* itself.

The Tribe cannot show that the Secretary acted arbitrarily and capriciously in *considering* the Tribe's evidence, especially given the shared histories of the Mashpees and the rejected Narragansetts. The Mashpees' evidence has been found wanting in every forum to consider it, including by the Secretary during the years leading up to the 2015 ROD.[1] In the 2018 Remand Decision, the Secretary

[1] The Tribe offered the identical evidence to Interior starting in 2012, claiming it constitutes irrefutable proof of being under federal jurisdiction in 1934. They submitted much of the same evidence (the Morse Report (1820), the Thomas McKenney Report (1826), Statistical Tables included in H.R. Rep. No. 23-474 (1834), and the Henry Schoolcraft Report (1850)) in litigation in the federal courts in Massachusetts to prove they were federally recognized by Interior, *e.g.*, *Mashpee Tribe v. Sec'y of Interior*, 820 F.2d 480, 484 (1st Cir. 1987), and to establish that they were a "tribe" for purposes of showing tribal status as a matter of law. *Id.* at 483. These documents were found "inadequate" to show federal recognition or tribal status. *Id.* at 483-84 ("Regardless of the legal lens through which we view these documents, however, we find them inadequate to show tribal status."). These same records reappear in this action and are similarly not up to the task for which they are offered.

provided reasoned decisionmaking by weighing the Tribe's evidence under the Department's M-Opinion, which implemented *Carcieri*. It is undisputed that the Tribe's evidence does not demonstrate *any* of the principal acts showing that a tribe was "under federal jurisdiction" in 1934—a federal treaty in effect in 1934, a congressional appropriation in effect in 1934, or enrollment of the tribe in the Office of Indian Affairs in 1934. *See Carcieri*, 555 U.S. at 399 (Breyer, J. concurring). Rather, the evidence offered by the Tribe consists of sporadic and inconsequential contacts with the federal government over two hundred years, none of which were "in effect" in 1934.

The Secretary's evaluation of the sparse historical record offered by the Tribe is reserved to the Secretary's judgment and his discretionary authority to take land into trust under the Indian Reorganization Act. The Tribe wrongly seeks to substitute its evaluation of the historical evidence for the considered judgment of the Secretary in violation of the APA standards of review. The Tribe cannot show that the 2018 Remand Decision is "arbitrary, capricious, or contrary to law."

The Tribe has also failed to demonstrate that it will suffer irreparable harm (or that the balance of hardships strikes in its favor) if the Secretary implements the final judgment in *Littlefield,* rescinds the unlawful 2015 ROD, and returns the lands to legal fee status. The hardships claimed by the Tribe do not reflect the Tribe's financial realities, and are largely belied by the record.

While the Tribe argues that "the Secretary is subject to a short delay at most" if the Tribe's motion is granted, the motion itself seeks an indefinite injunction that could last years: "The Tribe is seeking . . . a preliminary injunction to maintain the *status quo* pending resolution of this civil action *and any appeals*." ECF No. 42-1, at 2-3 ("Pl. Mem.") (emphasis added). The Tribe thus seeks to further hold off the *Littlefield* plaintiffs from obtaining the relief to which they have been entitled since 2016, as recently affirmed by the First Circuit. Should the Secretary be allowed to comply with the final court ruling in *Littlefield*, the trust lands will revert to legal fee status, the Tribe will continue to own the property, and the Tribe remains entitled to receive millions of dollars in federal aid every year, just

as it did before it had trust land.

Accordingly, the Tribe has not demonstrated entitlement to the extraordinary relief of a preliminary injunction.

ARGUMENT

I. LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)). "To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Id.*

At the outset, it is worth noting that the sliding-scale approach advocated by the Tribe is inconsistent with the United States Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Under *Winter*, both a likelihood of success *and* irreparable harm are necessary for a preliminary injunction. *See Alcresta Theraputics, Inc. v. Azar*, 318 F. Supp. 3d 321, 324-26 (D.D.C. 2018) ("Some judges of the D.C. Circuit have expressed the view that . . . *Winter* supplants the 'sliding scale' approach, and a movant cannot obtain an injunction without showing '*both* a likelihood of success *and* a likelihood of irreparable harm.'" (citations omitted, emphasis in original)); *Cal. Ass'n of Private Postsecondary Sch. v. Devos*, 344 F. Supp. 3d 158, 167 (D.D.C. 2018). In any event, even if the sliding scale survived *Winter*, the Tribe cannot prevail under its "less demanding" analysis. *See Heart 6 Ranch, LLC v. Zinke*, 285 F. Supp. 3d 135, 139 (D.D.C. 2018).[2]

[2] In fact, the courts of this Circuit have suggested that the primary focus of the court's inquiry is the moving party's likelihood of success on the merits. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir.

II. THE TRIBE CANNOT SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

A. The Tribe cannot show a substantial likelihood of success on the merits.

1. The Secretary's Remand Decision was mandated by the Supreme Court's decision in *Carcieri v. Salazar*.

As an initial matter, an agency's factual findings and judgments are entitled to great deference. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 n.3 (D.C. Cir. 2014). An agency's determination can only be disturbed if it is arbitrary or capricious or otherwise contrary to law. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (court may set aside agency decision only if it "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view").

Given the deferential standard of review that applies here, the Tribe cannot show that the Secretary abused his discretion in finding that they were not "under federal jurisdiction in 1934." The Tribe points to neutral language in the Department's M-Opinion that states Interior's guidance does not provide an exhaustive list of contacts that may be considered evidence of federal oversight or interaction for purposes of determining whether a particular tribe was under federal jurisdiction in 1934. But the fact that Interior *could* consider other evidence does not mean the Tribe's meager evidence is the kind of evidence, both in quality and in quantity, that demonstrates the Tribe was under federal jurisdiction in 1934. The Tribe's contention—*i.e.*, that the Secretary must view that record the same way it does, and find the Tribe, and by extension every other tribe in America, was under federal jurisdiction in 1934—is the antithesis of the tribe-by-tribe judgments that the Secretary is required to make under the IRA, the M-Opinion and *Carcieri*.

The M-Opinion expressly implements the dictates of *Carcieri* and requires tribes to show

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2014) (likelihood of success is "the most important factor"); *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 297 (D.D.C. 2017) (court describes need to demonstrate likelihood of success on the merits as "especially important").

meaningful federal contacts such as a federal treaty, congressional appropriation, or enrollment in Office of Indian Affairs in 1934. It requires much more than the Narragansett Tribe's infrequent historical contacts with the federal government found lacking in *Carcieri*. It is that Supreme Court controlling authority that necessarily makes the Mashpee ineligible under the IRA as the "twin" to the Narragansetts. The Mashpee Tribe has never distinguished their history from that of the Narragansetts, because they can't. As demonstrated by Defendant-Intervenors' summary judgment submissions in this action (ECF No. 33-1 at 1, 3, 5, 7, 9; ECF-38 at 1-9), the Mashpees' history closely mirrors that of the Narragansett. Until the Mashpees received federal recognition in 2007, the Mashpees had no meaningful contact with the federal government. Just like the Narragansetts, the Mashpees "w[ere] and always had been, under the jurisdiction of the New England States, rather than the Federal Government." *See Carcieri*, 555 U.S. at 384.

Unable to distinguish the Narragansetts' history on the merits, the Mashpees resort to claiming that the Supreme Court in *Carcieri* never ruled on the sufficiency of the historical evidence concerning the Narragansett tribe's interactions with the federal government—*i.e.*, that the majority and concurring opinions did not say what they said. Despite the Mashpees' protestations to the contrary, it is clear that the majority opinion *held* that the Narragansetts were not under federal jurisdiction based on the Narragansetts' history as set forth in the tribe's 2003 Federal Acknowledgment, as cited by the majority. *See Carcieri*, 555 U.S. at 383 (recounting Narragansett history and citing to the Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6,177 (1983)). That historical record showed that the Narragansetts were, "and always had been, under the jurisdiction of the New England States, rather than the Federal Government." *Id.* at 384; *id.* at 399-400 (Breyer, J., concurring) (declining to remand case because "no realistic possibility"

existed that the Narragansett could show they were under federal jurisdiction in 1934).[3]

2. The Tribe does not show a substantial likelihood of success in overturning the 2018 Remand Decision through its cherry-picking of evidence found to be relevant in the Secretary's other cases.

The Tribe resorts to cherry-picking from other land-into-trust decisions where Interior evaluated the historical evidence concerning other tribes. The Tribe pulls from these other decisions examples of federal interactions that Interior considered in taking land into trust for other tribes—and then argues that the Mashpee have the same meaningful contacts or interactions with the federal government, especially when considered as a whole. But the Mashpees' approach ignores the fact that the Secretary's consideration of a Tribe's status is holistic, focusing on the sum, rather than the individual parts. By isolating and ripping out of context pieces of historical evidence considered in other cases, the Tribe ignores the actual sum total of the evidence considered in the other cases—the quality and number of federal interactions in each of those prior cases—that supported the Secretary's decision to take land into trust for another tribe. The fact is that no other tribe except the Narragansetts has the same extreme paucity of federal interactions over a two-century history. It is the Secretary's duty to weigh the evidence and exercise his judgment and expertise. It is not the Tribe's role as a disappointed litigant to reweigh the Secretary's evidence for other tribes *out of context* and argue that a different result should have been reached based on the evidence for the other tribes. Such a complete "re-do" might be appropriate where *de novo* review is provided. It is entirely inappropriate under the APA's deferential "arbitrary, capricious, and contrary to law" standard of review. The Tribe is not permitted to substitute its judgment for that of the Secretary.

In the final analysis, the Secretary's Remand Decision is not only within the range of permissible outcomes given the Tribe's meager evidence, but compelled by *Carcieri*. Indeed, the

[3] Even the Narragansetts' petition for a writ of certiorari stated that the tribe "was neither federally recognized nor under the jurisdiction of the federal government" in 1934. *Id.* at 395-96.

Secretary has been remarkably consistent in his view of the evidence from 2012 to present. That evidence has always been insufficient to demonstrate any meaningful relationship with the federal government at any time during its history, much less a federal jurisdictional status in effect in 1934. No historical, legal, or logical basis exists to allow the Mashpees to qualify as "Indians" under the IRA when the Supreme Court denied that status to the nearly identically situated Narragansett. To hold otherwise flies in the face of *Carcieri*.

Although not required to do so, the Secretary carefully listed and addressed significant portions of the evidence presented by the Tribe. *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 190 (D.D.C. 2011) (detailed recitation not necessary to comply with APA—"[n]othing more than a 'brief statement' is necessary, so long as the agency explains 'why it chose to do what it did'" (citing *Tourus Records, Inc. v. DEA,* 259 F.3d 731, 737 (D.C. Cir. 2011)); *see* 2018 Remand Decision at AR0005107-0005115 (addressing each piece of historical evidence presented by Tribe). The Secretary explains why the contacts so heavily relied on by the Tribe lack the significance necessary, when viewed as a whole as required by the M-Opinion, to satisfy the IRA's jurisdictional requirement. Thus, the Tribe cannot legitimately contend that the Secretary failed to consider the evidence the Tribe believes conclusively proves their qualification for land into trust. Rather, they take issue with the importance or significance ascribed to that evidence by Interior and the Secretary's conclusion that the totality of the evidence was not sufficient to establish that the Mashpee were "under federal jurisdiction in 1934." But this disagreement with Interior regarding *the weight* of the Tribe's evidence does not make the Secretary's decision arbitrary, capricious or contrary to law, as explained in the summary judgment memoranda of law submitted by the Federal Government and Intervenor-Defendants.

B. The Tribe has failed to meet its burden to show irreparable harm.

1. The Cromwell Declaration omits any mention of the Tribe's receipt of federal assistance before the 2015 ROD took land into trust and the Tribe's entitlement to federal assistance if the lands revert to fee status.[4]

The Tribe cannot show that it will suffer irreparable harm if the 321 acres in question revert to fee status. The Tribe's federal recognition is not being taken away by the Secretary's directive; the Tribe still owns all of the land in question in both Taunton and the Town of Mashpee; and, critically, for purposes of this motion, the Tribe is still entitled to receive all of the same substantial federal funding it received before the land went into trust. Declaration of David H. Tennant in Opposition to Plaintiff's Motion for Preliminary Injunction, dated April 21, 2020 ("Tennant Decl.") at ¶¶ 15-21. That federal support averaged $5.5 million per year. *Id.* ¶ 21. In fact, the Tribe received more than $48 million from the federal government following its federal recognition in 2007 and before the Secretary unlawfully took the subject lands into trust in September 2015. *Id.* ¶ 17. The Tribe continued to receive federal aid after the land went into trust, adding another $30 million in federal funds after 2015. *Id.* ¶ 20. Some (but not all) of those post-2015 funds were premised on the Tribe having a reservation. During the Tribe's "landless" period (2007-2015), the federal government's assistance included a HUD loan in 2012 in the amount of $12.7 million, which allowed the Tribe to construct a state-of-the-art government and community center on the Tribe's fee lands in the Town of Mashpee. *Id.* ¶ 18. That center opened in 2014, more than a year before the Secretary issued the 2015 ROD. *Id.* As the record of the federal assistance given to the Tribe shows, the federal government is legally obligated to support the tribal governments and provide member services for every federally recognized tribe, regardless of whether the tribe has trust lands or a declared reservation. Accordingly, the many federal programs and services for tribes that do not depend on the existence of a reservation

[4] Declaration of the Honorable Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe, in Support of Plaintiff Mashpee Wampanoag Tribe's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, dated March 30, 2020, ECF 42-3 ("Cromwell Decl.").

remain available to the Tribe should the status of the land revert to fee status as required by the First Circuit's February 27, 2020 decision (and March 19, 2020 mandate) in *Littlefield*.

The Tribe, in making the case for irreparable harm in the form of "further economic harm," Pl. Mem. 13, omits any mention of the $48 million it received when it did not have trust lands or a reservation, and the substantial federal aid it will resume receiving—an estimated $5 million per year—when the lands revert to fee status. By omitting any mention of the past and future federal support for the Tribe when in possession of fee lands, the Tribe heavily and misleadingly skews the analysis of irreparable harm.

2. The Cromwell Declaration omits mention of the Tribe's receipt of $347,000,000 since 2015.

The Tribe also fails to disclose the fact that it received approximately $347 million in loans in 2015-2016 from Genting Malaysia, its casino backer, (Tennant Decl. ¶¶ 5-7), which the Tribe does not have to repay unless it opens a casino. *Id.* ¶ 10. The record thus shows that, since 2015, the Tribe has run through $30 million in federal grants, direct payments and loans to support its tribal operations, while burning through $347 million it received from Genting ostensibly for "pre-development" of a Tribal casino that has yet to be built, with its lands in Taunton empty.

3. The Tribe's injuries are self-inflicted.

Given the documented receipt of more than $377,000,000 in private and public assistance since 2015, the Tribe's claim that it "currently has no available revenue stream and is struggling to keep its government operating," Pl. Mem. 13, rings hollow. If the Tribe no longer has access to the money that it has received, that is a problem of the Tribe's own making. The land reverting to fee status is not the cause of the Tribe's financial injury; those harms are preexisting and self-created. A party seeking equitable relief has no right to claim irreparable harm that is self-created. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that litigant cannot "be heard to complain about damage inflicted by its own hand"); *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*,

28 F.3d 1268, 1276 (D.C. Cir. 1994) (harm is "self-inflicted" where "it results not from any actions taken by [defendant], but rather from the Council's own budgetary choices"); *Equal Rights Ctr. v. Post Properties, Inc.*, 657 F. Supp. 2d 197, 201 (D.D.C. 2009) (movant for preliminary injunction must "establish that the injuries it suffered were *not* due to a self-inflicted diversion of resources" (emphasis in original)).

4. The Tribe's claims of irreparable injury pertain almost entirely to the tribal homelands in the Town of Mashpee.

The Cromwell Declaration describes a range of federal programs (affordable housing, childcare, historic preservation, language school) that are at risk because certain federal funds are directed to Native Americans living on or near a reservation. Cromwell Decl. ¶ 23. All of these "at risk" projects and programs relate to the Tribe's ancestral lands in the Town of Mashpee, where the Tribe has its government and community center and where most of its members live. The Tribe talks passionately about the importance of those ancestral lands which are "central to the Tribe's spiritual and cultural identity," but talks about the land in Taunton only in terms of its economic value to the Tribe. Pl. Mem. 2, 12-14. To the extent the Court believes the Tribe's lands in the Town of Mashpee should not revert to fee status because of the cited concerns, the Court could issue an injunction narrowly tailored to protect those lands during the pendency of this lawsuit. However, the Tribe has not made a sufficient showing of irreparable harm in relation to the lands in Taunton if they were to revert to fee status. Currently, the land is completely undeveloped. Thus, the claimed economic injury from those lands reverting to fee status is speculative as well as self-created.

5. The Cromwell Declaration recites speculative and theoretical harms.

This Circuit "has set a high standard for [proving] irreparable injury." *Cal. Ass'n of Private Postsecondary Sch.,* 344 F. Supp. 3d at 170 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). Conclusory assertions of potential loss do not suffice. *Id.* at 171. To be entitled to a preliminary injunction, the moving party must show the alleged harm is "both certain and great" and "actual, and

not theoretical." *Id.*; *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016). Here, the Tribe's claims of irreparable injury are speculative, uncertain, and theoretical.

a. Right to self-governance and self-determination

The non-monetary impact of "losing" its reservation and right to self-governance and self-determination (in accordance with the final determination of the First Circuit) is a self-created harm that flows from rescinding the 2015 ROD that never should have been issued in light of *Carcieri*. The related concern about jurisdictional "confusion" is overstated inasmuch as the Tribe negotiated agreements with both the City of Taunton and Town of Mashpee before and after the lands were unlawfully taken into trust. Questions about jurisdiction can be amicably resolved through the same political process.

b. Loss of Taunton lands through foreclosure

The Cromwell Declaration makes brief reference to a potential or possibly actual unidentified third party who may have (or might take) an interest in the Taunton property and argues that the Tribe might thereby be prejudiced if those lands reverted to fee status. Cromwell Decl. ¶ 22. Without describing the holder of the interest and the interest held—and how that interest might be impaired by the lands reverting to fee status--the Tribe has not demonstrated prejudice to anyone, much less irreparable injury to it.

The Tribe's fear that it will be stuck with a large tax bill retroactive to 2015 is speculative and unsupported by any facts. The Tribe was current on its property taxes when the land was taken into trust, since that is a federal requirement. The question of liability for back taxes apparently has not come up. It would be a matter of negotiation. The taxing authority might waive the back taxes in toto. It is unlikely a taxing authority would impose penalties and interest under these circumstances. With no tax liability in any amount established or estimated, the Tribe's contention is both premature and speculative. This problem may never occur. If the Tribe is saying it has no money to make tax

payments going forward, that means the Tribe has squandered $347 million in four years and cannot afford to own the lands. The best course in that case is for the Tribe to sell the lands after they are returned to fee status. The inability to pay real property taxes is self-created.[5]

c. Tribal housing

The Tribe can only guess that its "nearly-completed" HUD housing project will be delayed for up to a year as the Tribe seeks compliance with local zoning requirements. The Tribe does not identify any conflict with the Town's zoning code, nor does it identify any way in which the Town's zoning requirements are more strict than the Tribe's, such that compliance would cause any delay, much less a significant delay. For any construction already started but not complete when land reverts to fee status, the local zoning requirements can be met with a variance issued by the Zoning Board of Appeal. The Tribe's stated concern about the project being delayed by zoning issues is unsupported by any facts and entirely speculative.

d. Closing of language school

The Tribe's stated concern that it will have to close its language school is speculative. The Tribe identifies no state educational requirements that its school would have to meet that it does not currently meet, or document the inability to secure a waiver of any such requirements. Nothing prevents the Tribe from continuing to operate the school under state law (say, for example, as a non-profit).

e. COVID-19 emergency relief

The Tribe contends that it may lose COVID-19 funding under the CARES Act that is tied to a reservation. Cromwell Decl. ¶¶ 25, 29. But this "potential" (not actual) loss of federal funds does

[5] In asserting financial distress, the Tribe also omits mention of its land in the Town of Middleboro, which it purchased for $5,125,000 in 2016, anticipating it would locate its casino in that community, which also sits 50 miles distant from the Town of Mashpee. Tennant Decl. ¶ 28. This asset logically could be sold to pay real property taxes if the Tribe has limited resources.

not take into account the many COVID-19 relief funds specifically set up to help Native Americans. This includes emergency funds set up by FEMA and the CDC that offer financial assistance to all tribal communities without limiting such aid to Indians living on or near a reservation. *See* FEMA, *Coronavirus (COVID-19): FEMA Assistance for Tribal Governments* (Mar. 26, 2020), https://www.fema.gov/news-release/2020/03/26/coronavirus-covid-19-fema-assistance-tribal-governments; CDC, *COVID-19 Funding for Tribes*, https://www.cdc.gov/tribal/cooperative-agreements/covid-19.html.

f. Forestry services

The Tribe complains that it will lose federal funding for forestry and wildlife management but does not quantify that amount, does not explain what other federal funds might pay for it, and does not address whether assistance is available from the State of Massachusetts' Indian Affairs office (which provides tribes with aid in this context).

The collection of self-created and speculative injuries identified by the Tribe fail to demonstrate that it will suffer irreparable injury if the injunction is not granted.

C. <u>The public interest would be furthered by denying the injunction.</u>

A party seeking injunctive relief must show "that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. The Tribe has not done so. Correcting federal agency overreach serves an important public purpose. *Damus v. Nielsen,* 313 F. Supp. 3d 317, 342 (D.D.C. 2018) ("The public interest is served when administrative agencies comply with their obligations under the APA."). The Tribe acknowledges as much, noting that "[t]he APA requires courts to set aside as unlawful agency decisions that are 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.'" Pl. Mem. 8 (quoting 5 U.S.C. § 706(2)(A)). Allowing the final determination in *Littlefield* (as expressed in the First Circuit's decision and mandate) to take legal effect will give meaning to the rule of law. It gives finality to the litigants including providing

assurances that the casino will not be constructed, thereby preserving the Intervenor-Defendants' community and way of life. Rescinding the unlawful trust acquisition clarifies title and otherwise lifts a cloud of uncertainty over the Taunton property for the benefit all stakeholders in Southeastern Massachusetts. The public interest is further served here by not allowing the Tribe to receive federal benefits that it is not entitled to receive and thereby deprive other tribes from receiving. The First Circuit determined that the Secretary's decision to place the land in trust was not in accordance with the law. The Department has concluded that the applicable law does not encompass the Tribe. The public interest is not served by allowing a party to continue to benefit from an agency action that has been finally determined by another court to be contrary to the law.

D. The Tribe mistakenly relies on the Maytubby Declaration in *Littlefield* to claim Interior policy and practice supports issuance of an injunction in this case.

The Tribe contends that the Department abides by a "longstanding policy and practice" to not take lands out of trust until "a final decision on the merits," quoting the Declaration of BIA Regional Director Bruce Maytubby, dated June 24, 2016, filed in *Littlefield*. Pl. Mem. 17. Regional Director Maytubby filed his declaration in June 2016, some four months into the *Littlefield* case, and obviously was referring to the "final decision on the merits" and "final court ruling" that would be provided by the federal courts in *Littlefield*—which is exactly what the First Circuit's February 27, 2020 decision and March 19, 2020 mandate is. Interior is under no obligation to refuse to comply with that mandate because the Tribe filed a separate lawsuit in this Court.[6]

III. THE TRIBE HAS COME TO THE WRONG COURT TO CHALLENGE THE *LITTLEFIELD* MANDATE.

The Tribe's motion is procedurally out of order inasmuch as the specific action by Interior

[6] The Tribe goes so far as to quote an Interior spokesperson in September 2018 stating the land will remain in trust "until a final court order is imposed." Pl. Mem. 17. The First Circuit decision and mandate meet that test as well.

that the Tribe challenges by its motion — the March 27, 2020 directive of the Secretary in response to the mandate issued by the First Circuit in *Littlefield*—is not part of this case. Nothing in the pleadings in this case permits the Tribe to challenge the March 27, 2020 directive before this Court. The Tribe's APA complaint challenges the Secretary's action in the September 7, 2018 Remand Decision, which determined that the Tribe was ineligible for trust land. Prior to the instant motion, the Tribe took pains to explain why its challenge to the 2018 Remand Decision does not involve the 2015 ROD, and continues to refer to the *Littlefield* case as resolving a "separable legal issue." Pl. Mem. 4. Yet the Tribe now blurs the lines between these actions and without any predicate pleading attempts to prevent the Secretary from implementing the final determination in *Littlefield*. To the extent the Tribe did not want to take the time to institute a separate APA action and chose instead to pursue injunctive relief in a pending case, the Tribe chose incorrectly. Short of a separate APA action challenging the Secretary's March 27, 2020 directive (and setting aside questions about whether that directive is a challengeable "final agency action"), the Tribe's only recourse to obtain relief relating to Interior's compliance with the First Circuit's mandate would be to seek it from the Supreme Court, or from the *Littlefield* district court. But the Tribe did not seek a stay of the mandate, and it did not ask for any other form of relief so that it could preserve its defense of the 2015 ROD and ensure that its land was kept in trust. Given that Interior's directive, taken after the First Circuit's decision, flowed from the invalidation of the 2015 ROD rather than the 2018 Remand Decision challenged here, this Court is not the right venue for the Tribe to be pursuing this interim relief.

CONCLUSION

The Tribe's motion for a preliminary injunction should be denied.

Dated: April 21, 2020

Respectfully submitted,

/s/ David H. Tennant
David H. Tennant (admitted *pro hac vice*)
Law Office of David Tennant PLLC
3349 Monroe Avenue, Suite 345
Rochester, NY 14618
Tel.: 585.708.9338
david.tennant@appellatezealot.com

/s/ Andrew Kim
Andrew Kim (D.C. Bar. No. 1029348)
GOODWIN PROCTER LLP
901 New York Avenue NW
Washington, DC 20001
Tel.: 202.346.4000
Fax.: 202.346.4444
AndrewKim@goodwinlaw.com

Attorneys for Intervenor-Defendants