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-WGY

PLAINTIFFS' OPPOSITION TO THE MASHPEE WAMPANOAG INDIAN TRIBE'S MOTION TO INTERVENE

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INTRODUCTION

Plaintiffs David Littlefield et al. ("Plaintiffs") oppose the Mashpee Wampanoag Tribe ("Tribe")'s motion to intervene (Dkt. 89) and supporting memorandum of law (Dkt. 90). The Tribe's motion is untimely. It comes two weeks after judgment was entered and the case closed, and follows a protracted period of litigation during which the Tribe tactically chose not to appear as a party and chose instead to act through two proxy "amicus" it arranged and paid for. During that time, the Tribe aggressively advanced its casino interests by engaging in a highly-publicized ground-breaking ceremony (April 5, 2016) and brazenly declaring that "no federal lawsuit will stop this project,"[1] while working to scuttle a commercial casino in Brockton.[2] The Tribe's deliberate and strategic avoidance of this Court's jurisdiction throughout that time confounded Plaintiffs' efforts to secure injunctive relief when it mattered most, and should not now be rewarded by granting the Tribe's belated intervention motion after the Court has ruled. The Tribe's motion is additionally and fundamentally misguided because the federal government is fully capable of protecting the interests of the Tribe, as it has done all along. The Tribe and its lawyers were happy to rely on the Department of Justice to defend the Secretary of the Interior's ("Secretary") Record of Decision ("ROD") and vindicate her exercise of authority under the

[1] See Declaration of David H. Tennant, dated Aug. 29, 2016 ("Tennant Decl."), ¶ 4 Ex. A ("Mashpee tribe speeds up timetable for Taunton casino opening," Boston Globe, Mar. 14, 2016) at 7:

> But the Mashpee tribe's lawyer, Arlinda Locklear, said the legal challenge filed by the Taunton residents was not considered a serious threat.
>
> "No federal lawsuit will stop this project," she said. Locklear said the reservation designation is being defended by the Department of Justice, and that she was confident the decision will hold up.
>
> "The Justice Department is intimately familiar with it and is prepared to defend it," she said.

[2] Tennant Decl. ,¶ 5 Ex. B ("Mashpee tribe projects confidence, claims Brockton casino will have problems competing," The Enterprise, Mar. 14, 2016).

IRA, with tribal members and outside counsel attending court and conferring with the federal government's lawyers in and out of court.[3]

The federal government's allegiance to the Tribe, and capacity to protect its interests, flows from the fact that the Secretary enjoys a special relationship with all Indian tribes (viewing that relationship as one between a guardian and a ward and gives rise to fiduciary responsibilities). And, in the case of the Mashpees, the Secretary bent over backwards in issuing the ROD with its novel and unprecedented (and ungrammatical) construction of the IRA's second definition of "Indian" that was rejected by this Court. The government did so to try to relieve the Mashpees of their patent ineligibility under the first definition because the Tribe was never under federal jurisdiction throughout its long history. The federal government at all times in this litigation has demonstrated its commitment to defend the Secretary's statutory authority under the IRA and the ROD, including most recently by moving for partial reconsideration after entry of judgment. (Dkt. 100). Moreover, the issues presented by Plaintiffs' First Cause of Action concern the scope of the Secretary's jurisdiction under the IRA and are rooted in questions of statutory construction that define the Secretary's authority to act. The Tribe possesses no expertise in such matters. In contrast, the Tribe's public comments about intervention suggest it wants to speak about matters within its area of knowledge, such as the importance of the land to the Tribe, but which have no legal relevance.

On this record, the Tribe has not met its burden as the movant to support its motion for intervention, either as of right or by permission, and the Court should deny the motion. To the extent the Tribe has something it wants to say in addition to what it already said through its two

[3] Tennant Decl. ¶ 6 Ex. C at 2 (Mashpee Chairman Cromwell is reported to have said that "[t]he tribe looks forward to working closely with the Justice Department to 'vigorously defend our land and sovereignty"). *id.*, Ex. A at 7 (The Tribe's outside lawyer said: "The Justice Department is intimately familiar with[the ROD] and is prepared to defend it").

proxy amicus curiae submissions, the Tribe can request amicus status and submit its own brief. Allowing the Tribe to "pile on" as an adverse party would prejudice Plaintiffs by increasing their litigation costs and complicating further litigation of this matter.

Should the Court nonetheless permit intervention, Plaintiffs ask the Court to clarify that the July 28, 2016 Memorandum & Order and Judgment apply in all respects to the Tribe as an intervening defendant; that the Tribe is bound by the July 28, 2016 Judgment and all further judgments and orders entered in this action in all respects; that the Tribe has waived its sovereign immunity with respect to the relief sought by Plaintiffs' in the Amended Complaint, including but not limited to injunctive relief; and injunctive relief should be imposed on the Tribe in keeping with the Court's July 28, 2016 Judgment.

ARGUMENT

I. Standard for Intervention under Fed. R. Civ. P. 24

"To succeed on a motion to intervene as of right, a putative intervenor must establish (i) the timeliness of its motion to intervene; (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (iii) a realistic threat that the disposition of the action will impede its ability to protect that interest; and (iv) the lack of adequate representation of its position by any existing party." *R & G Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 584 F.3d 1, 7 (1st Cir. 2009); Fed. R. Civ. P. 24(a)(2).

In cases where a party seeks to intervene on the same side as the federal government, courts presume that the federal government can and will adequately represent the interests of a putative intervenor, unless the intervenor establishes otherwise. *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n,* 197 F.3d 560, 567 (1st Cir. 1999) ("[T]he courts have been quite ready to presume that a government defendant will 'adequately represent'

the interests of all private defenders of the statute or regulation unless there is a showing to the contrary."); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998) ("Moreover, the burden of persuasion is ratcheted upward in this case because the commissioners are defending the Plan in their capacity as members of a representative governmental body.").

In order to overcome that presumption of adequate representation, the putative intervenor must come forward with "evidence of collusion, adversity of interest, nonfeasance, or incompetence." *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001); *cf. Daggett v Comm'n on Govtl. Ethics & Election Prac.*, 172 F.3d 104, 111 (1st Cir. 1999) (rejecting argument that there is an exclusive list of circumstances that rebut the presumption of adequacy).

Where a court denies intervention as of right under Rule 24(a) because the government will adequately protect the movant's interest, the case for permissive intervention under Rule 24(b) likewise disappears. *See Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999) ("The district court reasonably concluded that the Commonwealth was adequately representing the interests of everyone concerned to defend the statute and that any variations of legal argument could adequately be presented in amicus briefs. We see no abuse of discretion in this ruling."); *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 308 F.R.D. 39, 51 (D. Mass. 2015) (declining to allow permissive intervention because interests of prospective intervenor were adequately represented).

Thus, the Tribe, as the moving party, bears the burden of (a) showing that its motion was timely and (b) rebutting the presumption that that the federal government will adequately protect

its interests.[4] The Tribe has done neither. Therefore, the Court should deny the Tribe's motion for permissive intervention and intervention as of right.

II. The Tribe's Motion to Intervene Is Untimely.

Intervention should be denied where, as here, a party sits on its rights for six months with full knowledge of the litigation and only intervenes after judgment is entered. "It should come as no surprise . . . that courts have historically viewed post-judgment intervention with a jaundiced eye in situations where the applicant had a reasonable basis for knowing, before final judgment, that its interest was at risk." *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992) (denying intervention where intervenor knew three months earlier of potential hazards and likely consequences of inaction). Untimeliness alone is a sufficient basis upon which to deny a motion to intervene. *U.S. v Pitney Bowes, Inc.* 25 F.3d 66, 70 (2d Cir. 1994); *Canadian St. Regis Band of Mohawk Indians v. New York*, 2005 U.S. Dist. LEXIS 44673, **3-*38 (N.D.N.Y. Oct. 11, 2005) (denying tribe's motion to intervene as untimely under both Rule 24(a) and 24(b)), *app. dismissed*, 484 Fed. Appx. 586 (2nd Cir. 2012).

In deciding whether a motion intervene is timely, courts in the First Circuit consider the following four factors: "(1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene;" "(2) the prejudice to existing parties due to the applicants' failure to petition for intervention promptly;" (3) "the prejudice that applicants would suffer if they were not allowed to intervene;" and "(4) unusual circumstances

[4] The elements for permissive intervention are typically articulated as having to show that "an applicant's claim or defense and the main action have a question of law or fact in common." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 308 F.R.D. 39, 51 (D. Mass. 2015) (quoting another source); Fed. R. Civ. P. 24(b). Even so, as discussed below, courts regularly consider other factors including the adequacy of the representation and the presumption that the federal government will adequately protect the interests of the putative intervenor.

militating for or against intervention." *Garrity v. Gallen*, 697 F.2d 452, 455 (1st Cir. 1983). These factors all render the Tribe's motion untimely.

The inordinate delay here—waiting until after the Court entered judgment and closed the case—alone warrants denial as untimely. *See Garrity v. Gallen*, 697 F.2d 452, 458 (1st Cir. 1983) (attempted intervention not timely when motion made on heels of time to appeal). The delay is even more inexcusable here because the Tribe knew a lawsuit was coming for years (*see* Tennant Decl. ¶ 8, Ex. E at 1; Ex. D at 2) and when the lawsuit materialized, the Tribe closely tracked the litigation (*id.*, ¶ 9, Ex. F) and even participated in the case through two proxy amicus filings (*id.*, ¶ 10-11, Exs. G and H) which the Tribe solicited (*id.*, ¶ 10-11, Exs. G and H) and, at least as to one, paid for. (*id.*, ¶ 10, Exh. G). The Tribe's calculated, strategic decision to wait until *after* judgment was rendered to move to intervene should not be countenanced. The Tribe should have intervened when it mattered, that is, when the case was open; issues were being litigated; and Plaintiffs were seeking injunctive relief to shut down construction of the casino.

Having effectively thwarted Plaintiffs right to injunctive relief to halt that construction, the Tribe should not now be allowed to intervene for the purpose of either rehashing issues that were already decided in its deliberate absence, by piling onto the federal government's motion for reconsideration, or to introduce new issues including providing legally irrelevant information about the importance of the land to the Tribe and plans to develop it. (Dkt. 90 at 2-6, 10; *id.* at 7) (Tribe "seeks to bring its own critical voice to bear on this Court's and any appellate court's consideration of the pending opportunity to radically improve the life of every one of the Tribe's members")). The legal issue framed by the First Cause of Action—the grammatical reading of Section 479—is unaffected by such considerations. Moreover, the Tribe chose to hide behind

the shield of sovereign immunity when the Tribe's participation would have been useful in crafting an effective provisional remedy. The Tribe should be held to that choice.[5]

Permitting intervention now would prejudice Plaintiffs in the following respects: (1) having to address irrelevant considerations and misstatements of the record evidence and case law as the Tribe has already done through its two proxy amicus submissions (*see* USET Sovereignty Protection Fund, Inc.'s Amicus Curiae Brief in Support of Defendants' Motion for Summary Judgment (Dkt. 83) and Plaintiffs' Response (Dkt. 86)); (2) "piling on" to the federal defendants' motion for reconsideration which rests on a fabricated (straw man) argument of error by this Court; and (3) potentially having to re-plow already litigated and decided matters under Local Rule 56.1, which establish as an admitted fact that the Mashpees were not under federal jurisdiction in 1934.[6] *See, e.g.*, *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1235 (D.C. Cir. 2004) (prejudice resulting from intervention "captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice will take the form not only of the extra cost but also of an increased risk of error").

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[5] In trying to establish the timeliness of its post-judgment intervention motion, the Tribe cites *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986) and other cases which recognize the need for the putative intervenor to "act promptly" upon learning that their interests are implicated. *Dimond* illustrates diligence by one such putative intervenor by moving to intervene two days after the district court clarified its ruling and for the first time made clear that a substantial financial impact would befall the intervenor. 792 F.2d at 193. Here, in contrast, the Tribe was on notice immediately upon the complaint being filed (indeed even before the ROD was issued) that a serious legal challenge was being brought against the ROD given the Secretary's unprecedented reading of the IRA. By any standard recognized in the case law, the Tribe's conscious decision to avoid intervening with full knowledge of the litigation's potential to vacate the ROD and impair the Tribe's interests, renders its post-judgment intervention motion untimely by at least 6 months.

[6] The Tribe's Answer (Dkt. 90-1), filed as Exhibit A to its memorandum of law in support of intervention (Dkt. 90) raises the prospect of further prejudice to Plaintiffs in the form of additional trial court proceedings with attendant delays and expense. The federal defendants never answered the Amended Complaint. The Tribe's Answer is problematic because it envisions pursuing a jury trial (Answer at p. 26) after conducting discovery (Answer at p. 27) (the Tribe "intends to rely on such other and further defenses as may become available and apparent during discovery proceedings in this case"). To the extent those statements were mistakenly included and represent inapplicable boilerplate in this APA case, that imprecision is telling in its own right. It reinforces the Tribe's practice of filing unhelpful and irrelevant submissions (through its proxy amici).

By contrast, denying the Tribe's motion to intervene would not prejudice the Tribe in any respects because the Tribe's interests are, as explained further below, fully represented by the government.

III. The Federal Government Remains The Tribe's Steadfast Protector And, As Such, Adequately Protects the Tribe's Interests in This Litigation.

The Tribe has not met its burden to rebut the presumption that the federal government will adequately protect its interests. "[A]dequate representation is presumed where the goals of the applicants are the same as those as the plaintiff or defendant." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999); *Butler, Fitzgerald & Potter v. Seqa Corp*. 250 F.3d 171, 180 (2d Cir. 2001); *North Dakota ex rel Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015). "The strength of this presumption is 'ratcheted upward' when the intervenor attempts to enter on the same side as a government agency to defend the agency's decision." *Nextel Communs. of Mid-Atlantic, Inc. v. Town of Hanson*, 311 F. Supp. 2d 142, 151 (D. Mass. 2004) (quoting another source); *see Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001) ("[T]he government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervenor.").

South Dakota ex rel Barnett v. U.S. Dep't of Interior, 317 F.3d 783 (8th Cir. 2003) illustrates this principle in the specific context of a land-into-trust decision by the Secretary under the IRA (25 U.S.C. § 465).[7] There, the tribe moved to intervene on behalf of the

[7] The Tribe offers a "but see" citation to *South Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783 (8th Cir. 2003) (Mem. of Law at 20) but does not explain how the presumption of adequate representation in that case—equally applicable to Rule 24(a) and 24(b) motions to intervene—is overcome here, especially since the Secretary has moved for reconsideration and continues to vigorously defend the ROD. The Tribe's heavy reliance on *Diamond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986) and other intervention cases that do not involve either tribes or federal agencies (Mem. of Law at 13-16) is misplaced since those cases say nothing about the adequacy of the Secretary's representation in defending the ROD. The Tribe's citation to three tribal intervention cases (id. at 20) adds nothing to the analysis because those cases do not discuss the factors for intervention (whether permissive or as of right) or even whether the motions to intervene were

Department of the Interior and other federal defendants in a lawsuit brought by South Dakota and local governments challenging the Secretary's decision to take land into trust for that tribe. The tribe argued, after several rounds of litigation, that the United States could no longer adequately represent the tribe because the federal government had conflicting duties as a fiduciary to the tribe and as parens patriae to all citizens. The district court denied intervention as of right, as well as permissive intervention, based solely on the adequacy of the federal government's representation. The Eighth Circuit affirmed the district court's denial of intervention on that single ground, finding that the tribe had failed to set forth "specific interests that only it can protect by intervening." The Eight Circuit concluded that the federal government adequately represented the tribe's interests because "[t]he government placed the land in trust and has doggedly defended that agency determination against South Dakota's attack through several rounds of litigation, including one bout at the Supreme Court." *Id.*

Here, as in *Barnett*, the federal defendants are charged with representing the interests of the Tribe by taking and holding this land in trust for the Tribe. In executing this duty, the federal defendants have taken a hard-nosed approach in defending the Secretary's ungrammatical construction of 25 U.S.C. § 479 both in pretrial briefs, during argument, and in post-hearing briefs—and most recently in moving for reconsideration. The Tribe's long-standing reliance on the Department of Justice to protect its interests in this litigation (Tennant Decl., ¶ 5, Ex. C) is well-founded. Nothing has changed. The Tribe has not presented any objective grounds for doubting the federal government's ability to adequately represent its interests. The Tribe has not come forward with any "evidence of collusion, adversity of interest, nonfeasance, or incompetence." *See Butler, Fitzgerald & Potter*, 250 F.3d at 180. The federal defendants, for

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opposed. Moreover, all three decisions show a tribe being permitted to intervene before judgment was entered, apparently demonstrating that they acted promptly to protect their rights, which the Mashpee did not.

their part, continue to live up to their commitment to the Tribe and continue to take aggressive positions in the litigation. The federal government did not consent to the Tribe's motion to intervene as of right, signaling the federal government's belief that it remains capable of protecting the Tribe's interests. The interests of the Tribe and federal defendants remain fully aligned, as both seek to uphold the Secretary's decision to take land into trust for the Tribe. The Tribe has not identified any change in circumstances that would call into question the federal government's allegiance to the Tribe going forward. The Tribe's stated rationale for intervening —that the federal government may not appeal—is a red-herring and is entirely speculative. Nowhere has the federal government indicated that it does not intend to appeal the decision. And, because the federal government just recently moved for reconsideration, the time to appeal is extended pending a decision on the motion for reconsideration, making the Tribe's proffered excuse for intervention premature as well as speculative and unfounded.[8]

IV. The Tribe Should Participate—If at All—Only as an Amicus.

In the event the Court concludes that the Tribe should participate further in this case (it should not), the Tribe should only be allowed to participate as an amicus, as it did before through its proxies. However, like the previous amici briefs, the Tribe's amicus briefs going forward

[8] Given the record evidence concerning the Secretary's strong representation in this matter and fiduciary duty it owes to all tribes, the Tribe has not met its burden to rebut the presumed adequacy of the representation by the Secretary. The Tribe's cursory citation to *Arizona v California*, 460 U.S. 605, 615 (1983) (Mem. of Law at 15) is of no moment. In that case, the Supreme Court found five tribes were properly treated as permissive intervenors where the case arose within the high court's original jurisdiction (the case involved dispute among Western States over water rights in the Colorado River); the federal government previously intervened in that proceeding to represent the tribes and secured water rights for them; and in a later proceeding to change water rights allocated to the tribes, the tribes sought to intervene directly to expand their previously allocated water rights. In that setting, the federal government was acting as a representative of the tribes and could step out of the middle and allow the tribes to make their own decisions. Here, in contrast, the Secretary of the Interior is exercising its own authority delegated by Congress, and is not acting in a representative capacity for the Mashpee. The Secretary is committed to defending its own construction of the IRA and can adequately defend the Tribe's interest in having the ROD upheld.

would likely add nothing of value to the already-decided legal questions addressed in Plaintiffs' First Cause of Action, as to which the Tribe is adequately represented by the federal government.

V. If Granted Intervention Status, The Tribe Comes in As a Party-Defendant Subject to The July 28, 2016 Judgment and Full Panoply of Remedies Requested in the Amended Complaint With No Barrier Presented by Sovereign Immunity.

If the Tribe intervenes, it will waive its sovereign immunity—not as the Tribe equivocally represents, only "potentially" waive it. (Mem. of Law at 15.) *See Tohono O'odham Nation v. Ducey*, 2016 U.S. Dist. LEXIS 42410, at *21 (D. Ariz. Mar. 30, 2016) (quoting *United States v. State of Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981) ("By intervening, the Tribe assumed the risk that its position would not be accepted, and that the Tribe itself would be bound by an order it deemed adverse."); *United States v. Washington*, 20 F. Supp. 3d 986, 1058 (W.D. Wash. 2013), *aff'd*, 2016 U.S. App. LEXIS 11709 (2016) ("The Makah Tribe waived its immunity and consented to a full adjudication of its treaty fishing rights when it intervened in this case seeking a determination of those rights, and asking that the Court exercise its equitable powers to protect those rights. The court therefore has jurisdiction over the Makah to determine whether they threaten to infringe the adjudicated treaty rights of other tribes as alleged, and to grant equitable relief if it is appropriate.").

This waiver would have been helpful in the underlying proceeding. Because the Tribe was not a party to the underlying proceeding, the Court was not able to craft a remedy compelling the Tribe—as a non-party immune from suit—to halt construction activities. Having escaped such an order, the Tribe now attempts to get the best of both worlds by seeking to participate in the appeal. The Court should not allow the Tribe to do so. In the event that the Court permits intervention by the Tribe in this matter, the Court should also impose upon the Tribe the injunctive relief sought by Plaintiffs previously, namely:

1. Declaring the September 2015 Record of Decision unlawful;

2. Declaring that the determinations of taking land into trust, reservation status, initial reservation status and the right to game on the land also are unlawful and vacated; and

3. Declaring that all further building on the land, if any, is subject to State and local regulation.

This relief should not be problematic, as the Court already has determined that the land was unlawfully taken into trust under the Secretary's "second definition," (making the ROD and its determinations unlawful), and even if reconsideration is granted, as a matter of law, the Secretary still will not have provided any lawful basis for the land into trust, until such time as it fulfills its obligations under any remand.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Tribe's motion to intervene in its entirety.

Dated: August 29, 2016

Respectfully submitted,

s/ David H. Tennant

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CERTIFICATE OF SERVICE

I, David H. Tennant, 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/ David H. Tennant