UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASHPEE WAMPANOAG TRIBE, Plaintiff, v. DAVID L. BERNHARDT, 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

REPLY TO FEDERAL DEFENDANTS' AND INTERVENOR-DEFENDANTS' MEMORANDA IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The Defendants' and Intervenor-Defendants' ("Intervenors") effort to paint the Mashpee Wampanoag Tribe's ("Tribe" or "Mashpee") request for injunctive relief as a dispute over the 2015 Record of Decision and the related litigation in the First Circuit ignores the procedural posture of this case. When the Tribe filed its Complaint challenging a September 7, 2018 Record of Decision[1] ("Decision"), the Tribe had an existing reservation in trust under the Indian Reorganization Act[2] ("IRA"). The Tribe's Complaint alleges the Secretary erroneously determined that the Tribe was not "under federal jurisdiction" in 1934, and improperly refused to exercise his IRA authority to confirm that the land was properly acquired in trust and proclaimed a reservation. Complaint ¶ 2. This Court held "the Complaint raises national questions regarding the scope of DOI's authority to acquire land in trust for Indian tribes under the IRA and the standards by which its acquisitions are judged." Memorandum Opinion on Transfer Motion at 17 (ECF 21). Accordingly, the preliminary injunction motion seeking to maintain the *status quo* (preserving the current trust and reservation status of the Tribe's land) pending resolution of this civil action and any appeals fits squarely in the relief the Tribe is requesting. This Court has jurisdiction to grant the Preliminary Injunction.

Injunctive relief is necessary because the Secretary's March 27 Order ("Order") contravenes, without explanation, the longstanding policy of the Department not to take action to alter the trust status of land while litigation is pending, without a court order directing such

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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 ("AR") at AR0005088-5115.

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

action.[3] Implementation of the Secretary's Order without any explanation regarding the process that would be followed, would violate the Secretary's trust obligations and leave the Tribe with no reservation and no trust land. *Id.* ¶ 16. The impacts for the Tribe would be devastating. *Id.* ¶¶ 17-26.[4] The Tribe would lose federal funding and federal benefits, very likely lose its trust land to foreclosure, be unable to provide housing to Tribal members, have to close its language school, suffer jurisdictional harms, lose significant opportunities to become economically self-sufficient, and most of all, lose its sovereign right to self-governance and self-determination over these lands, the lands of its ancestors, to which it has immeasurable cultural and spiritual connections.

The Tribe seeks a preliminary injunction only to maintain the *status quo* until a final decision is reached regarding the Secretary's trust acquisition authority. The Defendants and Intervenors will not suffer any harm from preserving the *status quo ante* until the Court can finally rule regarding the Secretary's authority under the IRA. The request is consistent with the APA, the balance of the equities, and the public interest.

ARGUMENT

I. The Court Has Jurisdiction Over the Motion for Preliminary Injunction

The Tribe's complaint seeks this Court's decision on the authority of the Secretary to take land into trust under the IRA on grounds that the Tribe is a recognized Tribe under federal

[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, (cited herein as "Cromwell Dec.") at ¶ 13. *See also* Mashpee Memorandum of Points and Authorities in Support of Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction at 18-21 (cited herein as "Mashpee PI Mem.").

[4] *See also* Supplemental Declaration of the Honorable Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe, in Support of Emergency Motion for a Preliminary Injunction, May 11, 2020 at ¶¶ 14-15 (cited herein as "Cromwell Supp. Dec.").

jurisdiction in 1934. If the Secretary had such authority, the existing reservation must be maintained.

A. The Tribe's Complaint and Preliminary Injunction Motion Both Seek Decisions Allowing the Continued Existence of the Tribe's Reservation

The same operative facts that underpin the Tribe's Complaint underpin the Tribe's request for injunctive relief. The Tribe is arguing that it submitted adequate evidence to the Department to establish that it was "under federal jurisdiction" in 1934, meaning that an earlier Secretary acted within her authority when she took the Tribe's lands in trust and proclaimed them to be the Tribe's reservation, and that the 2018 Decision to the contrary is arbitrary, capricious, and an abuse of discretion. The Complaint specifically alleges that the Secretary improperly refused to exercise the authority delegated by Congress under the IRA "*to confirm the federally protected status of the Tribe's reservation land.*" Complaint ¶ 2 (emphasis added). It is undisputed that the land is currently in trust. The Tribe seeks an injunction to keep it in trust pending final resolution of this action and any appeals. Thus, this court has jurisdiction to issue the requested injunction. *See Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 9 (D.D.C. 2014) (court has jurisdiction because same general claims underlie complaint and request for preliminary injunction); *Johnson v. Couturier*, 572 F.3d 1067, 1084 (9th Cir. 2009) (court had jurisdiction over the preliminary injunction motion seeking equitable relief because the complaint sought equitable relief).

A "district court may grant a preliminary injunction 'to preserve the relative positions of the parties until a trial on the merits can be held.'" *Bayer HealthCare, LLC v. U.S. Food & Drug Admin.*, 942 F. Supp. 2d 17, 23 (D.D.C. 2013) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). A preliminary injunction "is a stopgap measure, generally limited as to time, and intended to maintain a status quo or 'to preserve the relative

positions of the parties until a trial on the merits can be held.'" *District of Columbia v. U.S. Dep't of Agriculture*, --- F. Supp. 3d --- 2020 WL 1236657 at *8 (citing *Sherley v. Sebelius*, 689 F.3d 776, 781–82 (D.C. Cir. 2012) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)); *see also Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 22–23 (D.D.C. 2019) (holding that "[Rule] 65 authorizes a plaintiff who fears that a defendant's actions will irreversibly and irremediably injure the plaintiff's interests before the court can rule on legal claims . . . to seek a court order that 'preserves the relative positions of the parties until a trial on the merits can be held'") (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). Indeed, seeking to preserve the status quo is the precise type of narrow relief that a preliminary injunction may be granted to provide. *See District of Columbia v. U.S. Dep't of Agriculture*, --- F. Supp. 3d --- 2020 WL 1236657 at *8 (D.D.C. March 13, 2020) (internal citations omitted) (court has jurisdiction to issue preliminary injunction to maintain status quo); *Jacinto-Castanon de Nolasco v. U.S. Immigration and Customs Enforcement*, 319 F. Supp. 491, 498 (D.D.C. 2018) (court had jurisdiction over injunction seeking to preserve *status quo*).

The Tribe's request that the *status quo* be preserved is entirely consistent with the relief it seeks in its Complaint, *i.e.*, the confirmation of the status of its reservation, *see* Complaint ¶ 2 ("Department … improperly refused … *to confirm the federally protected status of the Tribe's reservation land*.").[5] The requested injunctive relief to preserve the *status quo* accordingly "relate[s] in some fashion to the relief requested in the complaint." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1134 (11th Cir. 2005).

[5] The specific relief requested includes a declaration that the Secretary's decision is arbitrary, capricious and contrary to law, an order that the Secretary set aside the Decision and issue a new Decision properly based on the evidence and consistent with law, regulation and Departmental policy, and any other such relief that the Court may deem proper. Complaint ¶¶ 67-70.

The cases cited by the Defendants fail to compel a different conclusion. In fact *Sai v. Transp. Sec. Admin., id.*, 54 F. Supp. 3d at 9, actually held the Court had jurisdiction over the preliminary injunction, rejecting the defendant's argument that the *pro se* plaintiff sought relief beyond the scope of the complaint. All the other cases cited by Defendants involve circumstances where the Complaint and the Preliminary Injunction Motion raised significantly different facts, or where the injunctive relief was completely unrelated to the relief sought in the Complaint, neither of which is the case here. *See, e.g., Adair v. England*, 193 F. Supp. 2d 196 (D.D.C. 2002) (complaint alleged religious discrimination in promotion, assignment, and retention, and said nothing about the Navy directing recruiting of new chaplains which the Plaintiff sought to enjoin); *Benoit v. District of Columbia*, 2018 WL 5281908 (D.D.C. Oct. 24, 2018) (preliminary injunction sought enforcement of portions of Hearing Officer Determination that had not been challenged in the complaint); *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945) (preliminary injunction sought sequestration of U.S.-based assets of foreign corporation defendants in an antitrust action that sought only equitable relief); *Schwartz v. U.S. Dep't of Justice*, 2007 WL 2916465 (D.N.J. Oct. 4, 2007) (preliminary injunction sought relief related to Freedom of Information Act (FOIA) requests not addressed in the complaint); *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117 (11th Cir. 2005) (court held that a preliminary injunction is inappropriate for past injuries).

Defendants' argument that the Tribe could only seek a preliminary injunction in a separate case filed to challenge the March 27th Order is unsupported by the authority on which they rely. Def. Opp. at 14, *citing Holly Sugar Corp. v. Johanns*, 2006 WL 8451547 slip op. (D.D.C. Aug. 1, 2006), *aff'd*, 2007 U.S. App. LEXIS 22624 (D.C. Cir. Sept. 21, 2007). *Holly Sugar* involved a completely different situation where the plaintiff not only sought preliminary

injunctive relief not related to the claims alleged in the complaint, but sought such relief after the claims in the complaint had been decided, appealed and reversed.[6] That kind of attenuated connection in both subject matter and time is not analogous to this situation in which the land is in trust, the complaint raises the Secretary's authority to acquire land in trust, and the preliminary injunction sought is to preserve the status quo with respect to that trust status.

B. Defendants' Reliance on the First Circuit Mandate is Substantively and Procedurally Flawed

Defendants try to defend their effort to take away the Tribe's reservation by pointing out that the Tribe did not seek rehearing or rehearing *en banc*, or request a stay of the mandate in the First Circuit in *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30 (1st Cir. 2020), ECF 150. The Tribe was not required to do so to seek further review of that decision. A petition for *certiorari* to the Supreme Court is not due until July 26, 2020,[7] and seeking a rehearing of any kind before filing that petition is not a prerequisite. Accordingly the First Circuit mandate neither justifies the Secretary's action, nor does it require the Tribe to seek injunctive relief in that case.

Moreover, the First Circuit mandate in no way requires Defendants to take any action regarding the land's trust or reservation status. *See id.* The First Circuit's mandate simply states:

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[6] *Holly Sugar* involved a challenge by sugar processors to the government's continued imposition of a surcharge on sugar loans based on an erroneous interpretation of a statute. After the district court granted summary judgment to the plaintiffs on certain counts of the complaint, the D.C. Circuit reversed, and plaintiffs filed a motion for summary judgment on additional counts (which the district court found had already been addressed) and a motion for preliminary injunction against the collection of surcharges until the remaining issues were resolved. The court denied the preliminary injunction because it was related to a contractual addendum to the sugar loans based on the defendant's success on appeal.

[7] The Supreme Court has extended the filing deadline to 150 days from the date of the First Circuit's judgment due to the COVID-19 outbreak. SCOTUS Filing Order (March 19, 2020). https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

"In accordance with the judgment of February 27, 2020, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court." *Id.* It is directed to the lower court, which may take whatever further proceedings are appropriate. *See* 16AA Fed. Prac. & Proc. Juris. § 3987 (4th ed.). The First Circuit's opinion addresses only the district court's decision regarding the Department's interpretation of the second definition of Indian in the IRA, *see Littlefield*, 951 F.3d at 34. The First Circuit was aware of this case in which an alternative basis for taking the land into trust is being litigated. *Id.*. The Department, moreover, while bound by the mandate of a reviewing court in the same fashion as the lower court, is not bound with respect to a matter that the reviewing court did not decide or expressly left open -- that is, the authority to take the land into trust under the first definition of Indian in the IRA. *See* 18B Fed. Prac. & Proc. Juris. § 4478.3 (2d ed.). In short, the Secretary's assertion that issuance of the mandate left him no choice but to take the Tribe's land out of trust and disestablish its reservation is complete fiction, and his efforts to take these actions are contrary to law, contrary to established agency practice, and contrary to the commitment the Secretary's representatives made to the Tribe not to take the land out of trust until litigation relating to the September 2018 Decision is concluded.

The fact that the Tribe could have sought the preliminary injunction in another court does not mean that this Court does not have jurisdiction. The issue in this case is whether the Secretary had authority to place the Tribe's land in trust and proclaim it a reservation. The land was in trust at the time the Tribe filed the complaint. Accordingly, this Court has jurisdiction to require that the land stay in trust -- preserve the *status quo* -- until the issues are finally resolved.

II. The Tribe Meets the Standard for Entry of a Preliminary Injunction

Courts in this jurisdiction evaluate the four preliminary injunction factors (likelihood of success on the merits, irreparable harm, balance of hardships, public interest) on a "sliding scale"

-- "if a movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). Although *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) called that approach into question, "district judges … are obligated to follow controlling circuit precedent until either [the D.C. Circuit], sitting en banc, or the Supreme Court, overrule it.'" *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Regardless, the Tribe meets the requirements for issuance of a preliminary injunction.

A. The Tribe is Likely to Succeed on the Merits

Defendants and Intervenors attempt to frame the Tribe's arguments as nothing more than disagreements over the weight of the evidence, but the Secretary's September 2018 Decision not only discounted and often outright ignored substantial evidence (*e.g.*, census rolls, Mashpee children attending a federal Indian school, federal reports and surveys, provision of health care and social services to Mashpee members, and federal actions to protect Mashpee land) -- it departed from the Department's traditional application of the M Opinion, from established Departmental precedent, and from established case law with respect to how it evaluated that evidence. *See* Mashpee Combined Reply and Opposition in Support of Its Motion for Summary Judgment at 15-40.

In this context Intervenors' argument that the Tribe has ignored the "actual sum total" of the evidence is nonsensical, and ironic given that ignoring the actual sum total of the evidence is exactly what the Secretary did to reverse engineer his negative decision. Intervenors again argue that Mashpee and Narragansett share a "twin" history such that *Carcieri* dictates the outcome of this case. Intervenors grossly mischaracterize both the *Carcieri* holding (the majority never addressed the meaning of "under federal jurisdiction" and Narragansett's factual

jurisdictional record was not before the Court) and the Mashpee Tribe's history and jurisdictional evidence. *Id.* at 10-13.

The fact is that neither the Secretary nor the Intervenors have identified any case law or other precedent that justifies the contorted reading of the M opinion and prior precedent the Secretary applied to the Mashpee Tribe's fact pattern. The past administrative and judicial precedent, a fair application of the M Opinion, and the Indian canon of construction all weigh in favor of a finding for the Tribe.

B. The Tribe Has Demonstrated Irreparable Injury

The Tribe has demonstrated that it will suffer "actual" irreparable harm that is "certain and great" in the absence of an injunction. *See Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.,* 680 F. Supp. 2d 62, 76 (D.D.C. 2010) (internal citations omitted) (claimed injury must be "certain and great; it must be actual and not theoretical."). Further, as described in the Tribe's Memorandum in Support of the Preliminary Injunction Motion, and further detailed in Chairman Cromwell's Declarations dated March 30 and May 11, and the Declaration of Michelle Tobey, Mashpee Housing Director, the very existence of the Tribe's reservation is at stake, as well as economic losses that are unrecoverable. *Id.*; *see also Everglades Harvesting and Hauling, Inc. v. Scalia,* 2019 WL 6841948 *10 (D.D.C. 2019) (while economic loss alone does not constitute irreparable harm, loss that threatens the existence of an entity, or economic loss that is unrecoverable, is considered irreparable). Protection of the federal trust status of the Mashpee land during the pendency of this suit for the continued use of the Tribe is analogous to the protection of federal land in *National Wildlife Fed'n v. Burford,* 835 F.2d 305, 315 (D.C. Cir. 1987), where the D.C. Circuit confirmed an injunction against the Department to prevent it from

lifting restrictions on federal land to allow continued use of the land by the plaintiffs during ongoing litigation over those restrictions.[8]

1. Injury to Sovereign Authority, Self-Determination and Tribal Jurisdiction

The loss of the Tribe's federally protected reservation will rob the Tribe of its inherent rights to exercise sovereign authority, self-governance, and self-determination, as well as its ability to become economically self-sufficient. These lands have deep cultural, spiritual, governmental and economic value to the Tribe, and the harm caused by the loss of these lands is not speculative or theoretical. Cromwell Dec. ¶¶ 18-19. The federal government has offered no response; Intervenors ridiculously assert that the loss of the reservation is somehow the Tribe's own fault. Intervenors also contend that the Tribe overstates the jurisdictional harms that will result from the loss of trust and reservation status, but the harms to the Tribe's sovereign authority and jurisdiction are real and immediate: the Tribe will lose jurisdiction over its land, its Tribal police will no longer be able to exercise law enforcement jurisdiction and its Tribal courts will cease to have jurisdiction. Cromwell Dec. ¶ 26.

Defendants argue that the jurisdictional harms do not flow from the Secretary's action, but rather from decisions by the First Circuit and District of Massachusetts, asserting that as a result of those decisions, state and local authorities are entitled to exercise jurisdiction over the Tribe's trust lands. That is patently false -- the lands are still held in trust. The Secretary has

[8] In *National Wildlife Fed'n*, the District Court found that National Wildlife Federation (NWF) members would be irreparably harmed if Interior was permitted to lift mining-related restrictions during the pendency of the suit because by removing the restrictions "defendants [Interior] removed the only absolute shield against private exploitation of these federal lands" and NWF members would likely no longer be able to use the land for recreational activities. *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 278-79 (D.D.C. 1985), *aff'd*, 835 F.2d 305, 324-26 (D.C. Cir. 1987).

failed to identify any statutory authority[9] for removing the land from trust, and neither the District Court of Massachusetts nor the First Circuit have issued an order directing him to remove the trust restrictions from the land. Only if and when the land actually is taken out of trust would the state and local governments regain jurisdiction. *See, e.g., Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 529 (1998).

2. Loss of Federal Funding

Contrary to Defendants' mischaracterization, the Tribe has never argued that it would lose *all* federal funding -- but the Tribe absolutely *will* lose access to federal funding tied to services provided on or near reservations. Mashpee PI Mem. at 13-15. Defendants and Intervenors admit as much. *See* Def. Opp. at 19, Int. Opp. at 8.[10] Such programs include funding to construct a childcare facility on the reservation, tribal historic preservation officer funding, Bureau of Justice Assistance grants, treatment as a state status, and tribal transportation funding, among others. *See* Cromwell Dec. at ¶¶ 23-24.[11]

[9] Absent a court order, the Department does not have authority to "take land out of trust," because interests in land held in trust may not be sold or otherwise alienated without an act of Congress, pursuant to the Indian Trade & Intercourse Act. *See* 25 U.S.C. §177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."); *see e.g., Oneida County, N.Y. v. Oneida Indian Nation of New York State,* 470 U.S. 226, 232 (1985). The Department acknowledges this when, in the context of taking land out of trust for individual Indians, it explicitly cites to the statutory authority it has to take that action. *See infra*. at note 26. The Department identifies no analogous statutory authority to remove trust restrictions from tribal trust lands.

[10] The Tribe included information about receipt of federal funding in its Preliminary Injunction Motion, at 14-15; *see* Cromwell Dec. at ¶¶ 23-25.

[11] Defendants contend that the Tribe would be eligible for CARES Act Relief Funds, but there are CARES Act funds for which the Tribe will not be eligible if the Secretary disestablishes the Tribe's reservation, including funding for child care assistance under the Administration for Children and Families Child Care and Development Program (Pub. L. No. 116-136, Div. B, Title VIII (Mar 27, 2020) and funding for food assistance under the Department of Agriculture's Food Distribution Program on Indian Reservations (Pub. L. No. 116-136, Div. B, Title I). Further,

Defendants argue that *some* BIA assistance may still be provided to the Tribe's members even if it no longer has a reservation through designation as a service area. *See* 25 C.F.R. §§ 20.100; 20.101. But no such BIA service area now exists, and obtaining one requires preparation of a lengthy application with multiple certifications and documentation, and approvals by the BIA Region and then the Assistant Secretary for Indian Affairs.[12] The Assistant Secretary has discretion to deny service area designations. *See id*. at § 20.201(c).

Intervenor's attempt to portray the Tribe as ineffective in managing funding it receives relies on hearsay that is riddled with inconsistencies and errors.[13] The amount of funding that

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while the Tribe has received funds from the CARES Act's Coronavirus Relief Fund (the fund set aside for State, Local and Tribal governments), there are restrictions on their use. *See* CARES Act Section 5001, amending the Social Security Act, 42 U.S.C. 301 *et seq*. with the insertion of section 601(d) "Use of Funds", and related Guidance from the Department of Treasury, making clear that these funds may only be used for "necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)." https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf. Because these funds are limited and can only be used for specific purposes, it is simply not true that they somehow can take the place of other CARES Act funds and other federal grants which the Tribe will lose if the Secretary disestablishes its reservation. The Tribe can least afford to lose this funding while it is struggling to respond to a pandemic that already has sickened multiple tribal members. Massachusetts now has more than 64,300 COVID-19 cases and 3,716 deaths, including 4,694 cases and 224 deaths in Barnstable and Bristol Counties where the Tribe's reservation is located. *See* https://www.mass.gov/doc/covid-19-dashboard-may-1-2020/download (last visited 5/2/20).

[12] Compilation of the applications materials and certifications will take considerable time to prepare, and includes: a certification regarding all eligible Indians within the potential service area, a certification that the "the proposed service area will not include counties or parts thereof that have reasonably available comparable services", documentation showing that "an adequate level of services can be provided to eligible Indians residing in the area", a showing that no duplicate services exist, and a plan describing how services will be provided to tribal members. *Id.* at § 20.201(a) and (b).

[13] For example, Intervenors' Opposition at 8-9 states that the Tribe received *$48 million* from the federal government after it was federally recognized in September 2007 (correct date is May 2007, *see* 72 Fed. Reg. 8007 (Feb. 22, 2007)) and before its land was taken in trust in September 2015 (correct date is November 2015, *see Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391, 393 (D. Mass. 2016)), but the supporting declaration states the Tribe received

Intervenors contend the Tribe received after its land was taken in trust ($30 million) is incorrect, likely in part because the total (in Exhibit F, Tennant Declaration) includes a number of unverifiable entries and the date of the trust acquisition is incorrect by several months.[14] Intervenors also describe a 2012 $12.7 million HUD loan that the Tribe used to construct its Community and Government Center (now located on its trust land). The Tribe did not receive a HUD loan in 2012 -- it did receive a $12.7 million loan originally awarded in 2010 by the U.S. Department of Agriculture (which the Tribe is currently repaying). There is nothing improper about the Tribe obtaining a federal loan to build a community and government center; in fact, the Department of Agriculture notes that "the project will enable the Tribe to vastly expand essential services to current and future generations."[15] The Tribe's audits, furthermore, demonstrate that the federal funding it has received has been properly used in accord with the grant or loan requirements. *See* Cromwell Supp. Dec. at ¶ 7.

The Tribe's receipt of federal funding does not undermine the Tribe's documented allegations that it has no current revenue stream (federal grants and loans are not a revenue stream) and is struggling to keep its government operating, nor does it skew the irreparable harm analysis. Even if Intervenors are correct in their projection that the Tribe, without a reservation, will still receive an annual average of $5.5 million in federal funding, that amounts to approximately $1,870 per capita to run a Tribal government and provide services to 2,940

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approximately *$44 million* in federal funding during that time. Tennant Declaration ¶ 17. Neither figure appears correct based on Exh. F to the Tennant Declaration, although the Exhibit has non-functioning links, loans listed as grants, and entries that either have no agency designation or no funding associated with them, so its accuracy is, at best, questionable.

[14] *See* Exhibit F to Tennant Declaration; *see also* note 13, *supra*; Cromewll Supp. Dec. ¶ 7.

[15] https://www.usda.gov/media/blog/2010/11/08/usda-rural-development-financing-provides-mashpee-wampanoag-tribes-government cited in Tennant Dec., Exhibit F.

enrolled Tribal members. By contrast, the Town of Mashpee, which has an annual operating budget for FY 2020 of $60 million for 14,101 residents[16] supported by a tax base the Tribe does not have, is able to spend *more than twice* as much per capita (approximately $4,255) to provide for its citizens

Finally, Defendants' attack on the Tribe's expenditure of funds to support an economic development project as the Tribe's own folly misses the point that the economic development project was to reduce the Tribe's dependency on appropriated federal dollars. The Tribe was entitled to assume that its trustee made a proper decision in acquiring the land in trust for the Tribe, and the Tribe certainly expected that the current Secretary as its trustee would continue to defend the Department's original decision, rather than succumbing to political pressure (*see, e.g.*, AR0004508-4510), to abandon the Department's defense of the reservation and its 2015 ROD without explanation. *See Littlefield v. Mashpee Wampanoag Indian Tribe,* 951 F.3d 30, 34 (1st Cir. Feb. 27, 2020).

3. Other Irreparable Economic Harms

Intervenors' effort to portray the Tribe's loans from Genting, its development partner, as nefarious and the Tribe's economic woes as self-inflicted is unsupported. The Genting loan funds, pursuant to financing agreements for the Tribe's gaming facility, were properly spent on pre-development and tribal operating expenses in accord with the Pre-Development Budget and Tribal Operating Expense Budget approved by Genting and the Tribe. Cromwell Supp. Dec. ¶¶ 8-9. Pre-development expenses included purchase of land for the gaming facility project (cost

[16] Geoff Spillane, *Mashpee voters back $60M operating budget, approve replacing town seal*, CAPE COD TIMES (May 6, 2019), https://www.capecodtimes.com/news/20190506/mashpee-voters-back-60m-operating-budget-approve-replacing-town-seal; *see also* https://www.towncharts.com/Massachusetts/Demographics/Mashpee-town-MA-Demographics-data.html.

more than $45 million), tenant relocation, infrastructure improvements, road and traffic improvements for the City of Taunton, payments to the City of Taunton pursuant to the Intergovernmental Agreement (IGA) for mitigation and other costs, hiring contractors to develop building and structural plans, hiring a construction team, architectural and design fees, state and federal environmental reviews, traffic engineers and other civil engineering services, negotiation of the gaming compact and IGA, costs to complete the lengthy and complicated federal trust land acquisition process, payments in lieu of taxes, and preliminary construction activities, which included demolition of existing structures, upgrading of water and utility services, and site excavation for building foundations. Cromwell Supp. Dec. ¶¶ 10-11.

The amount the Tribe spent on this kind of economic development was far less than what commercial casino developers have spent in the same region.[17] The only reason the Tribe's investment has not come to fruition is *because the Littlefields have worked so hard to derail it*, an effort that, according to the press, is funded by a competing commercial casino developer.[18] Cromwell Supp. Dec. ¶ 11. As a result, the City of Taunton, local Taunton residents and the entire State have lost significant opportunities for job creation and economic development, revenue sharing, infrastructure upgrades, enhanced services, and broader community development upgrades. Cromwell Supp. Dec. ¶ 12.

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[17] The total cost of the Wynn Encore Boston Facility was $2.6 billion, *see* Jimmy Im, *Inside New Billion Dollar Encore Boston Harbor Casino*, CNBC.com, https://www.cnbc.com/2019/06/21/photos-inside-new-billion-dollar-encore-boston-harbor-casino-resort.html; the MGM Springfield facility, $960 million. Hayley Harding, *MGM Springfield: The New Casino by the Numbers*, HARTFORD COURANT (Aug. 3, 2018), https://www.courant.com/business/hc-news-mgm-springfield-numbers-20180724-story.html

[18] *See, e.g.*, Charles Winokoor, *Latest Mashpee Wampanoag land-in-trust decision elicits joy and dismay*, THE HERALD NEWS (Sep. 9, 2018) https://www.heraldnews.com/news/20180908/latest-mashpee-wampanoag-land-in-trust-decision-elicits-joy-and-dismay

Consequently, the Tribe's present inability to pay hundreds of thousands of dollars in taxes should its lands be removed from trust is neither surprising nor speculative, *see, e.g.*, Cohen's Handbook of Federal Indian Law, § 8.03(2)(b) (2019) (tribal real property held in fee is taxable by the state, land held in trust by the federal government is not), nor is it of the Tribe's own making. It is a real, imminent harm that will likely result in the Tribe losing its land. Cromwell Dec. 21. It is Intevernor's claim that back taxes are speculative or subject to negotiation that is speculative.

The Tribe's reservation land near Taunton, moreover, is subject to a mortgage in favor of Genting, which becomes effective if the land goes out of trust, giving Genting the right to foreclose. Cromwell Supp. Dec. ¶ 13. Neither the Tribe nor the Court can assume that Genting, or local taxing authorities, will not act in accord with their legal rights -- and in fact the law presumes as much. *See, e.g.*, 30 Am.Jur.2d Executions, §10 (judgment creditor has the right to avail himself of any remedy legislature provides to enforce a judgment; it is the policy of the law to assist the judgment creditor). In addition, the uncertainty regarding the payment of back taxes and foreclosure for non-payment serves to amplify the harm and make it irreparable.

Intervenors' self-serving argument that there is no irreparable harm because the reservation land near Taunton is undeveloped ignores the significant funds already invested in such development, and that it is Intervenors themselves who have interfered with that development. It also ignores that the Taunton land is part of the Tribe's historical territory and its reservation. Intervenors' suggestion that the Tribe can just sell the land if it cannot implement commercial gaming fails to acknowledge the profound injury to the Tribe from the loss of its historic lands.

For all these reasons, the harm to the Tribe is actual, certain and great, and far more than economic loss alone. These losses threaten the Tribe's continued government functions and operation. *See Smoking Everywhere, Inc.*, 680 F. Supp. 2d 62, 76 (economic loss that threatens the existence of an entity is irreparable).

4. Other Irreparable Injury

Intervenors' efforts to challenge the other impending irreparable harms fall equally flat.

Affordable Housing Development: The Tribe is constructing a housing project on its reservation in Mashpee that does not comply with multiple Town of Mashpee zoning requirements that will be applicable if the Department takes the land out of trust and disestablishes the reservation. Declaration of Mashpee Wampanoag Tribe Housing Director Michelle Tobey in Support of Plaintiff Mashpee Wampanoag Tribe's Emergency Motion for a Preliminary Injunction (hereinafter "Tobey Dec.") ¶¶ 5, 6. Intervenors' speculation that the Tribe could obtain a variance is speculation. The more likely consequence is that many tribal members in dire need of affordable housing will lose or face significant delays in obtaining their units, and the Tribe will have spent significant funding on housing that cannot be occupied. Tobey Dec. ¶¶ 7, 8.

Closing of Wampanoag Native Language School: The Mukayuhsak Weekuw and Weetum8 School, operated by the Wôpanâak Language Reclamation Project, is located in the Tribe's Community and Government Center. If the Department takes the land out of trust and disestablishes the reservation, the school will be forced to seek state licensing and additional teacher and administrator certifications, and negotiate with the local school committee to obtain authority to operate as a private school. The school will have to close while it attempts to negotiate these complicated regulatory issues, which will not be resolved quickly. If the school

does not offer instruction for the majority of the school day during the upcoming school year, the school could lose its major source of federal funding. Cromwell Supp. Dec. ¶ 14 and Exh. 1.

Forestry Services: The federal government acknowledges that the Tribe will not qualify for federal forestry funds if it does not have reservation land. Whether Mashpee could cobble together some State funding to replace some funds, Int. Opp. at 13, is both speculative and not relevant.

C. The Balance of the Equities and the Public Interest Favor an Injunction

In contrast to the Tribe, the Department will suffer no harm whatsoever if the status quo is maintained. Immediate removal of the land from trust and disestablishment of the reservation will likely create jurisdictional confusion and chaos. After the course of this litigation it may well be established that the Tribe meets the first definition of Indian, confirming that an earlier Secretary had the authority to create the reservation in 2015 and that the current Secretary had authority to confirm the status of the Tribe's reservation in 2018. The jurisdictional mess that would be created by the current Secretary's having taken the land out of trust *ultra vires* (as he has no independent statutory authority to remove the trust status of tribal land or to disestablish a reservation), *see supra* at 11, n. 9, placing the land in a jurisdictional limbo for a time, serves no one's best interest. Consequently, the balance of the equities, as well as the public interest, weigh strongly in favor of an injunction to preserve the status quo as to the trust and reservation status of the Tribe's land until the conclusion of this litigation and any appeals. *See, e.g., Ctr. For Pub. Integrity v. U.S. Dep't of Defense*, 411 F. Supp. 3d 5, 14 (D.D.C. 2019) (injunction granted) (citations omitted).

Defendants and Intervenors attack the affidavit provided by Federal Defendant's own former BIA Regional Director, Bruce Maytubby, as irrelevant because it addresses Intervenors' prior request in the District of Massachusetts litigation that the land be removed from trust status

when the 2015 Record of Decision was still in effect. The argument misses the point. Regardless of the purpose for which the affidavit was sworn, the harms described are real because there is no process for removing land from trust status, which will inevitably cause confusion and uncertainty.

Both Defendants and Intervenors contend that it is in the public interest for the Secretary to take the land out of trust consistent with the First Circuit's decision, again ignoring that the Tribe's time to appeal the First Circuit decision has not expired, and neither the First Circuit's ruling nor its mandate in any way directs the Department to take the land out of trust or take any action with respect to the land's status. *See supra* at 6-7. No public interest is served if the Department is acting prematurely when it is not required to act. Similarly, Intervenors' arguments that the public interest is served by removing the land from trust because it allegedly will address uncertainties relating to title and properly pull back the Tribe's federal benefits tied to trust land are misplaced -- in fact, taking such action without a final decision will unjustly deprive the Tribe of benefits, create title confusion, and harm any third parties who may acquire the land through tax foreclosure.

Defendants assert that "there are no outstanding determinations" that the Department must make regarding the Secretary's statutory authority to take the land in trust, and that statutory authority no longer exists to keep the land in trust, such that removing the land from trust will dispel confusion and allow state and local authorities their "rightful jurisdiction" over the land. Def. Opp. 23-24. The Tribe finds it particularly unsettling that Interior's primary concern appears to be protecting the interests of state and local authorities, rather than those of

the Tribe, to which it owes a trust responsibility.[19] Those state and local authorities noticeably are not clamoring for action; the only clamor is that generated by Intervenors. The Department's rush to take the Tribe's land out of trust when it has not been ordered to do so by any court, when the Tribe still has time to appeal the First Circuit decision, and when litigation is ongoing regarding an alternative basis for the Secretary's trust acquisition authority is just another arbitrary and capricious action the Department has taken with regard to this Tribe since March of 2017. This court may well find that the 2018 Decision was arbitrary and capricious and not in accordance with law and direct the federal defendants to redo their analysis as the law requires.

Defendants' argument that the Department has taken land out of trust in other cases is equally unavailing. In response to the Tribe's documented assertion that the Secretary's March 27 Order is inconsistent with longstanding Departmental policy and representations made to the Tribe, Defendants do not controvert that the policy, expressed repeatedly to Mashpee and in the public record, that, "consistent with our practices and procedures, the department will continue to hold the tribe's land in trust until a final court order is imposed."[20] The Department has consistently taken this position, that it will not alter the trust status of land while litigation is pending, which is why the Department's March 27 phone call announcing that it would disestablish the reservation was such a shock to the Tribe.[21] Indeed, the rush to take the land out of trust and disestablish the reservation is contrary to a commitment made to Mashpee when the

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[19] Indeed, because the land is in trust, the Federal Defendants have an obligation to preserve it. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003)("One of the fundamental common-law duties of a Trustee is to preserve and maintain trust assets.").

[20] 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.

[21] *See* Cromwell Dec. ¶ 16; *see also* Cromwell Supp. Dec. ¶¶ 3-5.

Department, acting through the Assistant Secretary for Indian Affairs and other officials, originally contacted the Tribe to deliver the news that the Secretary had disavowed Secretarial authority in the September 2018 Decision being challenged here.[22] When the Tribe advised it would challenge the Secretary's decision in court, it asked for and received a commitment from the Departmental officials present that the Department would take no further action until such litigation was concluded.[23] The Tribe was unaware that the Department was considering reneging on this commitment until the Department contacted the Tribe at 4 p.m. on Friday, March 27 to announce the Secretary's directive to disestablish the reservation.

The Department continues to state, disingenuously, that it is acting to "follow" the First Circuit mandate. But as explained above, the First Circuit mandate does not require this action. The federal government has never before taken the position that an appellate court "mandate" requires immediate removal of tribal land from trust status; rather it has consistently taken the position that it can only act to "remove" land from trust where there is a court order vacating the Department's decision as unlawful, such that the land was never properly held in trust. The agency's obvious departure from prior agency interpretations and established policy without reasonable explanation is a clear indication that its decision to disestablish the Tribe's reservation should be enjoined.

> 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

[22] *See* Cromwell Supp. Dec. ¶¶ 3-5.

[23] *Id.; see also* 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 ("consistent with our practices and procedures, the department will continue to hold the tribe's land in trust until a final court order is imposed").

> 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); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (departures from agency policy and past practices must, at a minimum, be explained).

The cases that Defendants cite only further highlight that the Department's action departs from longstanding policy and practice. In *Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013), Stand Up challenged the Department's decision to take land into trust for the North Fork Rancheria of Mono Indians. In *Stand Up*, the Court noted that it -- *the court* -- has jurisdiction to vacate the trust transfer after it occurs, if the court determines that the original transfer was unlawful. *Id*. at 82. In this context, the Department represented that, if ordered by the Court, the Department would take the land out of trust. *Id*. This representation is consistent with its practice of acting to change the status of trust land only when a court has made a determination about the lawfulness of the Department's action, vacated the Department's decision, and *ordered* the Department to take the land out of trust.

In *Crawford-Hall v. United States*, 394 F. Supp. 1122, 1153-1154 (C.D. Cal. 2019), the Court found that the Department's decision to acquire land in trust for the Santa Ynez Band of Mission Indians was *ultra vires* because it was made by the Principal Deputy Assistant Secretary, who did not have delegated authority to issue a final decision under the Department's regulations. The Court issued an order finding that "[t]he 2017 Decision and the Acceptance of Conveyance of the Grant Deed to the United States in trust for the Band are VACATED as unlawful." *Id*. at 1155. In contrast, the First Circuit mandate says absolutely nothing about vacating the Department's decision or the trust transfer.

Finally, in the Lower Brule case, the Eighth Circuit held that the Department's acquisition of land in trust was unlawful under the IRA. *State of South Dakota v. U.S. Department of the Interior*, 69 F.3d 878 (8th Cir.1995). After the Department's petition for rehearing was denied, the Court's mandate issued. The Department did not take action to remove the land from trust. The Department petitioned for certiorari (because at that time the Department was acting in tribes' best interests to preserve its trust acquisition authority under the IRA, consistent with its trust obligations). In response, the Supreme Court granted *certiorari*, vacated the district court decision that had sustained the Department's decision, and remanded the case to Interior. *Department of the Interior v. South Dakota*, 117 S.Ct. 286 (1996). The Department's Federal Register notice, cited by Defendants, implements the Supreme Court's decision, noting that, in remanding the decision, "the Supreme Court reopened the decision of the Secretary to acquire the land in trust … the remand operates to take the land out of trust." 62 Fed. Reg. 26551-2 (May 14, 1997).[24] Again, this case bears no resemblance to what the

[24] In response to the Eighth Circuit's decision that the IRA was an unconstitutional delegation of legislative authority, *State of South Dakota v. U.S. Department of the Interior*, 69 F.3d 878, the Department revised its fee-to-trust regulations to allow thirty days to challenge a trust acquisition before land was taken in trust. 61 Fed, Reg, 18082-83 (April 24, 1996). The Department determined such a rule was necessary because at that time, the prevailing view among the courts was that the Quiet Title Act, 28 U.S.C. §2409a, prohibited challenges to title of Indian trust title (so once land was taken in trust, the acquisition could not be challenged). *See, e.g., Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004). In 2012, the Supreme Court changed the legal landscape with its decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), which held that the Quiet Title Act was not a bar to APA challenges to trust acquisitions (unless the plaintiff asserts an ownership interest in the land). As a result, the Department again revised its fee-to-trust regulations to allow immediate acquisition of land in trust, without a thirty-day period for legal challenge. 78 Fed. Reg. 67928 (Nov. 13, 2013). The Department's Federal Register notice promulgating the new regulations provides: "Patchak did not decide, or even consider, whether the Secretary is authorized to take land out of trust. If a court determines that the Department erred in making a land-into-trust decision, the Department will comply with a final court order and any judicial remedy that is imposed." *Id.* at 67934. This illustrates what has been the Department's long-established position.

Department is attempting to do here, unilaterally attempting to take the Mashpee Tribe's land of trust absent a final judicial determination on the Secretary's authority and absent a court order.[25]

For these reasons, removing the land from trust status now, before this Court has made a final decision regarding the Secretary's determination that he lacks authority to hold the land in trust, is not in the public interest. It will create considerable confusion for the parties to this action, for state and local authorities, and for third parties. It will have devastating and irreparable impacts for the Tribe, and have little or no impact on the federal government -- in fact, as Defendants acknowledge, it will have negative impacts on the agency. Preserving the *status quo* until a final decision can be made is in the interest of the public and all involved. *See, e.g.*, J*ubilant DraxImage Inc. v. United States Int'l Trade Comm'n*, 396 F. Supp. 3d 113, 125 (D.D.C. 2019) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014)) (noting that "'[t]he primary purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition—to preserve the status quo'" and finding that maintenance of the status quo is on balance in the public interest). A preliminary injunction is justified.

CONCLUSION

For all the reasons set forth above and in the declarations submitted on behalf of the Tribe, plaintiff Mashpee Wampanoag Tribe respectfully requests the Court enter a preliminary injunction prohibiting Defendants and their employees, agents, servants, attorneys and all other

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[25] Defendants also assert that Interior routinely transfers land from trust to fee status as part of the probate process, 25 U.S.C. § 2206(b)(2)(B). The probate transfers they reference are made pursuant to limited, express statutory authority that allows the Secretary to alter the status of lands held in trust for individual Indians under the Indian Land Consolidation Act, 25 U.S.C. §§2201 et. seq, which Congress enacted to address fractionation of ownership of individual Indian interests in land, not tribal governments like Mashpee. These individual interests may only be transferred in fee status pursuant to a tribal resolution or law in limited circumstances. Congress has provided no such analogous authority for the Department to convey tribal land "out of trust" status, and in fact the Indian Trade and Intercourse Act prevents the removal of restrictions on alienation absent congressional consent.

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

Dated: May 11, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, I electronically filed the foregoing Reply to Federal Defendants' and Intervenor-Defendants' Memoranda in Opposition to Plaintiff's Emergency Motion for 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/ *Tami Lyn Azorsky*
Tami Lyn Azorsky