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

OMNIBUS DECLARATION OF DAVID H. TENNANT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INUNCTION AND IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

DAVID H. TENNANT, being a duly licensed attorney in the States of New York and California, and admitted to practice on a *pro hac vice* basis before this Court, hereby declares as follows:

1. I am a partner in Nixon Peabody LLP, counsel of record for Plaintiffs, who are private citizens, homeowners, and residents of Taunton and East Taunton, Massachusetts.

2. I submit this declaration for two purposes: (1) to support Plaintiffs' Motion for Preliminary Injunction filed contemporaneously herewith; and (2) to oppose Defendants' Motion for Partial Dismissal (Dkt 9) which seeks dismissal of the Fifth, Sixth, Seventh, and Eighth Causes of Action in the Amended Complaint.

3. These motions are before the Court for consideration in an unprecedented factual context where the Secretary acquired lands in trust for the benefit of the Mashpee Wampanoag Tribe; was required by its own rules to "immediately" transfer the land to the Tribe, and did in fact transfer the land to the Tribe; and the Tribe is now constructing a casino with groundbreaking, demolition and site clearing underway. Declaration of Adam M. Bond, dated

May 27, 2016 ("Bond Decl."), at ¶ 1; Affidavit of Frank Lagace, sworn to May 27, 2016 ("Lagace Aff."), at ¶ 5. In no other case has a court had to confront a sovereign tribe, put into immediate possession of trust lands, starting to construct a casino before any judicial review has occurred. The Tribe here seeks to build a casino as fast as it can, and promises to open in 14 months. Bond Decl. at ¶¶ 11-12.

4. The Tribe has demolished buildings, clear cut trees, and used heavy equipment for grading and removal of debris. The property is now fairly described as a moonscape. Lagace Aff. ¶ 41. These significant changes to the property are causing irreparable harm to Plaintiffs, who live in Taunton and East Taunton close the construction site. Bond Decl. ¶¶ 19-21.

5. Plaintiffs' Motion for a Preliminary Injunction seeks provisional relief to vindicate—or at least salvage to the extent possible—Plaintiffs' statutory rights under the Administrative Procedure Act (5 U.S.C. § 705) to have a court review the lawfulness of the federal government's decision to take land into trust for the Tribe ***before*** the lands are taken into trust by the United States and beneficial ownership transferred to the tribe. The Sixth, Seventh and Eighth Causes of Action in the Amended Complaint seek to frame claims and relief in the specific context presented here, where the Secretary revoked a rule and policy, extant from 1996 to 2013, that ensured orderly and complete judicial review before lands were transferred into trust.

6. Even though Defendants created the chaotic circumstances that now imperil judicial review, they seek to dismiss each of the causes of action in the Amended Complaint that Plaintiffs added to provide specific bases for the Court to issue injunctive relief under these usual circumstances, where a sovereign Tribe—immediately taking possession of the property without any pre-transfer judicial review—is causing irreparable harm.

7. The Mashpee Tribe was federally recognized in 2007, and as such, is treated as a sovereign entity that enjoys immunity from suit. The Tribe has not intervened in this lawsuit, and Plaintiffs cannot join it as a defendant.

8. Defendants may be arguing Plaintiffs have no recourse to injunctive relief whatsoever.

9. As set out in Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Partial Dismissal, the subject causes of action state viable claims. Pre-transfer judicial review of the Department's land acquisitions for tribes under the Indian Reorganization of Act of 1934 (IRA) is contemplated by the Administrative Procedures Act ("APA"), which authorizes aggrieved parties to seek to maintain the status quo before the government acts to the party's detriment, and is supported by case law construing the constitutionality of the IRA's land acquisition authority. That decisional law examined the Secretary's discretion under the IRA to take land in trust "for Indians" and supports the conclusion that without meaningful *pre-transfer* judicial review, the IRA violates the non-delegation doctrine. See Plaintiffs' Memorandum of Law in Opposition to Motion for Partial Dismissal at 23-24.[1]

The Government's Impairment of Plaintiffs' Right of Judicial Review

10. Because the Tribe is not a party to this lawsuit and is immune from suit, Plaintiffs' injunctive relief remedies to enjoin construction are curtailed, if not eliminated; this Court has no power to enjoin the Tribe itself from continuing with its casino construction. Plaintiffs must pursue their remedies against the federal defendants for having created these practical and legal barriers to judicial review, and the circumstances where the facts on the

[1] The non-delegation doctrine is rooted in the separation of powers clause in the Constitution and bars Congress from delegating lawmaking authority to federal agencies without also providing intelligible narrowing principles to guide how that authority should be exercised. *See* Plaintiffs' Memorandum of Law in Opposition to Motion for Partial Dismissal at 18-19.

ground each day—as the tribe races to complete its casino—further erode Plaintiffs' rights to judicial review and threaten to render this lawsuit moot.

11. The comment of one "casino expert," reported in the Cape Cod Times (Bond Decl. at ¶¶ 16-17), captures another real problem—that once a casino is open, there may be no way to shut it down. That concern is rooted in the experience of tribal casinos built in New York and Michigan—casinos constructed on lands indisputably not eligible for gaming—but the casinos remained standing and operating even after various legal challenges. In the New York case, involving the Oneida Indian Nation's Turning Stone Casino, the tribe built its high-rise casino on fee lands that were not eligible for gaming, but in various legal proceedings that stretched more than a decade, no governmental body sought a court order to shut down the successfully operating casino, apparently because there was little appetite to eliminate the jobs its provided. In the Michigan case, the tribe constructed an illegal gaming facility on fee lands it purchased 125 miles away from its reservation. While the political will apparently existed in Michigan to shut down the casino, the tribe successfully invoked tribal immunity from suit to prevent the State of Michigan from taking enforcement action against it. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

12. The present case presents the real prospect of a Pyrrhic victory for Plaintiffs. While their position on the Secretary's lack of authority is squarely supported by the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), which dictates the reversal of the land into trust decision for the Mashpee Tribe (see Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction), the Tribe is sprinting to complete its casino before this Court rules. If this case follows a standard litigation track, the tribal casino will be constructed and may well open before a decision is reached.

13. Significantly in this regard, the Government's lawyers are unable to say when the Administrative Record will be presented to the Court. The ROD was decided eight months ago with full knowledge that the unprecedented decision would be tested in court; and the present lawsuit was filed nearly four months ago. In another land into trust case, *State of New York v. Salazar*, No. 6:08-cv-00644 (N.D.N.Y. June 19, 2008), the federal government said it would take nine months to produce the administrative record, measured from the first status conference in that case, which was itself held four months after the complaint was filed. In that case it took more than a year to obtain the complete record. The Government in this case has taken the position that resolution of the so-called *Carcieri* issue (the application of the 2009 Supreme Court decision to this case), like other issues in this lawsuit, must await the production of the Administrative Record, however long it takes the Government to produce it.

The Unprecedented Circumstances:
Fast-Track Casino Construction Is Occurring Before Any Judicial Review

14. The situation here is unprecedented and presents an issue of first impression. This is the first time that the federal government has taken land into trust for a tribe, transferred beneficial ownership to the tribe, and the tribe has started constructing a casino before a court has ruled on the lawfulness of the Secretary's acquisition of the land under the IRA.

15. From 1996 to 2013 the Department of the Interior maintained a rule, codified at 25 U.S.C. § 151.12(b), and a complementary written policy, that ensured judicial review would occur before the land was taken into trust and any casino construction could start—provided an aggrieved party filed suit within 30 days of the announcement of the land going into trust. Attached as Exhibit A is a true and correct copy of the 1996 Federal Register publication (*see* 61 Fed. Reg. 18082 (Apr. 24, 1996)) by which the Department adopted a 30-day rule by which it stated it would not take any action on the trust transfer for thirty days, allowing aggrieved parties

to file an APA action "before transfer of title to the United States." Attached as Exhibit B is a true and correct copy of the written policy, binding on BIA employees, which guaranteed that the trust acquisition would be delayed until the lawsuit was concluded.

Department of the Interior's
Revocation of 30-Day Rule and Abandonment of Self-Stay Policy

16. The Department of the Interior revoked the 30-day rule (25 C.F.R. § 151.12(b)) and self-stay policy in November 2013, following the decision of the Supreme Court of the United States in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012). Attached as Exhibits C to K are true and correct copies of documents that pertain to the decision of the Department in November 2013 to revoke the 30-day rule and self-stay written policy.

a. Exhibit C is the Department of the Interior's notice regarding the revocation of the 30-day rule.

b. Exhibit D is the Department's response to the public comments concerning the legal/jurisdictional and practical problems created by a tribe building a casino before judicial review takes place. The full docket is available on the department's website at https://www.regulations.gov/#!documentDetail;D=BIA-2013-0005-0089.

17. A number of tribes who supported the revocation of the 30-day rule and self-stay policy observed that the Department should effectively replace it with merit-based injunctive relief at the outset of the litigation—and that the process could be further expedited if a judge exercises the discretion pursuant to Rule 65(a) to use the preliminary injunction hearing to advance the trial on the merits. *See* Ex. E (Ewiiaapaayp Band of Kumeyaay Indians public comment dated July 21, 2013); *see also* Ex. F (Alabama-Coushatta Tribe of Texas public

comment dated July 23, 2013); Ex. G (Rincon Band of Luiseño Indians public comment dated July 29, 2013); Ex. H (California Association of Tribal Governments public comment dated July 21, 2013).

18. A number of tribes joined with governmental commentators (and others) in opposing the proposed revocation of the 30-day rule and self-stay policy.

19. The United Auburn Indian Community of the Auburn Rancheria opposed the rule change and made the following points about the immediate transfer into trust:

> [T]he proposed rule revisions, when combined with the Department's new policy of no longer staying the taking of land into trust pending the outcome of litigation, impair the ability of affected parties to seek judicial review…. This eliminates legal options for affected parties and raises impermissible hurdles against judicial intervention. For instance, it eliminates an affected party's ability to seek a temporary restraining order or a preliminary injunction, and it removes a court's ability to postpone the transfer of land into trust.
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> Ex. I at 1.

20. The tribe known as the Forest County Potawatomi Community submitted a detailed legal critique of the proposed rule change, and observed that, "the 30 day waiting period, which the Department now proposes to abandon, played a vital role in protecting the constitutionally of the IRA." Ex. J at 3. This tribe directly challenged the Department's rationale for revoking the rule:

> [T]he Department's rationale for the rule change is based on the Supreme Court's decision in *Mash-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) ("*Patchak*"), but *Patchak* does not compel removal of the 30-day period. The Supreme Court held in *Patchak* that the Quiet Title Act does not prohibit suits involving Indian lands under the Administrative Procedure Act against the government so long as the plaintiffs do not assert competing rights to title. The *Patchak* case did not even consider the question of whether the Secretary is authorized, or under what circumstances the Secretary is authorized, to take land out of trust. The Department's position on the circumstances which will allow the Secretary to take land out of trust should be narrow. Finally, the elimination of the 30 day waiting period will complicate judicial review for both

> the United States and nearby communities, including Indian tribes and will create practical problems for all interested parties.
>
> *Id.* at 1-2.

21. A number of commentators, tribal and non-tribal, challenged the Department's proposed rule change on the basis that it would encourage tribes to build quickly to try to influence the outcome of the litigation by altering the balancing of equities. For example,

a. The City of Medford Oregon commented that:

> As BIA is aware, challengers may be unable to obtain emergency relief from the courts if tribes are not parties to challenged trust decisions because of sovereign immunity…. If the proposed rule is adopted, however, tribes will be far less likely to intervene so that they can develop the land quickly without risk of injunction, ultimately influencing the outcome of the suit by *not* participating…. BIA is encouraging tribes to begin development immediately. Doing so shifts the equities in favor of the tribe. Courts are less likely to order land to be removed from trust if the tribe has already invested substantially in its development, even if a trust decision is clearly arbitrary and capricious.
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> Ex. K at 4.

b. The United Auburn Indian Community of the Auburn Rancheria commented:

> The 30-day notice and self-stay rules also preserve the balance of equities between the parties in litigation. This is because a stay on the transfer of land into trust is also a stay on development of the land. Investments in buildings and infrastructure necessary for Class III gaming, for instance, would affect the court's ability to reverse a land-into-trust decision by shifting the balance of the equities against the intervening affected party.
>
> Conversely, a tribe that relies on the integrity of the Department of the Interior administrative decision making process may put itself and its subsequent investments at considerable risk should an affected party prevail in court. The Department exposes itself to litigation by a tribe that invested in land development only to have the fee-to-trust conversion reversed in court.
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> Ex. I at 2.

22. The Department rejected these concerns about a tribal casino being developed in parallel to judicial review and related legal questions about jurisdiction, available remedies,

balancing of equities, and possible lawsuits against the Department by tribes. The Department's response was as follows:

> Availability of Remedy
>
> Several commenters expressed concern that remedies or meaningful relief would not be available once the land is taken into trust because the tribe could assert sovereign immunity, opt not to intervene in a lawsuit challenging the trust acquisition, and/or proceed with development of the property in a manner not permitted under State or local law, creating "facts on the ground," and arguing reliance on the approval and vested interests. *Response:* These comments rely on several assumptions, including the assumption that the decision to take land into trust is not valid. We believe the reasons favoring the removal of the 30-day waiting period, as stated elsewhere in this preamble, outweigh the speculative risks put forward by the commenters' hypothetical scenarios and potential outcomes.
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> Ex. D at 67933.

23. The "speculative risks" and ""hypothetical scenarios" and "potential outcomes" are crystallized and made real in this case, as demonstrated by Mashpee Tribe's development of the property which already has included demolition of buildings, clear cutting of trees, and grading of the property, all before the parties have made their first appearance in court.

24. The Department also rejected concerns, expressed by both tribal and non-tribal commentators, that the Secretary may not have authority to take lands out of trust, thereby depriving aggrieved parties of relief.

> Taking Land Out of Trust
>
> Several commenters questioned whether the Department has authority to convey land out of trust as a result of an APA challenge and opined on whether *Patchak* affects that authority to take land out of trust. Response: *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.
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> *Id.* at 67934.

Government's Position in Other Land-Into-Trust Cases

25. Attached as Exhibit L is a true and correct copy of United States' Response to Plaintiffs' Motion for Preliminary Injunction in *Stand Up for California! v. U.S. Dep't of the Interior*, No. 1:12-cv-02039-BAH (D.D.C. Nov. 11, 2013) in which various municipalities and citizen groups challenged the Secretary's decision to acquire lands under the IRA for a California tribe. The plaintiffs in *Stand Up for California!* sought injunctive relief under the APA, 5 U.S.C. § 705, and Fed. R. Civ. P. 65 to preserve the status quo—i.e., before the lands were taken into trust and placed in possession of a tribe that was seeking to develop a casino. The *Stand Up for California!* plaintiffs were forced to seek injunctive relief at the outset of the lawsuit because the Department advised the plaintiffs in that case that the Department was not going to follow the 30-day rule and self-stay policy. The Department opposed the plaintiffs' application for injunctive relief, arguing that their motion was premature and they had failed to show irreparable harm because: (a) the plaintiffs were not harmed by the land going into trust; and (b) the tribe's plans to build a casino were speculative and not imminent.

26. Attached as Exhibit M is a true and correct copy of the United States' Opposition to Plaintiff's Request for a Temporary Restraining Order in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Salazar*, No. 2:12-cv-3021 (E.D. Cal. Jan. 18, 2013) in which various aggrieved parties challenged the Secretary's decision to acquire lands under the IRA for a California tribe. As in *Stand Up for California!*, the plaintiffs sought a preliminary injunction under Fed. R. Civ. P. 65(a) to enjoin the government from taking land into trust. The Department opposed the motion for a preliminary injunction, arguing, just as it did in *Stand Up for California!*, that the taking of land into trust would not harm plaintiffs and that construction on the subject parcel was not imminent. The court agreed that the act of taking land into trust

would not cause substantial, immediate, and irreparable harm to plaintiffs because it would be at least four months before the land would be developed. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Salazar*, No. 2:12-cv-3021, 2013 WL 417813, at * 4 (E.D. Cal. Jan. 30, 2013). However, the court noted that plaintiffs' concerns might support a finding of irreparable harm if construction was imminent. *Id.*

The Department of the Interior's Position in this Case

27. The Department in this case, in moving to dismiss the Fifth through Eighth Causes of Action in the Amended Complaint, does not recognize any need for pre-transfer judicial review, and is utterly unconcerned with the impairment or destruction of Plaintiffs' right to injunctive relief under the APA, a remedy that the Department says its rules and policies need not preserve.

28. As explained in Plaintiffs' Memorandum of Law in Support of its Motion for a Preliminary Injunction, the legal and practical impediments that exist to judicial review, caused by the immediate transfer of trust lands to a tribe that begins construction of a casino, presents the same type of constitutional infirmity recognized by courts pre-*Patchak*, when the Quiet Title Act ("QTA") was understood to preclude review. It is the impairment of judicial review that matters, not its cause. Thus, if the QTA required the Department to enact a 30-day rule (and self-stay policy) to avoid a judicial determination that the IRA violates the non-delegation doctrine, then by a parity of reasoning, a similar "window" is required to allow pre-transfer judicial review here, to avoid the impairment in judicial review that arises when lands are immediately transferred into trust and a tribe starts developing the land. In both cases that window is equally necessary to permit meaningful review and preserve the full measure of relief that plaintiffs are entitled to invoke under the APA.

IRA Legislative History Materials Pertinent to Non-Delegation Cause of Action

29. The legislative history for the Indian Reorganization Act of 1934 demonstrates that Indian Commissioner John Collier and his legal and technical staff within the Office of Indian Affairs presented a detailed bill to Congress that included a well-articulated land policy to accompany Section 5 of the Act, 25 U.S.C. § 465, in which Congress delegated to the Secretary of the Interior authority to take land into trust for Indians.

30. Indian Commissioner John Collier set forth the purpose and scope of the proposed land acquisition program in a memorandum of explanation before the Committee on Indian Affairs, House of Representatives (H.R. 7902) Part 1, February 22, 1934, at 15-29. True and correct copies of excerpts of H.R. 7902 are attached as Exhibit N. The Collier memorandum sets forth a provision-by-provision explanation of what the Department of the Interior intended to accomplish through the IRA—with Collier offering a clear statement about what authority the Secretary sought and how that authority would be exercised by the Secretary through the Office of Indian Affairs (i.e., by Commissioner Collier). Collier (together with other members of the Department) laid out a land acquisition policy that focused on "[t]he consolidation of Indian lands." *Id*. at 20-21; *id.* at 26 ("Title III aims next to restore to landless Indians some of the lands improvidently alienated in the administration of the allotment system."); *see also* Ex. O at 153 (true and correct copies of excerpts of Hearings before the Committee on Indian Affairs, United States Senate (S. 2755 and S. 3645)) (a purpose of Title is "to go back and restore to the Indians these so-called 'surplus lands.'"); *id.* at 160 ("[W]e can consolidate one checkerboarded Indian area by exchanging lands in another place with white owners, and so on…."); *see generally id.* at 147-160.

31. Restoring surplus lands to Indians alarmed property owners in the West since many white owners held properties within reservations that had been declared to contain "surplus lands" and opened up to non-Indian ownership, producing "checkerboarded" landholdings. Reversing that process was vigorously opposed by Western interests. *See* Ex. P at 11134-11136 (78 Cong. Rec. Senate 11122 (June 12, 1934) (statements by Senator Clarence C. Dill from Washington State).

32. Attached as Exhibit Q is a true and correct copy of the Original Collier Proposal [H.R. 7902, 73rd Congress, 2d Session].

33. Attached as Exhibit R is a true and correct copy of the Indian Reorganization Act (IRA), June 18, 1934, 48 Stat. 984.

34. Attached as Exhibit S is a true and correct redlined version of IRA comparing Original Collier Proposal (Ex. Q) and June 18, 1934 Act (Ex. R).

35. As reflected in Exhibit S, Congress gutted the bill including deleting all of the provisions describing the purpose of the land acquisitions and land policy. This left the IRA without intelligible principles governing the Secretary's land acquisition power, which by statutory text is unconstrained.

***Carcieri v. Salazar* Materials Pertinent to Plaintiffs Motion for a Preliminary Injunction**

36. The proceedings before the Supreme Court of United States in *Carcieri v. Salazar* included the unusual step of the Government submitting evidentiary materials in the high court. Specifically, the Solicitor General (on behalf of the Department of the Interior) submitted certain historical records from the Department that had not been produced by the Government in the prior six years of litigation.

37. Attached as Exhibit T is a true and correct copy of an excerpt of the Government's brief in the Supreme Court in *Carcieri* referring to the evidentiary submission in the high court. No explanation was provided for the late submission.

38. Attached as Exhibit U is a true and correct copy of U.S. Department of the Interior Circular No. 3134, dated March 7, 1936, which was one of the documents submitted in the Supreme Court by the Government in the *Carcieri* case. Justice Breyer, in his concurring opinion in *Carcieri*, cited this Circular as proof that the Secretary, as bill sponsor and initial drafter of the IRA, and Congress as the adopter of the IRA, understood that "now under Federal jurisdiction" meant the date of enactment, June 18, 1934.

39. Attached as Exhibit V is a true and accurate excerpt of the transcript of the November 3, 2008, *Carcieri* oral argument in the Supreme Court.

40. Attached as Exhibit W are a true and correct copies of the U.S. Department of Interior's Final Determination and Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island dated July 29, 1982, which established the Narragansett Tribe a federally recognized tribe. The majority opinion in *Carcier*i cites the Final Determination document for the tribe's history and the basis for the court's holding that the Narragansett Tribe was not under Federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 383.

41. The Department of the Interior believes *Carcieri* was wrongly decided and has supported efforts in Congress to overturn it. The Secretary has consistently supported "*Carcieri* fix" bills since 2009. Attached as Exhibit X is a true and accurate copy of a Statement of Kevin K. Washburn, Assistant Secretary – Indian Affairs, U.S. Department of the Interior, Before the Senate Committee on Indian Affairs on S. 2188, a Bill to Amend the Act of June 18, 1934, to

Reaffirm the Authority of the Secretary of the Interior to Take Land Intro Trust for Indian Tribes, dated May 7, 2014.

42. Every "*Carcieri* fix" bill has failed in Congress.

43. The Department moved to "Plan B"—a "regulatory fix" for *Carcieri*, as discussed in Ex. Y, a true and accurate copy of an article entitled "Alternative in the works if Carcieri fix legislation fails" published in *Indian Country Today*, November 20, 2009. Under this alternative, the Department would adopt "a regulation that would be issued by the Secretary and essentially says what it means to be under the federal government in 1934."

44. After five years of unsuccessful legislative efforts to overturn *Carcieri*, the Secretary took matters into her own hands and adopted a definition of "now under federal jurisdiction" that is extremely broad—so broad that almost any tribe can meet it. Attached as Exhibit Z is a true and accurate copy of the U.S. Department of the Interior Memorandum M-37029, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, dated March 12, 2014.

45. The Secretary's articulation of what qualifies as an act of federal jurisdiction is inconsistent with the IRA's legislative history. For example, the Secretary apparently would allow a tribe to qualify as being "a recognized tribe under federal jurisdiction" in 1934 based on a single contact with the federal government, such as the Department having permitted a group of Indians to vote on whether or not to organize as a tribe under the IRA, even if the tribe thereafter voted to reject the IRA; never became an IRA tribe; and the record showed the Indians were under state jurisdiction for their entire history. *See* Ex. Z at 20.

46. The Legislative history for the IRA demonstrates that the drafters and adopters of IRA intended "under federal jurisdiction" to serve as a meaningful limiting criterion, one that

would narrow the universe of eligibility to Indians who were already being helped by the federal government. Congress in 1934 did not intend to expand the federal government's support obligations and had no wish to bring within the IRA's reach Indians who were members under state jurisdiction, or reverse the assimilation of Indians who lived non-tribally as state citizens in non-Indian society. The Secretary's current expansive interpretation of the IRA's statutory language is contrary to the legislative history and seeks to salvage, by administrative action, the expansive authority to acquire land for all (or almost all) Indians, expressly denied by both Congress and the Supreme Court.

47. The Department's resistance to *Carcieri* is further reflected in its immediate efforts to understand which federally recognized tribes would be affected by that decision. Two weeks after the Supreme Court decided *Carcieri*, the Department issued a memorandum, dated March 12, 2009, to all Regional Directors concerning the impact of *Carcieri* on pending land into trust proceedings. Attached as Exhibit AA is a true and correct copy of the March 12, 2009 Memorandum from George T. Skibine, Deputy Assistant Secretary for Policy and Economic Development, Office of the Assistant Secretary – Indian Affairs, entitled "Application of the Holding of *Carcieri v Salazar* to Pending Requests to Acquire Land-in-Trust."

48. The March 12 Memorandum asked for the Regional Director to inventory pending requests and to, among other things, identify "tribes with an organizational history that raises any question about whether they were under Federal jurisdiction in 1934." Ex. AA at 2. The memorandum also provided certain "guidance" including that no final decision should be made, and no deeds approved for "those tribes with an organizational history that raises any question about whether they were under Federal jurisdiction in 1934 … until it has been

determined whether or not they were under Federal jurisdiction in 1934." *Id.* This memorandum was referred to at the time as the "Skibine Guidance."

49. The Department abandoned the process mid-course after tribes complained about the Skibine Guidance. Attached as Exhibit BB is a true and correct copy of excerpts of the July 8, 2009 "Carcieri Tribal Consultation," in which George Skibine, Assistant Secretary – Indian Affairs, and members of the Department, discussed the Skibine Guidance. Tribes were concerned that the Department "already possibly making [a list of] who is under federal jurisdiction and who isn't…." Ex. BB at 112. The then-Director of the BIA, Jerry Gidner, addressed tribal concerns that "we are compiling a list, whether there would be something that would be able to be received by opponents of fee-to-trust transactions under the Freedom of Information Act." *Id*. at 15. Director Gidner acknowledged that "we were thinking about creating a list at one point but pretty soon realized that it would not be a good idea at this point." *Id.*

50. After stopping the process of creating a list that would be subject to disclosure under the Freedom of Information Act, the Secretary continued to gather data on tribes.

51. Attached as Exhibit CC is a true and correct copy of a Freedom of Information Act request, dated August 10, 2009, prepared by my firm; which specifically sought, among other things, the documents submitted by the Regional Directors in response to the Skibine Guidance, and any lists created by the Secretary. Exhibit DD is a true and correct copy of the Department's February 1, 2010 response, including a privilege log and responsive documents submitted to the Department by Regional Directors, as heavily redacted to remove any information that would disclose which tribes were identified as having questions about whether they were under federal jurisdiction in 1934. Included in Exhibit DD are records submitted by

the Eastern Region that presumably identify the Mashpee Wampanoag Tribe as one of the tribes with a questionable status under *Carcieri*, but all such information was redacted.

52. Attached as Exhibit EE is a true and correct copy of the U.S. Department of Interior's Final Determination, dated February 15, 2007, which established the Mashpee Wampanoag Tribe as a federally recognized tribe.

53. A comparison of the Department's Final Determinations for the Narragansett Tribe (Ex.W) and Mashpee Tribe show both tribes were under the jurisdiction of their respective state and local governments (State of Rhode Island and Commonwealth of Massachusetts) going back to earliest colonial days and lasting well into the 20th century, including in 1934.

54. In the mid-1970s both tribes retained the same lawyer (Barry A. Margolin, Esq.) to commence federal court lawsuits in which the tribes sued their respective state and local governments alleging violations of the Indian Trade and Intercourse Act, based on the theory that the states and local governments had unlawfully alienated their lands in the 19th century through state statutes. *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass 1978); *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp*., 418 F. Supp. 798 (1976). Both tribes asked the federal government to intervene on their behalves but the federal government refused to do so. *See* Ex. EE at 13; 418 F. Supp. at 811.

55. Attached as Exhibit FF are true and correct copies of excerpts from the brief of the U.S. Department of the Interior in *MichGO v. Norton*, D.C. District Court Case No. 1:05-cv-01181-JGP, dated January 6, 2006 (pp. 43-47).

Executed in Rochester, New York, under the pains and penalties of perjury under the laws of United States of America.

Dated: May 27, 2016

/s/ David H. Tennant
DAVID H. TENNANT