UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 1:16-CV-10184-ADB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR WRIT

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INTRODUCTION

1. Overview

This case is about the Department of the Interior's refusal to abide by the plain language of the operative federal statute and the clear holding in *Carcieri v. Salazar*, 555 U.S. 379 (2009) in purporting to take land into trust for an Indian tribe that does not qualify for such benefit under established law. By administrative fiat, the Department took land into trust for the Mashpee Wampanoag Tribe ("Mashpee Tribe"), land on which the Mashpee Tribe is now rushing to build a resort casino that will irreparably harm Plaintiffs and other local residents—***before this Court can even rule on this case.*** The Court should issue injunctive relief freezing the status quo until Plaintiffs claims are resolved on the merits.

This case is controlled by the United States Supreme Court's decision in *Carcieri*, which held that the Indian Reorganization Act of 1934 authorizes the Secretary to take land into trust only for tribes who were "under Federal jurisdiction" in 1934, when the statute was enacted. The Mashpee Tribe, the beneficiary of the Secretary's land acquisition in this case, was admittedly not under federal jurisdiction in 1934. The Mashpee Tribe, like many other Eastern tribes, was throughout its long history subject to the jurisdiction of the colonial/state government—not the federal government—and was at all times subject to the laws of the Commonwealth of Massachusetts and governed accordingly by the Commonwealth, which provided services, support and supervision to the Mashpee Tribe and later to its individual members after tribal status was lost in the 19th Century.[1] The Mashpee Tribe was not under federal jurisdiction in 1934, as required to receive benefits under the IRA. The Mashpee Tribe's long history under state jurisdiction is no different than that of the Narragansett Tribe in Rhode Island, which the

[1] *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 945-946 (D. Mass 1978); Omnibus Declaration of David H. Tennant, dated May 27, 2016, Ex. EE (Final Determination for Mashpee Tribe) Ex. W (Recommended Findings and Final Determination for Narragansett Tribe).

Supreme Court in *Carcieri* declared ineligible to have lands taken into under the IRA.

The Secretary's administrative fiat in this case consists of an unprecedented reading of the IRA that deliberately attempts to exempt the Mashpee Tribe from the IRA's 1934 temporal restriction. But a plain reading of the IRA's text—the only grammatical reading permitted—shows that the temporal restriction still applies no matter how much the Secretary wishes it did not. Moreover, the legislative history further shows that the principal drafter of the IRA intended the temporal limitation to apply in accordance with the statute's plain language. Thus, the Secretary's interpretation of the IRA is contrary to law.

The Secretary's attempted administrative "work around" to the *Carcieri* holding follows seven years' of unsuccessful efforts by the Secretary to persuade Congress to overturn *Carcieri* and to reinstate the broader authority that the Department purported to exercise before *Carcieri* made clear the Department held no such power. Despite a flurry of so-called proposed "Carcieri fix" bills, which the Secretary publicly supports, none have become law.[2]

The Department's administrative self-help here—giving itself the power that the Supreme Court declared did not exist and Congress has never granted—violates the separation of powers doctrine and undermines democracy, because under this flawed regime, unelected federal officials both make the law and enforce it. Here 24 ordinary citizens in Massachusetts find themselves injured by administrative overreach, where a federal agency, frustrated with years of stalemate on a "*Carcieri* fix" in Congress, decided to make its own law. But *Carcieri* is binding on the Department and this Court, and it fully answers the specific question of whether the Secretary has authority to take land into trust for the benefit of the Mashpee Tribe. She does not.

This lawsuit is not a referendum on the federal government's reasons for supporting the legislative expansion of its authority beyond that permitted by *Carcieri*. Nor is it about the

[2] Tenant Decl., ¶¶ 41-42. The Department has regularly supported so-called "*Carcieri* fix" legislation.

wisdom of federal policies that permit Indian tribes to operate tribal casinos. Rather this case is about the Department's compliance with the law. Plaintiffs, as homeowners and long-time residents of Taunton and East Taunton, are directly and immediately impacted by the Mashpee Tribe's current and ongoing construction of its "billion-dollar-plus" casino resort in the middle of their quiet, wooded, residential neighborhood. These citizens respectfully ask this Court to make the Department of the Interior comply with the statutory limits imposed by Congress on the Secretary's land acquisition authority under the Indian Reorganization Act of 1934, as determined by the Supreme Court in *Carcieri*.

Plaintiffs make their request for injunctive relief while the Tribe is busy constructing its "billion dollar plus" casino on a fast track basis, with plans to be open in 14 months.

2. Injunctive Relief Requested

Plaintiffs ask that this Court (1) issue a preliminary injunction under Fed. R. Civ. P. 65(a), 5 U.S.C. § 705, or the All Writs Act removing the Property from trust, and/or (2) issue a preliminary injunction prohibiting any construction activities on the Property.

Plaintiffs first ask this Court to issue a preliminary injunction removing the Property from trust. Courts may grant such mandatory preliminary injunctions under Fed. R. Civ. P. 65(a). *See W Holding Co., Inc. v. AIG-Ins. Co.-Puerto Rico*, 748 F.3d 377 (1st Cir. 2014) ("Whether a mandatory preliminary injunction should issue typically depends on the exigencies of the situation, taking into account [the] four familiar factors").

> The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190 (9 Cir. 1953), by the issuance of a mandatory injunction, see 7 Moore's Federal Practice P65.04(1), or by allowing the parties to take proposed action

> that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974). Courts may grant mandatory preliminary injunctions where "the exigencies of the situation demand such relief." *Massachusetts Coal. of Citizens with Disabilities v. Civil Def. Agency & Office of Emergency Preparedness of Commonwealth of Massachusetts*, 649 F.2d 71, n. 7 (1st Cir. 1981) (denying motion for a mandatory preliminary injunction); Robert Haig, 3d Bus. & Comm'l Litig. in Fed. Cts. § 17:26 (2011) ("Nonetheless, the court may still grant a mandatory preliminary injunction when necessary to protect the movant from irreparable harm and to preserve the court's ability to render a meaningful decision.").

As explained below, those exigencies are present here and require such extraordinary relief. Moreover, such relief is also appropriate under 5 U.S.C. § 705, which permits an order to "preserve status *or rights* pending conclusion of the review process." 5 U.S.C. § 705 (emphasis added). As explained more fully below, the land must be taken out of trust to effectively preserve Plaintiffs' rights pending the conclusion of the review process. Likewise, the Property may be taken out of trust pursuant to the All Writs Act, which grants courts the authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). An order compelling the land out of trust is, as described below, necessary and appropriate to effectively resolve the issues currently before this Court.

Finally, if the above relief is unavailable, the Court should, at the very least, issue of standard prohibitory preliminary injunction to maintain the status quo by prohibiting further construction.. *See* 5 U.S.C. § 705; Fed. R. Civ. P. 65(a).

3. Entitlement to Injunctive Relief

Plaintiffs are highly likely to succeed on their *Carcieri* claim (Amended Complaint, Count One); and Plaintiffs can demonstrate immediate and irreparable harm arising from the actual ongoing construction and development of the tribal casino in East Taunton, as detailed in declarations from Adam M. Bond and Plaintiff Francis Lagace and other Plaintiffs. Declaration of Adam M. Bond in Support of Motion for Preliminary Injunction, dated May 27, 2016, Exs. J and K-1 and K-2.

With respect to the balancing of interests, temporarily stopping the Mashpee Tribe from further constructing their casino in East Taunton works a modest delay in the Tribe's plans for that property. Such a limited injunction does not impact the Tribe's ability to occupy and use the 170 acres of land taken into trust 50 miles away in the Town of Mashpee (also part of the Record of Decision), where the Tribe is based and has its government center, housing and historical buildings. In other words, an injunction that precludes further construction pending resolution of this litigation, addresses a purely commercial interest of the Tribe. With respect to the public interests that are stake, it is in the interest of everyone—Plaintiffs, Defendants, the Mashpee Tribe, the Commonwealth of Massachusetts, and businesses and regulatory bodies in the gaming industry in Massachusetts, Rhode Island, and Connecticut, to promptly resolve whether or not the Secretary has authority under the IRA to take the Taunton land into trust on behalf of the Mashpee Tribe—before the Tribe spends more on building and opening its casino. If the construction is unchecked, and the casino is built, and perhaps even opens, before this litigation is resolved, the Tribe and others will no doubt argue that it is unfair to the Tribe, and wasteful to the taxpayers of the Commonwealth, to close down the operating casino, even though a federal court has concluded it never should have been built in the first place as a matter of law. And

even if the "billion dollar plus" casino could then be shuttered, a vacant white elephant would erode the tax base, be prone to structural decay through neglect, and invite vandalism. Stopping its construction until Plaintiffs' claims are resolved is far preferable. .

4. Advancement of "Trial" on the Merits

The requested preliminary injunction would thus create the time and space for the Court to make a decision on a narrow legal issue relating to *Carcieri* through the lens of likelihood of success on the merits. As a result, this Court should advance the merits of the *Carcieri* issue and consolidate it with the hearing on this motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a)(2). The parties can then exercise their right under 28 U.S.C. 1292(a) to immediately appeal this central, dispositive issue. In short, Plaintiffs seek an order to return to the status quo, and/or to preserve the rights of the Plaintiffs to a meaningful remedy, to prevent the further construction of the tribal casino, which is occurring on an expedited basis from further undermining, or perhaps even mooting, Plaintiff's right to judicial review under the APA.

STANDARD ON A MOTION FOR A PRELIMINARY INJUNCTION

In considering whether to grant a preliminary injunction, district courts in this Circuit look to: "(i) the movant's likelihood of success on the merits of its claims; (ii) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (iii) the balance of hardships as between the parties; and (iv) the effect, if any, that an injunction (or the withholding of one) may have on the public interest." *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013).

"[L]ikelihood of success is the main bearing wall of this framework." *W Holding Co. v. AIG Ins. Co.-Puerto Rico*, 748 F.3d 377, 383 (1st Cir. 2014) (internal citations omitted). Courts "measure irreparable harm on a sliding scale, working in conjunction with a moving party's

likelihood of success on the merits, . . . such that [t]he strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown." *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 42-43 (1st Cir. 2010) (internal citations and quotation marks omitted); *see Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012) ("Because we conclude that plaintiffs have made a strong showing of likelihood of success on the merits of their First Amendment claim, it follows that the irreparable injury component of the preliminary injunction analysis is satisfied as well."); *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009). In other words, a plaintiff "has a lower threshold to overcome to establish irreparable harm" where the plaintiff has established a high likelihood of success on the merits. *iQuartic, Inc. v. Simms*, No. 15-13015-NMG, 2015 WL 5156558, at *5 (D. Mass. Sept. 2, 2015). Where the plaintiff establishes likelihood of success on the merits, it need only show a "modicum of irreparable harm." *Spruce Envtl. Techs., Inc. v. Festa Radon Techs., Co.*, No. 15-11521-NMG, 2015 WL 4038802, at * 5 (D. Mass. July 2, 2015).

The most important factor in the preliminary injunction analysis is whether Plaintiffs are likely to succeed on the merits of their claim. *See W Holding Co.*, 748 F.3d at 383.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS ON THEIR *CARCIERI* CLAIM THAT THE SECRETARY OF THE INTERIOR LACKS AUTHORITY TO TAKE LAND INTO TRUST FOR THE MASHPEE WAMPANOAG TRIBE.

A. The Supreme Court's Decision in *Carcieri v. Salazar* Controls the Analysis and Demonstrates the Secretary's Lack of Authority to Take Land into Trust for the Mashpee Tribe

The Supreme Court in *Carcieri v. Salazar* held that the Indian Reorganization Act of 1934 (IRA) authorizes the Secretary to take land into trust for tribes only if they were under

federal jurisdiction in 1934, when the IRA was enacted. 555 U.S. at 395-96. The *Carcieri* decision thus bars the Secretary from taking land into trust for the Mashpee Wampanoag Tribe for the same reasons that the high court in *Carcieri* concluded that the Secretary was barred from taking land into trust for the Narragansett Tribe in Rhode Island. Both the Mashpee Tribe and the Narragansett Tribe were under state jurisdiction from the earliest colonial days through modern times, including in 1934, and thus both tribes are equally ineligible under the IRA. The histories of the tribes under state jurisdiction are remarkably similar and well documented in the federal government's decisions conferring federal recognition for the Narragansett Tribe in 1982 and the Mashpee Tribe in 2007. Tennant Decl., Exs. W and EE. In these and other ways, the present case involving the Mashpee Tribe could easily be called, "*Carcieri II*: The Sequel."

1. Definition of Eligibility under the IRA

At the core of the *Carcieri* analysis is Section 479 of the IRA, which defines who qualifies as an eligible "Indian." Section 479 presents three classes or categories of eligibility:

> The term "Indian" as used in the Act shall include [1] all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction; [2] and all persons who are descendants of *such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (emphasis added).

The first category of who is an "Indian"—with its express temporal limitation of "now under Federal jurisdiction"—was construed in *Carcieri*, and governs the acquisition of trust land for the benefit of Indiana tribes. Here, the Secretary circumvented both the IRA and *Carcieri* by improperly relying on the second definition (or "class") of Indian. That decision was arbitrary and capricious, and a violation of law.

2. *Carcieri* Analysis of Section 479: The Controlling Benchmark

The Secretary in *Carcieri* argued that it possessed broad authority under the IRA to take land into trust for the benefit of any tribe provided the tribe was federally recognized at the time the lands are taken into trust—without regard to the tribe's status in 1934. *Carcieri*, 555 U.S. at 391. The Secretary read "now" to mean "now or hereafter," thereby removing any temporal limitation. *Id.* The District Court and First Circuit (sitting en banc) agreed with the Secretary, largely deferring to the Secretary's interpretation of his own authority. *See Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007); *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D.R.I. 2003).

The Supreme Court reversed the First Circuit with only a single justice prepared to credit the Secretary's reading of the IRA. The other eight justices rejected the Secretary's interpretation of the statute and expressly declined to defer under *Chevron* principles to the Secretary's power-grabbing interpretation of the IRA. The eight justices agreed that when Congress enacted the IRA in 1934, it imposed an express temporal limitation: only tribes "under Federal jurisdiction" in 1934 are eligible to have lands taken into trust. *Carcieri*, 555 U.S. at 382 ("We agree with petitioners and hold that, for purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment."). Stated another way, the Secretary lacks authority under the IRA to take land into trust for any tribes that were under state jurisdiction, and not federal jurisdiction, in 1934.

The rationale for reading "now" to mean 1934 varied somewhat among the justices. The majority opinion, written by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Alito, and Kennedy) relied on the plain meaning rule and found the language unambiguous and admitted of only one reasonable construction, without any need to resort to legislative history to

answerer it.[3] Justice Breyer's concurring opinion did not agree that the use of "now" was free of ambiguity but he nonetheless joined the majority because he concluded that the Secretary's current reading of the IRA was disproven by the IRA's legislative history, including a particularly pertinent statement by the IRA's principal drafter, Indian Commissioner John Collier, contained in a March 7, 1936 Department Circular. Tennant Decl. ¶ 38. Justices Souter and Ginsburg agreed with Justice Breyer that the Secretary's reading was untenable in light of the legislative history but concluded that the Department should be allowed to demonstrate that the Narragansett Tribe was under federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 390.

The only Justice who deferred to the Secretary's reading of the IRA was Justice Stevens.

Thus, the *Carcieri* ruling prohibits the Secretary from acquiring lands under the IRA for any tribe that, like the Narragansett Tribe, was under state jurisdiction throughout its history including in 1934. The *Carcieri* holding covers the Mashpee Wampanoag Tribe in Massachusetts because the undisputed tribal history reveals its status as a tribe exclusively recognized and supervised by the Commonwealth of Massachusetts.

3. Key Takeaways From *Carcieri* Ruling

The *Carcieri* decision provides three principal teachings:

1. Whether the Court applies the plain meaning rule (which dispenses with the need to consider legislative history) or the Court takes a more holistic approach and looks to both the text and context of the IRA, the result is exactly the same. 555 U.S. at 387.
2. Section 479 is not ambiguous, but even if it were, legislative history disproves the Secretary's interpretation. *Id.* at 395

[3] The plain meaning of Section 479 was evident to the high court in *United States v. John*, 437 U.S. 634, 650 (1978) ("The 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'").

3. Deference is not due when the Secretary is interpreting who is an eligible Indian under Section 479 of the IRA because statutory eligibility requirements are set by Congress and not delegated to the Department, and, as such, are properly determined by the Court. 555 U.S. at 395; *id.* at 396.

B. Re-Cap of Statutory Interpretation Principles and *Chevron* Deference

As reflected in the Supreme Court's interpretation of the IRA in *Carcieri* (555 U.S. at 387), the court begins with the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908, 927 (2002) (in all statutory construction cases, the court begins with the language of the statute); *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009); *Seahorse Marine Supplies, Inc. v. P.R. Sun Oil Co.*, 295 F.3d 68, 74 (1st Cir. 2002) ("the starting point for interpretation of a statue is the language of the statute itself") (internal citation omitted). "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the cases. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart*, 534 U.S. at 450 (omitting internal quotation marks); *Saysana v. Gillen*, 590 F.3d at 13; *Seahorse Marine*, 295 F.3d at 74 (quoting *Parisi by Cooney v. Chater*, 69 F.3d 614, 617 (1st Cir 1995) (the court is to "give effect to the statute's plain meaning 'unless it would produce an absurd result or one manifestly at odds with the statute's intended effect.'")).

As further reflected in the Supreme Court's majority decision in *Carcieri*, 555 U.S. at 395, if a federal statute is unambiguous, no deference is owed to the federal agency which administers. *Barnhart*, 534 U.S. at 462, 122 S. Ct. at 956 ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation."); *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (plain meaning of "immediate relative" clear under 8

U.S.C. § 1151(b)(2)(A)(i), such that court did not need to defer to agency).

As reflected in Justice Breyer's concurring opinion in *Carcieri*, 555 U.S. at 396, where a statute is ambiguous, the court must resort to "the normal devices of judicial construction"—examining the "text, structure, purpose, and history of the [statute], along with its relationship to other federal statutes" —to resolve the ambiguity. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600, 124 S. Ct. 1236, 1248, 157 L. Ed. 2d 1094, 1113 (2004); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998). If the legislative history reveals "an unequivocal answer," the inquiry ends. *Arnold*, 136 F.3d at 858. ("If that history reveals an unequivocal answer, this Court do not look to the interpretation that may be given to the statute by the agency charged with its enforcement.").

Chevron deference to an agency's interpretation of a statute thus sits in last place, existing as a last resort, one that is "called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys.*, 540 U.S. at 600; *Saysana v. Gillen*, 590 F.3d at 13 (internal citations omitted).

For the same reasons that the Supreme Court rejected *Chevron* deference in *Carcieri* (555 U.S. at 395 (majority); *id*. at 396 (Breyer (concurring), this Court should reject it here. The plain text of Section 479 should be read as written and given effect under the plain meaning rule. That reading yields one unambiguous and grammatical meaning that refutes the Secretary's interpretation—the Class 2 definition of "Indian" under 479 is a subset of Class 1 and necessarily incorporates the same temporal requirement stated in Class 1. To the extent that the Court believes legislative history should be consulted, a single document, Department Circular No. 3134 issued in 1936 by Indian Commissioner John Collier (Tennant. Decl. ¶ 38), provides the conclusive answer here just as it did for Justice Breyer (and Justices Souter and Ginsburg) in

Carcieri. 555 U.S. at 396. That Circular, written by a particularly knowledgeable source about the IRA (since John Collier was the principal drafter of it) (*Carcieri*, 555 U.S. at 390), conclusively shows Class 2 was intended to be a subset of Class 1 ("There will not be many applicants under Class 2 because most persons in this category will themselves be enrolled members of the tribe … and hence included under Class 1."). The Class 2 registration was envisioned as a way to register unenrolled minor children and other unenrolled descendants of members of Class 1 (members of a recognized tribe that was under federal jurisdiction on the date of the Act), who were living on a reservation as of June 1, 1934.

C. The Secretary's Ungrammatical Reading of the IRA Violates the Plain Meaning Rule And Is Refuted By the Legislative History.

The September 18, 2015 Record of Decision for the Mashpee Tribe represents a novel approach by the Secretary—never before used by the Department in taking land into trust—to locate statutory power in the IRA where none exists. The ROD is the first land-into-trust decision ever to disavow reliance on the Class 1 definition of "Indian" in § 479 and rely exclusively on the Class 2 definition of "Indian" under the IRA. In every other land-into-trust decision, including for the Narragansett Tribe in *Carcieri*, the Secretary has relied on the Class 1 definition. The Secretary jettisoned Class 1 for the Mashpee Tribe because the Secretary knows that the Mashpee Tribe, like the Narragansett Tribe in Rhode Island, was under state jurisdiction throughout its history and therefore cannot meet the Class 1 definition of a federally-recognized tribe under federal jurisdiction in 1934.

The Class 2 definition of "Indian," however, provides no greater authority for the Secretary than the Class 1 definition because Class 2 is grammatically a subset of Class 1 under a straightforward reading of the plain statutory text. The demonstrative adjective "such" before "members" in Class 2 naturally and necessarily refers to the antecedent phrase "members of any

recognized tribe now under Federal jurisdiction" in Class 1. That reading is required under the plain meaning rule; it is entirely free of ambiguity on its face. No reader would hesitate to connect "such members" to the one and only antecedent phrase that precedes it and necessarily refers to.

Without any support in the plain meaning rule or canons of statutory construction, the Secretary falsely proclaims in ipse dixit fashion that an ambiguity exists in Class 2 where none exists, and then in the guise of "interpretation" offers an artificial, ungrammatical, result-oriented reading of the IRA that: (a) splits the single unitary antecedent clause in Class 1 into two parts; and then (b) declares that "such members" (in Class 2) refers only to "members of any recognized tribe" (in Class 1)—abruptly stopping her reading before reaching the "now under Federal jurisdiction" portion of that same antecedent phrase. In doing so, the Secretary cleaves in two a single antecedent phrase without any basis in grammar rules, law, or logic.

The Department's unprecedented construction of Class 2 is so ungrammatical and unreasonable that the Secretary jettisons the latter part of the antecedent phrase in Class 1—"members of any recognized tribe [*now under federal Jurisdiction*]" —even though the latter italicized text is closer to the demonstrative adjective and in the normal operation of the last antecedent rule would be the first text connected to the demonstrative adjective. No canon of statutory construction remotely permits such an abusive reading of plain text.

To the extent the Court looks for assistance from the canons of statutory construction, the "last antecedent" rule provides the closest analogue. *See generally Lockhart v. United States*, 136 S. Ct. 958, 960 (2016) (explaining last antecedent rule and applying it in context of a sentencing enhancement for any prior conviction related to "aggravated sexual abuse, sexual abuse, or

abusive sexual conduct involving a minor or ward"). The Supreme Court held that the limiting phrase "involving a minor or ward" applied only to the last item on the list. *Id.* at 960.

The last antecedent rule has been applied to the definition of "Indian tribe" or "tribe" under the Indian Land Consolidation Act (25 U.S.C. § 2201) ("ILCA"):

> §2201. Definitions
> For the purpose of this chapter—
> (1) "Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

The Northern District of New York, employing the last antecedent rule, concluded that the limiting phrase "for which, or for the members of which, the United States holds lands in trust," referred only to the immediately antecedent "community"—not the four other listed items. *Town of Verona v. Salazar*, No. 6:08-cv-647(LEK/GJD), 2009 WL 3165556, at *9 (N.D.N.Y. Sept. 29, 2009). Here, of course, the Class 1 antecedent phrase ("members of any recognized tribe now under Federal jurisdiction") is a single unitary antecedent; it does not constitute a list of items so there is no grammatical choice to be made from a list. As such, the Secretary's ungrammatical reading of Section 479 actually *reverses* the last antecedent rule by de-selecting the language in closest proximity. The last antecedent rule necessarily pulls in the entire antecedent clause (i.e. "members of any recognized tribe now under Federal jurisdiction") into Class 2.

The Secretary acknowledges that the text of Section 479 naturally permits reading "such members" to refer to the complete antecedent phrase, i.e., "members of any recognized tribe now under Federal jurisdiction." But the Secretary thinks that reading makes Class 2 duplicative of Class 1, and renders Class 2 surplusage.[4] Not so. First, the plain meaning rule requires the text

[4] The Secretary read Section 479 very differently – i.e., grammatically – in *Gervais v. Dep't of the Interior*, 2004 MSPB LEXIS 3395 (Merits Sys. Prot. Bd. July 8, 2004). There, the Department interpreted Section 479 to

to be read as written unless it would produce an absurd result. The unambiguous text permits only one grammatical reading and the Secretary's stated concerns about possible overlap between Class 1 and Class 2 falls far short of an absurd result that permits consideration of legislative history. Application of the plain meaning rule, as employed by the majority in *Carcieri*, would accept the grammatical reading and end the inquiry there. *Carcieri*, 555 U.S. at 395-96.

The result is that the ROD completely re-writes the second definition of "Indian" in the IRA, which the ROD tellingly reformulates with italics and brackets (in original) as follows:

> The IRA applies to "Indians," including "descendants of *[members of any recognized Indian tribe]* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.

In contrast, Section 479, as enacted by Congress, provides as follows:

> The term "Indian" as used in the Act shall include [1] all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction; [2] and all persons who are descendants of *such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (emphasis added).

Of course, it is a simple matter to refute the Secretary's argument that Class 2 would be rendered surplusage by incorporating Class 1's temporal restriction to 1934. As noted above, Department Circular No. 3134 (Tennant Decl, Ex U), penned by Indian Commissioner John Collier in 1936, expressly refutes the Secretary's reading of Class 2—just as this same document expressly refuted the Secretary's reading of "now" in Class 1 in *Carcieri*. In his circular,

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determine who was an Indian for purposes of preferential hiring under the IRA. The Department read Class 2 as a subset of Class 1, provoking Indian applicants to cry foul and make the same arguments that the Secretary is making now, namely that incorporating the "any recognized tribe now under Federal Jurisdiction" requirement of Class 1 into Class 2 renders Class 2 "redundant and mere surplussage." The Administrative Law Judge accepted the Department's grammatical interpretation of Section 479, noting that it was long-standing. *Id*. at 22 (referring to legal analysis performed by Department in 1970s). In contrast, the Secretary's ungrammatical reading of Section 479 in the ROD, used to expand its authority under Section 465 to benefit the Mashpee Tribe and circumvent *Carcier*i, is a quite recent invention.

Commissioner Collier confirmed that Class 2 is a subset of Class 1 and "there will not be many applicants under Class 2."

D. Other Arguments Pertaining to Carcieri Issue.

1. The Mashpee Tribe's Prior Lack of Standing to Assert Claims Against State, Local and Federal Governments For Violation of the Indian Trade and Intercourse Act (25 U.S.C. § 177)

In a series of actions, the Mashpee unsuccessfully brought suit in the U.S. District Court for the District of Massachusetts seeking damages and the return of lands that they claimed had been wrongly taken from them. A basic question of standing arose and, following a 40-day trial, a jury determined that Mashpees stopped being a tribe as of 1869 and lacked standing as a tribe in 1975 to assert a claim under the ITIA. *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978). That decision was affirmed by the First Circuit and raised as a defense by the Department of the Interior in a subsequent land claim action by the Mashpee against the federal government. *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). This prior litigation demonstrates that the Mashpees were not a tribe in 1934 or more precisely any time between 1869 and 1975, for purpose of having standing to assert a claim for damages under the Indian Trade and Intercourse Act (ITIA) 25 U.S.C. §177. Those judicial determinations logically compel a finding that that the Mashpees were not a tribe for purposes of the IRA—and specifically they were not a recognized tribe under Federal jurisdiction in 1934. Thus, just as the Mashpee were found not to be a tribe for purposes of bringing a claim under the ITIA, they are not a tribe for purposes of receiving IRA benefits because they were not a tribe in 1934 and thus could not be a "recognized tribe under Federal jurisdiction" in 1934.

The fact that the Department administratively recognized the Mashpee Tribe in 2007 does not and cannot overrule judicial determinations in this court. The current Mashpee Tribe is

entitled to whatever federal services and benefits are provided to Indians under federal statutes that do not contain a temporal restriction such as the IRA. But they are not entitled to land acquisition benefits under the IRA because they were not a tribe in 1934.[5]

Based on the forgoing record and arguments, Plaintiffs have demonstrated a high likelihood of success on the merits. That alone warrants issuance of a preliminary injunction. Nevertheless, Plaintiffs present argument on the other factors which also weigh heavily in favor of issuing a preliminary injunction.

2. The Mashpee "Plantation" Was Not a Reservation Within the Meaning of the IRA

In arguing that the Mashpee Tribe satisfies the Class 2 definition, including that descendants were living on a reservation as of June 1, 1934, the Secretary adopted a definition of "reservation" that is historically unsound and legally inaccurate, and moreover directly contradicted by the Department's own definition of a reservation adopted in its land-into-trust regulations in 25 C.F.R. Part 151.2(f) (defining reservation" as "the area of land over which the tribe is recognized by the United States as having governmental jurisdiction . . . .") and positions taken by the Department in other cases. *See, e.g.*, Brief of the U.S. Department of the Interior, *MichGO v. Norton*, No. 1:05-cv-01181-JGP (D.D.C. Jan. 6, 2006) attached as Ex. FF to Tennant Decl, at p. 45 (finding land was not a "reservation" under Indian Gaming Regulatory Act where "the Tribe had not exercised sovereign authority over the land, such as land use, building codes, zoning, law enforcement, fire services, education, or judicial activity.").

Plaintiffs are therefore likely to succeed on their claims challenging the ROD on these grounds as well.

[5] *See KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 11 (1st Cir. 2012) ("Neither the Mashpee nor the Aquinnah, the two federally recognized tribes in Massachusetts, were federally recognized in 1934, raising the serious issue of whether the Secretary has the authority, absent Congressionally action, to take lands into trust for either tribe.").

II. PLAINTIFFS ARE SUFFERING SERIOUS, IMMEDIATE, AND IRREPARABLE HARM.

Plaintiffs currently are suffering irreparable harm which will continue if this Court does not issue injunctive relief to take the Property out of trust, or at the very least, to halt construction activities during the pendency of this action. This harm is not hypothetical or speculative; it is real, concrete, and it is happening now. Only a preliminary injunction can stop Plaintiffs from being harmed further.

A. Harm is Happening Now

The Tribe has transformed an existing garden-style warehouse park, with low rise buildings fully screened from the residential properties by a mature tree line, into a moonscape. Affidavit of Frank Lagace ¶ 16 . The Tribe has torn down buildings and, by clear cutting trees, has removed the natural buffer between the industrial park and the residential neighborhood. Lagace Aff. ¶¶ 27-30. The transformation of the property has produced immediate harms including aesthetic injury in the form of a jarringly ugly and visible moonscape (a truly unpleasant eyesore) (Lagace Aff. ¶¶ 20-29 and attached photos), dust and dirt migration onto nearby properties and into nearby homes (Lagace Aff. ¶ 18), noise from demolition, grading, and other site preparation work, noise, and air pollution (diesel fume exposure) from heavy vehicles driving by, braking, and causing homes to rattle (Lagace Aff. ¶¶ 9-11), and damage to roadways from heavy construction equipment traveling over the residential streets (Lagace Aff. ¶ 26). This construction is occurring beyond the hours permitted by state and local law (including on Saturday and Plaintiffs have no right of requires to town government because the construction is undertaken by a sovereign tribe. (Lagace Aff. ¶¶ 32-33).

In going forward with the demolition, clear-cutting, and grading, the Tribe has made good on its repeated declarations to construct the casino on the Property at break-neck speed.

See Bond Decl. at ¶ 10. The president of the financial backer for the casino project stated back in March, "We put this together so that we can open the doors on a fast-track basis in 2017." Bond Decl. at ¶ 11. Another official put it this way: "The first phase has a 14-month construction time line. That means if we break ground next month, which we are going to do in April, we will open in summer 2017." Bond Decl. at ¶ 12. Finally, a March 14, 2016 article in the Boston Globe described the Tribe's plan to "sharply accelerate[]," rather than slow the construction in light of the pending litigation. Bond Decl. at ¶ 14. That is precisely what the Tribe is doing.

This case is unlike the other land-into-trust cases where courts, in denying motions for preliminary injunctions, concluded there was no immediate irreparable harm because the land was not yet in trust, and construction could not yet realistically or legally commence. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Comm v. Salazar*, No. 2:12-cv-3021, 2013 WL 417813 (E.D. Cal. Jan. 30, 2013); *Stand Up for California! v. United States Dep't of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013). In those cases, the courts found that there was nothing to enjoin because the harm was not imminent. Those courts noted, however, that irreparable harm would occur if construction were to commence, and because the tribe had intervened in both lawsuits, the courts were able to direct the tribe to inform the court and the plaintiffs well in advance of any construction activities, precisely so that the plaintiffs could then file a timely motion for preliminary injunction. *Cachil Dehe Band of Wintun Indians*, No. 2:12-cv-3021, 2013 WL 417813, at * 4 ("While [plaintiff's] concerns might support a finding of irreparable harm if construction and gaming were to occur without any notice, [Defendants and contractors] both represent that 30 days [sic] notice will be given before any activity commences at the Proposed Site."); *Stand Up for California*, 919 F. Supp. 2d at 83 ("Despite the plaintiffs'

insufficient showing of irreparable harm, the Court is mindful that, once the transfer occurs, the likelihood of irreparable harm will increase as this litigation continues. Therefore, the Court will require, during the pendency of this case, that the North Fork Tribe provide notice to the parties and the Court at least 120 days prior to any physical alteration of the land at the Madera Site.").

Here, in contrast, the land is *already* in trust and construction *already* has begun. Construction has moved from imminent to actual groundbreaking to demolition and grading. As described below, this construction is harming Plaintiffs and the surrounding community, and, if not stopped by this Court now, those harms will be irreversible, leaving plaintiffs with no adequate remedy at law.

B. The Harm is Irreparable

An injury is "irreparable" if it is "not accurately measurable or adequately compensable by money damages." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996). Injuries in cases involving the environment are often irreparable because environmental disruption and damage can rarely be undone through monetary remedies. *See New Mexico v. Watkins*, 969 F.2d 1122, 1137 (D.C. Cir. 1992) ("Money damages . . . would not be responsive to the environmental…concerns complainant raises."); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its very nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."). Additionally, courts have found that the construction of a tribal gambling casino constitutes irreparable harm. *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

Here, the construction on the Property, which will result in a gambling casino, is causing

severe and irreparable environmental injuries. And, it may be impossible to stop the construction on the Property unless the Property is taken out of trust. In any event, unless this Court takes the Property out of trust and/or stays all construction, Plaintiffs will continue to experience irreparable harm, as described above.

Plaintiffs cannot avoid these environmental impacts. According to section 8.24-1 of the FEIS, ". . . certain adverse effects of development of the land in Taunton could not be avoided even with the application of mitigation measures." As construction continues, the daily vehicle trips on local and regional roads will increase significantly. Bond Decl. ¶ 23. So too will the output of solid waste and recycling. Bond Decl. ¶ 24. And, air quality will continue to deteriorate as motor vehicle exhaust, equipment exhaust, and fugitive dust is pumped into the air. Bond Decl. ¶ 25. As Plaintiffs are acutely aware, continuation of construction activities will continue to result in noise related to equipment and vehicles at and around the site. Bond Decl. ¶ 26. In 14 short months, the Property, originally intended to be a garden-variety industrial complex, will be an intrusive tribal casino impacting neighboring residential areas. Bond Decl. ¶ 27. The tribal resort ultimately will be so massive it will engulf much of the surrounding neighborhood in shadows during late afternoon hours, especially during weeks near the Winter Solstice. *Id.*

III. DEFENDANTS WILL NOT BE HARMED BY INJUNCTIVE RELIEF

Plaintiffs request that the Property be taken out of trust and/or that all construction activities on the Property be enjoined to prevent further irreparable harm. Each day the construction continues, the Plaintiffs are not just exposed to additional construction-related harms, but their legal rights are eroded with a substantial risk that the "equities" will shift as the tribe invests more money in its casino. Tennant Decl.¶¶ 22-24. There is a real risk that as time

goes on, and the tribe gets closer to their goal of opening a casino, the "facts on the ground" will overtake the legal process, with experience in other jurisdictions showing that illegal tribal casinos (constructed on non-trust land) were allowed to operate either because political will was lacking to shut it down, or tribal immunity from suit precluded courts from ordering the tribe to shut it down. Bond Decl. ¶ 18, Tennant Decl. ¶10.

The federal government has consistently argued in other land-into-trust cases that the courts have the inherent power to take land out of trust. Tennant Decl. Ex. L, U.S. Opp'n Br. to Mot. for Prelim. Injunction; *Cachil Dehe Band of Wintun Indians of Colusa Indian Comm v. Salazar*, No. 2:12-cv-3021, 2013 WL 417813 (E.D. Cal. Jan. 30, 2013) (stating, in response to argument that land should not be taken into trust, that "this Court can order the United States to take the land out of trust"); U.S. Opp'n Br. to Mot. for Prelim. Injunction, at 40, *Stand Up for California v. United States Dep't of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013) (noting that the "Department of the Interior has taken land out of trust in other cases").

This is not an extreme position. In fact, it may be the only way to effectively stop the irreparable harm. The Tribe and the contractors are not parties to this litigation, and they or other litigants could argue that this Court lacks authority to order them to stop construction. *But see* Fed. R. Civ. P. 65(d)(2)(C) (stating that an order may bind "other persons who are in active concert or participation with anyone described in Fed. R. Civ. P. 65(d)(2)(A) or (B)"); *G. & C. Merriam Co. v. Webster Dictionary Co.,* 639 F.2d 29 (1st Cir. 1980) (if non-party was legally identified with party to whom injunction was issued, non-party could be bound to injunction). The Tribe is immune from suit, unless it expressly waives its sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (sovereign immunity "cannot be implied but must be unequivocally expressed") (internal citations omitted). Thus, the only way to reliably and

comprehensively prevent further irreparable harm is to take the land out of trust pending this litigation so that the Tribe and its contractors cannot continue to build on the Property in the interim.

If the Court decides that it should not take the Property out of trust at this time, it should at least stay all construction activities on the Property so as to prevent any further irreparable harm. Again, this is remedy is not extraordinary. In fact, the United States previously admitted that such a remedy is available. Tennant Decl. Ex. L, U.S. Opp'n Br. to Mot. for Prelim. Injunction, at 40, *Stand Up for California v. United States Dep't of the Interior*, 919 F. Supp. 2d 51, 58 (D.D.C. 2013) ("[T]he Court could enjoin specific activities, such as construction or gaming activities on the land to maintain the status quo, all without reversing the land into trust decision.").[6]

None of this relief would impact, much less cause substantial harm to, Defendants. Rather, the benefits of taking the land into trust, or at the very least stopping construction, far outweigh any possible detriments. *See F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1996) (recognizing the policy of "maintain[ing] the status quo by injunction pending review of an agency's action"). It behooves all parties and non-parties involved here to have the validity of the Secretary's decision to take land into trust adjudicated before any further construction is undertaken.

IV. ENFORCEMENT OF THE LAW AS WRITTEN IS IN THE PUBLIC INTEREST

A strong public interest exits in the enforcement of public laws and regulations. *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (issuing preliminary injunction in

[6] The Government's brief noted that a similar order was entered in Sac and Fox Nation of Missouri v. Norton, where the court allowed the land transfer to occur, but maintained the status quo for all other purposes. U.S. Opp'n Br. to Mot. for Prelim. Injunction, at 40 fn.21, *Stand Up for California v. United States Dep't of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013).

case of NEPA compliance). "The public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). The public interest is heightened when the Secretary exercises the "extraordinary power" (Tennant Decl. ¶ 39) to take land into trust and divest state and local jurisdiction. The Record of Decision has far-reaching consequences for non-tribal and tribal interests alike. One billion dollars will be spent on a tribal casino that lacks a legal basis. Without an injunction, construction activities will continue, causing Plaintiffs grave harm, which, as described above, may be beyond the power of this Court to correct. If the Court fails to take the land out of trust or to otherwise halt construction now and later finds the transaction to be illegal, it may be too late to unwind the transaction and the construction. Plaintiffs respectfully implore the Court to act now before any more harm occurs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for a preliminary injunction be granted. A proposed form of order is being submitted concurrently herewith.

Dated: May 27, 2016

Respectfully submitted,

s/ Matthew J. Frankel

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CERTIFICATE OF SERVICE

I, Matthew J. Frankel, hereby certify that this document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent via first class mail to those indicated as non-registered participants, if any.

/s/ Matthew J. Frankel